

EXPERT WITNESSES: COURT RULES & WAIVER OF PRIVILEGE

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Expert evidence is often critical in construction litigation. Expert witnesses have a special role. They are permitted by the rules of evidence and civil procedure to express opinions in written and oral form, rather than being restricted to direct observations.

Special care must be taken when instructing experts. In particular:

- In most jurisdictions, superior courts have promulgated **rules** concerning the reception of expert evidence.
- **Legal professional privilege may be waived** in the process of commissioning and using expert reports. The consequences of inadvertently waiving privilege may be serious and prejudice the outcome of the litigation. Often, opposing parties attempt to gain access to correspondence between experts and their instructing lawyers and the expert's draft reports in an attempt to find material useful for cross-examination.

There are conflicting lines of authority in relation to when “privilege” over an expert's materials and communications is maintained, non-existent, or lost. Experts should be engaged on the assumption that privilege may be waived in relation to **all** associated materials (including instructions, drafts, working documents, and “other” confidential communications).

This note is intended to address the following:

1. Court Rules (including Selected Case Law and General Admissibility Requirements)
2. Legal Professional Privilege (at Common Law and under Statute)
3. Waiver of Legal Professional Privilege (including Waiver of an Expert's Associated Working Materials)

Selected Further Reading:

- Peter Faris Q.C. and Professor Mirko Bagaric, *Victorian Uniform Evidence Act* (2009) Pearson Australia.
- Ian Freckelton and Hugh Selby, *Expert Evidence* (4th ed, 2009) Thomson Reuters (Professional) Australia Limited.

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1. COURT RULES

JURISDICTION	RULES
Federal Court of Australia	Practice Note CM 7 – Expert Witnesses in Proceedings in the Federal Court of Australia Federal Court Rules Order 34 (34.1 – 34.6) – Court Expert Order 34A (34A.1 – 34A.3) – Evidence of Expert Witnesses Order 34B (34B.1 – 34B.4) – Expert Assistant
Supreme Court of Victoria	Supreme Court (General Civil Procedure) Rules 2005 Order 44 – Expert Evidence Form 44A – Expert Witness Code of Conduct Order 50 – References Out Of Court
Supreme Court of New South Wales	Uniform Civil Procedure Rules 2005 (NSW) Part 31 Div 2 – Expert Evidence Generally
Supreme Court of Queensland	Uniform Civil Procedure Rules 1999 Part 5 – Expert Evidence (Div 1-4)
Supreme Court of South Australia	Practice Direction No. 46A – Guidelines for Expert Witnesses
Supreme Court of Western Australia	Rules of the Supreme Court 1971 Order 36A – Expert Evidence
Supreme Court of the Australian Capital Territory	Court Procedures Rules 2006 Part 2.12 – Expert Evidence (rules 1200-1246)
Supreme Court of the Northern Territory	Supreme Court Rules Order 44 – Expert Evidence
Supreme Court of Tasmania	Supreme Court Rules 2000 Div 5 – Expert Opinion Evidence (r 515-517)

The Supreme Court of Victoria sets out an expert witness **Code of Conduct**, which is also generally applicable in the [County Court of Victoria](#)². The County Court’s Expert Witness Code of Conduct is set out under **Form 44A** of the [County Court Rules of Procedure in Civil Proceedings 2008 \(S.R. No. 148/2008\)](#). Rules 44.01 to 44.06 deal with Expert Evidence.

The Federal Court of Australia provides **guidelines** which are prefaced by an explanatory memorandum.³ The Guidelines have substantially been adopted throughout the Australian legal system.⁴

In proceedings before the [Victorian Civil and Administrative Tribunal](#), Practice Note [PNVCAT 2 – Expert Evidence](#) applies. The Domestic Building List has its own **guidelines** specifically relating to the appointment of experts or special referees, experts’ obligations and the preparation of reports.

² *County Court Civil Procedure Rules 2008*, Order 44.

³ Refer to the explanatory memorandum preface in the Practice Note CM 7 Guidelines.

⁴ *Uniform Civil Procedure Rules 2005 (NSW) Schedule 7; Uniform Civil Procedure Rules 1999 (Qld); Practice direction 46 of the Supreme court of South Australia; Supreme Court Rules (Tas) rr 515-517; Supreme Court Rules (Vic) O 44; Supreme Court Rules (WA) O 36A; Practice Direction No 3 of 2000 of the Supreme court of the Australian Capital Territory; Supreme Court Rules (NT) O 44.*

1.1 Selected Case Law:

- a) Admissibility of expert's report: *Australian Securities & Investment Commission v John David Rich & Ors* [2005] NSWCA 152. Admissibility requirements: *Indoport Pty Ltd v National Australia Bank Limited [1]* [1999] NSWSC 828 at 239. **Cf:** statutory rules under s 79 of the Uniform Evidence Acts.
- b) Boundaries regarding expert evidence: *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305 (In particular, Heydon JA at 743-744).
- c) Changes of expert's material opinion to be communicated in a timely manner (through legal representatives) to each party to whom the expert witness's report has been provided and, when appropriate, to the Court: *Ikarian Reefer* [1993] 20 FSR 563 at 565.
- d) Distinction between expert opinion and expert assistance: *Evans Deakin Pty Ltd v Sebel Furniture Ltd* [2003] FCA 171 at 676 (Allsop J).
- e) Enforcement of court rules for expert witnesses: *Barak v WTH Pty Ltd* [2002] NSWSC 649; *Langbourne v State Rail Authority* [2003] NSWSC 537 at 13-14 (Levine J); *Jermen v Shell Co of Australia Ltd* [2003] NSWSC 1106; *Portal Software v Bosdworth* [2005] NSWSC 1228; *United Rural Enterprises Pty Ltd v Lopmand Pty Ltd* [2003] NSWSC 870 (Campbell J); *Commonwealth Development Bank of Australia Pty Ltd v Cassegrain* [2002] NSWSC 980 at 9 and 11 (Einstein J).
- f) Expert witness is not an advocate for a party even when giving testimony that is necessarily evaluative rather than inferential: *Sampi v State of Western Australia* [2005] FCA 777 at 792-793; *ACCC v Liquorland and Woolworths* [2006] FCA 826 at 836-842.
- g) Expert witness to maintain their independence and avoid altering their expert reports to suit the needs of the litigants. Problems can arise when drafts and instructions are discovered: *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242. Care should be taken to avoid any communication which may undermine or appear to undermine the independence of the expert: *Phosphate Cooperative Co. of Australia Pty Ltd v Shears & Anor* [1989] VR 665 (Brooking J).
- h) Expert's overriding duty to the Court: *National Justice Compania Naviera SA v Prudential Assurance Co ("The Ikarian Reefer")* [1993] FSR 563.
- i) Function of an expert: *Quick v Stoland* (1998) 87 FCR 371 at 382 (Finkelstein J).
- j) Involvement of counsel or solicitors in the formulation of an expert's final opinion can result in the rejection of that witness' evidence: *Cobram Laundry Services Pty Ltd v Murray Goulburn Co-operative Co Ltd* [2000] VSC 353.
- k) Putting words (or opinions) into the mouths of experts must be avoided in respect of all witnesses (not just specialist witnesses): *Timms v Commonwealth Bank of Australia* [2001] NSWSC 560 at 69-75 (Young CJ in Eq).
- l) The Form of the expert evidence: *HG v The Queen* (1999) 197 CLR 414 per Gleeson CJ at [39]-[43]; *Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd* [2000] FCA 1463 (FC) at 17-23.

- m) The provisions of the Federal Court Practice Note (and its Victorian Supreme Court equivalent must be observed): *Sampi v State of Western Australia* [2001] FCA 110 (Beaumont J).
- n) Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports: *Ikarian Reefer* [1993] 20 FSR 563, at 565-566; See also, Ormrod, *Scientific Evidence in Court* [1968] Crim LR 240.

1.2 General Admissibility Requirements

Evidence law is concerned with distinguishing admissible from inadmissible information. The Uniform Evidence Act ("UEA") was passed in Victoria as the [Evidence Act 2008 \(Vic\)](#) and it is likely to come into force on 1 January 2010. The legislation adds Victoria to the list of jurisdictions (after the Commonwealth, NSW, ACT, and Tasmania) adopting the uniform evidence legislation.

The other Australian jurisdictions have not yet adopted the UEA. Evidence law is a combination of common law and statute.

The Victorian UAE introduces a codified regime which replaces the existing common law. The principal difference between the UAE framework and the common law are set out in the [Australian Law Reform Commission Report 102 "Uniform Evidence Law"](#), at 2.17 and 2.18.

Victorian courts are likely to find themselves bound by other jurisprudence applying the UEA where the law can be said to be settled.⁵

The relevant admissibility requirements are published in *Victorian Uniform Evidence Act*⁶ and *Expert Evidence*⁷.

In the context of draft expert reports, it is important to note that where a party in a proceeding intends to rely upon an expert's report, any draft expert reports prepared, including the instructions given to the expert for preparing the report, are discoverable. However, it does not follow that the draft reports are then also admissible in the hands of the party relying on the report. The relevance of any draft expert reports is undermined once a final report is furnished. Therefore, a party seeking to tender their own expert's draft report, rather than or in addition to a final report, may have significant difficulty in establishing its relevance and consequently its admissibility.⁸

⁵ This is because s 1 of the UEA clearly states that the law of evidence should be uniform. Also, when Parliament re-enacts a section which has a settled meaning (by the courts) then it is the intention of Parliament that that meaning is correct: see the joint judgment of seven judges (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh) in *Re Alcan Australia Limited; Ex Parte Federation of Industrial Manufacturing and Engineering Employees* [1994] HCA 34; (1994) 181 CLR 96, 20.

⁶ Peter Faris Q.C. and Professor Mirko Bagaric, *Victorian Uniform Evidence Act* (2009) Pearson Australia.

⁷ Ian Freckelton and Hugh Selby, *Expert Evidence* (4th ed, 2009) Thomson Reuters (Professional) Australia Limited.

⁸ Kate Anderson, 'Expert Evidence' (paper presented at the Leo Cussen Institute, Melbourne, March 2008) 15.

2. LEGAL PROFESSIONAL PRIVILEGE

Expert evidence may be kept confidential and excluded from being admitted or even discovered, if a claim of privilege is upheld.

There are various heads of privilege, including legal professional privilege, doctor-patient privilege (at the discretion of the judge), public interest immunity and without prejudice privilege.

This note is limited to **legal professional privilege**. At both common law and under the Uniform Evidence Acts there are two distinct privileges: one relating to **legal advice**, the other relating to **litigation**. When experts are engaged to advise clients and their lawyers and to prepare reports for use in actual or anticipated litigation, those communications are caught by **litigation privilege** (as opposed to legal advice privilege⁹).

Where the privilege is contested, the onus rests with the party claiming the privilege.¹⁰ There is a voluminous body of Australian case law where the courts have found that the “privilege” regarding expert reports and associated working materials is either maintained, non-existent, or lost.

An important **distinction** should be drawn between communications exchanged between the expert and the lawyer/client and the expert’s associated materials (e.g. notes, memos and drafts) that are produced as he or she works towards that communication.

The former category attracts the protection of the privilege. The latter may not. Issues about the ambit of the “privilege” for expert reports generally arise in litigation, because the court’s case management principles and issues of fairness demand that expert reports be filed with the court and served on opponents before the hearing.¹¹ Sometimes those reports refer to “privileged” documents seen by the expert, but are not attached to the expert report. This may prompt claims that the privilege has been **waived**.¹² The admissibility of an expert’s associated working materials is addressed under 3.3 below.

2.1 Common Law

Litigation privilege exists to protect the confidentiality of communications between a client, the client’s legal adviser and third parties (e.g. experts), for the **dominant purpose of use** in or in relation to litigation, which is either pending or in contemplation.¹³

⁹ Advice privilege exists to protect communications passing between a client and a client’s legal adviser for the dominant purpose of obtaining, or giving legal advice: *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357 (Finn J at 19-20, Stone J with whom Merkel J agreed at 58); s 118 of the *Evidence Act 1995* (Cth).

¹⁰ *Waugh v British Railways Board* [1980] AC 521.

¹¹ Felicity Davis, ‘Communications with Experts and Privilege’ (paper presented at an AILA Breakfast Seminar, 12 April 2006) 1.

¹² Freckelton and Selby, above n 7, 421.

¹³ *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357, 19-20 (Finn J) 58 (Stone J with whom Merkel J agreed); *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332, 8-9 (Batt JA with whom Charles and Callaway JJA agreed); and *Grant v Downs* 135 CLR 674, 677 (Barwick CJ).

From the mid-1970s until 1999, such a communication was only “privileged against disclosure” if the **sole purpose** in its creation was tied to actual or anticipated litigation. This “sole purpose” test was abandoned in 1999 by the High Court and replaced with the **dominant purpose** test in *Esso Resources Limited v Commissioner of Taxation* (1999) 201 CLR 49 (“*Esso*”). The Court held that, for Australia, the correct common law test for claiming legal professional privilege in relation to documents is whether a communication was made or a document was prepared for the dominant purpose of a lawyer providing legal advice or legal services.¹⁴

Consequently, there is a considerably broader class of communications over which the privilege can now be claimed. Difficult questions arise in the context of commissioning and using expert reports. In particular, what are the dominant purposes of expert reports, both draft and final, and the expert’s working materials?

In brief, a “dominant purpose” is one that predominates over other purposes; it is the prevailing or paramount purpose”: *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 1234, 155 FCR 30 at 44 (which contains a detailed summary of the general principles underlying legal professional privilege). In *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* (2002) 4 VR 332; [2002] VSCA 59 at 17, Batt JA held that “litigation is reasonably anticipated or in contemplation if its initiation is likely or reasonably probable”. Batt JA later clarified “as a general rule at least, there must be a **real prospect of litigation**, as distinct from a mere possibility, but it does not have to be more likely than not”¹⁵ [emphasis added].

Notably, the High Court settled the status of privilege attaching to **copies** in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501.

2.2 The Uniform Evidence Acts (“UEA”)

Litigation privilege arises under s 119 of the [Evidence Act 1995 \(Cth\)](#), [Evidence Act 1995 \(NSW\)](#), the [Evidence Act 2001 \(Tas\)](#) and the [Evidence Act 2008 \(Vic\)](#). Section 118 (legal advice privilege) is not applicable to communications with experts. This is consistent with the common law.¹⁶

Section 119 states:

“Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of-

- (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or
- (b) the contents of a confidential document (whether delivered or not) that was prepared-

¹⁴ *Esso Resources Limited v Commissioner of Taxation* (1999) 201 CLR 49.

¹⁵ (2002) 4 VR 332; [2002] VSCA 59, 19.

¹⁶ *Wheeler v Le Marchant* (1881) 17 Ch D 675, 684 (Cotton LJ); *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* (2002) 4 VR 332, 9 (Batt JA).

for the **dominant purpose** of the client being provided with **professional legal services** relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.”

Considerations applying to communications at common law generally apply to s 119(a).¹⁷ However, an important issue is whether a draft expert report constitutes a “confidential document” for the purposes of s 119 (b).¹⁸ Section 117 defines a “confidential document” as “...a document prepared in such circumstances that, when it was prepared- (a) the person who prepared it; or (b) the person for whom it was prepared- was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law...”

Section 119 (b) thus goes beyond the scope of communications caught by s 119(a) and the common law concept of privilege. It is concerned with “documents”. As explained by Austin J *In the matter of Southland Coal Pty Ltd (rec and mgrs apptd) (in liq)* [2006] NSWSC 899 at 17 (“*Southland Coal*”):

“Both s 118 and s 119 literally protect not only certain confidential communications, but also the contents of certain confidential documents (whether delivered or not). If, therefore, a document satisfies the requirements of either section - if, that is, it is a confidential document that was prepared by the requisite person for the requisite dominant purpose - the contents of the document are not to be disclosed, regardless of whether those contents have been or are to be communicated. To say that the statutory provisions protect the “communication constituted by the document”, rather than the document as such, is correct only in the sense that the privilege attaches to the information contained in the document (whether communicated or not) rather than to the piece of paper upon which that information is recorded.”

Other recent decisions, at least in New South Wales, confirm that section 119(b) of the *Evidence Act 1995* (NSW) extends privilege to confidential “documents” whether or not those documents are “communications” under s 119(a), provided they satisfy the requirements of s 119(b), including the dominant purpose test.¹⁹

¹⁷ *New Cap Reinsurance Corporation Ltd (In Liq) and 1 Or v Renaissance Reinsurance Ltd* [2007] NSWSC 258.

¹⁸ *Natuna Pty Ltd v Cook* [2006] NSWSC 1367, 10 (Biscoe AJ).

¹⁹ Prior to *Southland Coal*, Justice Barrett held in *Ryder v Frohlich* [2005] NSWSC 1342 that privilege can only attach to documents which embody communications between the expert and the litigant or the litigant’s lawyer. He said that a draft report prepared by the expert is not, of its nature, such a communication [at 12]. Therefore, draft expert reports and working materials may be privileged even if they are not “communications”. Since *Ryder v Frohlich*, several Supreme Court of New South Wales decisions, including *Southland Coal*, have agreed that section 119(b) extends privilege to certain confidential “documents” irrespective of whether they contain “communications”. In *New Cap Reinsurance Corporation Ltd (In Liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258, Justice White said [at 34] “[s]ection 119(b) of the Evidence Act extends the privilege to confidential documents, whether communicated or not, provided they were brought into existence with the requisite dominant purpose”. In *Natuna Pty Ltd v Cook* [2006] NSWSC 1367, Biscoe AJ said [at 10] “...in my opinion, a draft expert report is a confidential “document” which is privileged from production by operation of s 119(b). Section 119(b) goes outside the area of communications with which both s 119(a) and common law concepts of privilege are concerned. It applies to ‘documents’”.

3. WAIVER OF LEGAL PROFESSIONAL PRIVILEGE

In Australia, the doctrine of waiver is very much in a state of development and flux, particularly in the context of commissioning and using expert reports. Waiver is one of the most contentious exceptions to legal professional privilege. This reflects, in part, the provisions of s 122 of the Uniform Evidence Acts which are not identical to the corresponding common law principles, conflicting decisions at State level (in particular, the circumstances in which privilege is waived in source documents forming the basis of an expert opinion and in draft expert reports), and the High Court's approach to legal professional privilege and waiver since 1999.²⁰

Notably:

- The privilege may only be waived by the person who has the benefit of the privilege (i.e. the client);
- Questions of waiver are matters of fact and degree;²¹ and
- An act of waiver may be **express** or **implied**, intentional or unintentional.²²

Whether express or implied, waiver involves the abandonment of confidentiality. Once the confidentiality is broken “the genie cannot be returned to the bottle. The privilege is effectively lost. It cannot be retrieved.”²³

Even where the communication falls within the protected category as having the requisite dominant purpose, there may be some scope to argue that the privilege has been waived, either at common law or under statute, because of the conduct of the privilege holder.

The extensive body of case law dealing with waiver is largely accounted for by the doctrine of “imputed” waiver. In some cases, courts have adopted an expansive view, whereas in other cases, they have adopted a constrictive view.²⁴

The privilege may be lost accidentally in a number of ways, including relying on part of a document,²⁵ relying on one in a series of documents,²⁶ providing a copy of a privileged document to another,²⁷ disclosing the substance of legal advice,²⁸ and issue waiver.²⁹

²⁰ Paul Mendelow, ‘Expert Evidence: Legal Professional Privilege and Experts’ Reports’ (2001) *Australian Law Journal*, 258. The 1999 High Court decisions in *Esso* and *Mann* which were handed down on the same day entail that the conclusions drawn in the earlier cases are open to review: Freckelton and Selby, above n 7, 668.

²¹ *Nine Films & Television Pty Ltd v Ninox Television Limited* [2005] FCA 365 at 26; affirmed by the High Court in *Osland v Secretary to the Department of Justice* [2008] HCA 37.

²² Andrew Palmer, ‘Legal Professional Privilege: An Update’ (paper presented at the Leo Cussen Institute, Melbourne, February 2008) 9.

²³ *Ampolex Ltd v Perpetual Trustee Company (Canberra) Ltd* [1996] HCA 15; 70 ALJR 603; 137 ALR 28, 7 (Kirby J).

²⁴ Palmer, above n 22, 16.

²⁵ *Ibid.*

²⁶ E.g. *AWB Limited v Honourable Terence Rhoderic Hudson Cole (No 5)* [2006] FCA 1234 at 164 (“*AWB (No 5) Case*”). In this case, it was held the “test applied to determine the scope of any waiver of associated material is whether the material that the party has chosen to release from privilege represents the whole of the material relevant to the same issue or subject matter.”

²⁷ The High Court decisions of *Ng* and *Mann* suggest that the question of waiver may depend on whether the disclosure is at odds with the maintenance of confidentiality in the document, and whether it would be unfair to withhold the document from the other party. Copies of **non-privileged** documents may be privileged if those copies were made for the requisite dominant purpose: *Commissioner Australian Federal Police v Propend Finance* (1997) 188 CLR 501, 552–553. Possibly, the copy may lose privilege if no copy of the original document is available, as suggested by Brennan J [at 512]. A copy of a privileged document will be privileged unless the privilege has been expressly or impliedly waived. The Victorian Court of Appeal decision in *Spotless Group Ltd v Premier Building and Consulting Pty Ltd* [2006] VSCA 201 is authority for the proposition that, in appropriate circumstances, the privilege-holder may provide copies of privileged documents to a third party for a particular purpose without being held to have waived privilege, even though the re-communication may not have been created for the dominant purpose of obtaining or receiving legal advice. *Spotless* also demonstrates that although courts will be informed by considerations of fairness in making the assessment of the inconsistency between the conduct of the client and the maintenance of the privilege, the principle of fairness does not operate at large; rather, it guides the court in its assessment of inconsistency.

In *Spotless*, the advice provided to Premier was, from the very outset, clearly privileged. The question is then whether Premier waived its privilege in passing on the information (is the analysis of the purposes of the communication to the financiers relevant if the privilege claimed is the privilege over the original advice?)

²⁸ **Where the uniform evidence legislation does apply** (e.g. in matters before the New South Wales Supreme Court and the Federal Court), privilege is waived if a party has knowingly and voluntarily disclosed the **substance** of the advice to another (as opposed to the advice itself): e.g. see *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 40 NSWLR 12. For disclosure waiver to occur, disclosure of the substance of the advice is required rather than mere reference to the advice: *Maurice Case* (1986) CLR 475, 481 and 499. The purpose for which the disclosure was made and whether inadvertence was involved is also relevant. Disclosure of a position may constitute waiver: *Temwood Holdings Pty Ltd v Western Australian Planning Commission* [2003] WASCA 112, 18-25. However, the calling of an expert witness does not of itself amount to a disclosure of the substance of the instruction or instructions given to the witness: *Tirango Nominees v Dairy Vale Foods Ltd* (1998) 156 ALR 364 at 368 (Mansfield J). Notwithstanding that the common law test of waiver is one of inconsistency, rather than whether the substance of advice has been disclosed, there is a line of authority to the effect that **disclosing the substance of the advice also amounts to a waiver at common law**: e.g. *AWB Ltd v Cole(No 5)* [2006] FCA 1234, 155 FCR 30, 163; *Bennett v Chief Executive Officer of the Australian Customs Service* (2004) 140 FCR 101; *Switchcorp Pty Ltd v Multimedia Ltd* [2005] VSC 425; *AWB (No 5) Case* [2006] FCA 1234, 163. The applicable principles were discussed at length in *AWB (No 5) Case* [2006] FCA 1234, 158. Although there does not appear to be a clear line of authority as to when partial disclosure of a privileged communication will result in waiver, in 2008, the High Court in *Osland v Secretary to the Department of Justice* [2008] HCA 37 made some effort to clarify the uncertainties surrounding the question of whether **any** disclosure of the conclusion or gist will be enough to waive privilege. In applying the “inconsistency” test enunciated by the majority justices in *Mann*, the Court held that the disclosure of the substance and gist of the advice was not, in the circumstances, inconsistent with the maintenance of the confidentiality which the privilege protects and, as such, there was no implied waiver. The Court found that there was no unfairness to Mrs. Osland. The High Court noted that application of the Commonwealth’s Evidence Act has the effect that privilege may be lost in circumstances which are not identical to the circumstances in which privilege may be lost at common law. *Osland* therefore affirms that **substance** disclosure waiver is a rule of the uniform evidence legislation. At common law, the test remains one of **inconsistency** as articulated in *Mann* (see discussion under 3.1 of this note). The objective **purpose** of the relevant disclosure will be highly relevant, as will considerations of fairness.

²⁹ Issue waiver is perhaps less relevant to expert opinion, but arises in respect of pleadings. If the pleadings put in issue the confidential communication, it may be alleged that the holder of the privilege has thereby waived any privilege. While the High Court has yet to consider the principle of issue waiver either at common law or under the

The case law makes it clear that special care must be taken to ensure that the inadvertent disclosure of privileged material is avoided, especially in terms of referring to legal advice in statements to experts. Any disclosure of the contents of legal communications could inadvertently waive legal privilege over that communication.

If it would be unfair to withhold some privilege material after the inadvertent disclosure of related privileged material, there is an implied waiver.³⁰ Short of unfairness though, inadvertent disclosure does not dislodge privilege.³¹

Issues about disclosure of draft expert reports and other associated working materials often arise in cross-examination or earlier as part of the discovery process. For example, if the expert is to be called to give evidence, his/her drafts may be called for production. Other categories of ancillary materials that may be contested include the instructions given to the expert, “other” confidential briefings between lawyer and the expert, source materials used by the expert, witness statements provided to the expert, and documents generated by the expert.

The general common law and statutory requirements for waiver are set out below.

3.1 Common Law

The governing principle that underpins intentional waiver (sometimes called **express waiver**) is well-settled. It is constituted by a client consenting to the release of certain privileged communications or documents. Voluntary disclosure usually effects a waiver.³² Any decision to intentionally waive the privilege must be taken by the client, not the legal adviser.³³ Privilege in relation to a final expert report which is served or tendered may be lost by operation of express waiver (but not necessarily the expert’s drafts).³⁴

In contrast, the governing principle that underpins unintentional waiver (sometimes called **implied waiver**) has undergone a process of gradual judicial evolution. There appears to have been an increase in disputes about implied waiver in Australia as the dominant purpose test has gradually replaced the sole

Evidence Act 1995 (Cth) (the decision of the High Court in *Mann* concerned waiver by disclosure to third parties, rather than issue waiver), the rule was stated by Derrington J in *Wardrope v Dunne* [1996] 1 Qd R 224, 226. An example of issue waiver arose in the case of *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 40 NSWLR 12 (Giles CJ). The question of whether, by asserting that it acted in reliance upon a matter, a party to litigation is necessarily putting at issue its state of mind in so acting, so as to waive legal professional privilege with respect to legal communications which might have had a bearing on its arriving at that state of mind, was extensively examined by Byrne J in *Liquorland (Australia) Pty Limited v Anghie* [2003] VSC 73. In particular, 32, 40-41. Byrne J’s approach is consistent with the principles espoused by the High Court in *Mann* and earlier cases such as *Maurice* and *Ng*.

³⁰ *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475.

³¹ *Hongkong Bank of Australia Ltd v Murphy* [1993] 2 VR 419, 441.

³² *Goldberg v Ng* (1994) 33 NSWLR 639.

³³ *Anderson v Bank of British Columbia* (1876) 2 Ch D 644.

³⁴ Hugh Stowe, ‘Expert Reports and Waiver of Privilege’ (2007) 45 *Law Society Journal* 2, 74.

purpose test for legal professional privilege.³⁵ The case law dealing with implied waiver is therefore important, because it articulates the scope of legal professional privilege.³⁶

In 1999, the test for waiver was enunciated by the High Court of Australia in *Mann v Carnell* [1999] HCA 66 (“*Mann*”). The majority (Gleeson CJ, Gaudron, Gummow and Callinan JJ) held that waiver occurs where the conduct of the party asserting the privilege is **inconsistent with the maintenance of the confidentiality** which underpins legal professional privilege. Considerations of fairness are relevant, but not an overriding principle.³⁷

The *Mann* inconsistency test focuses upon the **conduct** of the client, rather than their subjective intention. The type of conduct that may be inconsistent with the maintenance of the confidentiality is identified above.

Prior to 1999, **fairness** was central to the question of whether the conduct of a client was to be taken as waiving legal professional privilege. The inconsistency test is narrower and has a more confined operation than the test of fairness set out in earlier cases.³⁸ Earlier High Court authorities on the point include *Attorney-General (NT) v Maurice* [1986] HCA 80 (“*Maurice*”) and *Goldberg v Ng Hango Holdings Pty Ltd* [1995] HCA 39 (“*Ng*”).

In *Mann*, although the majority (Gleeson CJ, Gaudron, Gummow and Callinan JJ) used the fairness test to determine the issue of waiver, the test was redefined and limited. The Court stated:

“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 (eg, *Goldberg v Ng* (1995) 185 CLR 83 at 95). 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.** Thus, in *Benecke v National Australia Bank* ((1993) 35 NSWLR 110), the client was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to a barrister in related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister’s version of those instructions. She did not subsequently intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication. **What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations**

³⁵ Peta Spender, ‘McCabe: Unresolved Questions About Truth and Justice’ (2004) 12 *Torts Law Journal* 2, 166; citing *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; 168 ALR 123; *Evidence Act 1995* (Cth) ss 118, 119; *Evidence Act 1995* (NSW) ss 118, 119.

³⁶ *Ibid.*

³⁷ *Ibid.* 29. It should be noted that there is some debate about whether the language used by the majority actually made any real change to the governing principle: *Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341, 44 (Kenny, Stone and Edmonds JJ).

³⁸ *DSE (Holdings) Pty Ltd v Intertan Inc* [2003] FCA 384 (unreported, 30 April 2003, BC200301932) at 5 (Allsop J).

of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.³⁹

[emphasis added]

Their Honours went on to state that:

“considerations of fairness may be relevant to a determination of whether there is such inconsistency”⁴⁰

The majority’s judgment thus resolved some of the uncertainty and confusion that surrounded the doctrine of fairness that existed under the earlier decisions of *Ng* and *Maurice*.

The significance of *Mann* is that Australian courts may consider the purpose behind the disclosure of documents and whether the circumstances are inconsistent with the confidentiality claimed.⁴¹ There must be no inconsistency between the client’s conduct and the maintenance of confidentiality. “Fairness” is one of the considerations inferring the question of “inconsistency”.

A difficult circumstance arising is when “privileged” information is voluntarily passed by a client to a third party (e.g. expert) for a limited and confidential purpose. Does that passing of information constitute a waiver of the privilege so that others can now demand access? This issue confronted the High Court in *Mann*. The majority determined that the privilege was not lost in the particular circumstances of the case.

Notably, the majority rejected the notion that a voluntary disclosure to a third party necessarily waives the privilege.⁴² Courts must examine the asserted inconsistency bearing in mind considerations of fairness. In contrast, the “purist” dissenting approach is that, “[o]nce there is voluntary disclosure of privileged material to a stranger to the privileged relationship ... the privilege in that material is waived as against the world”⁴³.

3.2 The Uniform Evidence Acts (“UEA”)

Legal professional privilege is governed by ss 117 – 126 of the Uniform Evidence Acts. Section 122 deals with **loss** of privilege. It provides that privilege is lost if the client has knowingly and voluntarily disclosed to another person the **substance** of the evidence and the disclosure was not made on a confidential basis. Other relevant sections include ss:

- 121: Loss of client legal privilege: generally
- 123: Loss of client legal privilege: defendants;
- 124: Loss of client legal privilege: joint clients;
- 125: Loss of client legal privilege: misconduct; or

³⁹ *Mann Case* [1999] HCA 66, 13.

⁴⁰ *Ibid* 15.

⁴¹ Aine Magee, ‘High Court Extends Legal Professional Privilege’ (2000) 15 *Australian Insurance Law Bulletin* (2) 9, 10.

⁴² *Mann Case* [1999] HCA 66, 385.

⁴³ *Ibid* 401.

126: Loss of client legal privilege: related communications and documents.

However, there will be no loss of privilege if (among other things) the disclosure was made under compulsion of law.⁴⁴

Implied waiver of privilege may potentially arise in relation to associated materials under ss 126 and 122.⁴⁵ If privilege is waived in respect of an otherwise privileged communication or document under s 122, the waiver extends to such associated documents that are reasonably necessary to enable a proper understanding of that communication or document.⁴⁶

The general principles applicable under ss 122 and 126 were addressed in *ML Ubase Holdings Co Ltd v Trigem Computer Inc* [2007] NSWSC 859. Notably:

- Section 126 was considered in some detail in *David Towney v Minister for Land & Water Conservation for NSW & Ors* [1997] FCA 656, and more recently, in *Australian Medic-Care Co Ltd v Hamilton Pharmaceutical Pty Ltd (No 5)* [2008] FCA 1979.
- Recent cases dealing with s 122 include *Spalding v Radio Canberra Pty Ltd* [2009] ACTSC 26 and *Artistic Builders Pty Ltd v Nash* [2009] NSWSC 102.

Judicial opinions differ on the interpretation and scope of s 122 (in those jurisdictions where it applies). Some courts have tended to read it as a restatement of the common law waiver rules. Others have argued that the section “may well, in any given case, produce an entirely different outcome to that which would follow under the common law doctrine”⁴⁷.

A detailed discussion of this issue is beyond the scope of this note.⁴⁸ A summary of the differences between s 122 and the common law was described by Sackville J in *BT Australasia Pty Ltd v New South Wales & Telstra Corp Ltd (Judgment no. 7)* [1998] FCA 294⁴⁹.

⁴⁴ UEA s 122(2)(c); *Ingot Capital v Macquarie Equity* [2008] NSWSC 25; *New Cap Reinsurance Corporation Ltd (In Liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258.

⁴⁵ Stowe, above n 34, 74.

⁴⁶ UEA s 126.

⁴⁷ *Carnell v Mann* (1998) FCR 247, 257.

⁴⁸ See, Paul Nicols and Matthew Skinner, ‘Attracting and Preserving Legal Professional Privilege’ (2007) *Commercial Law Quarterly* (March-May) 3, 16; See also, S B McNicol, ‘Client Legal Privilege and Legal Professional Privilege: Considered, Compared and Contrasted’ (1999) 18 *Australian Bar Review* 189, 201 – 204.

⁴⁹ Sackville J said: “* In the case of disclosure waiver, the test to be applied is that specified in subss 122(2) and (4) namely, whether the client has knowingly and voluntarily disclosed to another person the substance of the privileged communication or whether the substance of the communication has been disclosed with his or her express or implied consent. * The test for loss of privilege by reason of disclosure provided by subss 122(2) and (4) is a quantitative one. It is inconsistent with the common law fairness test, enunciated in *Maurice*. The common law has to that extent been modified. * Section 122(1) provides for the loss of client legal privilege where the client expressly or impliedly consents to disclosure. * The so-called issue waiver raises are to be regarded as particular manifestations of the

The principal **distinctions** include:

- First, the doctrine of waiver under s 122 has been described as a “quantitative” one⁵⁰ whereas the common law test for waiver has been described as a “qualitative” one.⁵¹ Essentially, this is because s 122 (2) and (4) require the “substance” of the evidence to be disclosed for waiver to arise, whereas the common law “fairness” test dictates that privilege will be lost wherever disclosure is “incompatible with the retention of confidentiality.”⁵²

Problems have been encountered with the question whether the common law notion of inconsistency informed by fairness can be imported into the section.⁵³

- Second, the statutory doctrine is stated to only apply in a court room, whereas the common law doctrine applies in both judicial and non-judicial arenas.

However, efforts have been made to “adapt” the common law so that the statutory waiver doctrine can at least apply to ancillary processes.⁵⁴

- Third, the “consent” that is stated under s 122 appears to be confined to “express” consent under s 122 (1) and to “express or implied” consent under s 122 (4). This is to be contrasted with the common law position which covers express, implied, and imputed (including unintentional and inadvertent) waiver.⁵⁵

principles applying either to waiver by disclosure or to implied consent to disclosure. They do not fall outside the purview of s 122 of the *Evidence Act*.”

⁵⁰ *Adelaide Steamship Co Ltd Anor v Janis Hunars Spalvins Ors* [1998] FCA 144.

⁵¹ Graham Roberts, ‘Client Legal Privilege: Some Practical Considerations’ (1996) 70 *Law Institute Journal* 54, 56.

⁵² See generally, McNicol, above n 48, 204 (referring to the “fairness” test exemplified in *Ng Case* (1996) 185 CLR 83).

⁵³ Paul Nicols and Matthew Skinner, ‘Attracting and Preserving Legal Professional Privilege’ (2007) *Commercial Law Quarterly* 3, March/May 2007, 16; See also, McNicol, above n 48, 202; Palmer, above n 22, 12.

⁵⁴ E.g. *BT Australasia Pty Ltd v New South Wales & Telstra Corp Ltd* (Judgment no. 7) [1998] FCA 294.

⁵⁵ *Ibid.*

3.3 Waiver of Associated Materials

The production of an expert report often involves the creation of extensive ancillary documents, including instructions, source materials, drafts, working documents, and confidential communications with lawyers.⁵⁶ This then raises the question of what documents provided to and communications with the expert are privileged?⁵⁷

There is no clear-cut answer to this question.⁵⁸ The law of privilege is affected by broad policy considerations, which seek to provide protection for experts who change their minds and adjust their expression as their understanding of the issues evolves. Such arguments have been canvassed in a number of judgments. Noteworthy cases include:

- *Linter Group Ltd (in liq) v Price Waterhouse (a firm)* [1999] VSC 245 at 16 (Harper J); followed in criminal proceedings, *Filipowski v Island Maritime Ltd* [2002] NSWLEC 177 at 22 (Lloyd J);
- *Natuna Pty Ltd v Cook* [2006] NSWSC 1367 at 15;
- *New Cap Reinsurance Corporation Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258 at 22.

Unserved final reports, drafts, and other working material may stand in a different position to served reports. In particular, difficulties may arise in establishing the requisite dominant purpose.⁵⁹ Unserved

⁵⁶ Stowe, above n 34, 74.

⁵⁷ Davis, above n 11, 1-2.

⁵⁸ Freckelton and Selby, above n 7, 426. Noting that “[t]he law on the question of whether client legal privilege protects draft reports is not yet finally resolved”; citing Mendelow, above n 20.

⁵⁹ The cases on the dominant purpose test do not provide clear guidance, for example, see Justice White's comments in *New Cap Reinsurance Corporation Ltd (In Liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258 to the effect that an expert's report, particularly their final report, will usually be prepared for the dominant purpose of putting that witness's evidence before the Court and not for the dominant purpose of providing legal services in relation to proceedings. If so, it would not be privileged under section 119(b) of the *Evidence Act 1995* (NSW). In *Roach & Ors v Page & Ors (No. 17)* [2003] NSWSC 973, 8-9, Justice Sperling, in rejecting a submission that the dominant purpose of communications with an expert witness (as distinct from the expert's report) is to assist the Court and not to provide the client with professional legal services, said:

"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. That is because the predominant purpose of such communications is to bring forward expert evidence in aid of the party. But for that purpose the communications would not be entered into at all. The fact that the witness is constrained to assist the court and to be impartial does not displace that purpose.

The plaintiffs' argument fails to recognise the adversarial nature of the proceedings. No party is under an obligation to adduce expert evidence to assist the court. No expert is obliged to provide evidence to assist the court... The court receives the benefit of assistance from an expert only if it suits a party to adduce such evidence... 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. To suggest otherwise fails to recognise this reality".

draft and final reports will usually have a dual purpose.⁶⁰ It will be a question of fact as to which purpose is dominant.⁶¹

The usual starting point of any such discussion is *Australian Securities & Investments Commission v Southcorp Limited* [2003] FCA 804 (“*Southcorp*”). Lindgren J had to decide whether draft reports passing between an expert engaged by ASIC and ASIC’s lawyers were subject to privilege, including a version annotated by the expert and another annotated by counsel.

His Honour summarised the relevant principles as follows:⁶²

“

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 Corporation 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] HCA 3; (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 that could be said to influence the content of the report, because,

In *Natuna Pty Ltd v Cook* [2006] NSWSC 1367, the expert in question had confirmed in a letter to his instructing solicitors that he had been asked to assess the market value of certain land “for litigation purposes”. Biscoe AJ found [at 4] that this was sufficient to establish that the drafts were prepared for the dominant purpose of the client being provided with professional legal services relating to a proceeding or an anticipated or pending proceeding. It was submitted that the overriding duty of an expert to assist the Court impartially, as stated in the expert witness code of conduct, means that it can no longer be said that an expert report is prepared for the dominant purpose of the client being provided with professional legal services relating to proceedings. Biscoe AJ rejected that submission [at 12], taking the view that the overriding duty to the Court imposed by the code does not change the dominant purpose for which an expert report is prepared.

⁶⁰ *New Cap Reinsurance Corporation Ltd (In liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258 (White J).

⁶¹ Notably, where s 119(b) of the UEA applies, it must be shown that such documents were brought into existence for the dominant purpose of being provided with “professional legal services” relating to anticipated or pending legal proceedings.

⁶² *Southcorp Case* [2003] FCA 804, 21.

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] HCA 80; (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] HCA 39; (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].”

Relying on principle three, Justice Lindgren found that unannotated versions of the draft report were not privileged.

However, His Honour held that annotations to those versions, whether made by the expert or counsel, were subject to privilege, because they would tend to disclose confidential communications (the annotations had been made during the course of meetings between the expert and ASIC’s lawyers).

The judgment of Lindgren J has been quoted with approval in subsequent cases.⁶³ However, despite this general approval, Lindgren J’s summary of principles appears to contain ambiguous and controversial propositions.⁶⁴ Some of these are addressed below in relation to the different **categories** of ancillary materials, namely:

- a) Implied waiver of privilege in instructions to the expert
- b) Other “confidential briefings” – dealings between lawyer and expert
- c) Documents used by an expert – source materials
- d) Whether there is privilege in draft expert reports
- e) Implied waiver of privilege for witness statements provided to the expert
- f) Whether privilege extends to documents generated by the expert

⁶³ E.g. *Temwell Pty Ltd v DKGR Holdings Pty Ltd (in liq)* [2003] FCA 948, 7 (Ryan J); *AWB v Cole* [2006] FCA 1234, 168; *Gate Gourmet Australia Pty Limited (in liquidation) v Gate Gourmet Holding Ag and Ors* [2004] NSWSC 768 at 28; *R v Ronen and Ors* [2004] NSWSC 1305, 18; *Thomas v State of New South Wales* [2006] NSWSC 380, 16; See also, *Ryder v Frohlich* [2005] NSWSC 1342, 10.

⁶⁴ Stowe, above n 34, 75.

a) Implied waiver of privilege in instructions to the expert

Although there is little controversy that the written instructions to the expert are initially privileged,⁶⁵ a reference to those instructions in the expert's report may give rise to an implied waiver of that privilege.

An example of this arose in *Instant Colour Pty Ltd v Canon Australia Pty Ltd*⁶⁶. The Federal Court held that where an expert refreshed his memory from a copy of his proof of evidence, privilege in that document was waived.

Although it was not in dispute that the document was, in the absence of waiver, subject to legal professional privilege, Nicholson J found:

“... notwithstanding that the statement used by the second applicant to refresh his memory was privileged, the document comprising the true proof of his evidence should be made available to counsel for the respondent for inspection without penalty”⁶⁷

Extreme care must therefore be taken with the provision of information to an expert upon which the expert may form his or her opinion or to which the expert may have regard.⁶⁸ Some superior courts (including the Victorian Supreme Court and the Federal Court) require the expert to make a declaration setting out such information. If the declaration is not made and if there is non-compliance with the relevant Practice Note, the expert's evidence may be excluded in the exercise of the Court's discretion.⁶⁹

b) Other “confidential briefings” – 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.

The principles in *Southcorp* suggest that privilege over this material initially arises, but will generally be waived upon service of the expert report.

While some authorities affirm that principle,⁷⁰ there is, on the other hand, 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).⁷¹

⁶⁵ Stowe, above n 34, 75.

⁶⁶ *Instant Colour Pty Ltd; Brian Ivey; Matthew Ferguson, Neville Charles Quartermaine, Edwin Bennett Ivey and Richard Thomas Mincherton v Canon Australia Pty Ltd and Canon Finance Australia Ltd* [1995] FCA 1625 (“*Instant Colour Case*”).

⁶⁷ *Instant Colour Case* No. WAG 93 OF FED No. 870/95 (Federal Court, Nicholson J, 13 March 1995), 14.

⁶⁸ Glenn McGowan SC, ‘Experts in Civil Cases – Management Principles’, Victorian Bar CLE program, 1 August 2005, 6.

⁶⁹ *Australian Competition and Consumer Commission v Lux* [2003] FCA 89.

⁷⁰ Stowe, above n 34, 6.

c) Documents used by an expert – source materials

Although *Southcorp* affirms that any privilege in source materials will be waived on service of the report, there are a number of conflicting authorities regarding that proposition.⁷²

For example, in *Towney v Minister for Land and Water Conservation (NSW)*⁷³, Sackville J held that the scope of waiver in relation to source materials may be limited to the particular portions relied upon, if the expert specifies, with particularity, the discrete portions of the document relied upon without creating an “inaccurate perception” of the privileged material to the opposing litigant.⁷⁴

Moreover, there are a series of cases which firmly establish that the scope of waiver in relation to source materials relied upon may be excluded altogether, if the expert structures their report so that it is based on precisely identified assumptions (rather than privileged source materials).⁷⁵

On the other hand, other authorities affirm that waiver should extend to the whole of the component of source material on which at least partial reliance has been placed. This is because the other party should be entitled to test the contention as to partial reliance.⁷⁶

Based on the principles in *Southcorp*, it seems 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. Indeed, the weight of authority clearly affirms that principle.⁷⁷

Despite this conflicting line of authority, 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 to which the expert “used” or relied on them).

Given the well-established principle that partial disclosure of a privileged document triggers an implied waiver of the whole document, Stowe argues that “fairness dictates that the opposing party should have

⁷¹ Stowe, above n 34, 75; citing *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141, 162; *Greenhill Nominees Pty Ltd v Aircraft Technicians of Australia Pty Ltd* [2001] QSC 7 per Wilson at 11; *Roach v Page (No 17)* 2003 NSWSC 973, 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.

⁷² *Ibid* 75; citing *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438.

⁷³ (1997) 76 FCR 401.

⁷⁴ Stowe, above n 34, 75; citing *Towney v Minister for Land and Water Conservation for the State of New South Wales* (1997) 147 ALR 402, 414 (Sackville J); quoted with approval in *Director-General, Department of Community Services v D* [2006] NSWSC 827, 32.

⁷⁵ *Ibid*; citing *Cole v Dyer and the Nominal Defendant* [1999] SASC 272 at 57; *Lampson and 2 Ors v McKendry and Anor* [2001] NSWSC 373, 35; *Mackinnon v BHP Steel (Ais) P/L and Anor* [2004] NSWSC 459, 24; and *Mackinnon v BHP Steel (Ais) Pty Ltd and Anor* [2004] NSWSC 1027, 20.

⁷⁶ *Ibid*; citing *Henderson v Low* [2000] QSC 417, 16; *Bryce v Anderson and Anor* [2005] QSC 216, 8-13; *Minister for Finance v C and I Rogers Pty Ltd* [2004] VSC 370, 9.

⁷⁷ *Ibid*; citing *Dingwall v Commonwealth* (1992) 39 FCR 521, 524; *R v Ronen and Ors* [2004] NSWSC 1305, 19 (Whealy J); and *Australian Competition and Consumer Commission v Lux Pty Ltd* [2003] FCA 89, 55.

the opportunity of testing through cross-examination what aspects of the privileged source material influenced the formation of the final recorded opinion”⁷⁸

Furthermore, Stowe contends there are two additional considerations which weigh in favour of the waiver being extended to **all** materials that are provided to the expert, irrespective of whether the expert states they have **used** them.

- 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”⁷⁹.
- Second, 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”⁸⁰.

d) Whether there is privilege in draft expert reports

Before one comes to the difficult question of whether service of the report has waived privilege in draft reports, it is necessary to determine whether the draft reports are privileged. There are conflicting lines of authority. Whether a draft report is privileged (i.e. there is no implied waiver of the privilege) may ultimately depend upon two criteria:⁸¹

1. the purpose(s) for which the draft came into existence; and
2. the Court guidelines or rules which apply

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.⁸² For example, in the Victorian case of *Linter Group Ltd v Price Waterhouse (A Firm)*⁸³ (“*Linter Group*”), Harper J was required to decide prior to the commencement of the trial whether a draft expert report was required to be produced. The final report had been served. His Honour refused an order to produce the draft, holding:

⁷⁸ Stowe, above n 34, 75; citing *Nea Karteria Maritime Co Ltd v Atlantic and Great Lakes Steamship Corp (No 2)* [1981] Com LR 138, 139; quoted with approval in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, 482 (Gibbs CJ) 498-499 (Dawson J).

⁷⁹ Ibid 76; citing *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 948, 12 (Ryan J).

⁸⁰ Ibid 76; citing *ASIC v Rich* [2005] NSWSC 149, 377 (Austin J); see also *ASIC v Rich* [2005] NSWCA 152, 168-170.

⁸¹ Davis, above n 11.

⁸² Ibid 6; citing *Linter Group Ltd v Price Waterhouse (a firm)* [1999] VSC 245; See also, Paul Mendelow, ‘Expert Evidence: Legal Professional Privilege and Expert’s Reports’ (2001) 75 (4) *Australian Law Journal* 258, 271.

⁸³ [1999] VSC 245.

“I accept for these purposes the sworn statement by Mr. Sawyer that that opinion is a mere draft. As such it would only be of relevance to the first defendant if it could be shown that it differed from Mr. Spencer’s witness statement, not because Mr. Spencer had had a genuine change of opinion but because he was motivated by a desire simply to improve the plaintiff’s case. Such would of course be entirely improper; but 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 a judgement, 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. For these reasons the application for an order that the plaintiff produce the opinion of Mr. Spencer of March 1997 is refused.”⁸⁴

The reasoning of Harper J in *Linter Group* was applied in *Filipowski v Island Maritime Ltd*⁸⁵, in the context of criminal proceedings. However, it does not appear to have been applied in other cases which have considered privilege in a draft expert report, including the *Southcorp* decision.⁸⁶

Other noteworthy cases include *Natuna Pty Ltd v Cook* [2006] NSWSC 1367 at 15 and *New Cap Reinsurance Corporation Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258 at 22.

Common law

Given the centrality of “communication” as a determinant to legal professional privilege⁸⁷, much depends upon whether draft reports are sent to lawyers and are properly to be viewed as “communications”. Most of the time, they are likely to be seen as communications, unless the drafts remained entirely internal to experts and were not communicated to the commissioning lawyers.⁸⁸

Although *Linter Group* was not referred to by Lindgren J in *Southcorp*, it was referred to by Lindgren J in his earlier decision, *Spassked Pty Ltd v Commissioner of Taxation (No 4)*⁸⁹. 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.⁹⁰

Recent case law on the point suggests 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

⁸⁴ *Linter Group Ltd v Price Waterhouse (A Firm)* [1999] VSC 245, 16.

⁸⁵ [2002] NSWLEC 177.

⁸⁶ Davis, above n 11, 7.

⁸⁷ See *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* (1999) 201 CLR 49; 75 ALJR 339, 80.

⁸⁸ Freckelton and Selby, above n 7, 427.

⁸⁹ *Spassked Pty Ltd v Commissioner of Taxation (No 4)* (2002) 50 ATR 70; [2002] FCA 491, 14.

⁹⁰ Davis, above n 11, 7; citing *Spassked Pty Ltd v Commissioner of Taxation (No 4)* (2002) 50 ATR 70; [2002] FCA 491, 20.

draft.⁹¹ 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.⁹²

In *Southcorp*, Lindgren suggested that drafts are not necessarily to be viewed as "communications". His Honour relied heavily on *Interchase*. That case involved drafts of various parts of what became a valuation report prepared by an expert were not communicated to, or prepared for, the purpose of communication to a legal adviser. A claim for privilege in those documents was rejected. The primary reason for rejecting the claim 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.⁹³

In *Southcorp*, Lindgren J found that there was no privilege in two draft reports on the basis that they 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. In relation to the third draft report which had been 'marked up' or tracked by the solicitors to indicate to counsel the difference between that an earlier reports, Lindgren J concluded that the report was privileged on the basis that the marking up was for a confidential communication between the solicitor and counsel.

In one of the *Temwell Pty Ltd v DKGR Holdings Pty Ltd*⁹⁴ decisions, Ryan J applied the principles espoused by Lindgren J in *Southcorp*, stating:

"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 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 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"⁹⁵

Lindgren J's summary of principles were also followed by Barrett J in *Ryder v Frohlich*⁹⁶ ("Ryder"). Barrett J concluded that a draft expert report did not attract the common law privilege, stating:

"Lindgren J's item (3) refers to the judgment of Thomas J in *Interchase Corporation Ltd v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141. It is pertinent to quote from his Honour's judgment (at p.162):

⁹¹ Recently, it has been held that draft documents and other communications of a like nature with an expert witness proposed to be called in litigation are privileged under s 119(b) of the *Evidence Act 1995* (Cth), whatever may have been the position at common law: *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 7)* [2008] FCA 323, 6 (Heerey J).

⁹² Davis, above n 11, 7.

⁹³ Ibid 8; citing *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 1)* [1999] 1 Qd R 141.

⁹⁴ [2003] FCA 985 (*Temwell Case*).

⁹⁵ Davis, above n 11, 8; citing *Temwell Case* [2003] FCA 985, 3.

⁹⁶ [2005] NSWSC 1342.

“We are concerned in this case with discovery and production of documents. A necessary basis for privilege to attach to anything - document or otherwise - is that it records a communication. The material in categories B, C, D and E has remained in Richard Ellis's possession, and has not been the subject of any communication with the solicitors, or for that matter anyone else. The basis upon which privilege was claimed for these documents is confined to the claim that they were ‘brought into existence by Richard Ellis solely for use in this litigation since its commencement and *have been kept confidential.*’ (my italics). The italicised words draw attention to what is missing, and expose a deficiency in the claim. The documents consist mainly of working papers and valuations of other properties, and lack the quality of confidentiality. There is no reason to think that the documents were made for any confidential purpose. The other deficiency is that they were not communicated or intended to be communicated to anyone. In *Commissioner of Federal Police v Propend Finance Pty Ltd* [1997] HCA 3; (1997) 188 CLR 501, 552, McHugh J underlined the fundamental point that the subject matter of privilege is *communications*.

‘This point, however trite it may seem, is fundamental to the determination of the present appeal. Much of the confusion present in the case law arises from a failure to apply it. Legal professional privilege is concerned with communications, either oral, written or recorded, and not with documents per se.’

In the present matter, shortly put, the documents in no way make or record communications, let alone confidential communications.

I would hold that in general, when an expert is engaged by a solicitor for the purpose of giving evidence in a case, documents generated by the expert and information recorded in one form or another by the expert in the course of forming an opinion are not a proper subject for a claim of legal professional privilege. Privilege may however be claimed in relation to communications between the expert and the solicitor (both ways) when such communication is made for the purpose of confidential use in the litigation. Beyond this there is no sufficient reason why any material relevant to the formation of the expert's opinion should be subject to a claim of legal professional privilege. It is as well to add that an expert or solicitor may not artificially manufacture privilege by, for example, the expert sending in his or her file to the solicitor. Documents of this kind simply are not confidential.”

The point made here is that privilege can only attach to documents which embody communication between the expert and the litigant by whom the expert is retained (or the litigant's lawyer). A draft report prepared by the expert is not, of its nature, such a communication. It may be that the draft report is, in fact, given or sent by the expert to the litigant or the litigant's lawyer, but that does not change its character as something prepared by the expert which is not intended to be a means of communication with the litigant or lawyer.”⁹⁷

Notably, the *Southcorp* and *Interchase* cases referred to by Barrett J dealt with legal professional privilege at common law, as opposed to the Uniform Evidence Acts.

⁹⁷ *Ryder v Frohlich* [2005] NSWSC 1342, 11-12.

However, in *Brookfield v Yevad Products Pty Ltd*⁹⁸, Mansfield J said:

“I do not think that Lindgren J’s principle (3) in *Southcorp* should be read as suggesting that a draft report provided by an expert to solicitors for the purpose of litigation is not itself privileged. It operates precisely as a communication for the purposes for which privilege exists. That says nothing about the status of the expert’s copy of such a document. However, if a draft of a report (as distinct from working notes and field notes and other documents used by an expert to form an opinion) encompassed within principle (3) is not in fact communicated to solicitors, the draft of that report may nevertheless have been prepared for the purpose of recording the views of the proposed expert and intended by the expert as a means of communication to a party’s legal adviser. Provided that document was brought into existence for such a purpose, that is to record information to be submitted to a solicitor for the purpose of litigation, it may be privileged even in the hands of the expert. That is an issue as to characterisation, a point recognised both by Lindgren J in *Southcorp* and by Barrett J in *Ryder* upon a careful reading of their Honour’s respective remarks. Some drafts may not have that character, so in some cases evidence may be necessary as to the characterisation of the particular document held by the expert. In *Interchase Corporation Limited (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 1)* [1999] 1 Qd R 141 at 162, Thomas J pointed out the reason why neither principle nor policy should protect from inspection documents which an expert generates from the information which the expert collects in order to form an opinion. His Honour did not indicate that the formation of the opinion itself would not itself be privileged, as he did not need to. Pincus JA in that case at 148-149 suggested that the formation of the opinion of the expert itself is not privileged, but a report on that information communicated to the party’s legal adviser is privileged.”⁹⁹

His Honour held that a draft expert report was privileged from production at an interlocutory stage.

Similarly, privilege was held to attach to draft reports in *Re Southland Coal Pty Ltd (rec and mgrs apptd) (in liq)* (2006) 59 ACSR 87 at 16-20; *Linter Group Ltd v Price Waterhouse (a firm)* [1999] VSC 245 at 16; and *Filipowski v Island Maritime Ltd* [2002] NSWLEC 177 at 22 .

The Uniform Evidence Acts

As noted earlier, s 119 of the UEA deals with litigation privilege. Considerations generally applying to “communications” at common law apply to s 119(a).¹⁰⁰

Whether a draft expert report constitutes a “confidential document” for the purposes of s 119 (b)¹⁰¹ is a critical issue. Recent decisions in New South Wales confirm that section 119(b) of the *Evidence Act 1995* (NSW) extends privilege to confidential “documents” whether or not those documents are

⁹⁸ [2006] FCA 1180.

⁹⁹ Ibid 15.

¹⁰⁰ *New Cap Reinsurance Corporation Ltd (In Liq) and 1 Or v Renaissance Reinsurance Ltd* [2007] NSWSC 258.

¹⁰¹ *Natuna Pty Ltd v Cook* [2006] NSWSC 1367, 10 (Biscoe AJ).

“communications” under s 119(a), provided they satisfy the requirements of s 119(b), including the dominant purpose test.¹⁰²

Subject to that necessary qualification, the case of *Natuna Pty Ltd v Cook* [2006] NSWSC 1367 (“*Naturna*”) is particularly noteworthy. Biscoe J held that a draft report by an expert retained by a party or parties is not stripped of its character of confidentiality by the expert witness code of conduct. His Honour rejected the submission that the overriding duty of an expert to assist the court impartially, as stated in various expert witness codes of conduct, means that it can no longer be said that an expert report is prepared for the dominant purpose of the client being provided with professional legal services relating to proceedings.

Additionally, Biscoe J held that service of an expert report does not waive privilege in relation to a draft. The effect of service has been the subject of much debate. In the more recent case of *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 7)* [2008] FCA 323, the Federal Court established that:

- Service of expert report alone does not waive privilege over earlier correspondence with legal representatives and drafts.
- The relevant test is whether the expert report can completely or thoroughly understood without reference to the privileged documents.

This case arose out of a subpoena served by Cadbury upon one of Darrell Lea's expert witnesses seeking production of documents relating to communications between the expert and Cadbury's lawyers in relation to the proceedings and the expert's evidence.

Cadbury resisted production by relying on s 119(b) of the *Evidence Act 1995* (Cth) which provides that evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of 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 (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

Darrell Lea did not dispute this proposition but relied on waiver and s 122(2) of the *Evidence Act 1995* (Cth) arguing that by serving the expert's report Cadbury had waived privilege.

¹⁰²Prior to *Southland Coal*, Justice Barrett held in *Ryder v Frohlich* that privilege can only attach to documents which embody communications between the expert and the litigant or the litigant's lawyer. He said that a draft report prepared by the expert is not, of its nature, such a communication [at 12]. Therefore, draft expert reports and working materials may be privileged even if they are not “communications”. Since *Ryder v Frohlich*, several Supreme Court of New South Wales decisions, including *Southland Coal*, have agreed that section 119(b) extends privilege to certain confidential “documents” irrespective of whether they contain “communications”. In *New Cap Reinsurance Corporation Ltd (In Liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258, Justice White said [at 34] “[s]ection 119(b) of the Evidence Act extends the privilege to confidential documents, whether communicated or not, provided they were brought into existence with the requisite dominant purpose”. In *Natuna Pty Ltd v Cook* [2006] NSWSC 1367, Biscoe AJ said [at 10] “...in my opinion, a draft expert report is a confidential “document” which is privileged from production by operation of s 119(b). Section 119(b) goes outside the area of communications with which both s 119(a) and common law concepts of privilege are concerned. It applies to ‘documents’”.

The court disagreed with Darrell Lea. Justice Heerey took the opportunity of clarifying the law in light of a number of conflicting past decisions.

In his opinion, service and tender of an expert witness' report in proceedings does not necessarily constitute a waiver of the privilege in associated documents except if those associated documents were reasonably necessary to an understanding of the report. This will likely be the case if the primary document contains a summary or excerpt from an earlier communication, or responds to questions which are not themselves restated in it.

Justice Heerey said:

"...The test is concerned with the comprehensibility of the primary communication or document: if it can be completely or thoroughly understood without more, then access to the related communications or documents is not reasonably necessary

...

... for the purposes of s 126, one starts by looking at the substantive document (made admissible under s 122 or another of the applicable sections) and asking whether, in order to understand it thoroughly, it is necessary to know what is in the associated material "¹⁰³

Darrell Lea was unable to point to any particular part of the expert's report which required some further document to enable the report to be understood or to resolve any uncertainty or ambiguity or confusion in it.

e) Implied waiver of privilege for witness statements provided to the expert

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.¹⁰⁴ The question of whether privilege is waived may turn on issues of fairness.¹⁰⁵

In *Cole v Dyer*¹⁰⁶, the question before Doyle CJ was whether a waiver of legal professional privilege in relation to some documents referred to by experts was to be imputed.

A personal injury action arose out of 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 statements. Privilege for the statements was claimed by the defendant's solicitors.

¹⁰³ *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 7)* [2008] FCA 323, 45-46.

¹⁰⁴ Davis, above n 11, 4; citing *Jessup v Gorjup*, Unreported, Supreme Court, Tas, 20 November 1997; *Interchase Corporation Ltd v Grosvenor Hill (Qld) Pty Ltd (No 1)* [1999] 1 Qd R 141, 148 and 160-161; *Clark v Boden* [2004] TASSC 81.

¹⁰⁵ *Ibid.*

¹⁰⁶ No. SCGRG-97-259 Judgment No. S272 [1999] SASC 272.

The Court held that the defendant was not required to disclose her statements. Doyle CJ stated that 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.¹⁰⁷

Doyle CJ did, however, comment:

“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”¹⁰⁸

f) *Whether privilege extends to documents generated by the expert*

Consistent with *Southcorp*, there are numerous authorities which affirm that unilaterally generated working documents (including drafts) brought into existence by the expert to assist in the preparation of the expert report are not the subject of privilege, unless made between the expert and instructing solicitor for the purpose of confidential use in litigation.¹⁰⁹

The policy underlying this position was stated by Thomas J in *Interchase Corporation Limited v Grosvenor Hill (Queensland) Pty Ltd (No 1)*¹¹⁰ (“*Interchase*”):

“When an expert is engaged by a solicitor for the purpose of giving evidence in the case, documents generated by the expert and information recorded in one form or other by the expert in the course of forming an opinion are not a proper subjects for a claim of legal professional privilege. Privilege may however be claimed in relation to communications between the expert and the solicitor (both ways) when such communication is made for the purpose of confidential use in the litigation. Beyond this, there is no sufficient reason why any material relevant to the formation of the expert's opinion should be subject to a claim of legal professional privilege. It is well to add that an expert or solicitor may not artificially manufacture privilege by, for example, the expert sending in his or her file to the solicitor. Documents of this kind simply are not confidential.”

Interchase was decided in 1997 in the shadow of the “sole purpose” test. Subject to that necessary pre-*Esso* qualification, *Interchase* reflects the commonly accepted position that instructions provided to an

¹⁰⁷ *Cole v Dyer* No. SCGRG-97-259 Judgment No. S272 [1999] SASC 272, 50-51.

¹⁰⁸ *Ibid* 59.

¹⁰⁹ Davis, above n 11, 4; citing *Jessup v Gorjup*, Unreported, Supreme Court, Tas, 20 November 1997; *Interchase Corporation Ltd v Grosvenor Hill (Qld) Pty Ltd (No 1)* [1999] 1 Qd R 141, 148 & 160-161.

¹¹⁰ [1999] 1 QR 141, 162.

expert will be matters required to be disclosed by the expert in their report notwithstanding that those instructions may also be the subject of legal professional privilege.

In *Australian Competition & Consumer Commission v Lux Pty Ltd*¹¹¹, Nicholson J ruled on privilege for a number of documents, including letters to and from an expert and handwritten notes of communications between the expert and 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.¹¹²

In relation to the other documents, the claim of privilege was rejected where the document did not record a confidential communication or where, by reason of an implied waiver of the privilege, it would be unfair to maintain the claim of privilege.¹¹³

Similar issues arose in *Temwell Pty Ltd v DKGR Holdings Pty Ltd*¹¹⁴ (“*Temwell*”) In a series of *Temwell* decisions¹¹⁵, Ryan J made findings relevant to privilege of communications with experts. In two of these decisions¹¹⁶, His Honour held that file notes of meetings between the expert, solicitors and Counsel were not privileged on the basis that 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 therefore characterised the communications, 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.¹¹⁷

¹¹¹ [2003] FCA 89 (“*Lux Case*”).

¹¹² Davis, above n 11, 6; citing *Lux Case* [2003] FCA 89.

¹¹³ Ibid 6; citing *Lux Case* [2003] FCA 89.

¹¹⁴ *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 930 (*Temwell Case*).

¹¹⁵ *Temwell Case* [2003] FCA 930, 948, 985, 1032, 1078 & 1348.

¹¹⁶ *Temwell Case* [2003] FCA 948 & 1032.

¹¹⁷ Davis, above n 11, 6; citing *Temwell Case* [2003] FCA 1032, 2.