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Expert evidence and privilege in Australian courts – a cross-jurisdictional insight

Expert evidence in Australia is used when a party requires the expertise of a witness who possesses "specialised knowledge" by reason of the person's training, study or experience. While all practitioners understand that once an expert report is tendered, any privilege attached to the report itself is waived, Australian practitioners and litigation funders should be conscious of the difference in jurisdictions when it comes to the discoverability of any briefing material and communications sent between the expert, the party's lawyers and third parties, like litigation funders, as well as their legal and ethical obligations when engaging with an expert to produce an expert report.

Discoverability of Privileged Communications

There are largely two approaches in Australia when it comes to the discoverability of correspondence between an expert and solicitors. The New South Wales, Victoria, Northern Territory, Tasmania, ACT and the Commonwealth jurisdictions have all adopted the Uniform Evidence Acts which set out the rules for legal professional privilege.

In these jurisdictions, communications between experts, their instructing solicitors and clients are generally privileged. This privilege applies when legal counsel is briefing or instructing an expert for the dominant purpose of receiving legal advice in relation to an existing proceeding or contemplated litigation (*Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357). Privilege will be maintained if the communication was merely in relation to the form or a peripheral matter relating to the expert's report (*Sprayworx Pty Ltd v Homag Pty Ltd* [2014] NSWSC 833). However, ordinarily, disclosure of the expert report for the purpose of reliance on it in a litigation will result in an implied waiver of the privilege over the briefing communications and instructions, if these communications have influenced the report (*Australian Securities and Investments Commission v Southcorp Ltd* [2003] FCA 804 at [21]).

The consideration of whether a communication has "influenced" an expert report is based on the circumstances of the engagement and expert themselves. For example, more communication between a solicitor and an expert may be required for less experienced experts, as any report will likely require more assistance to be put into an admissible form (*Finance Guarantee Company Pty Ltd v Auswild (Expert Evidence Ruling)* [2019] VSC 665). Communications which do affect the substantive content of a report (i.e. communications that provided questions, assumptions or material to be considered) also need not be disclosed where they are properly referred to in the report (*New Cap Reinsurance Corporation (In Liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258).

Comparatively, in Queensland, South Australia and Western Australia, the courts apply the common law principles of privilege set out in the decisions of superior courts in Australia. That principle is that confidential communications between a lawyer and a third party expert will be privileged where the communications are made for the dominant purpose of use in existing or reasonably anticipated litigation (*Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 516; *Glencore International AG v Commissioner of Taxation* (2019) 265 CLR 646).

Privilege will be impliedly waived where the conduct of the party entitled to privilege is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect (*Mann v Carnell* (1999) 201 CLR 1). The implied waiver occurs when the "report is first deployed to the advantage of the party who commissioned it" (*Thomas v New South Wales* [2006] NSWSC 380; applying *Matthews v. SPI Electricity Pty Ltd (Ruling No.1)* [2013] VSC 33 at [47], [97]).

Whether privilege has been waived will be decided based on the specific circumstances of the case and may involve considerations of fairness (*Osland v Secretary, Dept of Justice* (2008) 234 CLR 275 at [45]). In *Osland v Secretary, Dept of*

Justice (2008) 234 CLR 275, the Victorian Attorney-General disclosed the conclusion of legal advice regarding a convicted murderer's (Osland) petition for mercy for a pardon at a press conference. Osland sought access to these legal advices, however the High Court held that a limited disclosure of the existence, and the effect, of legal advice could be consistent with maintaining confidentiality of the content of the advice, and therefore privilege had not been waived. Further, where experts prepare draft reports for the purpose of them being communicated to the lawyers for the purposes of the litigation, the draft reports would be privileged under the common law principles, provided the drafts have the necessary quality of confidentiality (*New Cap Reinsurance Corporation (In Liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258 at [22] applying *Interchase Corporation Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141; ASIC v Southcorp Ltd (2003) 46 ACSR 438).

Common Interest Privilege

Importantly for litigation funders, privilege is generally maintained where a document is disclosed on a confidential basis to a third party (e.g. a litigation funder) who shares a sufficient "common interest" in the litigation that the document is relevant to (*Farrow Mortgage Services Pty Ltd (in liq) v Webb* (1996) 39 NSWLR 601).

In *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* [2006] NSWSC 234, the court found that since the litigation funder had an interest in the most advantageous conduct of the proceedings by the plaintiff, and that interest was identical with that of the plaintiff, the funder in this case had a common interest in relation to the proceedings. Therefore, where an expert's report, which is prepared for the dominant purpose of a litigation, is circulated to a litigation funder on a confidential basis, common interest privilege may allow litigation privilege to be maintained over the report and/or communication.

Obligations when engaging with experts

In *New Aim v Leung* [2023] FCAFC 67, the Full Federal Court overturned a decision which rejected expert evidence due to the extent of solicitor involvement in the production of the expert's report. Notably:

- Although desirable, there is no legal obligation to disclose the involvement of solicitors in assisting with the drafting of an expert report nor is there an obligation to disclose all correspondence relating to the preparation of the report;
- It is undesirable for lawyers to be involved in the drafting of an expert's report other than to ensure that the report is admissible and complies with the Expert Code which governs expert reports prepared in the Federal Court of Australia. Greater involvement may be required in certain circumstances, such as the expert facing potential geographical issues, resource difficulties or language barriers;
- Whether there has been a breach of ethical obligations will turn on whether the solicitor's involvement has influenced the expert's opinion. Lawyers must not change the content of an expert report;
- Letters of instruction should be used to present to the Court what material has been provided to the expert to consider and the questions that the expert was asked to address. These questions do not need to have been formalised at the time the expert was first retained. In fact, the court recognised the value of solicitors engaging with an expert to discuss how to best frame the relevant questions so as not to produce questions which do not engage with all of the correct and relevant issues to the experts opinion;
- Rule 23 of the Federal Court Rules 2011 (Cth) does not require every single question asked of the expert to be identified. It requires the report to identify all questions that the solicitors asked the expert to address in their report; and
- Lawyers should never seek to influence or interfere with the opinions of an expert.

There is no single approach to be taken by lawyers when assisting experts in producing expert reports as the ethical obligations will depend on the particular circumstances. The primary obligation is to ensure that the independence of the expert witness is maintained.

Final thoughts

Overall, lawyers must be aware of the different ways in which expert evidence is dealt with in each jurisdiction, with the most significant difference arising between those jurisdictions that have adopted the Uniform Evidence Acts, and those who continue to operate under common law only. Additionally, practitioners must be careful not to affect the opinion of experts when helping to draft expert evidence, and be aware of their corresponding ethical obligations.