

Are draft expert reports privileged? An update from Australia

In brief

- Recent decisions have confirmed that section 119(b) of the Evidence Act 1995 (NSW) extends privilege to confidential "documents" whether or not those documents are "communications" under section 119(a), provided that they satisfy the requirements of section 119(b) including the dominant purpose test.
- In *New Cap Reinsurance Corporation Ltd (In liq) v Renaissance Reinsurance Ltd*, Justice White held that:
 - it is not sufficient under section 119 of the Evidence Act to show that the document was brought into existence for the dominant purpose of use in legal proceedings; and
 - draft expert reports will usually have dual purposes namely to set out the witness's evidence and also to be submitted to the lawyers to be settled. It is a question of fact as to which purpose is dominant.
- Justice White has highlighted an important issue as to what is the dominant purpose of unserved draft and final expert reports. As a consequence, the privileged status of unserved expert reports remains an open question.

This paper considers recent judicial comments on the application of section 119 of the Evidence Act 1995 (NSW) to draft expert reports. The paper discusses whether draft expert reports may be privileged even if they are not "communications" and we explore the application of the dominant purpose test to draft expert reports.

An earlier update (May 2006) from the authors (see <http://www.rics.org/RICSWEB/getpage.aspx?p=TCLrodaU9kSOCaDHHyyh6g>) considered whether draft expert reports are privileged and reviewed the recent case law. In particular, we looked at the decision of Justice Barrett of the New South Wales Supreme Court in *Ryder v Frohlich* [2005] NSWSC 1342 where his Honour found that certain draft expert reports were not privileged as they were not "communications".

In this update we consider:

- three recent first instance decisions in New South Wales where it has been held that section 119(b) of the Evidence Act 1995 (NSW) extends privilege to certain confidential "documents" whether or not those documents are "communications" under section 119(a), provided that they satisfy the requirements of section 119(b) including the dominant purpose test; and
- recent judicial comments on the dominant purpose test and how it applies to experts' reports and working papers. In particular we look at Justice White's comments in *New Cap Reinsurance Corporation Ltd (In Liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258 ("New Cap") to the effect that an expert's report, particularly their final report, will usually be prepared for the dominant purpose of putting that witness's evidence before the Court and not for the dominant purpose of providing legal services in relation to proceedings. If so, it would not be privileged under section 119(b).

Draft expert reports and working papers may be privileged even if they are not "communications"

Justice Barrett held in *Ryder v Frohlich* that privilege can only attach to documents which embody communications between the expert and the litigant or the litigant's lawyer. He said that a draft report prepared by the expert is not, of its nature, such a communication (para 12).

In coming to this conclusion, Justice Barrett found that the test for client legal privilege under the Evidence Act 1995 (NSW) applied to the application before him although he did not refer specifically to section 119(b) of that Act.

While Justice Barrett's position is consistent with a number of authorities on privilege at common law and under the Evidence Acts in New South Wales, Tasmania and the Commonwealth ("Uniform Evidence Acts"), as we noted in our May 2006 Litigation Update, there is difficulty in seeing how it can be reconciled with the words of section 119(b) of the Uniform Evidence Acts which expressly extend litigation privilege to confidential "documents" in addition to confidential "communications."

Section 119 of the Uniform Evidence Acts is in the following terms (except for minor grammatical variations between states):

Litigation

119 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 confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made, or
- 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.

Since *Ryder v Frohlich*, three judges of the Supreme Court of New South Wales have agreed that section 119(b) extends privilege to certain confidential "documents" irrespective of whether they contain "communications".

In *Re Southland Coal Pty Ltd (rec & mgrs apptd) (in liq)* [2006] NSWSC 899, Justice Austin held that a draft witness statement prepared for the requisite dominant purpose would be protected from disclosure under the Evidence Act 1995 (NSW) whether or not the draft reflects some communication that has occurred or is a wholly uncommunicated draft. He said that under the Evidence Act, this result flows from "the simple application of the statute which applies to the contents of the confidential document 'whether delivered or not'" (para 18).

In *New Cap Justice White* said "[s]ection 119(b) of the Evidence Act extends the privilege to confidential documents, whether communicated or not, provided they were brought into existence with the requisite dominant purpose" (para 34).

In *Natuna Pty Ltd v Cook* [2006] NSWSC 1367, Biscoe AJ said "...in my opinion, a draft expert report is a confidential "document" which is privileged from production by operation of s 119(b). Section 119(b) goes outside the area of communications with which both s 119(a) and common law concepts of privilege are concerned. It applies to 'documents'" (para 10).

Although the appellate courts are yet to comment on this issue, given the clear words in section 119(b) and these decisions, the better view is that:

- if draft expert reports do not form part of a "communication" they are not privileged under section 119(a) of the Uniform Evidence Acts;
- draft expert reports may nevertheless be privileged under section 119(b) of the Uniform Evidence Acts (if they otherwise satisfy the requirements of section 119(b) including the dominant purpose test).

What is the dominant purpose of draft or final expert reports?

A more difficult question may be what are the dominant purposes of expert reports, both draft and final, and the expert's working papers? Justice White's decision in *New Cap* highlights that there is still much room for debate in the application of the dominant purpose test to these documents.

His Honour observed that:

- Draft reports will only be privileged under section 119(b) if the dominant purpose of the draft was for the client to be "provided with professional legal services" relating to anticipated or pending proceedings (para 27).
- It is not sufficient to show that the draft was brought into existence for the dominant purpose of use in legal proceedings (para 27).
- Prima facie the expert's final report or a final witness statement would not be privileged under the Evidence Act 1995 (NSW) because presumably the dominant purpose of those documents was to be "laid before the Court as the witness' evidence" (para 29).
- Draft reports and notes used in preparing a report may stand at a different position, particularly where the expert has been retained by the party's solicitors and it is expected that the party's lawyers will advise on the contents of, and settle the form of, the report (para 29). "It will be a question of fact" as to whether any such documents were brought into existence for the dominant purpose of the plaintiffs being provided with professional legal services (para 30).
- "If they were prepared for the dominant purpose of a draft report being submitted for advice or comment by the plaintiffs' lawyers, then they would be privileged under section 119. However 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"(para 30). The expression "professional legal services" is not defined in the Evidence Act (para 31).

- "In all probability, an expert witness retained by a lawyer for a party will prepare a draft report with the intention (and purpose) that it will set out the evidence which he or she expects to give, but also with the intention and purpose of its being considered and commented on by the party's lawyers. If the latter purpose is dominant, the document so produced is privileged. If not, it is not privileged" (para 35).

Justice White has raised an important question as to what would normally be the dominant purpose of an expert witness's report. As His Honour notes, in all probability any "draft" expert report will be prepared for dual purposes, namely so that the expert can set out his or her evidence and also to assist with the provision of legal services to the client in relation to the proceedings. On the other hand, his Honour suggests that "final" reports may only have one clear dominant purpose, that is to be "laid before the Court as the witness's evidence".

Where a witness is retained to prepare a report setting out the evidence he or she would give if called as a witness, arguably their report was only brought into existence because the client also intended to obtain professional legal services in relation to the report. In every case the lawyers will consider the expert's report (both in draft and as a final). Further, at least in New South Wales, it is the client and the lawyers, not the expert, who will ultimately determine whether the report is ever served on the other parties or used in evidence. Arguably, the preparation, finalisation, service and tender of the expert's report are all inextricably linked parts of the provision of legal services to the client in relation to the litigation.

For these reasons there remains an argument, at least in New South Wales, that the dominant purpose of a report of an expert witness, whether in final or in draft, will usually be the provision of legal services in relation to litigation. If that is correct, the expert's reports, whether final or in draft, should normally be privileged under the Uniform Evidence Acts provided they have not been served on the other parties (and the other elements of section 119(b) have been met). Clearly, if a final report is served, privilege is waived in relation to that report (but not necessarily over any drafts)

Other cases on the dominant purpose test

Other cases on the dominant purpose test do not provide clear guidance. Justice Sperling said the following in *Roach & Ors v Page & Ors* (No.17) [2003] NSWSC 973, in rejecting a submission that the dominant purpose of communications with an expert witness (as distinct from the expert's report) is to assist the Court and not to provide the client with professional legal services:

"Assistance to the court must be the witness's dominant purpose in providing an opinion for use in the proceedings. But the purpose of communications between the party's legal representatives and the witness is nonetheless predominantly to assist the party. That is because the predominant purpose of such communications is to bring forward expert evidence in aid of the party. But for that purpose the communications would not be entered into at all. The fact that the witness is constrained to assist the court and to be impartial does not displace that purpose.

The plaintiffs' argument fails to recognise the adversarial nature of the proceedings. No party is under an obligation to adduce expert evidence to assist the court. No expert is obliged to provide evidence to assist the court... The court receives the benefit of assistance from an expert only if it suits a party to adduce such evidence...The witness's evidence must be impartial, but communications with a view to securing and facilitating the provision of such evidence are entered into for the purpose of assisting the party, not for the purpose of assisting the court. To suggest otherwise fails to recognise this reality" (paras 8 and 9).

In *Natuna Pty Ltd v Cook*, the expert in question had confirmed in a letter to his instructing solicitors that he had been asked to assess the market value of certain land "for litigation purposes". Biscoe AJ found that this was sufficient to establish that the drafts were prepared for the dominant purpose of the client being provided with professional legal services relating to a proceeding or an anticipated or pending proceeding (para 4).

It was submitted that the overriding duty of an expert to assist the Court impartially, as stated in the expert witness code of conduct, means that it can no longer be said that an expert report is prepared for the dominant purpose of the client being provided with professional legal services relating to proceedings. Biscoe AJ rejected that submission, taking the view that the overriding duty to the Court imposed by the code does not change the dominant purpose for which an expert report is prepared (para 12).

Lessons – the privileged status of unserved expert reports is uncertain

In conclusion it remains arguable that unserved draft and final expert reports may be privileged under the Uniform Evidence Acts. This is because:

1. Even if unserved draft or final expert reports do not form part of a "communication" and are not privileged under section 119(a) of the Uniform Evidence Acts (which is debatable), they may be privileged under section 119(b) of the Uniform Evidence Acts, provided that they otherwise satisfy the requirements of that section

including the dominant purpose test. This is because section 119(b) extends privilege to confidential documents (whether delivered or not).

2. Arguably, unserved draft or final reports would usually satisfy the dominant purpose test in section 119 of the Uniform Evidence Acts. Even though both draft and final expert reports may have the dual purposes of assisting with the provision of legal services to the client and setting out the evidence which the witness would give in court, it is arguable that in many cases the preparation, finalisation, service and tender of the expert's report are all inextricably linked parts of the provision of legal services to the client in relation to the litigation. If so, the dominant purpose of any expert report, would arguably be the provision of legal services to the client.

There remains room for debate over these issues, particularly the application of the dominant purpose test to experts' reports. Therefore experts, lawyers and clients alike should continue to be mindful of the risk that communications with experts, the expert's reports both draft and final, and the expert's working papers may never be privileged, or may lose their privileged status when any final report is served.

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