# *BRIEFING EXPERTS*

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## *LECTURE OUTLINE*

## (I) How best to brief an expert

(a) Discuss the cardinal rule of "radio silence; "
(b) Consider whether communications with experts are privileged or can be required to be produced to Court by subpoena or notice to produce. Discuss impact on how to brief;
(c) Should instructions be written? If not, why not? If so, why so?
(d) Horses for courses: compare and contrast different types of experts and how to brief them.

## (II) How involved should lawyers be in assisting experts to draft their reports

A range of matters need balancing, including:
(a) Degree of complexity of the report;
(b) Degree of formality required: consumer oriented Tribunal v District or Superior court;
(c) Quantum at stake in the litigation;
(d) How willing the expert is to work with the lawyers;
(e) How experienced the expert is at report writing: e.g. do they know how to list instructions and assumptions? Do they know where to list them? DO they know what question to answer?
(f) How experienced is the Solicitor in the particular field : young , busy or inexperienced Solicitors need to rely more heavily on counsel;
(g) The degree of urgency.

**(III) At what stage to retain an expert**

(a) Do you really have a choice? i.e. is the report required for an interlocutory matter e.g. security for costs?
(b) Hope springs eternal: does one wait to see if the matter will settle? Or will the very fact of having retained an expert, assist with achieving settlement?
(c) Be realistic: what is the budget?
(d) Is the matter in the Technology and Construction List of the NSW Supreme Court or equivalent?
(e) Other factors

**(IV) Briefing for conclaves**

**(V) Briefing for the final hearing**

**LECTURE PAPER**

**(I) How best to brief an expert**

(a) *Radio silence*

Much like medical practitioners, the first goal should be "Do no harm" when one retains an expert. Regrettably, lawyers sometimes –perhaps often- shoot off letters of instruction to experts they sometimes have not even met.

Sometimes the questions posed are not well articulated.

Sometimes, at early stages, the questions can be simply misleading –because often at the early stages of proceedings, the matter has not yet "shaped up".

And the wrong question can lead to an undesirable answer.

On the flip side of the coin, experts just want to solve the world's problems, especially engineers, who I single out for special mention. As such, they often express - in writing - preliminary views. These can be seriously detrimental.

By then, $1000's in costs have been incurred, the client's budget dented, and everyone is then on the horns of a dilemma; if a new expert is retained, one with marginally more discretion, that will break the budget. But if the existing expert is retained, that may hamper the case, especially if the initial correspondence is required to be ***discovered.***

(b) *Consider whether communications with experts are privileged or can be required to be produced to Court by subpoena or notice to produce. Discuss impact on how to brief.*

The law on this topic is complex, as the cases show e.g. *New cap Reinsurance Corp Ltd (in liq) v G S Christensen* [2008] NSWSC 93; *IO Group Inc v Prestige Club Australia Pty Ltd (No 2)* [2008] FCA 1237.

[*Please see case summaries set out at the end of this paper*]

So why live dangerously? Why create field notes that are double-edged swords? Why send emails expressing anything other than "May I call you?" before you know what the question is, let alone before you know what your CONCLUDED views are?

Why lay the foundation for your opponents to say your Draft (Revised) No 9, containing admissions against interest, just before you changed your views, should be admitted into evidence?

In short, why remove ants from your feet, with a shotgun?

Why ensure that counsel in the matter will have to make urgent, uncertain and expensive application for your Draft (Revised) No 9 to be clothed with privilege?

Ask yourself: what am I trying to achieve,? Can I not do this in a smarter fashion?

*(c) Should instructions be written? If not, why not? If so, why so?*

Some Courts and tribunals require instructions to an expert to be written e.g. the Family Court and, apparently, NCAT.

Other courts do not.

So WHY do so many solicitors, by default, shoot off letters of instruction, at early stages, when no one really knows what the crisp issues are, and then engage in solemn correspondence about the matter? The expert or possibly even the Client, can be cross examined on these letters in due course.

Why so solicitors descend into writing when they haven't had your experts' views as to what the question should be?

Why not wait until later in the proceedings, when there is a better chance of everyone understanding the true issues in dispute, and a better chance of assisting your client, and recording the crisp issues to be addressed, in the actual *report*?

Defining the crisp issues in dispute to be reported on, ought ideally be done in conference with the solicitor, barrister, and expert *after robust debate.*

For example: an issue in a construction dispute is whether an entire staircase has to be replaced at a cost of $300,000. The relevant Standard says that the risers have to be equal height. The lawyer has not read the Standard-he's left it to his expert. He had a busy day. He had to take his dog to the vet, and never thought it his job anyway, to read anything as mundane as a Standard. He considers his professional duty having been discharged by flinging the entire pleadings and volumes of affidavits at the expert, and writing a letter asking the expert's opinion "as to whether there were any defects in the way the staircase was constructed."

Across town, working away in his shed, the expert does not think it his job to ask the lawyer to read the Standard together with him and interpret it.

He is so sure of himself, he does not think the Standard has any other meaning

other than the one he's always given it. He gave it a certain meaning 5 years ago. That meaning is now *ex cathedra* in his own mind.

Naturally, the lethal combination of these two attitudes results in an embarrassment in court.

Lesson: the expert and the lawyer need to discuss the matter and have robust debate BEFORE articulating the question to be asked. If each leaves it to the other, then BOTH might well be guilty of dereliction of duty.

(d) *Horses for courses: compare and contrast different types of experts and how to brief them*

Some experts do not wish to work with the lawyers, rather to work alone. I avoid them if I can. The client is entitled to the best service it can get; and the best product is almost always the product of robust debate between lawyer and expert.

This almost never can be achieved via routine correspondence.

Some experts e.g. medical doctors doing reports on how long an injury might take to recover from, possibly need minimal interaction with the lawyers when drafting.

However, at the more complex end of the spectrum, e.g. building disputes involving why work as constructed deviated from plans or Standards, there are few reports that will not benefit from collaboration between expert and lawyer.

## **(II)** ***How involved should lawyers be in assisting expert to draft their reports***

It is perfectly legitimate for lawyers to assist experts in the drafting exercise, so long the focus is restricted to matters of form: see the cases at the end of the paper.

The degree of involvement of the lawyer depends on a range of matters that need balancing, including:

(a) Degree of complexity of the report;

(b) Degree of formality required: consumer oriented Tribunal v District or Superior court;
(c) Quantum at stake in the litigation;
(d) How willing the expert is to work with the lawyers;
(e) How experienced the expert is at report writing: e.g. do they know how to list instructions and assumptions? Do they know where to list them? DO they know what question to answer?
(f) How experienced is the Solicitor in the particular field: young, busy or inexperienced Solicitors need to rely more heavily on counsel;
(g) The degree of urgency.

One theme of my lecture is to not create multiple drafts, upon which you can be cross-examined. The first draft, if done alone, is unlikely to be the final draft. So the less the lawyers assist you from the outset *with your first draft* with matters of form, the more likely there will be multiple drafts brought into existence, as everyone relives groundhog day, with the solicitor issuing his / her letter to an expert the other side of town; the expert working alone in the shed to grapple with the material and issuing revision after revision, the lawyer sending on to counsel, counsel marking up with comments, the solicitor then passing on the expert, who by then is overseas / at his child's graduation/ under cross examination in another case-you get the picture.

The "usual way" is disproportionately costly, inefficient and perhaps most mind numbingly boring.

Justice McDougal, writing extra curially in *An Overview of the Evidence Act Keynote Address prepared for the Young Lawyers Annual One Day CLE Seminar 2011: Evidence Act* (viewed www September 2014) said that the lawyer's role ought be as follows:

"(i) identifies the field of specialized knowledge and the expert's training, study or experience;
(ii) identify the precise question on which the expert is to opine;
(iii) identify the facts (assumed, or known to the expert) on which the opinion will rest;
(iv) show the reasoning process, which in turn

(a) shows how the expert's specialized knowledge has been applied or used;
(b) shows the rational links , or steps , from premises to conclusions ; and
(c) sets out the expert's opinion on the question."

His honour warns against the lawyers influencing the substance of what the expert has to say, referring to *Universal Music Australia v Sharman Licence Holdings* [2005] FCA 1242.

**(IV)** ***Briefing for conclaves***

A conclave is a meeting of experts, pursuant to the rules of the Court or Tribunal. There are practice notes which stipulate what can and cannot occur.

The NSW UCPR PN is in Sch 7, as follows:

"(Rule 31.23)

(cf SCR Schedule K)

## 1 Application of code

This code of conduct applies to any expert witness engaged or appointed:

(a) to provide an expert's report for use as evidence in proceedings or proposed proceedings, or
(b) to give opinion evidence in proceedings or proposed proceedings.

## 2 General duty to the court

(1) An expert witness has an overriding duty to assist the court

impartially on matters relevant to the expert witness's area of expertise.
(2) An expert witness's paramount duty is to the court and not to any party to the proceedings (including the person retaining the expert witness).
(3) An expert witness is not an advocate for a party.

**3 Duty to comply with court's directions**

An expert witness must abide by any direction of the court.

**4 Duty to work co-operatively with other expert witnesses**

An expert witness, when complying with any direction of the court to confer with another expert witness or to prepare a parties' expert's report with another expert witness in relation to any issue:

(a) must exercise his or her independent, professional judgment in relation to that issue, and
(b) must endeavour to reach agreement with the other expert witness on that issue, and
(c) must not act on any instruction or request to withhold or avoid agreement with the other expert witness.

**5 Experts' reports**

(1) An expert's report must (in the body of the report or in an annexure to it) include the following:
(a) the expert's qualifications as an expert on the issue the subject of the report,
(b) the facts, and assumptions of fact, on which the opinions in the report are based (a letter of instructions may be annexed),
(c) the expert's reasons for each opinion expressed,

(d) if applicable, that a particular issue falls outside the expert's field of expertise,
(e) any literature or other materials utilised in support of the opinions,
(f) any examinations, tests or other investigations on which the expert has relied, including details of the qualifications of the person who carried them out,
(g) in the case of a report that is lengthy or complex, a brief summary of the report (to be located at the beginning of the report).
(2) If an expert witness who prepares an expert's report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated in the report.
(3) If an expert witness considers that his or her opinion is not a concluded opinion because of insufficient research or insufficient data or for any other reason, this must be stated when the opinion is expressed.
(4) If an expert witness changes his or her opinion on a material matter after providing an expert's report to the party engaging him or her (or that party's legal representative), the expert witness must forthwith provide the engaging party (or that party's legal representative) with a supplementary report to that effect containing such of the information referred to in subclause (1) as is appropriate.

## 6 Experts' conference

(1) Without limiting clause 3, an expert witness must abide by any direction of the court:
(a) to confer with any other expert witness, or
(b) to endeavour to reach agreement on any matters in issue, or
(c) to prepare a joint report, specifying matters agreed and matters not agreed and reasons for any disagreement, or
(d) to base any joint report on specified facts or assumptions of fact.
(2) An expert witness must exercise his or her independent,

professional judgment in relation to such a conference and joint report, and must not act on any instruction or request to withhold or avoid agreement."

***(III) At what stage to retain an expert*** [refer to lecture outline]

***(V) Briefing for the final hearing***

Prior to the final hearing, the expert ought meet in a timely manner with instructing solicitor and counsel, so as to:
(a) distil the issues that remain in dispute;
(b) assist counsel meet the opponent's case by e.g. pointing out any mistakes in then opponent's report/s;
(c) identify in general terms the lines of cross examination that might be anticipated of that expert by opposing counsel;
(d) identify any further evidence that may be required. Hence, meeting in a TIMELY fashion is CRUCIAL, so as to avoid objections based on prejudice.

Embarrassment will be avoided if the expert resists asking:

"How should I answer that question?" because the most any counsel ought say to that is:

"In accordance with the truth and your conscience."

Part of this preparation process is to discuss:
(a) what occurs in re- examination, and be prepared for this;
(b) the order in which counsel will cross examine, if there are multiple parties; and the stage at which the Judge might seek clarifications.

## CASE SUMMARIES

***CONFIDENTIALITY, PRIVILEGE AND WAIVER***

*New Cap Reinsurance Corporation Ltd (In Liq) & 1 Or v Renaissance Reinsurance Ltd* [2007] NSWSC 258, White J

"15 The defendant submitted that the provisions of the *Evidence Act* 1995 (NSW) do not apply to the determination of this application. I do not agree. The questions of whether the documents are privileged, and if so, whether privilege has been waived, are to be resolved by the provisions of the *Evidence Act*, not by the common law. That is not because the Act has modified the common law, or applies by its own force to pre-trial procedures (*Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* [1999] HCA 67; (1999) 201 CLR 49; *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1). Rather, it is a consequence of the rules. Rule 21.3 of the *Uniform Civil Procedure Rules* 2005 (NSW) requires that a list of documents must identify any document that is claimed to be a "*privileged document*" and must specify the circumstances under which the privilege is claimed to arise. Rule 21.5 provides in substance that a party is not required to make available "*privileged documents*" for inspection. Rule 1.2 provides that words and expressions defined in the Dictionary have the meaning set out in the Dictionary. In the Dictionary, the expression "*privileged document*" is defined as meaning a document that contains privileged information. "*Privileged information*" is defined as meaning, relevantly, any information of which evidence could not by virtue of the operation of Div 1 of Pt 3.10 of the *Evidence Act* be adduced in the proceedings over the objection of any person. Hence, the provisions of the *Evidence Act* are made applicable by the definitions contained in the *Uniform Civil Procedure Rules*.

16 The relevant section in Div 1 of Pt 3.10 of the *Evidence Act* is s 119. It provides:

"***119 Litigation***

*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,*

*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.*"

17 The expressions "*confidential communication*" and "*confidential document*" are defined in s 117 as follows:

*"***Confidential communication** *means a communication made in such circumstances that, when it was made:*

*(a) the person who made it, or*

*(b) the person to whom it was made,*

*was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.*

**Confidential document** *means 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.*"

18 Paragraph 119(b) is important. It has been held that common law legal professional privilege does not attach to an expert's own documents, prepared by him for the purpose of expressing an expert opinion in litigation but which were not communicated to the client or the lawyer of the client, and do not reveal communications between the expert and the client, or between the expert and the lawyer for the client (*Interchase Corporations Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No. 1)* [1999] 1 Qd R 141 at 150-151, 153, 162; *Australian Securities and Investments Commission v Southcorp Limited* [2003] FCA 804; (2003) 46 ACSR 438 at [21]).

19 This view is based upon the fact that:

"*Legal professional privilege is concerned with communications, either oral, written or recorded, and not with documents per se.*" (*Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 529, 543, 552, 568, 580-581, 585).

20 Section 119 of the *Evidence Act* expressly applies both to confidential communications between the client and a third party, or between a lawyer acting for the client and a third party, for the dominant purpose of the client being provided with professional legal services relating to legal proceedings, and to the contents of a confidential document prepared with that dominant purpose, whether the document is delivered or not (*Re Southland Coal Pty Ltd (recs and mgrs apptd) (in liq)* [2006] NSWSC 899; (2006) 59 ACSR 87 at [16]-[19]; *Natuna Pty Ltd v Cook* [2006] NSWSC 1367 at [8], [15]).

*"Associated material waiver"* was explained as follows in *Matthews v SPI Electricity Pty Ltd & Ors and SPI Electricity Pty Ltd v ACN 060 674 580 & Ors (formerly Utilities Services Corporation Ltd)* [2013] VSC 33 (13 February 2013):

"31 It is common ground that the issues raised by the plaintiff's application are governed by the provisions of the Evidence Act 2008 (Vic) ("Evidence Act"), in particular Part 3.10, Division 1, which applies to interlocutory proceedings.[34]

32 The application is made on the assumption that the documents identified in the Summons are properly the subject of privilege.

33 The plaintiff claims that SPI has lost the privilege in the Summons documents by the operation of s 122, or by a combination of that section and s 126, of the Evidence Act. For present purposes, only sub-section 122(2) need be considered. It provides:

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 objecting to the adducing of the evidence because it would result in a disclosure of a kind referred to in sections 118, 119 or 120.

34 The origin of this sub-section is the provision in the same terms introduced into the Commonwealth and New South Wales Uniform Evidence Acts following the Australian Law Reform Commission Report 102, prepared with the New South Wales and Victorian Law Reform Commissions.[35] Because the

Victorian Act post-dated those amendments, the sub-section appeared in the Victorian legislation from enactment.

35 The object of the sub-section was to adopt the approach of the High Court in Mann v Carnell, in which case Gleeson CJ, Gaudron, Gummow and Callinan JJ stated:[36]

What brings about the waiver is inconsistency, which the courts, where necessary informed by the consideration of fairness, perceive, between the conduct of the client and the maintenance of the confidentiality; not some overriding principle of fairness operating at large.

36 Although sub-section 122(2) is formulated a little differently from the formulation of the common law principle by the High Court in Mann v Carnell, in that it works on inconsistency between the conduct of the party and a claim of legal entitlement to confidentiality, whilst the High Court formulation works on inconsistency between the conduct of the party and the maintenance of confidentiality,[37] for present purposes nothing turns on this difference. The relevance, however, of the origin of the formulation is that the common law cases on the question of waiver of privilege continue to be relevant to the question arising under s 122 of the Evidence Act.[38]

37 So, under the test propounded in Mann v Carnell it is inconsistency between the conduct of the client and the maintenance of the confidentiality that the privilege is intended to protect which effects a waiver of the privilege. The test for imputed waiver had previously been expressed in terms of fairness: see Attorney-General (NT) v Maurice [1986] HCA 80; (1986) 161 CLR 475 ('Maurice') at 481 per Gibbs CJ, 487–8 per Mason and Brennan JJ, 492–3 per Deane J, and 497–8 per Dawson J. Fairness has become a subsidiary consideration; it may be relevant to the court's assessment of inconsistency in some contexts but not in others.[39]

38 In any application of Mann v Carnell, the starting point must be an analysis of the disclosures or other acts or omissions of the party claiming privilege that are said to be inconsistent with the maintenance of confidentiality in the privileged material.[40]

39 It is well established that a voluntary disclosure of privileged documents can result in a waiver of privilege over those documents and associated material. 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: Maurice at 482 and 484 per Gibbs CJ, 488 per Mason and Brennan JJ, and 498–9 per Dawson J.

40 Associated material waiver brings into play s 126 of the Evidence Act, the related communications and documents provision. That section provides:

If, because of the application of section 121, 122, 123, 124 or 125, this Division does not prevent the adducing of evidence of a communication or the contents of a document, those sections do not prevent the adducing of evidence of another communication or document if it is reasonably necessary to enable a proper understanding of the communication or document.

41 Sections 4(1)(b) and 131A of the Evidence Act have the effect of applying s 126 to the interlocutory questions raised by the plaintiff's Summons.

42 In Towney v Minister for Land & Water Conservation (NSW),[41] Sackville J made a number of pertinent observations about this section. First, that the test set out is an objective test; secondly, that its operation must be assessed according to its terms and not on the basis that it in some way reflects the pre-existing common law; and thirdly that it was clear in his view that a mere reference in a subject document to another communication or document, of itself, does not necessarily result in a loss of privilege attaching to the subject document. The application of s 126 ultimately depends on the degree and manner in which the subject document assists in a proper understanding of the other communication or document. In relation to the meaning of 'proper understanding', Sackville J said:

The dictionary definition of 'proper' includes 'complete or thorough'; the definition of 'understand' includes 'to apprehend clearly the character or nature of' and 'to grasp the significance, implications or importance of': *Macquarie Dictionary*.

43 Sackville J's views were essentially accepted as correct by the NSW Court of Appeal in Sugden v Sugden.[42]

44 A common application of associated material waiver is where an expert report has been prepared in reliance on other documents"

In *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438; [2003] FCA 804, Lindgren J helpfully summarised the following principles derived from his analysis of the case law, in relation to the waiver of privilege in connection with expert evidence, in the following terms:

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 Ch D 675; Trade Practices Commission v Sterling [1979] FCA 33; (1979) 36 FLR 244 at 246; Interchase Corp Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 1) [1999] 1 Qd R 141 (Interchase) at 151 per Pincus JA, at 160 per Thomas J.

2. Copies of documents, whether the originals are privileged or not, where the copies were made for the purpose of forming part of confidential communications between the client's lawyers and the expert witness, ordinarily attract the privilege: Commissioner of Australian Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501 ; 141 ALR 545 ; 91 A Crim R 451 (Propend); Interchase, per Pincus JA; Spassked Pty Ltd v Cmr of Taxation (No 4) [2002] FCA 491; (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 161-2 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 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 ; [1986] HCA 80; 69 ALR 31 at 34 per Gibbs CJ, CLR 487-8; ALR 38-9 per Mason and Brennan JJ, CLR 492-3; ALR 42-3 per Deane J, CLR 497-8; ALR 46-7 per Dawson J; Goldberg v Ng [1995] HCA 39; (1995) 185 CLR 83 at 98 ; [1995] HCA 39; 132 ALR 57 at 66 per Deane, Dawson and Gaudron JJ, CLR 109; ALR 75 per Toohey J; Instant Colour Pty Ltd v Canon Australia Pty Ltd [1995] FCA 870; BC9506842; Australian Competition

and Consumer Commission v Lux Pty Ltd [2003] FCA 89; BC200300344 (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 148-50 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 [1992] FCA 627; (1992) 39 FCR 521; Tirango Nominees Pty Ltd v Dairy Vale Foods Ltd (No 2) (1998) 83 FCR 397 at 400; 156 ALR 364 at 366; ACCC v Lux at [46].

In *Traderight (NSW) Pty Ltd (ACN 108 880 968) & Ors v Bank of Queensland Limited (ACN 009 656 740) (No 14) and 13 related matters* [2013] NSWSC 211, the Bank of Queensland applied for access to a number of documents produced by an expert in response to a subpoena served on her by the bank. The expert had prepared the report on instructions from the OMB parties (OMB).

It was held that a claim for privilege in respect of communications between a party's legal advisors and an expert retained by the party, and draft reports prepared by the expert, was not waived by service of the expert's report.

OMB claimed client legal privilege in respect of:

- draft reports of the expert containing comments, requests or advice made by the OMB legal advisors and communicated to the expert
- draft reports of the expert created for the dominant purpose or with the expectation that those draft reports would be provided to the OMB legal advisors for the purpose of those advisors considering or providing comment or advice
- documents recording communications between the expert and the OMB legal advisors

The issue before the Court was whether, pursuant to section 122 of the *Evidence Act*, it would be inconsistent for OMB to rely on the expert's report and at the same time maintain a claim for privilege.

Justice Ball set out the history of section 122 and noted that the meaning of "inconsistency" is informed by considerations of fairness between the conduct of the client and maintenance of the confidentiality.

His Honour observed that the fact that legal advisors have communicated with an expert and provided comments on drafts of a report does not mean the expert has not reached her own conclusions or relied on material that has not been disclosed in the report. In fact, it is of general assistance to the court when parties' legal advisors help experts to narrow the issues and present their opinions in an admissible and understandable form.

The court held that the privileged materials had not influenced the content of the expert's report in such a way that the service of the report was inconsistent with maintaining the privilege in those materials. Accordingly, OMB was entitled to maintain its claim for privilege.

The lesson:

Legal advisors briefing an expert and wanting to maintain privilege over their communications, ought ensure that the assistance and commentary provided does not influence the expert's conclusions. It is permissible for the legal advisors to test the expert's findings by raising factual or hypothetical issues which may cause the expert to alter their conclusions.

As long as the expert continues to form his or her own conclusions, all working drafts and communications passing between the expert and the legal advisors will continue to attract privilege.

## ***HOW INVOLVED SHOULD LAWYERS GET IN ASSISTING EXPERTS?***

In *Harrington-Smith v Western Australia (No 2)* (2003) 130 FCR 424, Lindgren J said:

There were 30 experts' reports by 15 authors relating to native title. There were1426 objections. HH said there were significant shortcomings in the reports, which could have been avoided if lawyers had given greater direction

as to matters of form.

"Lawyers *should* be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed. In the same vein, it is *not* the law that admissibility is attracted by nothing more than the writing of a report in accordance with the conventions of an expert's particular field of scholarship. So long as the Court, in hearing and determining applications such as the present one, is bound by the rules of evidence, as the Parliament has stipulated in s 82(1) of the [*Native Title Act 1992* (Cth)], the requirements of s 79 (and of s [55] as to relevance) of the *Evidence Act* are determinative in relation to the admissibility of expert opinion evidence."

To like effect *Jango v Northern Territory of Australia (No.2)* [2004] FCA 1004. 1,100 objections were taken to two reports. Sackville J "strongly" agreed with the comments in *Harrington-Smith v Western Australia (No 2)*

## *FURTHER READING*

*Dasreef Pty Ltd v Hawchar* (2011) 85 ALJR 694 (is a report based on the expert's study, training or experience –if not, not admissible).

Comments and constructive criticism welcomed to:

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