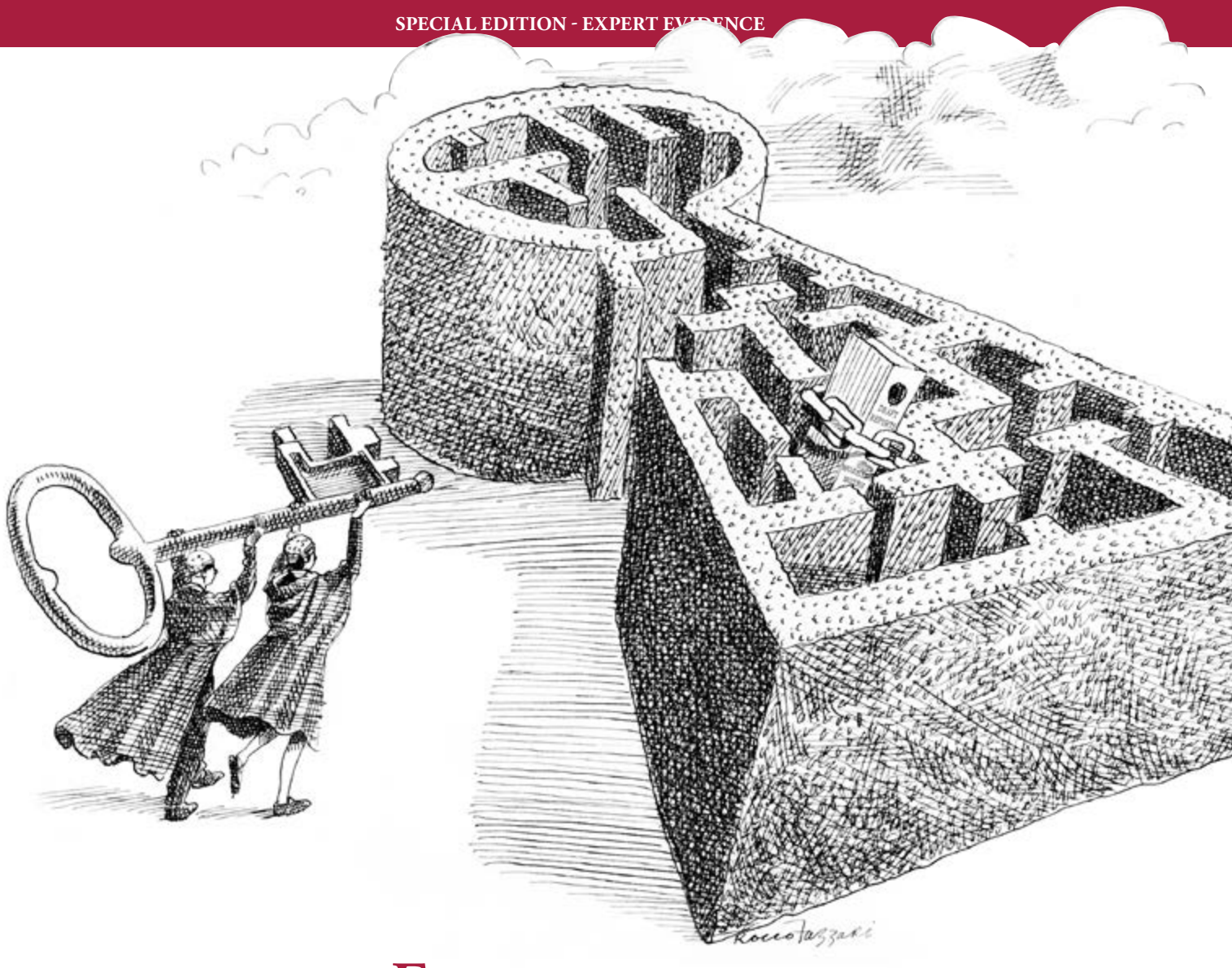

Expert reports: reconsidering waiver of privilege

By Hugh Stowe, 5 Wentworth

Introduction

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

The article updates an analysis undertaken 10 years ago in this journal.[1] Back then, I stated: 'Regrettably, a crisp answer to the questions cannot be given. Privilege may arise, and privilege may be waived on service or tender of the report. However, the scope of privilege and waiver are uncertain'. That conclusion remains apt, but there have been significant developments and clarifications in this field since then.

This article sketches an overview of the law of legal professional privilege, briefly reviews the authorities and principles relevant to the application of privilege to Associated Materials, tentatively outlines a summary of prevailing principles, raises proposals for the further evolution of principles, and outlines possible strategies to minimise the prospect and prejudice of waiver. These are large and significant topics which bristle with controversies and uncertainties. The thorough analysis which these topics merit is beyond the scope of this brief article.

Which body of evidence law applies?

In the Federal Court, questions of legal professional privilege are governed by the common law in pre-trial proceedings,[2] and by the *Evidence Act 1995* (CW) at trial. In NSW question of privilege are (subject to one exception) governed by the *Evidence Act 1995* (NSW) in all stages of proceedings, including pre-trial procedures by operation of UCPR r 1.9 and section 131A of the Evidence Act.[3] The exception is that the common law still applies to claims of privilege made by parties other than the party producing the document.[4]

It is doubtful whether there is significant difference in the operation of the statutory and common law principles.[5]

Purpose of legal professional privilege: the policy tension

The scope of privilege represents the resolution of a fundamental policy tension: 'A person should be entitled to seek and obtain legal advice in the conduct of his or her affairs, and legal assistance in and for the purposes of the conduct of actual or anticipated litigation, without the apprehension of being prejudiced by subsequent disclosure of the communica-

tion. The obvious tension between this policy and the desirability, in the interests of justice, of obtaining the fullest possible access to the facts relevant to the issues in a case lies at the heart of the problem of the scope of the privilege. Where the privilege applies, it inhibits or prevents access to potentially relevant information….. For the law, in the interests of the administration of justice, to deny access to relevant information, involves a balancing of competing considerations'.[6]

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

Privilege and waiver under the common law

The question as to the scope of privilege under the common law is 'more easily asked than answered, despite all that is to be found in the decided cases and all that has been said in the learned articles'.[7] Nevertheless, the following general traditional categories can be identified:[8]

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

It has been said that the doctrine of privilege itself reflects the final resolution of the policy tension described above,[9] and that 'no further balancing exercise is required' in the application of privilege.[10] However, the doctrine of privilege is 'subject to defined qualifications and exceptions'.[11] These act as 'the common law's safety valve',[12] when the operation of privilege places undue pressure on the search for truth. In other words, within the recognised 'qualifications and exceptions' to privilege, there remains embedded the scope for the further balancing of the conflicting policies which underpin the operation of privilege. The doctrine of 'waiver of privilege' is one of those safety valves. Waiver of privilege may be 'express' or 'implied'.

Express waiver arises when a party 'deliberately and intentionally discloses protected material'.[13]

Implied waiver arises under the common law when there has been an 'intentional act' which was 'inconsistent with the maintenance of … confidentiality. What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large'.[14]

'Fairness' is thereby identified as relevant to (but not determinative of) the matter. 'Fairness presupposes a balancing of interests between parties who are in dispute'.[15] The 'question of 'fairness' involves an inquiry as to whether the facts supply sufficient reason for depriving the client of the form of protection which the law confers upon communications between solicitor and client'.[16]

An assessment of 'inconsistency' 'is to be made in the context and circumstances of the case, and in the light of any considerations of fairness arising from that context or those circumstances'.[17] Although a full exploration of the relevant principles is beyond the scope of this paper, a recognised category of case is 'associated material waiver', which arises when it is deemed 'unfair or misleading to allow a party to refer to or use material and yet assert that that material, or material associated with it, is privileged from production'.[18] By way of example, waiver will arise 'where the privilege holder has put the contents of the otherwise privileged communication in issue' in proceedings.[19] It has been observed that implied waiver extends to associated materials which are 'necessary to a proper understanding' of the primary privileged materials which have been referred to or used.[20]

'Fairness presupposes a balancing of interests between parties who are in dispute'.

The difficulty with the concepts of 'inconsistency' and 'unfairness' is that they reflect a policy conclusion on specific facts that the law will override privilege, but leave unarticulated the precise basis for that conclusion. Although the operation of implied waiver is well settled in many areas, there are not (and maybe cannot be) generally settled universal criteria relevant to resolving the underlying policy balance. I suggest that the (unarticulated) reality is that the application of implied waiver involves the court re-opening and re-striking the balance between the fundamentally irreconcilable policy objectives which underpin the law of privilege (referred to above). Those policy objectives are incommensurable, and where the balance is struck reflects an inherently contestable weighting of those objectives. There can be settled answers, but no objectively 'right' answers.

Privilege and waiver under the Evidence Act

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

Implied waiver of privilege in relation to Associated Materials potentially arises under section 126 and section 122.

Section 126 provides that privilege is lost in relation to documents which are 'reasonably necessary for a proper understanding' of other documents in respect of which privilege has been lost. By operation of section 126, 'if a privileged document is voluntarily disclosed for forensic purposes, and a thorough apprehension or appreciation of the character, significance or implications of that document requires disclosure of source documents, otherwise protected by client legal privilege, ordinarily the test laid down by s 126 of the Evidence Act will be satisfied.'[21]

Section 122(2) provides that: 'Subject to subsection (5), this Division does not prevent the adducing of evidence if the client or party concerned has acted in a way that is inconsistent with the client or party' claiming privilege. The section incorporates the common law test for implied waiver.[22]

Underpinning policy considerations

As noted above, the formulation of rules in relation to implied waiver involves striking a balance with respect to incommensurable policy considerations. In addition to the general policy tensions described above, there are a number of specific policy matters that are relevant to the 'balance' in the context of the scope of implied waiver in Associated Materials, following service or tender of an expert report.

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

Firstly, 'the important principle that there is no property in a witness means that an adverse party may subpoena an expert retained by the original party and require that expert to give all relevant information in his possession, including an expression of his opinion, to the court'.[23]

Secondly, the fact that in the 'field of expert evidence it is difficult to sever an opinion from the information and process upon which it is based. It would seriously jeopardise the proper testing of such witnesses if privilege were extended to documents' upon which the opinion is based.[24]

Thirdly, although not specifically referred to in the authorities, waiver of privilege in relation to Associated Materials reduces and addresses the risk of adversarial bias in the preparation of expert evidence. 'For whatever reason, and whether consciously or unconsciously, the fact is that expert witnesses instructed on behalf of parties to litigation often tend … to espouse the cause of those instructing them to a greater or lesser extent'.[25] That is a reflection of pervasive 'adversarial bias': ie, a 'bias that stems from the

fact that the expert is giving evidence for one party to the litigation'.[26] The process is insidious and may be conscious or unconscious. Irrespective of the integrity of expert and lawyer, there is an ever present risk that the expert's opinion will be influenced and biased by signals communicated by lawyers. The influence of an expert's opinion 'by undisclosed facts and reasoning processes' may go to the 'weight' of the opinion,[27] and may properly be the subject of testing through cross-examination.[28] These considerations arguably support waiver of privilege in relation to Associated Materials, to facilitate the opposing party testing for adversarial bias (or any other undisclosed matter which might have influenced the opinion).[29] Sunlight is the best disinfectant. It has been recognised that it would 'be both unfair to the applicant, and contrary to the interests of justice, to insulate the [experts] from a full examination of all of the information which they took into account and the various influences to which they were exposed in the preparation of their evidence'.[30] (Waiver in relation to Associated Materials to permit such testing would be directly analogous to another recognised category of implied waiver: when there has been a partial disclosure of a privileged document, there is an implied waiver in relation to the 'whole of the material relevant to the same subject matter',[31] because the 'opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question'.[32]) The added advantage of recognising pervasive waiver of Associated Materials in the context of expert evidence, is that the prospect of waiver will impose a chastening discipline on lawyers in their dealings with experts.

Waiver of privilege in relation to Associated Materials reduces and addresses the risk adversarial bias in the preparation of expert evidence.

Fourthly, 'opinion evidence is a special kind of evidence, and courts have traditionally encouraged experts who are qualified to give such evidence to be objective…an expert's duty to the court is more important than the duty to a client'.[33]

Conversely, there are a number of policy considerations recognised as weighing against waiver in relation to Associated Materials.

Firstly, the waiver of privilege with respect to drafts would inhibit the expert from changing his opinion. 'An expert is surely permitted, indeed to be encouraged, to change his or her mind, if a change of mind is warranted….. [E]xperts should not be inhibited by fear of exposure of a draft from changing their minds when such change is warranted by the material then before the expert'.[34]

Secondly, the risk of waiver in relation to Associated Materials may deter a party from vigorously searching for evidence. 'The efficacy of the adjudicative process depends on the readiness and ability to each party to vigorously search for evidence. A party might be discouraged from making anything but the most cursory enquiries were he to be required to hand over unfavourable evidence to the adversary.'[35]

Thirdly, the spectre of waiver in relation to Associated Materials is likely to compromise the process of the formulation and articulation of expert opinion.[36] In complex matters, the diligent preparation of an expert report may demand the generation of extensive work notes, drafts and correspondence which facilitate the progressive refinement of the opinion. However, if waiver operates widely in relation to Associated Materials, prudent litigation management may dictate that working documents not be generated. Further, a possible corollary of the broad application of waiver to written Associated Materials is that privilege would also be waived in relation to oral communications between the expert and lawyers, which might deter lawyers from conferring with experts and thereby further compromise the process of report and case preparation).

Fourthly, the widespread application of waiver in relation to drafts (and other Associated Materials) would likely generate a miscellany of collateral inquiries in cross-examination, directed to exploring and challenging the reasons for the evolution of the opinions expressed in the final expert report. In some cases that may be a forensically important process. However, in many cases that will be a time-consuming distraction from the essential task of testing expert evidence.[37] This is particularly salient, when regard is had to the essential purpose of expert opinion evidence to 'enable [the judge] to form his own independent judgment by applying the criteria furnished to the facts proved'.[38] The test for admissibility is that the 'expert identify the facts and reasoning process which the expert asserts to be an adequate basis for his or her opinion'.[39] 'The fact that the expert's opinion was at one time - or even still is - reinforced by undisclosed facts and reasoning processes is irrelevant to the admissibility of the opinion'.[40] Furthermore, although the fact that an expert's opinion is or was 'reinforced by undisclosed facts and reasoning processes' may go to the 'weight' of the opinion in some circumstances,[41] the weight of expert opinion will substantially turn on the court's independent evaluation of the asserted justification for the expert opinion, in respect of which the process of the evolution of the opinion is substantially irrelevant.[42] Further, if Associated Materials are taken out of context, there is scope for skilful cross-examination to cause unwarranted damage to the credit of the expert.

Fifthly, the relevance to waiver of the expert's supervening duty to the court should not be exaggerated. 'Assistance to the court must be the witness's dominant purpose in providing an opinion for use in the proceedings. But the purpose of communications between the party's legal representatives and the witness is nonetheless predominantly to assist the party.…..The fact that the witness is constrained to assist the court and to be impartial does not displace that purpose'. The argument that the special role of an expert militates against privilege 'fails to recognise the adversarial nature of the proceedings.…..The witness's evidence must be impartial, but communications with a view to securing and facilitating the provision of such evidence are entered into for the purpose of assisting the party, not for the purpose of assisting the court'.[43]

Sixthly, and 'a rule that privilege is waived if material is submitted to an expert for use in connection with an expert report, would be a very substantial intrusion on legal professional privilege'.[44] 'Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity'.[45]

Privilege & expert reports – a framework of analysis

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

Any loss of privilege in relation to a final expert report which is served or tendered, will arise (if at all) by operation of 'express waiver'.[46]

Any loss of privilege in relation to Associated Materials will arise (if at all) by operation of 'implied waiver'. As noted above, implied waiver is triggered by some conduct of the privilege holder. If implied waiver is to operate in relation to Associated Material, the 'triggering conduct' will typically be the service (or tender) of the expert report. Any such implied waiver can generally be classified as an example of 'associated material' waiver.[47]

When access is sought to Associated Material, 'there are typically two questions: The first is whether the documents in question are entitled to litigation privilege….and the second is whether that privilege has been waived by service of the report'.[48]

A starting point – ASIC v Southcorp

The most cited case addressing privilege in the context of expert reports is probably *Australian Securities & Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438, in which Lindgren J summarised the relevant principles as follows:[49]

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

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

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

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

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

The case has been widely approved[50] ('**Southcorp Line of Authority**'). 'The principles stated by Lindgren J provide the context for more recent judgments concerning the Act'.[51] However, the case was decided under the common law, and 'the principles….must be modified in cases governed by the Evidence Act and in the light of the analysis in *Mann v Carnell*'.[52] The required modifications are substantial. I seek to summarise below the prevailing position in relation to the categories of documentation identified in Southcorp.

First Issue: does privilege originally arise (subject to waiver)?

Categories 1-2 of Southcorp. There is no controversy that these categories of documents are prima facie privileged.

Category 3 of Southcorp: 'Documents generated unilaterally'. There are numerous authorities (consistent with Southcorp) which affirm that working documents (including draft reports) generated unilaterally by the expert to assist in the preparation of the expert report are typically not privileged.[53] There are 2 alternative reasons stated for that proposition: they do not have the requisite confidentiality, and they are typically not the subject of communication.[54]

The prevailing view under the common law, is that privilege will apply to documents generated unilaterally by the expert (including drafts), in a range of alternative situations which generate exceptions to the general rule identified in *Southcorp* (subject to the documents having the requisite degree of confidentiality[55]). *Firstly*, even if the document was not communicated, privilege will attach if the document was 'prepared with the dominant purpose of being used as a communication', which would include draft reports prepared for the dominant purpose of being communicated to lawyers for comment.[56] (To ensure privilege attaches to drafts, experts should be instructed to prepare drafts for the dominant purpose of communicating the draft to the lawyers for review and comment). *Secondly*, the better view is that confidential documents are privileged if they are brought into existence to facilitate a subsequent privileged communication,[57] which will extend privilege to working notes prepared for the dominant purpose of preparing draft reports. *Thirdly*, privilege may extend to internal working papers which evidence otherwise privileged communications,[58] which will include marked up comments and edits by lawyers on a draft.[59]

"If you don't believe me, Google it."

Under the Evidence Act, section 119 now provides that the litigation privilege extends to 'the contents of a confidential document (*whether delivered or not*) that was prepared' for 'the dominant purpose of the client being provided with professional legal services etc'. By application of section 119,' if an expert prepares a draft report, or notes for the report, with the dominant purpose of a draft report (whether the precise draft then prepared by the expert or an intended later draft) being furnished for comment or advice by the lawyer, then it is privileged'.[60]

However, by way of significant qualification, White J held in the same case that 'if they were brought into existence for the dominant purpose of the expert forming his or her opinions to be expressed in *the final report*, then it could be arguable that they were not made for the dominant purpose of the plaintiffs being provided with professional legal services relating to the proceedings', and would therefore not be privileged.[61] That qualification is consistent with the prevailing view that finalised affidavits and reports (as opposed to drafts) are not privileged because they were prepared for the dominant purpose of being disseminated to the opposing party and tendered (rather than being submitted to legal advisers for advice), and also lacked the requisite confidentiality.[62] Justice White has observed 'It will be a question of fact, to which the expert may be required to put his or her oath, as to whether any draft reports prepared and kept by him, and working notes prepared by him or his staff, were brought into existence for the dominant purpose….of a draft report being submitted for advice or comment by the plaintiffs' lawyers…. [rather than]….the expert forming his or her opinions to be expressed in the final report',[63] and 'the issue may not be an easy one to determine'.[64](This highlights the strategic significance of initially instructing the expert only to produce draft reports for the purpose of submission to lawyers for review and comment, and on the basis that confidentiality is preserved).

Second Issue: waiver of privilege

Southcorp affirms that 'ordinarily' service of the expert report will result in the implied waiver of the 'brief or instructions' if it can be inferred that they 'influenced the content' of the report (Principle 4); and of any other document 'used by an expert to form an opinion' (Principle 5).

There has subsequently been significant refinement of the trigger for implied waiver, which has significantly limited its scope.

In relation to the operation of implied waiver under the common law and section 122, the leading modern statement of principle by White J in *New Cap Reinsurance Corporation Ltd (in liq) v Renaissance Reinsurance Ltd* [65] is that: 'The question is not merely whether it could be said that the privileged materials were used in such a way that they could be said to influence the content of the report, but whether it could be said that they influenced the content of the report in such a way that the use or service of the report would be inconsistent with maintaining the privilege in those materials'.[66] (The capacity of Associated Materials to 'influence

the content of the report' is thereby recast as necessary, but not sufficient, to trigger waiver). However, consistent with the *Southcorp* Line of Authority, other authorities have formulated the test for waiver in a manner which implies that the capacity to 'influence' the content of the expert report is sufficient of itself to generate the requisite 'inconsistency' and waiver. An example of such a broader formulation is: 'there is a sufficient level of inconsistency with the maintenance of privilege if there has been reliance on the privileged information as a basis or foundation of the opinion, or incorporation of it so as to make it part of the issue'.[67]

In relation to the operation of implied waiver under section 126 of the Evidence Act, the prevailing view is a 'proper understanding' of the primary document under section 126 does not involve 'an appreciation of the manner in which the opinions contained in the document have been formed over time, or the iterations and evolutions through which they have passed. 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'.[68] (Whatever view is taken of the appropriateness of that principle to strike the policy balance encapsulated by waiver under section 126, it should be recognised that it reflects a contestable and restrictive construction of the expression 'proper understanding'. Without semantic injustice, 'proper understanding' could have been more broadly construed to extend to documents which are relevant to assessing the probative strength of the primary document. That broader construction would have caused waiver under section 126 to cut more deeply into Associated Materials).

'The question is not merely whether it could be said that the privileged materials were used in such a way that they could be said to influence the content of the report, but whether it could be said that they influenced the content of the report in such a way that the use or service of the report would be inconsistent with maintaining the privilege in those materials'.

In light of those general principles, I tentatively outline the present operation of waiver in relation to various categories of Associated Materials.

Waiver: draft reports (and confidential communications about them)

If privileged communication concerning draft reports (or the draft reports themselves) only influenced the 'form' of the report, and not 'the substantive opinion', the prevailing view is that there is no inconsistency in serving the reports and retaining privilege, and therefore no waiver in relation to those documents.[69] This reflects the recognition that it 'is proper for the parties' lawyers to influence the content of an expert's report by seeking to have the report produced in a form in which it will be admissible and by providing the expert with assumptions or documents that may well influence the content of the report'.[70]

If privileged communication concerning draft reports (or the draft reports themselves) influenced the actual 'substantive opinion' in the final expert report, some authority supports the operation of waiver when the report is served or tendered.[71] However, a recent statement by *Ball J in Traderight (NSW) Pty Ltd v Bank of Queensland Ltd* [72] affirms that mere influence of the 'substance' of opinion is not of itself sufficient, and that waiver depends upon a further finding either that the stated final opinions of the expert are 'not her own or based on material other than the material disclosed in the report',[73] or that lawyers have failed to discharge their ethical obligations concerning the preparation of expert evidence. In declining to order waiver over drafts and confidential communications with lawyers, Ball J held: 'It is common for a party's legal advisors to communicate with an expert retained by the party for the purpose of giving instructions and commenting on the form of the expert's report. In some cases, those advisors may test tentative conclusions that the expert has reached and in doing so may cause the expert to reconsider his or her opinion'; and there was nothing before the court which indicated that 'legal advisors have failed to discharge' their obligation to 'ensure that any opinion expressed by an expert is an opinion the expert holds for the reasons that the expert gives and that the expert otherwise complies with the Expert Witness Code of Conduct'.[74]

There are other decisions which have simply rejected that service or tender of an expert report necessarily waives privilege in relation to any previous drafts, without reference to the principles to which Ball J refers.[75]

Waiver: letters of instruction (including communication of assumptions)

The prevailing view is that there is no automatic waiver in relation to any letter of instructions when the report is served or tendered.[76] This is for a variety of alternative reasons: (a) there may be no basis to infer that the substance of the expert report has been influenced by the letter of instructions;[77] (b) 'it is proper for the parties lawyers' to influence the content of an expert's report by… providing the expert with assumptions or documents that may well influence the content of the report';[78] (c) the disclosure of the communications which provided assumptions (or instructions generally) is typically not reasonably necessary to comprehend the report, because the expert's report is 'required to state what material and assumptions are relied on';[79] and/or (d) there is typically no risk of unfairness because 'if the assumptions which he has made in his draft report are not established, the views expressed in that report would not be of any significance'.[80]

However, privilege over letters of instruction may be waived if: (a) the expert report 'responds to questions which are not themselves restated'[81] (reflecting the application of the general principle that at waiver of instructions are reasonably necessary for a proper understanding of the report)[82]; or (b) if the expert report purports expressly to summarise the letter of instructions (reflecting the application of a general principle of implied waiver that privilege is waived by the 'laying open of the confidential communication to necessary scrutiny…by expressly or impliedly making an assertion about the contents of the communication'[83]); or (c) possibly if the expert fails to state assumptions, at least in circumstances where the absence of assumptions frustrates a 'true understanding of what is being asserted'[84] in the expert report (such that waiver of letters of instruction are reasonably necessary for a proper understanding of the report).

In the Federal Court the issue of waiver in relation to instructions is immaterial, because the Expert Evidence Practice Note mandates the disclosure of the instructions given to the expert. There is no equivalent provision in the Uniform Civil Procedure Rules, but I suggest that letters of instructions should invariably be prepared with the understanding and intention that they be disclosed.

Waiver: 'Source Materials'.

This section addresses confidential communications between lawyers and experts conveying information or documentation to the expert relating to the subject matter of opinion ('**Source Materials**').

There is no significant doubt that waiver in relation to Source Materials will operate when: (a) the expert report contains 'a summary or excerpt' from the privileged source materials;[85] or (b) the expert expressly refers to or relied on the substance of the privileged material for the purpose of 'bolstering' the expert's opinion.[86]

Consistent with the *Southcorp* line of authority, the better view is that it is also sufficient for waiver to apply to Source Materials (without more), if those materials 'influenced the content' of the expert report, in the sense of the substance of the opinion.[87] (Unlike drafts, and communications about drafts,

there is no countervailing policy consideration that justifies further limiting the scope of waiver in relation to Source Materials which influence the content of an expert report).

Waiver can be avoided, if the expert structures his or her report so that opinions are based on precisely identified assumptions (rather than identified privileged Source Materials),[88] but it will be incumbent on the party to prove those assumptions through admissible evidence.

In the Federal Court, fine distinctions about what Source Materials 'influenced the content' of the expert report are irrelevant, because the Expert Evidence Practice Note mandates that the expert must attach or exhibit 'documents and other materials that the expert been instructed to consider'.

Scope of waiver

If the conditions for waiver are established, the question then arises as to the scope of the implied waiver over Associated Materials. Some authorities support the proposition that the scope of waiver in relation to Associated Materials can be limited to the particular portions of privileged documents that relevantly influenced the final report, if the expert specifies with particularity the discreet portions of the document which relevantly influenced the report (and did not thereby create any inaccurate perception of the privileged material).[89] Other authorities affirm that waiver should extend to the whole of the privileged document which relevantly influenced the final report, or even all other Associated Materials that related to the relevant issue.[90]

A useful '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'.[91] However, the application of that test begs the contestable questions as to the proper characterisation of the 'issue' or 'subject matter', and the degree of relevance required.

Establishing the conditions for waiver.

It may be difficult to establish whether the relevant 'inconsistency' has been established.[92] The conditions for waiver are 'questions of fact' to be resolved by reference to the 'testimony of [the deponent] and the inferences properly to be drawn from the documents in dispute themselves'.[93] The question of whether there has been a waiver can be re-assessed in light of the conduct of a trial, and the cross-examination of the expert.[94] The courts have shown a willingness to inspect the documents, to assess whether the requisite influence is established.[95] 'There are limits to whether this is a useful exercise. It would be impossible, as a matter of practice, and inappropriate, as a matter of principle, for a judge to approach that question in the same way as a party might wish to do so if preparing a cross-examination of the expert'.[96] Sometimes the Court rejects an application for waiver in the absence of inspection, on the grounds that there is 'nothing to point to' the requisite influence, reflecting that there may need to be demonstrated a threshold possibility of the requisite influence, before the Court is prepared to inspect.[97]

When is waiver triggered?

Southcorp provides that it is the service of the expert report (as distinct from its tender) which triggers the operation of waiver (if the grounds for waiver otherwise exist). Other authorities (consistent with *Southcorp*) assert that position without explanation.[98]

However, this is a matter of significant controversy. Some authorities affirm that that privilege is not lost until the report is tendered,[99] relying on 2 alternative principles in support of that position. *Firstly*, under an earlier enactment of the Evidence Act, section 122(2) provided that there was waiver if a party 'knowingly and voluntarily disclosed to another person the substance of the evidence', unless the disclosure was made 'under compulsion of law'; and the prevailing view has been that service of expert reports pursuant to court directions was 'under compulsion of law', by reason of which service did not give rise to waiver.[100] *Secondly*, other authorities held there can be 'no unfairness' in maintaining privilege, unless and until the expert report is tendered and the expert called.[101]

Should there otherwise be grounds for the operation of waiver, the deferral of its operation until tender of the expert reports means that potentially relevant documents over which waiver might operate will not be available for pre-trial preparation. This gives rise to obvious risks of trial disruption when the expert is finally called and waiver operates. These consequences are 'most impractical from the perspective of the efficient running of the litigation, including the proper and efficient preparation for trial and the taking of evidence at the trial. Those consequences do not fit comfortably with modern case-management practices, and in particular the 'just, quick and cheap' principle to which litigation is subject in this court'.[102]

For the following reasons, there is strong basis for distinguishing earlier authority and finding that service of expert reports is sufficient to trigger waiver (if the grounds for waiver otherwise exist). *Firstly*, as a matter of general principle, the possibility of waiver arises when privileged material is deployed for a forensic purpose through which the party derives a forensic advantage.[103] It is now recognized that the forensic purpose of expert reports is not confined to the tender of the reports as formal evidence, but extends to reliance for forensic advantage in the course of settlement discussions, mediation and the expert conclave.[104] Such advantage can arise on service (and prior to tender). *Secondly*, there have been significant legislative changes, which calls into question the line of authority which holds service is insufficient to trigger waiver. The first is that section 122 has been amended, and now provides that there is no 'inconsistency' giving rise to waiver 'merely' because 'the substance of the evidence has been disclosed…under compulsion of law'. It is arguable that the requisite 'inconsistency' arises not 'merely' from compulsory service of expert reports, but by reason also of the pre-trial forensic advantage thereby derived.[105] The second is that Section 131A (which came into force on 1 January 2009 in NSW, but not federally) 'effectively requires the court to determine a pre-trial claim for privilege as though the claim was made in the course of adducing evidence at trial'.[106] *Thirdly*, there is some contest as to whether the service of expert reports should be characterised as 'under compulsion'.[107]

A tentative proposal

Consistent with what I described above as the prevailing view, I tentatively suggest that the following principles regulate when service of an expert report would be 'inconsistent with' the maintenance of privilege over Associated Materials (under section 122(2) of the Act and the general law), so as to give rise to a waiver of privilege in relation to those materials:

- With respect to all Associated Materials, the expert has 'laid open' communications in the Associated Materials 'to necessary scrutiny… by expressly or impliedly making an assertion about the contents of the communication' in the expert report;[108]

- With respect to all Associated Materials, the

substance of stated opinion in the expert report (as distinct from the evolution of the opinion, the reasons for the opinion, or the weight of the opinion) is not reasonably comprehensible without reference to the Associated Materials;[109]

- With respect to Source Materials, if those materials 'influenced the content' of the expert report, in the sense of the substance of the opinion;[110]

- With respect to draft reports (and communications between experts and lawyers concerning preparation of drafts), there is demonstrated to be an undue risk of adversarial bias, subject to the proviso that the mere fact of ethical dealings between expert and lawyers is insufficient of itself to establish the requisite risk. (This principle is elaborated below).

In view of the relatively narrow manner in which the scope of section 126 has been construed,[111] section 126 is unlikely to further extend the scope of waiver.

'Undue risk of adversarial bias, subject to the proviso….'

Justification for the principle

To reiterate, 'adversarial bias' is a conscious or unconscious bias 'that stems from the fact that the expert is giving evidence for one party to the litigation'.[112] The recognition of the principle that waiver will operate when there is demonstrated an undue risk of adversarial bias (subject to the proviso that the mere fact of ethical dealings between expert and lawyers is insufficient of itself to establish the requisite risk) is supported by the following considerations.

First, it is generally consistent with the recent line of authorities based on *Newcap* and *Traderight*. These cases affirm that the mere fact that privileged communications actually influence the form and even the substance of expert opinion is not sufficient to trigger waiver. Something further is required, being grounds to infer either that the expressed opinions of experts 'are not their own', or that the lawyers have failed to discharge their obligations in relation to the preparation of the expert evidence. However, these cases also recognise 'safe harbours', in the sense of ethically endorsed methods of expert witness preparation which are recognized as insufficient in themselves to trigger waiver: eg 'legal advisors may suggest wording to be included in the report which expresses in admissible form an opinion stated by the expert in an inadmissible form', and 'advisors may test tentative conclusions that the expert has reached and in doing so may cause the expert to reconsider his or her opinion'.[113] Those principles can arguably be collectively encapsulated in the overarching principle which I suggest.

Secondly, the recognition of undue risk of adversarial bias as a trigger is consistent with the recognition in the context of implied waiver that "fairness' has not been treated as requiring that the other party should have all the information available to the party claiming privilege, but as requiring that that party *should not abuse privilege* so as to disadvantage the other party forensically'.[114] The requirement of a demonstrated risk of adversarial bias is consistent with the requirement that there is a demonstrated risk that the privileged relationship between expert and lawyer has been compromised (by reason of which the entitlement to the privilege should be qualified to allow testing for the presence and effect of that adversarial bias on the evolution of the opinion).

Thirdly, although *Traderight* implies that a trigger for waiver is the indication that the expert's views 'are not her own',[115] I propose that the trigger be defined more broadly by reference to the indication of 'adversarial bias'. This is because adversarial bias might cause not merely the dishonest expression of partisan opinion, but also the unconscious moulding of honest opinion to the partisan cause. The opinion may be the expert's 'own', but still the product of unconscious adversarial bias. Undue risk of both conscious and unconscious adversarial bias should trigger waiver to facilitate testing as to the presence and effect of such bias.

Fourthly, it is important that the principle be qualified by the requirement that the risk of adversarial bias be an 'undue' risk. That is because the risk of adversarial bias is unavoidable and pervasive. The requirement that the risk be 'undue' reflects the need to identify something in the factual mix which materially and unacceptably exacerbates the inherent universal risk of adversarial bias. In the absence of the qualification that the risk of adversarial bias be 'undue', waiver would be universal and the protection of privilege would be illusory. This is addressed further below.

Fifthly, I respectfully suggest that the principle reflects an appropriate balance of the competing policy objectives in relation to waiver of privilege in connection with the expert reports:

- the default position that privilege over drafts and privileged communications between experts and lawyers should be preserved, reflects a presumptive respect for the maintenance of privilege; the typically limited relevance of the manner in which an expert report evolved to the admissibility and probative value of the report;[116] the desirability of not compromising the process of the evolution of expert opinion and the preparation of expert reports by a pervasive threat of waiver;[117] and avoiding distracting and irrelevant collateral inquiries involved in the cross-examination as to the evolution of expert opinion (when that is not material to the probative value of the opinion);

- on the other hand, the recognition that waiver will nevertheless be triggered when there is a demonstrated undue risk of adversarial bias, reflects the insidious prevalence of adversarial bias; the capacity of adversarial bias to compromise the fact-finding process; the capacity of waiver to facilitate the testing of the presence and effect of adversarial bias; and the fact that the privilege should reasonably be forfeited when there is a demonstrated undue risk that the relationship of privilege has compromised the preparation of expert evidence;

- the further recognition that there should be a 'safe harbor' for witness preparation, by operation of which 'ethical dealings' between expert and lawyers should not of itself trigger waiver, is supported by two considerations. *Firstly*, the establishment of a safe harbor is desirable to create a degree of certainty in relation to the application of waiver to expert reports, both to generate confidence during the evidence preparation phase, and to avoid encouraging speculative applications for waiver. *Secondly*, defining the scope of the safe harbor by reference to 'ethical dealings' is desirable, because the judicial refinement of 'ethical dealings' will permit an explicit recognition and resolution of the policy tension between permitting the advancement of partisan client interests within an adversarial system, and ensuring that truth-seeking is not unduly frustrated by particular methods of such advancement. This tension (and proposals for its resolution) are addressed in another article in this edition of *Bar News*.[118]

Sixthly, although there may appear to be uncertainty in the application of an ostensibly broad and vague standard, it would in fact provide a relatively certain 'safe harbor' for the preservation of the privilege. On the criteria set out below, if the dealings between expert and lawyers are ethically appropriate, and the expert comprehensively sets out the assumptions and reasoning upon which the expert's opinion is based, it is difficult to conceive how a waiver on the grounds of 'undue risk of adversarial bias' could arise. Although the concept of 'ethically appropriate' dealings with experts is presently uncertain, it would inevitably be refined and clarified by the judicial application of this proposed standard.

Criteria for assessing 'undue risk' of adversarial bias

I respectfully suggest that there are 4 general categories of factual circumstances which might be relevant to demonstrating an 'undue risk of adversarial bias'.

Firstly, circumstances supporting a positive inference of the possible operation of conscious or unconscious adversarial bias, which might include the following:

- deficiencies in the comprehensive and coherent statement of the assumptions and reasoning which justify the opinion. This is consistent with the possible operation of adversarial bias, because the need to coherently justify an opinion (with assumptions and reasoning) places practical limits on the extent to which opinion can be swayed (consciously or unconsciously) by adversarial bias. Although by no means conclusive of adversarial bias tainting opinion, the untethering of opinion from assumptions and reasoning circumvents those practical limits, and renders the formulation and articulation of opinion more vulnerable to the operation of conscious and unconscious adversarial bias. Further, in view of the expert's duty under the expert codes and the general law[119] to set out an adequate statement of assumptions and reasons, and the fact that lawyers are relied on by the courts to ensure experts' fulful that duty,[120] the expert's failure adequately to set out reasons and assumptions reflects that the relationship of privilege has been compromised, and reasonably weakens the entitlement to maintain privilege. Corroborating the relevance of this consideration, it has been recognized that 'uncertainty or ambiguity or confusion in the body of the report' might weigh in favour of waiver;[121] and that it is 'unlikely' that waiver would operate in relation Associated Materials if an expert complies with the expert's duty to set out assumptions and reasoning.[122] Decisions discounting the relevance of coherent reasoning to waiver can be distinguished on the grounds that they did not apply the principles under section 122(2).[123] This consideration of the adequacy of reasoning and assumptions obviously overlaps with tests for admissibility under section 79 of the Evidence Act. However, it is open to the Court to make findings of deficiencies in the statement of reasoning and assumptions, without addressing or determining whether the deficiencies are sufficient to render the opinion strictly inadmissible. In any event, a party might make the strategic decision not to challenge admissibility on grounds of inadequacy of reasoning, but still rely on deficiencies in reasoning to support waiver.

- concessions by the expert in cross-examination which are consistent with the possible operation of adversarial bias. Such concessions might include: that the report does not reflect the expert's actual opinion in some material respect; that the report fails to include a material qualification to the stated opinion; that the report does not include reference to all material assumptions and reasoning; that the expert's opinion has changed during the course of preparing the report (and the change is not reasonably explicable in a manner which reasonably excludes the operation of conscious or unconscious adversarial bias);[124] that lawyers have engaged in unethical witness preparation practices (which is addressed below).

Secondly, I suggest it is material to take account of the vulnerability of particular categories of expert opinion to adversarial bias. In particular, the risk of adversarial bias (and the risk it will compromise fact finding) is accentuated when the subject matter of the opinion substantially precludes the court from independently evaluating the stated justification for the opinion. As to this:

- Although the objective of expert evidence is to 'furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions', an expert 'frequently draws on an entire body of experience which is not articulated and, is indeed so fundamental to his or her professionalism, *that it is not able to be articulated*':[125] eg, in a medical negligence case, addressing the point at which a reasonable medical practitioner would have medically intervened in a complex and unusual case. Further, there will be cases where the subject matter for expert opinion relates to an very open-textured standard, in respect of which there is inherently a broad spectrum of ostensibly reasonable expert judgment: eg, in patent law, whether there is demonstrated an 'inventive step'; and the 'discount rate' by which projected cashflows are discounted when quantifying damages for a lost business opportunity;

- In such cases, the report will likely be incapable of providing an entirely self-sufficient justification for the opinion, which can readily be independently evaluated by the court. There will remain an irreducible 'judgment call' by the expert;

- To the extent that critical aspects of the expert's reasoning process cannot be fully articulated and exposed, the court is effectively being invited to accept the opinion on the basis that it is proffered by the expert (rather than because of the court's independent evaluation of the cogency of the stated justification for the opinion). In such cases, investigations of the factors which might have influenced the formulation of the stated opinion are arguably more relevant to an assessment of the weight of that opinion (than would be the case if the stated justification could be independently assessed). Associated Materials may be relevant to such investigations. This conclusion is reinforced by the fact that open-textured expert opinion is inherently more vulnerable to adversarial bias: to the extent that the subject matter of the opinion necessitates irreducible 'judgment calls', it logically follows that there is scope for experts plausibly to justify a range of different opinions on given assumptions. This creates greater scope for an expert's opinion to sway in a partisan way. However, although this factor could reasonably provide some support a finding of waiver by reason of 'undue risk of adversarial bias', I suggest that this factor alone should not be sufficient to justify waiver.

Thirdly, evidence of unethical dealings between the expert and lawyers, which increase the risk of adversarial bias (by directly or indirectly suggesting to the expert what evidence the expert should give). Evidence of such dealings is likely only to emerge from the Court's inspection of privileged communications, or perhaps also from the cross-examination of the expert. This obviously begs the question of the ethical limits of expert witness preparation. This is not a matter which has been considered comprehensively by the courts, but is addressed in another article in this edition of *Bar News*.[126] One of the collateral benefits of this overarching principle, is that it would inevitably lead to the judicial clarification of the ethical scope of expert preparation.

Fourthly, it would be appropriate to have regard to the materiality of testing the expert on the evolution of the expert's opinion, to the resolution of the issues in dispute.

It is critical to note that (under my proposal) a finding of undue risk of adversarial bias does not depend upon a finding of bad faith on the part of either the expert or lawyer, because adversarial bias may arise without intent or awareness. It also does not depend upon a finding on the balance of probabilities that adversarial bias has in fact operated, let alone operated to corrupt the integrity and probative value of the opinion. It is sufficient merely that circumstances support an 'undue risk' of the operation of adversarial bias on the facts, which warrant further investigation and testing through waiver. Indeed, it would be very important that judges do not make any preliminary finding in an application for waiver, which risk causing an apprehension of prejudgment or bias against an expert. No such finding is necessary in the application of this proposed test.

Process of applying for waiver

As noted earlier, the courts have been prepared to inspect the Associated Materials in assessing whether privilege has been waived.[127]

I suggest that the appropriate process for claiming waiver on the ground of undue risk of adversarial bias might involve 2 steps. *Firstly*, the applicant for waiver adducing evidence and making submissions in support of the demonstrated risk of adversarial bias in the circumstances. *Secondly*, the Court inspecting the Associated Materials to determine whether they disclose dealings which (together with all other circumstances) support a finding that there is sufficient risk of adversarial bias to warrant waiver for the purpose of allowing the applicant for waiver to test for the presence and effect of adversarial bias.

Any application for waiver would obviously be potentially assisted by the Court trawling through the Associated Materials, for signs of inappropriate dealings with lawyers. However, I respectfully suggest that the Court should only do so, if the applicant for waiver has satisfied the Court that there are otherwise sufficient circumstances to support the positive inference that the report is possibly tainted by adversarial bias. This is consistent with the court's recognition that a party has no right to require the Court to inspect documents to support a privilege claim, in circumstances where the party has not itself adduced appropriate evidence to support that claim.[128]

Strategies

Experts should be engaged on the assumption that privilege may be waived in relation to all Associated Materials. The following strategies maximise the scope of privilege, and may minimise the prospect (and prejudicial impact) of waiver.

1 Ensure the witness complied fully with the Expert Code, including in relation to statement of assumptions and material facts on which opinion is based, the comprehensive and coherent statement of reasons for the expert's opinion.

2 Ensure that instructions (in the sense of directions as to the required scope and substance of the report and assumptions) are not recorded in the same document which also records other forms of prima facie privileged communications to the expert, over which the lawyer wants to retain privilege.

3 Where reasonably possible, avoid briefing an expert with privileged source materials (such as draft statements). In the alternative, brief the expert with explicit assumptions upon which the report is to be based, and instruct the expert to base his opinion on those assumptions.

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

5 Until the drafting process is complete, limit instructions to the expert to the preparation of draft reports only, and instruct the expert to prepare the draft reports for the exclusive purpose of provision to the lawyers for review. Instruct the expert to prepare working notes for the exclusive purpose of facilitating the preparation of such drafts.

6 Instruct the expert on the basis that all communications with the lawyers, working notes and draft reports, are to be kept confidential.

7 Advise the expert that all internal working documents may be exposed to waiver, and that the expert should therefore confine the generation of such documents to those which are reasonably necessary for the preparation of the draft reports.

8 Do not advise the expert to destroy internal working documents (or acquiesce in such conduct). Destruction might be contempt of a discovery obligations, and any involvement by lawyers in that process might constitute professional misconduct. At the very least, destruction may give rise to an adverse inference.[129]

I am interested in exploring this topic further, and welcome comments.[130]

END NOTES

1 Hugh Stowe, "Preparing expert witnesses – a search for ethical boundaries", *Bar News*, Summer 2006/7, page 44
2 *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; *Commissioner of Taxation v Rio Tinto Ltd* [2006] FCAFC 86 ('*Rio Tinto*'), per the Court at 43.
3 *Tavcol Pty Ltd v Valbeet Pty Ltd* [2016] NSWSC 1002
4 ibid
5 eg, *Morony v Reschke* [2014] NSWSC 359, per Black J at [45]
6 Esso, supra fn 1, at [35].
7 *Grant v Downs* (1976) 135 CLR 674, at 682.
8 See discussion in *Desiatnik*, 'Legal Professional Privilege in Australia' (2005), at 24
9 See text at fn 3.
10 *Waterford v Commonwealth* (1987) 163 CLR 54, at 65.
11 *A-G for the Northern Territory v Maurice* (1986) 161 CLR 475 ('**Maurice**'), at 488, 490.
12 *Desiatnik*, supra fn 6, at 131.
13 *Goldberg v Ng* (1994) 33 NSWLR 639, per Clarke JA at 670.
14 *Mann v Carnell* (1999) 201 CLR 1, per Gleeson CJ, Gaudron, Gummow and CallinanJJ at [29].
15 *AWB v Cole* [2006] FCA 1234 ('*AWB*'), per Young J, at [132].
16 *Goldberg v Ng* (1995) 185 CLR 83 ('*Goldberg*'), at 120-121.
17 *Osland v Secretary, Department of Justice* (2008) 234 CLR 2 ('**Osland**'), at [45]; *Goldberg*, ibid, at 96.
18 *Maurice*, supra fn 11, per Gibbs CJ at 481
19 *Rio Tinto*, supra fn 2, at [52]
20 *British American Tobaco Australia Services Ltd v Cowell* (2002) 7 VR 524, per Phillips, Bat and Buchanan JJA at 664.
21 *Towney v Minister for Land & Water Conservation for the State of New South Wales* (1997) 147 ALR 402 ('**Towney**'), per Sackville J at 414; quoted with approval *Sugden v Sugden* (2007) 70 NSWLR 301, at [54].
22 *Hastie Group Ltd (in liq) v Moore* [2016] NSWCA 305 ('**Hastie**'), per Beazley & McFarlan JJA, at [42]
23 *Interchase Corporation Ltd (in liq) v Grosvenot Hill (Queensland) Pty Ltd (No1)* [1999] 1 Qd R 141 ('**Interchase**'), per Thomas J at 160; but compare Re Forsyth; *Re Cordova v Philips Roxane Laboratories Inc* [1984] 2 NSWLR 327, at 334-7 .
24 *Interchase*, ibid, per Thomas J at 161-2.
25 *Abbey National Mortgages Plc v Key Surveyors Nationwide Limited and Others* [1996] 3 All ER 184; see also *Fox v Percy* (2003) 214 CLR 118, per Callinan J at [151]
26 NSW Law Reform Commission, Report 109, 'Expert Witnesses', page 70
27 *ASIC v Rich* [2005] NSWCA 152, at [136]; see also at [167]
28 *ASIC v Rich*, supra fn 27, at [167], [170]
29 That principle has been applied to justify waiver of all associated materials relating to an expert report: *Rhiannon Rigby v Shellharbour City Council & Anor* [2003] NSWSC 906, at [11]-[12]; *Westgem Investments Pty Ltd v CBA* [No 2] [2018] WASC 71. at [25]; *Roads Corporation v Love* [2010] VSC 253 Vickery J ('**Love**'), at [26]; see also *Clough v Tameside and Glossop Health Authority* [1998] 2 All ER 971 ('**Clough**')
30 *Roads Corporation v Love*, supra fn 29, [26]; see also *Clough*
31 *AWB*, supra fn 15, at [164]
32 ibid
33 *Interchase*, supra, fn 23, per Thomas J at 161-2.
34 *Linter Group Ltd v Price Waterhouse (a firm)* [1999] VSC 245 ('**Linter**'), [16]; *New Cap Reinsurance Corporation Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258 ('**Newcap**'), [52].
35 *NJ Williams*, (1980) 58 Canadian Bar Review 1; quoted with approval in *Southern Equities Corporation v West Australian Government Holdings Ltd* (1993) 10 WAR 1, per the Full Court at 21; see also *Mendelow*, 'Expert Evidence: Legal Professional Privilege and Experts' Reports' (2001) 75 ALJR 258, at 271.
36 *Cole v Dyer and the Nominal Defendant* [1999] SASC 272 ('**Cole**'), at [56].
37 See Woolf, 'Access to Justice – Final Report' (1996), [31], where the Lord Chancellor cited this matter as weighing against the waiver of privilege in drafts.
38 *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, at [79]; quoted with approval in *ASIC v Rich*, supra fn 27, at [106]
39 *ASIC v Rich*, supra fn 27, at [92], [134]-[136]
40 *ASIC v Rich*, supra fn 27, at [136]
41 *ASIC v Rich*, supra fn 27 at [136]; see also at [167]
42 see *ASIC v Rich*, supra fn 27, at [170]
43 *Roach & Ors v Page & Ors (No 17)* [2003] NSWSC 973, at [7]-[11].
44 *Cole*, supra fn 36
45 *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543, at [11]
46 This question is not examined in this article.
47 See text at footnote 18.
48 *ML Ubase Holdings Co Ltd v Trigem Computer Inc* (2007) 69 NSWLR 577 ('**ML Ubase**'), per Brereton J at [25]
49 at [21].
50 *Federal Court*: eg, *TJ (on behalf of Yindjibarndi People) v State of Western Australia (No 4)* [2016] FCA 231, at [18]; *Clifford v Vegas Enterprises Pty Ltd (No 3)* [2010] FCA 287 at [8]; *IO Group Inc v Prestige Club Australasia Pty Ltd (No 2)* [2008] FCA 1237 ('**IO Group**'), at [8]; *Temwell Pty ltd v DKGR Holdings Pty Ltd* (in liq) (No 7) [2003] FCA 985, at [3]; *AWB*, supra fn 15 [168]; *New South Wales: Baron v Gilmore* [2018] NSWSC 439, at [7]; *Shoal Bay Developments Pty Ltd v Port Stephens Council* [2018] NSWSC 286, per Parker J at [13]; *Traderight (NSW) Pty Ltd v Bank of Queensland Ltd (No 14)* [2013] NSWSC 211 ('**Traderight**'), per Ball J at [15]; *Gate Gourmet Australia Pty Ltd (in liq) v Gate Gourmet Holding AG* [2004] NSWSC 768, [28]; *R v Ronen & Ors* [2004] NSWSC 1305, at [18]; *Thomas v State of New South Wales* [2006] NSWSC 380, [16] ('**Thomas**')
51 *Traderight*, supra, fn 50, [15]
52 *Shea v TruEnergy Services Pty Ltd (No 5)* [2013] FCA 937 ('**Shea**'); *Traderight*, supra fn 50, at [15]
53 *Interchase*, supra fn 22, at 162, 156; *Temwell*, supra fn 43, at [10]; *Rhiannon*, supra fn 29, [11]; *Ryder v Frohlich* [2005] NSWSC 1342, [12]; *IO Group*, supra fn 50, at [12] (drafts).

54 *Interchase*, supra fn 23, at 152; Tavcol, supra fn 3, [17]; *Optiver Australia Pty Ltd v Tibra Trading Pty Ltd (No 5)* [2012] FCA 1226 ('**Optiver No 5**'), per Rares J; *IO Group*, supra fn 50, at [12].

55 *New Cap*, supra fn 34, at [22]

56 *New Cap*, supra fn 34, at [22]; *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122 ('**Pratt**'), at [19]; *Optiver No 5*, supra fn 54, [13]; *Shea*, supra fn 52, at [31]

57 *Pratt*, supra fn 56, [19] (in an analogous but slightly different context); *Optiver No 5*, supra fn 54, [10-[11]; *Optiver Australia Pty Ltd v Tibra Trading Pty Ltd (No 6)* [2012] FCA 1503 ('**Optiver No 6**'), at [8]-[10]; *Bristol-Myers Squibb Co v Apotex Pty Ltd (No 3)* [2012] FCA 1310 ('**Bristol- Myers Squibb**'), per Yates J at [25]

58 *Propend*, supra fn 35, 569; *Pratt*, supra fn 56, [20], [88]-[89]; *AWB*, supra fn 15, [46]; *R v P* (2001) 53 NSWLR 664, [49].

59 *Australian Securities & Investments Commission v Southcorp Ltd* [2003] FCA 804 ('**Southcorp**'), per Lindgren J at [31]

60 *New Cap*, supra fn 34, [20]

61 *New Cap*, supra fn 34, [20], [30,[34]; *Shea*, supra fn 52, [46]

62 *Anthony John Michael Perish v R* [2015] NSWCCA 98, at [40]-[52]; *Morony*, supra fn 5, at [36]-[55]; *Maurice*, supre fn 11, at 480

63 *New Cap*, supra fn 34, at [30]

64 *New Cap*, supra fn 34, at [35]

65 [2007] NSWSC 258, at [53]

66 *New Cap*, supra fn 34, at [53]. This decision has been widely approved: eg, *R v Ian Robert Turnbull (No 3)* [2016] NSWSC 686, per Johnson J at [41]; *Traderight*, supra fn 50; *Gillies v Downer EDI Ltd* [2010] NSWSC 1323 ('*Gillies*'), at [49]; *Shea*, supra fn 52, [60]

67 *Kentish Council v Bellenjuc Pty Ltd* [2011] TASSC 58 ('**Kentish Council**'), at [36]

68 *ML Ubase*, supra fn 48, at [45]

69 *New Cap*, supra fn 34, [53]

70 *D'Apice v Gutkovich — Estate of Abraham (No 1)* [2010] NSWSC 1336 ('**D'Apice**'), per White J, at [24

71 By implication, *New Cap*, supra fn 34, at [53]; *Sprayworx Pty Ltd v Homag Pty Ltd* [2014] NSWSC 833 ('**Sprayworx**'), [43]-[51]

72 *Traderight*, supra fn 50, [23]

73 *Traderight*, supra fn 50, [23]; *Shea*, supra fn 52, [52]

74 *Traderight*, supra fn 50, [23]

75 *Linter Group*, supra fn 34, [16]; *Filipowski v Island Maritime Ltd & Anor* [2002] NSWLEC 177, [23]; *ASIC v Vines* [2003] NSWSC 1005, [15]; *Ray Fitzpatrick Pty Ltd (In Members Voluntary Liquidation) v Minister for Planning* [2007] NSWLEC 833, at [11];.

76 *D'Apice*, supra fn 70, [24]; Limit (No 3) Ltd v Ace Insurance Ltd (No 3) [2009] NSWSC 1061, per Rein J at ; New Cap, at [53]

77 In *Collins Debden Pty Ltd v Cumberland Stationery Co Pty Ltd* [2005] FCA 1194, [9]

78 *D'Apice*, supra fn 70, [24]

79 *New Cap*, [53]

80 *Limit (No 3) Ltd v Ace Insurance Ltd (No 3)* [2009] NSWSC 1061, per Rein J; see also *New Cap*, supra fn 34, [53]

81 *ML Ubase*, supra fn 48, [45]

82 Evidence Act, section 126; *British American Tobacco*, supra fn 20, [121],

83 *DSE (Holdings) Pty Ltd v Intertan Inc* [2003] FCA 384 ('**DSE**'), at [61]; quoted with approval in Hastie, supra fn 22,at [49]

84 *Kentish Council*, supra fn 67,[55]-57]

85 *ML Ubase*, supra fn 48, [47]

86 *Gillies*, supra fn 66, [61]

87 *Thomas*, supra fn 50, [17]; quoted with approval in *New Cap*, at [49]. However, there is some tension with Newcap, at [53]

88 *Cole*, supra fn 36, [57]; *Lampson & 2 Ors v McKendry & Anor* [2001] NSWSC 373, [35]; *Mackinnon v BHP Steel (Ais) P/L and Anor* [2004] NSWSC 459, [24]; *Mackinnon v BHP Steel (Ais) Pty Ltd and Anor* [2004] NSWSC 1027, [20].

89 *Towney*, supra fn 21, 414; quoted with approval in *Director-General, Department of Community Services v D* [2006] NSWSC 827, [34]; see also *Karen Ann Baulch v Lyndoch Warrnambool* [2008] VSC 421, at [11].

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

91 *AWB*, supra fn 15, [164]

92 *Shoal Bay Developments Pty Ltd v Port Stephens Council* [2018] NSWSC 286, per Parker J at [36]; *Southcorp* at [21]

93 *Southcorp*, supra fn 59 [17].

94 *Spassked Pty Ltd v Commissioner of Taxation (No 4)* [2002] FCA 491, at [21]

95 *Sprayworx*, supra fn 71 [49]; *D'Apice*, supra fn 70, [25]; *Ingot Capital v Macquarie Equity* [2008] NSWSC 25, per Campbell J at [34]; *New Cap*, supra fn 34 at [51]; *R v Ronen & Ors* [2004] NSWSC 1305, per Whealy J at [63]

96 *New Cap*, supra fn 34, [51]

97 *Traderight*, supra fn 50, at [23]

98 *Director-General, Department of Community Services v D*, supra fn 89 at [32]

99 *Cole*, supra fn 36, [56]; *Mackinnon*, supra fn 37, [18]; *Sevic v Roarty*, supra fn 50, 308; *New Cap Reinsurance Corp Ltd (In Liq) v G S Christensen and Ors* [2008] NSWSC 93, per Hamilton J at [15] (no waiver before tender, not addressing whether waiver after tender); *Protec Pacific Pty Ltd v Brian Cherry* [2008] VSC 76, at [56] (no waiver before tender, but leaving open the question of waiver after tender).

100 *Buzzle Operations v Apple Computer Australia* (2009) 74 NSWLR 469 per White J at [30] (and the cases there referred to); but compare *Liberty Funding Pty Ltd v Phoenix Capital Ltd* [2005] FCAFC 3

101 *Mackinnon v BHP Steel (Ais) Pty Ltd and Anor* [2004] NSWSC 1027, [18]; *Sevic v Roarty* (1998) 44 NSWLR 287, per Powell JA at 308

102 *Gillies*, supra fn 66

103 *Goldberg v Ng* & Ors (1995) 185 CLR 83, per Toohey J at 109-110.

104 *Prince Removal & Storage Pty Ltd v Roads Corporation* [2012] VSC 245, per Emerton J

105 *Gillies*, supra fn 66, [46]

106 *Gillies* supra fn 66, [46

107 *Gillies*, supra fn 66, [44]-[47]; *Kentish Council*, supra fn 67, [51]

108 *DSE*, supra fn 83, [61]; quoted with approval in Hastie, supra fn 22, [49].

109 This is consistent with the prevailing view of the scope of section 126, see fn 68. It is also consistent with implied waiver under the general law and section 122(2): eg, *British American Tobaco*, supra fn 20, 664

110 see text at fn 67 above.

111 see text at fn 68 above.

112 NSW Law Reform Commission, Report 109, 'Expert Witnesses', page 70

113 *Traderight*, supra fn 50, at [23]

114 *Watkins v State of Queensland* [2007] QCA 430, per Keane JA at [57], and [55]; see also *Kentish Council v Bellenjuc Pty Ltd* [2011] TASSC 58. at [25], [55]; see also *Maurice*, supra fn 11, at 488; *Interchase*, supra fn 50, 160; *D'Apice*, supra fn 70, [25]

115 *Traderight*, supra fn 50, [23]

116 see text at fn 42

117 see text at fn 36

118 Stowe, 'Preparing expert witnesses – a (continuing) search for ethical boundaries'

119 *In the Matter of Idylic Solutions Pty Ltd and Ors — Australian Securities and Investments Commission v Hobbs* [2012] NSWSC 73, at [37]-[38]

120 *Traderight*, supra fn 50, [23]

121 *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 7)* [2008] FCA 323, per Heerey J, at [7]

122 *Kentish Council*, supra fn 67, at [39]

123 *ML Ubase*, supra fn 48, at [47]

124 eg, *Cobram Laundry Services Pty Ltd v Murray Goulburn Cooperative Co Ltd* [2000] VSC 353, [58]. However, the mere fact of change of opinion does not support a waiver: *Melrose Cranes and Rigging Pty Ltd v Manitowoc Crane Group Australia Pty Ltd* [2012] NSWSC 904, per Campbell J at [50

125 *ASIC v Rich*, supra fn 27, at [170]

126 Stowe, supra, fn 118

127 see text at fn 95.

128 *Hancock v Rinehart (Privilege)* [2016] NSWSC 12, per Brereton J at [6]

129 Eg, *British American Tobacco*, supra fn 20, [173]-[175]

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