Can You Really Claim Privilege Over Evidence That You Have Served? Reconciling Conflicting Appellate Authority and Modern Case Management Principles

Anthony McInerney and Nicholas Bentley*

Practitioners often assume that once an expert report is served, the letters of instruction and material provided to and relied upon by the expert should be disclosed before the hearing. Similar assumptions arise with evidentiary statements that set out the substance of legal advice. However, conflicting intermediate appellant authority cast doubt on such assumptions and throw light on the tension between (1) case law suggesting that there is no waiver of privilege over such material when served and (2) the case management principles expressed in ss 56–60 of the Civil Procedure Act 2005 (NSW) and ss 37M–37P of the Federal Court of Australia Act 1976 (Cth). This article explores the case law concerning whether served evidence, and any underlying documents, are no longer subject to client legal privilege and attempts to identify a consistent approach that can be followed in the Federal and State courts based on modern case management principles.

Introduction

When served with an expert report in civil litigation, practitioners often request that they also be provided with the letter(s) of instruction and documents provided and referred to by the expert. Ordinarily, such requests will be acceded to. But what happens if the request is refused? Are parties served with expert reports entitled to the letters of instruction and documents relied upon by the expert before the hearing and before the expert report is tendered? Relatedly, many assume that once a lay statement is served it is no longer a confidential document such that it, and anything it refers to, does not attract legal professional privilege (at common law) or client legal privilege (under statute) (*privilege*).[1] Despite these common assumptions, intermediate appellant authority in New South Wales suggests (or at least assumes) that even after being served, privilege will be maintained over such evidence and any underlying material (otherwise referred to as "associated material") until the expert report is tendered or the lay evidence is read. This strikes at the heart of the policy tension that arises with privilege:[2]

> 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 communication. 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. The party denied access might be an opposing litigant, a prosecutor, an accused in a criminal trial, or an investigating authority. For

* Anthony McInerney SC: BA, LLB (Hons), LLM (ANU), LLM (Hons) (Camb); Barrister. Nicholas Bentley: BBus, LLB (Hons) (UTS), MSc in Law and Finance (MLF) (Oxon); Barrister.

[1] The term privilege is used in this article only as a means to conveniently encapsulate the terms legal professional privilege and client legal privilege. It does not cover other forms of privilege.

[2] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, [35] (Gleeson CJ, Gaudron, Gummow and Callinan JJ). For an analysis of the traditional rationale for legal professional privilege, see L Brown, "The Justification of Legal Professional Privilege When the Client Is the State" (2010) 84 ALJ 624.

> the law, in the interests of the administration of justice, to deny access to relevant information, involves a balancing of competing considerations.

This article assesses the cogency of the case law that addresses the effect service[3] has on privilege and waiver, while identifying the statutory framework that must now be operated within, particularly the *Uniform Evidence Acts*[4] and modern case management principles expressed in ss 56–60 of the *Civil Procedure Act 2005* (NSW) (*CPA*) and ss 37M–37P of the *Federal Court of Australia Act 1976* (Cth) (*FCA*).[5] Through this assessment, the article identifies how, despite the procedural differences between the Federal Court of Australia and the Supreme Court of NSW, a coherent basis exists, based on modern case management principles, for both courts to adopt a consistent approach that service of evidence gives rise to a waiver of privilege.

Stages for Obtaining Underlying Documents

A party seeking material arising from the service of an expert report or lay evidence will ordinarily first request that material informally. If the request is refused, then the party will have to proceed through the following formal steps:

(1) issue a subpoena to the expert or lay witness or a notice to produce to the other side to have the material produced to court;[6]
(2) if there is no application to set aside the subpoena or notice to produce, seek access to inspect the material produced. If an objection is raised to access on the basis of privilege consideration must be given to:
   (a) whether the privilege claim is to be assessed at common law or under statute;
   (b) whether the privilege claim is established by the party claiming it; and
   (c) whether waiver of privilege is established by the party seeking access; and
(3) if access to the material is obtained, consider whether any of the material should be sought to be admitted during the hearing.[7]

This article is focused on the first and second steps, where a party resists production or access on the basis that the material sought is subject to privilege. The question of if a party is entitled to resist production or access on the basis of privilege is first informed by understanding the legislative regime that governs the above processes and when the common law applies.

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[3] For consideration of the law of privilege at the discovery stage, see M Legg and N Turner, "When Discovery and Technology Meet: The Pre-discovery Conference" (2011) 21 JJA 54, 64–69; M Legg, "Client Legal Privilege, Discovery and Expense Reduction in the Information Age" (2014) 3 JCivLP 78.

[4] This article will focus on the *Evidence Act 1995* (NSW), but see also *Evidence Act 1995* (Cth); *Evidence Act 2008* (Vic), *Evidence Act 2001* (Tas), *Evidence Act 2011* (ACT), *Evidence (National Uniform Legislation) Act 2011* (NT), which are based on the *Model Uniform Evidence Bill*, as endorsed by the then Standing Committee of Attorneys-General in 2007.

[5] *Civil Procedure Act 2005* (NSW) s 56(3), (4) and *Federal Court of Australia Act 1976* (Cth) s 37N.

[6] If the affidavit or witness statement refers to a particular document, then r 21.10(1)(a) of the *Uniform Civil Procedure Rules 2005* (NSW) provides a direct means to obtain the document via a notice to produce for inspection (see r 20.31 of the *Federal Court Rules 2011* (Cth)). Otherwise, a notice to produce to court under *Uniform Civil Procedure Rules* r 34.1 (see *Federal Court Rules* r 30.28) can be issued which is governed by the same principles as a subpoena issued under r 33.2 (see *Federal Court Rules* r 24.12) although the former is not an order of the court: *Xinfeng Australia International Investment Pty Ltd v GR Capital Group Pty Ltd* [2020] NSWSC 620, [34] (Ward CJ in Eq, as her Honour then was); *Suzlon Energy Ltd v Bangad* (2011) 198 FCR 1, [13]–[14] (Rares J). See also *Secretary of the Department of Planning, Industry and Environment v Blacktown City Council* [2021] NSWCA 145 and T Fishburn, "Restoring Legitimacy: The Subpoena to Produce in Civil Litigation" (2021) 10 JCivLP 93.

[7] For the three steps that apply to a subpoena see: *National Employers' Mutual General Insurance Association Ltd v Waind & Hill* [1978] 1 NSWLR 372, 381 (Glass JA, Moffit P and Hutley JA agreeing); *Carbotech-Australia Pty Ltd v Yates* [2008] NSWSC 1151, [10] (Brereton J, as his Honour then was).

APPLICABLE LEGISLATION

Objections to production of, or access to, documents on the basis of legal privilege

In New South Wales r 1.8[8] of the *Uniform Civil Procedure Rules 2005* (NSW) (*UCPR*) and, if applicable, s 133 of the *Evidence Act 1995* (NSW) (*EA*) permit the court to (1) inspect any document to assess a claim of privilege, and (2) require its production to enable such inspection. r 1.9[9] provides a regime for a party to object to production or access being given to documents on the basis of privilege:

> **1.9 Objections to production of documents and answering of questions founded on privilege**
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> …
>
> (3) A person may object to producing a document on the ground that the document is a privileged document or to answering a question on the ground that the answer would disclose privileged information.
>
> (4) A person objecting under subrule (3) may not be compelled to produce the document, or to answer the question, unless and until the objection is overruled.
>
> (4A) If a document is produced, and a person objects to the production of the document on the ground that the document is a privileged document, access to the document must not be granted unless and until the objection is overruled.

Rule 1.9 of the *UCPR* complements the analogous s 131A of the *EA*. Section 131A extends the application of the privileges in Pt 3.10 (other than the provisions of ss 123 and 128) to pre-trial stages of civil and criminal proceedings. It does this by requiring the court to determine any privilege objection under the provisions of Pt 3.10 of the *EA*, but *only* if the objection is made by the person who is to disclose the documents (emphasis added):

> **131A Application of Part to preliminary proceedings of courts**
>
> (1) If –
>
> (a) ***a person*** is required by a disclosure requirement to give information, or to produce a document, which would result in the disclosure of a communication, a document or its contents or other information of a kind referred to in Division 1, 1A, 1C or 3, and
>
> (b) ***the person objects*** to giving that information or providing that document,
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> the court must determine the objection by applying the provisions of this Part (other than sections 123 and 128) with any necessary modifications as if the objection to giving information or producing the document were an objection to the giving or adducing of evidence.

Section 131A of the *EA* applies to production and access orders.[10] Again, for s 131A of the *EA* to be engaged, the objection needs to be raised by the same person producing the documents. If the objection is made by a different person to the disclosing party, the objection is to be determined under common law principles, not the *EA*.[11] Section 131A came into effect on 1 January 2009 in response to ALRC 102[12] and is largely duplicated in the Victorian, ACT and NT Evidence Acts. Section 131A of the *Evidence Act 1995* (Cth) is not in the same form as s 131A of the *EA* and does not provide for the application of Pt 3.10 of the *Evidence Act 1995* to preliminary interlocutory proceedings.[13] This has the consequence that federally such issues are to be determined by reference to common law principles. This is a significant procedural difference that arises between the Federal Court of Australia and the NSW Supreme Court.

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[8] See the equivalent *Federal Court Rules 2011* (Cth) r 20.35(2).

[9] See the equivalent *Federal Court Rules 2011* (Cth) rr 20.02, 20.35. *Uniform Civil Procedure Rules 2005* (NSW) r 33.9(5)–(7) addresses objections to access and the requirement for the objection to be referred for hearing and determination.

[10] *Singtel Optus Pty Ltd v Weston* (2011) 81 NSWLR 526, [24]–[28] (White J, as his Honour then was).

[11] *New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60, [32] (Allsop P, Hodgson JA and Sackville AJA agreeing).

[12] Australian Law Reform Commission (ALRC), *Uniform Evidence Law* (ALRC Report 102, 2006).

[13] For further analysis of other differences between the Evidence Acts see: JD Heydon, "The Non-uniformity of the 'Uniform' Evidence Acts and Their Effect on the General Law" (2013) 2 JCivLP 169.

The distinction between determining privilege under common law or the *EA* can be significant. Sections 118 and 119 of the *EA* apply to both confidential communications and confidential documents (see s 117 of the *EA*), whereas, the common law is only concerned with communications, either oral, written or recorded, and not with documents per se.[14] Accordingly, it has been held that at common law legal professional privilege does not attach to an expert's own documents, prepared 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.[15]

Legal professional privilege/client legal privilege

If s 131A of the *EA* has been triggered by a privilege objection raised by the producing party at the pre-trial stage (again, this does not arise in the Federal Court at the pre-trial stage because the common law instead applies), then ss 117–119 of the *EA* are in play.

Section 118 of the *EA* prohibits the adducing of evidence that would result in the disclosure of a "confidential communication" or "confidential document" made for the dominant purposes of a lawyer providing legal advice to their client. Section 119 of the *EA* prohibits the adducing of evidence that would result in the disclosure of a "confidential communication" or "confidential document" made for the dominant purposes of a client being provided with professional legal services relating to an Australian or overseas proceeding (or anticipated proceeding) in which that client is or might be a party.

In order to determine whether s 118 or 119 of the *EA* are engaged, the court must determine whether the material sought is a "confidential communication" or "confidential document" within the meaning of s 117 of the *EA*:

> **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.

If the communications or documents in question were not created pursuant to an obligation of non-disclosure, one does not need to address whether legal privilege is established under s 118 or 119 of the *EA* as those provisions are not enlivened.

To the extent privilege is to be dealt with under common law, the High Court has now adopted the same test of dominant purpose expressed in ss 118 and 119 of the *EA*, *viz*, whether a communication (or a document recording such a communication) was made for the dominant purpose of a lawyer providing legal advice or legal services.[16] Like what is specified in s 117 of the *EA*, inherent in the application of the common law test[17] (and the former sole purpose test)[18] is that the communication (whether documented or not) is confidential.[19]

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[14] *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 529, 543, 552, 568, 580–581, 585.

[15] *Interchase Corporations Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141, 150–151, 153, 162; *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438, [21].

[16] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

[17] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, [64], [66], [78].

[18] *Grant v Downs* (1976) 135 CLR 674.

[19] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, [1], [2], [35] (Gleeson CJ, Gaudron and Gummow JJ).

Regardless of whether the claim of legal privilege is made under common law or the *EA*, the basis for the claim must be proven by the person claiming privilege.[20] When a court is assessing whether the material in question is subject to privilege it must act upon admissible "focussed and specific evidence",[21] not upon hearsay.[22] Only if privilege is established does the next question arise; whether there has been a waiver of privilege.

Waiver of privilege

If privilege is established by the party claiming it, then the opposing party may seek to establish waiver.[23] When s 131A is engaged, ss 121–126 of the *EA* address loss of client legal privilege. Relevantly, s 122 of the *EA* speaks of the client acting inconsistently with maintaining a privilege objection (emphasis added):

> **Loss of client legal privilege: consent and related matters**
>
> (1) This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.
>
> (2) 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 section 118, 119 or 120.
>
> (3) Without limiting subsection (2), a client or party is taken to have so acted if:
>
> (a) the client or party ***knowingly and voluntarily disclosed the substance of the evidence*** to another person; or
>
> (b) the ***substance of the evidence has been disclosed with the express or implied consent*** of the client or party.
>
> …
>
> (5) A client or party is not taken to have acted in a manner inconsistent with the client or party objecting to the adducing of the evidence merely because:
>
> (a) the substance of the evidence has been disclosed:
>
> (i) in the course of making a confidential communication or preparing a confidential document; or
>
> (ii) as a result of duress or deception; or
>
> (iii) ***under compulsion of law***; or
>
> …

The principles relating to waiver of legal professional privilege at common law apply with equal force in relation to the statutory question posed by s 122(2) of the *EA*.[24] Section 126 of the *EA* provides that an otherwise privileged communication or document may be adduced if it is reasonably necessary to enable a proper understanding of another communication or document:

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

The effect of s 126 is that where there is a waiver (under any of the earlier sections to which it refers) in respect of an otherwise privileged communication or document – for example, under s 122 – the waiver

[20] *Grant v Downs* (1976) 135 CLR 674, 689.

[21] *Barnes v Commissioner of Taxation* (2007) 242 ALR 601, [18] (Tamberlin, Stone and Siopsis JJ).

[22] *Cmr of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, [21]. See also *Hancock v Rinehart* [2016] NSWSC 12, [7] (Brereton J, as his Honour then was) and *BWO19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (2020) 283 FCR 299, [61] (Rangiah, SC Derrington and Abraham JJ).

[23] *New South Wales v Betfair* (2009) 180 FCR 543, [54] (Kenny, Stone and Middleton JJ).

[24] *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303, 316 [31]–[32].

extends to such associated documents as are reasonably necessary to enable a proper understanding of that communication or document.[25]

Sections 122 and 126 of the *EA* largely capture the common law concepts of express waiver,[26] implied waiver,[27] issue waiver[28] and partial disclosure/derivative waiver[29] all of which are concerned with whether the party claiming privilege has acted inconsistently with such a claim. As the High Court said in *Mann v Carnell*:[30]

> 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.

With the above statutory and common law framework in mind, the applicable case law concerning the effect service has on privilege and waiver for expert reports and lay evidence can be assessed.

No Waiver When Documents Served Pursuant to Court Order

Several intermediate appellant decisions have shaped the case law concerning access to material after expert reports and lay evidence have been served. The patchwork of cases in this area must be read closely given that the dominant purpose test (for establishing privilege) and the former unfairness and current inconsistency tests (for establishing waiver) are all fact specific and informed by the nature of the case and the stage of the proceeding.

A useful starting point is the NSW Court of Appeal decision of *Akins v Abigroup Ltd* (*Akins*).[31] In *Akins*, lay and expert statements were served in initial proceedings pursuant to court case management orders.[32] In subsequent related proceedings those statements were to be discovered, but legal professional privilege was claimed. In determining whether the statements should be disclosed, the Court of Appeal[33] refused leave to the appellant to argue whether the statements were subject to legal professional privilege because privilege had been conceded before the primary judge.[34] The Court of Appeal accordingly proceeded straight to the question of waiver.

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[25] See *Towney v Minister for Land & Water Conservation (NSW)* (1997) 76 FCR 401 (Sackville J) and *Sugden v Sugden* (2007) 70 NSWLR 301, [92]–[96] (McDougall J, Mason P and Ipp JA agreeing).

[26] See, eg, *Goldberg v Ng* (1994) 33 NSWLR 639, 670 (Clarke JA).

[27] See, eg, *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303, [31]–[32]; *Mann v Carnell* (1999) 201 CLR 1, [28]–[29]; *GR Capital Group Pty Ltd v Xinfeng Australia International Investment Pty Ltd* [2020] NSWCA 266, [57]. For a summary of the policy considerations informing implied waiver see H Stowe, "Expert Reports and Waiver of Privilege", *Bar News* (Summer 2006/2007) 72.

[28] See, eg, *Council of the New South Wales Bar Association v Archer* (2008) 72 NSWLR 236, [48], [72]; *Pomare v Hogan (No 2)* [2019] NSWSC 496, [48]. See also M Legg, "Case Note: A Recent Development in the Law of Issue Waiver: Poland v Hedley (No 4) [2022] WASC 144" (2022) 10 JCivLP 199.

[29] Sometimes referred to as "associated material waiver": see Stowe, n 27, 71. See, eg, *Towney v Minister for Land & Water Conservation (NSW)* (1997) 76 FCR 401, 412, 413–414; *Bennett v Chief Executive Officer of the Australian Customs Service* (2004) 140 FCR 101, [58], [65]; *Sugden v Sugden* (2007) 70 NSWLR 301, [92]–[96]; *Fenwick v Wambo Coal Pty Ltd (No 2)* [2011] NSWSC 353, [12]–[23]; *Federal Treasury Enterprise (FKP) Sojuzplodoimport v Spirits International BV (No 6)* (2019) 369 ALR 267, [25].

[30] *Mann v Carnell* (1999) 201 CLR 1, [29] (Gleeson CJ, Gaudron, Gummow and Callinan JJ). See also *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 127 FCR 499, [58] (Allsop J), which was adopted in *Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341, [61] (Kenny, Stone and Edmonds JJ).

[31] *Akins v Abigroup Ltd* (1998) 43 NSWLR 539.

[32] This article does not consider the separate but equally important issue of whether or not a *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 (*Harman*) undertaking applies to the material in question where it is from earlier proceedings: see *Unicomb v Blais* [2024] NSWSC 903 where McGrath J, applying *Hearne v Street* (2008) 235 CLR 125, [96], considered the application of the *Harman* undertaking to affidavits and witnesses statements from earlier proceedings.

[33] Mason P, Priestley JA and Rolfe AJA agreeing.

[34] *Akins v Abigroup Ltd* (1998) 43 NSWLR 539, 542E-F, 544G-545A-B.

Akins was decided before s 131A of the *EA* was introduced in 2009 and so should have been resolved based on common law principles. However, the Court of Appeal said that the *EA* applied derivatively to ancillary processes involving the pre-trial gathering of evidence;[35] a position later disapproved in *Esso Australia Resources Ltd v Federal Commissioner of Taxation*.[36] On this basis it was concluded that there had been no waiver of privilege in either proceeding as the statements had been disclosed in the initial proceeding under compulsion of law (pursuant to the case management orders) so that any privilege which attached to them was not lost – this result coming about because of the then s 122(2)(c) of the *EA*:

> [T]his Division does not prevent the adducing of evidence if a client or party has knowingly and voluntarily disclosed to another person the substance of the evidence and the disclosure was not made:
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> …
>
> (c) under compulsion of law.

President Mason's reasoning was largely premised on then Practice Note No 39 which governed proceedings in the Commercial Division of the Supreme Court of NSW. The Practice Note provided that the Court would enforce compliance with its orders "with all appropriate sanctions". His Honour explained that it did not matter whether the order of the Court to serve the material was procedural in nature.[37] President Mason then said in *obiter* that the same result would have arisen if determined pursuant to common law principles:[38]

> **The position at common law:**
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> My reasoning makes it unnecessary to decide the case on common law principles. Were it necessary to do so, I would have held (as Bainton J did below) that no waiver of privilege occurred of such nature or extent as to preclude its invocation by Abigroup against Deloittes in the current proceedings: see *Smoothdale; Prudential Assurance* (at 774); *Goldberg v Ng* (1994) 33 NSWLR 639; affirmed (1995) 185 CLR 83; *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275.

Putting to one side the fact that *Akins* was incorrectly decided under the *EA*, the limited *obiter* reasoning given by Mason P is premised on the decisions of *Smoothdale v State Bank of South Australia (No 2) Ltd* (*Smoothdale*), *Goldberg v Ng* and *Network Ten Ltd v Capital Television Holdings Ltd*.[39]

The High Court in *Goldberg v Ng* confirmed that limited disclosure of privileged material is possible and waiver will not be readily imputed unless the disclosure has led to an unfair advantage to an opponent (applying the fairness test then in place that has since been replaced by the inconsistency test[40]). The facts of that case are not analogous to *Akins* as it concerned a solicitor who disclosed privileged documents between him and *his* solicitor to the NSW Law Society to address enquiries arising from a complaint made by a client. None of the material had been served in proceedings.

The facts in *Network Ten Ltd v Capital Television Holdings Ltd* are also not analogous to *Akins*. It is a first instance decision where Giles J[41] applied the Court of Appeal's decision in *Goldberg v Ng* to hold that the sharing of a confidential letter of advice by a defendant company with two third parties who undertook to keep the letter confidential amounted to no more than a limited waiver or, alternatively, there was no imputed waiver because there was no act that made it unfair to maintain privilege.[42]

In *Smoothdale*, seven witness statements brought into existence for the purpose of litigation in separate Supreme Court of NSW proceedings were sought to be produced in South Australian proceedings. The respondent, who had been a party to the NSW proceedings, claimed legal professional privilege in respect

[35] *Akins v Abigroup Ltd* (1998) 43 NSWLR 539, 546.

[36] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

[37] *Akins v Abigroup Ltd* (1998) 43 NSWLR 539, 552.

[38] *Akins v Abigroup Ltd* (1998) 43 NSWLR 539, 552–553.

[39] *Smoothdale v State Bank of South Australia (No 2) Ltd* (1995) 64 SASR 224; *Goldberg v Ng* (1995) 185 CLR 83 and *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275.

[40] *Mann v Carnell* (1999) 201 CLR 1, [29] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

[41] As his Honour then was.

[42] *Goldberg v Ng* (1994) 33 NSWLR 639, 286.

of the statements and the issue on appeal was whether the documents were protected from production by legal professional privilege. The statements were prepared by a subsidiary of the respondent in the NSW proceedings, not the respondent. The statements were served pursuant to a court order made under the then Practice Note No 58 that governed the Construction List and Commercial Division of the Supreme Court of NSW. Like in *Akins*, it had been conceded at first instance that the statements were subject to legal professional privilege, a concession that the appellant was not permitted to resile from on appeal to the Supreme Court of South Australia Full Court.[43] In *obiter*, Chief Justice King (Mullighan and Nyland JJ agreeing) was of the view that the statements were privileged, reasoning that they were confidential documents served for a limited purpose pursuant to a court order that does deprive them of their confidential character.[44]

Having assumed that privilege was established (and reaching that same conclusion in *obiter*), King CJ proceeded to the question of waiver. The Chief Justice held that the service of the statements only amounted to a limited purpose waiver – being waiver for the limited purpose of serving the statements pursuant to the Practice Note:[45]

> The delivery of statements pursuant to the order of the court is for the limited purpose contemplated by the Practice Note namely "the just, quick and cheap disposal of the proceedings". The object is to provide advance notice to the other parties of the evidence which the witnesses are expected to give and thereby to facilitate the hearing perhaps even to the point of the use of the statements as evidence in chief.
>
> …
>
> I can find nothing in the circumstances to indicate a use of the statements which is incompatible with the retention of confidentiality except to the extent that confidentiality must be modified to achieve the purpose of the Court Order namely to acquaint the other parties in advance with the evidence which the witnesses were expected to give. There was therefore no intentional waiver of privilege except to the extent of permitting use of the documents by the other parties for the purpose of preparing the case.

In addition to applying *Goldberg v Ng* and the *Harman* undertaking that arose in the Supreme Court of NSW proceedings, King CJ concluded that there was no waiver having regard to the former waiver test premised on unfairness:[46]

> I can see no unfairness to the appellant in the maintenance by the respondent of its privilege in the statements. Their disclosure to other parties in other proceedings is quite fortuitous as regards the appellant. If there is a question of fairness, it might be thought that the forced disclosure of the respondent's statements while the appellant retains privilege with respect to its statements would not be without some element of unfairness to the respondent.

When reading *Akins* and *Smoothdale*, it becomes apparent that there are a number of reasons why they should not be followed today. *First*, *Smoothdale* and *Akins* both assumed that the material was privileged. *Second*, *Akins* is premised on the incorrect application of the *EA* when the common law should have applied. *Third*, both decisions apply the former test of unfairness for establishing waiver, making them distinguishable from contemporary litigation that applies the inconsistency test (which permits the court to be informed by considerations of fairness).[47] *Fourth*, the common law reasoning in *Smoothdale* and the assumption in *Akins* that the material is privileged is unconvincing and difficult to rationalise when one attempts to apply the dominant purpose test for establishing privilege: the very purpose (or dominant purpose) of serving expert reports or evidentiary statements in a proceeding is not

[43] *Smoothdale v State Bank of South Australia (No 2) Ltd* (1995) 64 SASR 224, 226.

[44] *Smoothdale v State Bank of South Australia (No 2) Ltd* (1995) 64 SASR 224, 226–227.

[45] Referring to *British Coal Corporation v Dennis Rye Ltd (No 2)* [1988] 1 WLR 1113; [1988] 3 All ER 816; *Goldman v Hesper* [1988] 1 WLR 1238; [1988] 3 All ER 97 and *Goldberg v Ng* (1994) 33 NSWLR 639. With respect to limited purpose waiver see also: *Goldberg v Ng* (1995) 185 CLR 83 and *Spotless Group Ltd v Premier Building & Consulting Pty Ltd* (2006) 16 VR 1.

[46] *Smoothdale v State Bank of South Australia (No 2) Ltd* (1995) 64 SASR 224, 231. See *Attorney-General (NT) v Maurice* (1986) 161 CLR 475. The unfairness test has been overtaken by the inconsistency test stated in *Mann v Carnell* (1999) 201 CLR 1, [29] (per Gleeson CJ, Gaudron, Gummow and Callinan JJ).

[47] *Mann v Carnell* (1999) 201 CLR 1, [34]. For a useful analysis of the difficulties with applying the inconsistency test, see A Terzic, "Implied Waiver of Legal Professional Privilege: A Search for Consistency" (2018) 45 *Australian Bar Review* 287.

to keep them confidential, but rather to tell the court and parties the facts the experts or deponents seek to establish. *Fifth*, each decision was decided (and premised on cases decided) before (1) *Aon Risk Services Australia Ltd v Australian National University* (*Aon Risk*),[48] (2) the "cards on the table" approach to litigation and (3) the enactment of ss 56–60 of the *CPA* and ss 37M–37P of the *FCA* codifying the modern case management approaches of "just, quick and cheap"[49] and to resolve disputes "as quickly, inexpensively and efficiently as possible".[50] *Sixth*, a distinguishing feature of *Smoothdale* and *Akins*[51] is that the documents sought were from separate proceedings and thus a rationale for not implying waiver was based on the premise that filing and service in the earlier proceeding had in no sense entailed consent to use the materials in other proceedings such as to waive the applicable privilege. This was the conclusion reached by Barret J[52] in *Austress Freyssinet Pty Ltd v Marlin International Pty Ltd* who distinguished *Akins* and *Smoothdale* and was satisfied that the principles stated in those decisions do not apply where the affidavits or witness statements (his Honour was not dealing with expert reports[53]) sought are served by one's opponent in the same proceedings.[54] His Honour was of the view that the purpose of such evidence is to inform the recipient of the evidence the serving party intends to lead, which cannot carry with it any restrictions upon the recipient's use of the material, save that it must be used for the proper purposes of the particular proceedings.

Akins was followed by the Full Federal Court in *Bell Group Ltd (in liq) v Westpac Banking Corporation*[55] (the Full Federal Court applied the *EA* derivatively as occurred in *Akins*) and the NSW Court of Appeal in *Dubbo City Council v Barrett* (*Dubbo City Council*)[56] (where the *EA* was applied by reason of the then Supreme Court Rules 1970 requiring derivative application of the *EA*). In both of those subsequent decisions, privilege was assumed and the only question addressed was waiver.

Shortly after deciding *Akins*, the NSW Court of Appeal delivered its decision in *Sevic v Roarty* (*Sevic*).[57] *Sevic* concerned an expert report served pursuant to a court order. The report stated: "I have received your letter of 9 September last and the documents concerning this claim in a well indexed folder".[58] Prior to the hearing (and thus before the report was tendered), the appellant sought production of all instructing letters and materials furnished to the expert for the purposes of his report. Like in *Akins* and *Smoothdale*, in *Sevic*, it had been common ground before the Master, accepted by McInerney J, and not challenged before the Court of Appeal, that legal privilege applied to the expert report that had been served.[59]

Sevic contains three separate judgments with different reasoning and thus its authoritative weight is questionable. Sheller JA concluded that there had been no waiver by reason of service being pursuant to compulsion of law per s 122(2)(c) of the *EA* (as it then was), applying the *EA* derivatively as occurred in *Akins*.[60] Again, derivative application of the *Evidence Acts* through the common law was later

[48] *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

[49] *Civil Procedure Act 2005* (NSW) s 56(1).

[50] *Federal Court of Australia Act 1976* (Cth) s 37M(1)(b). See *Glover v Australian Ultra Concrete Floors* [2003] NSWCA 80, [60]; *Gillies v Downer EDI Ltd* [2010] NSWSC 1323, [46] and *Moubarak by his tutor Coorey v Holt (No 2)* (2001) 53 NSWLR 116, [26].

[51] This is also the central issue in *Nilsen Industrial Electronics Pty Ltd v National Semiconductor Corporation* (1994) 48 FCR 337.

[52] As his Honour then was.

[53] His Honour did not consider *Sevic v Roarty* (1998) 44 NSWLR 287.

[54] *Austress Freyssinet Pty Ltd v Marlin International Pty Ltd* [2002] NSWSC 958, [8]–[11]. His Honour also distinguished *Nilsen Industrial Electronics Pty Ltd v National Semiconductor Corporation* (1994) 48 FCR 337.

[55] *Bell Group Ltd (in liq) v Westpac Banking Corporation* (1998) 86 FCR 215; [1998] FCA 849.

[56] *Dubbo City Council v Barrett* [2003] NSWCA 267, [16].

[57] *Sevic v Roarty* (1998) 44 NSWLR 287.

[58] *Sevic v Roarty* (1998) 44 NSWLR 287, 289.

[59] *Sevic v Roarty* (1998) 44 NSWLR 287, 290C-D, 291E-F, 293E-G, 301A-B.

[60] The *Evidence Act 1995* (Cth) was also applied derivatively in a similar case of *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360.

disapproved by the High Court.[61] His Honour applied *Akins* and *Adelaide Steamship Co Ltd v Spalvins*[62] (a Full Federal Court decision that applied the *Evidence Act 1995* derivatively) to conclude that service occurred under compulsion of law and thus there was no waiver of privilege over the report or any underlying documents.

Interestingly, Sheller JA said that if the matter were decided at common law, waiver of privilege would not be premised on the expert report being served under compulsion of law.[63] Powell JA in *Sevic* said, in contrast to Sheller JA, that the common law applied and that there had been no waiver because the expert report was served under compulsion of law.[64]

Powell JA did not refer to *Smoothdale* in his reasoning. Instead, his Honour referred to a number of United Kingdom and Australian decisions where privilege was held to be maintained despite disclosure of the privileged material under compulsion. None of the decisions referred to by Powell JA are analogous and instead concern either production to police under an obligation to assist with an investigation where it would be contrary to public policy to imply waiver[65] or production in compliance with a direction by a taxing officer for a costs claim where statute required production.[66] His Honour also referred to *Woollahra Municipal Council v Westpac Banking Corporation* where Giles J[67] held that there is no implied waiver of a claim for legal professional privilege over documents where they are produced to a third party under the threat of compulsion, or an attempt at compulsion, and the person claiming privilege did not use the material in such a way as to make it unfair to maintain the privilege – invoking the former unfairness test.[68] Ultimately, the unfairness test drove the conclusion reached by Powell JA that there had been no waiver.[69]

Fitzgerald AJA also applied the then common law test of unfairness. His Honour was of the view that the expert report was inadmissible in any event such that there was no unfairness by the appellant being denied access to all instructing letters and materials furnished to the expert for the purposes of his report.[70]

To the extent that any principle of authority can be drawn from *Sevic*, none of the separate judgments appear to overcome the shortcomings already identified above that also apply to *Akins* and *Smoothdale*. Privilege is assumed in each judgment; cases are authority only for what they decide, not what they assume.[71] Sheller JA's judgment is premised on an incorrect application of the former *EA*. Powell JA and Fitzgerald AJA applied the former unfairness test concerning waiver without referring to any analogous authority that explains how the decision to serve evidence in response to case management orders does not waive privilege over that evidence. None of the judgments grapple with the fact that case management orders do not dictate what the contents of the evidence is or that it is being disclosed to the opposing party, a position that would seem antithetical and inconsistent with maintaining confidentiality over it and any underlying material that influenced its contents or is referred to.

The implication of *Akins*, *Smoothdale* and *Sevic* (and the cases that have followed them) is that where a party serves expert or lay evidence pursuant to a court order, service does not waive any claim of privilege at common law or under the *EA* that may apply to those documents – and, based on *Sevic*, the underlying

[61] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

[62] *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360.

[63] *Sevic v Roarty* (1998) 44 NSWLR 287, 295–296.

[64] *Sevic v Roarty* (1998) 44 NSWLR 287, 301.

[65] *British Coal Corporation v Dennis Rye Ltd (No 2)* [1988] 1 WLR 1113; [1988] 3 All ER 816.

[66] *Hobbs v Hobbs & Cousens* [1960] P 112; *Pamplin v Express Newspapers Ltd* [1985] 1 WLR 689; [1985] 2 All ER 185; *Goldman v Hesper* [1988] 1 WLR 1238; [1988] 3 All ER 97.

[67] As his Honour then was. *Woollahra Municipal Council v Westpac Banking Corporation* (1994) 33 NSWLR 529.

[68] See *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475.

[69] *Sevic v Roarty* (1998) 44 NSWLR 287, 308.

[70] *Sevic v Roarty* (1998) 44 NSWLR 287, 309.

[71] *Markisic v Commonwealth* (2007) 69 NSWLR 737, 748, [56].

documents – until the evidence is tendered or read at final hearing. This leaves the opposing party in the dark about documentation that would touch on relevant evidence until the parties are at the final hearing. Once the expert or lay evidence is tendered or read, an interlocutory application during the hearing will be necessary to gain access to the material over which privilege no longer attaches. In the ordinary course such an application will be necessary before cross-examination, resulting in adjournments, delay and interference with the smooth running of the trial.

Any court that is asked to apply *Akins*, *Smoothdale* or *Sevic* today must grapple with how they may impede a party's ability to prepare their case and potentially waste time and costs. This should lead to a consideration of how *Akins*, *Smoothdale* and *Sevic* are antithetical to modern case management principles.

RECONCILING AKINS, SMOOTHDALE AND SEVIC WITH MODERN CASE MANAGEMENT PRINCIPLES

It has been over 20 years since Heydon JA (as he then was) said:[72]

> the conduct of litigation as if it were a card game in which opponents never see some of each other's cards until the last moment is out of line with modern trends.

Akins, *Smoothdale* and *Sevic* predate *Aon Risk* and are products of the former practice of "trial by ambush". This practice has been replaced by the "cards on the table" approach to litigation, requiring disclosure before trial, as cemented with the enactment of ss 56–60 of the *CPA* and ss 37M–37P of the *FCA*.[73] Despite the procedural differences that arise with pre-trial privilege determinations in the Federal Court and the NSW Supreme Court, both courts closely adhere to these modern case management principles. This provides a unifying basis for *Akins*, *Smoothdale* and *Sevic* to not be followed today.

For many practitioners, the correct approach in 2024 (both in the NSW Supreme Court and the Federal Court) is that regardless of whether an expert report or lay statement is served pursuant to case management orders or otherwise, the underlying material – to the extent it influenced the expert report or is disclosable as a result of what has been served – should be produced in advance of the hearing. This is to facilitate trial preparation and avoid the need to make an application for production in the middle of the hearing when the report or statement is tendered or read.[74] This approach is logical for a number of reasons, including because it:

(1) affords procedural fairness;
(2) encourages settlement discussions by reducing the information asymmetry between the parties;
(3) enables other experts to respond to reports served and understand the basis for the opinions they are responding to;
(4) enables lay witnesses to respond to evidence served;
(5) is needed so that all experts are referring to the same material, otherwise the utility of any conclaves is compromised; and
(6) avoids hearings being delayed and/or adjourned because material relied upon by the expert or referred to by a lay witness has been disclosed in the middle of the hearing and taken a party by surprise and/or undermined cross-examination.

The above approach equates with the view that the common law is now subject to ss 56–60 of the *CPA*,[75] ss 37M–37P of the *FCA* and the *EA* is to be read with regard to those provisions. Such differences are likely to indicate that *Akins*, *Smoothdale* and *Sevic* should be distinguishable and wrong if sought

[72] *Nowlan v Marson Transport Pty Ltd* (2001) 53 NSWLR 116, [26].

[73] *Glover v Australian Ultra Concrete Floors* [2003] NSWCA 80, [60]; *Gillies v Downer EDI Ltd* [2010] NSWSC 1323, [46] and *Moubarak by his tutor Coorey v Holt (No 2)* (2001) 53 NSWLR 116, [26].

[74] See also, eg, *Uniform Civil Procedure Rules 2005* (NSW) r 31.4(5).

[75] For a useful analysis and comparison of the case management legislation in Victoria and New South Wales see S Willis, "Should Uniform Civil Case Management Principles Overarch or Override? Comparing Victorian and New South Wales Active Case Management after a Decade of the Civil Procedure Act 2010 (Vic)" (2021) 10 JCivLP 55 and C Byrne, "Changing the Culture of Litigation in Victoria: Ten Years of the Civil Procedure Act 2010 (Vic)" (2021) 10 JCivLP 31.

to be applied in 2024. Nonetheless, the correctness of these decisions by reference to modern case management principles has not been squarely addressed and signifies a tension that has long been recognised.[76] President Ward recently suggested that an appropriate case was necessary for these cases to be considered.[77]

Akins and *Sevic* were recently applied in two Supreme Court of NSW decisions, indicating their continued influence at least on first instance decisions in New South Wales. The first case saw Harrison AsJ in *Foxall v Carter (No 2)*[78] apply the *EA* to the question of waiver and to conclude that service of an expert report pursuant to case management orders is not inconsistent with the maintenance of privilege applying to that report and underlying material s 122(5)(a)(iii) of the *EA*.[79] Her Honour said the same conclusion would arise if the common law was applied, citing *Akins*, *Sevic* and *Waugh Asset Management Pty Ltd v Lynch*[80] relied upon Powell JA's judgment in *Sevic* to conclude that there was no waiver of privilege for underlying material sought, although his Honour did not address the fact that Powell JA applied the unfairness test as opposed to the inconsistency test). The second case was *Rickhuss v Cosmetic Institute Pty Ltd (No 4)*[81] where Garling J said at [231] that he was bound by *Sevic* such that at common law service of an expert report did not waive privilege to the underlying documents provided to and relied upon by the expert.[82]

In contrast, in *Ghorbanzadeh v Western Sydney Local Health District*[83] Elkaim AJ ruled that a document created by an expert, while preparing his served report, was not a privileged communication at common law and thus no privilege applied to it and the underlying notes used during a call between the solicitor and the expert. No question arose as to whether the expert report was served pursuant to a court order, *Akins* and *Sevic* were not addressed by his Honour and waiver was only decided in *obiter* by reference to *Australian Securities and Investments Commission v Southcorp Ltd* (*Southcorp*)[84] where Lindgren J said at [21]:

> I will apply the following principles which I did not understand to be in dispute:
>
> 1. Ordinarily the confidential briefing or instructing by a prospective litigant's lawyers of an expert to provide a report of his or her opinion to be used in the anticipated litigation attracts client legal privilege: *cf Wheeler v Le Marchant* (1881) 17 ChD 675; *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 246; *Interchase Corp Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141 ("Interchase") at 151 per Pincus JA, at 160 per Thomas J.
> 2. Copies of documents, whether the originals are privileged or not, where the copies were made for the purpose of forming part of confidential communications between the client's lawyers and the expert witness, ordinarily attract the privilege: *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 ("Propend"); Interchase, per Pincus JA; *Spassked Pty Ltd v Commissioner of Taxation (No 4)* (2002) 50 ATR 70 at [17].

[76] *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, [35].

[77] *Sader v Elgammal* [2024] NSWCA 20, [102]–[103].

[78] *Foxall v Carter (No 2)* [2023] NSWSC 872.

[79] Her Honour cited *Akins v Abigroup Ltd* (1998) 43 NSWLR 539, 551; *Sevic v Roarty* (1998) 44 NSWLR 287; *The Bell Group Ltd v Westpac Banking Corporation* (1998) 86 FCR 215, 224 (Foster, Lee and Nicholson JJ) (addressed above); *Ingot Capital v Macquarie Equity* [2008] NSWSC 25, [32] (where Campbell JA referred to *Akins v Abigroup Ltd* (1998) 43 NSWLR 539and *Dubbo City Council v Barrett* [2003] NSWCA 267); *Australian Institute of Fitness Pty Ltd v Australian Institute of Fitness (Vic/Tas) Pty Ltd (No 2)* [2015] NSWSC 994 [36]–[39], [43] (where Sackar J in obiter at [43] accepted he was bound by *Akins v Abigroup Ltd* (1998) 43 NSWLR 539).

[80] *Waugh Asset Management Pty Ltd v Lynch* [2010] NSWSC 197, [14]–[17] (McDougall J).

[81] *Rickhuss v Cosmetic Institute Pty Ltd (No 4)* [2023] NSWSC 666.

[82] The judgment does not address in detail the correctness of *Sevic v Roarty* (1998) 44 NSWLR 287 or the separate judgments. The authors appeared for the seventh to sixteenth defendants in that case.

[83] *Ghorbanzadeh v Western Sydney Local Health District* [2023] NSWSC 1330.

[84] *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438.

3. Documents generated unilaterally by the expert witness, such as working notes, field notes, and the witness's own drafts of his or her report, do not attract privilege because they are not in the nature of, and would not expose, communications: cf Interchase at 161-162 per Thomas J.
4. Ordinarily disclosure of the expert's report for the purpose of reliance on it in the litigation will result in an implied waiver of the privilege in respect of the brief or instructions or documents referred to in (1) and (2) above, at least if the appropriate inference to be drawn is that they were used in a way that could be said to influence the content of the report, because, in 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) 161 CLR 475 at 481 per Gibbs CJ, 487-488 per Mason and Brennan JJ, 492-493 per Deane J, 497-498 per Dawson J; *Goldberg v Ng* (1995) 185 CLR 83 at 98 per Deane, Dawson and Gaudron JJ, 109 per Toohey J; *Instant Colour Pty Ltd v Canon Australia Pty Ltd* [1995] FCA 870; *Australian Competition and Consumer Commission v Lux Pty Ltd* [2003] FCA 89 ("ACCC v Lux") at [46].
5. Similarly, privilege cannot be maintained in respect of documents used by an expert to form an opinion or write a report, regardless of how the expert came by the documents; Interchase at 148-150 per Pincus JA, at 161 per Thomas J.
6. It may be difficult to establish at an early stage whether documents which were before an expert witness influenced the content of his or her report, in the absence of any reference to them in the report; *cf Dingwall v Commonwealth of Australia* (1992) 39 FCR 521; *Tirango Nominees Pty Ltd v Dairy Vale Foods Ltd (No 2)* (1998) 83 FCR 397 at 400; *ACCC v Lux* at [46].

Southcorp provides a helpful summary with respect to expert reports and gaining access to underlying material, although the following points should be noted:[85]

(1) the decision was concerned with application of the common law rather than the *Uniform Evidence Acts*;
(2) the references to unfairness are now superseded by the inconsistency test for waiver;
(3) it makes no mention of *Smoothdale*, *Akins* or *Sevic* and appears to assume that once an expert report is served, an implied waiver of privilege occurs in respect of any documents said to influence the content of the report;
(4) subsequent authority confirms that at common law letters of instruction will not be waived if there is no basis for the inference that the instructions influenced the content of the report;[86]
(5) there remains some conflict in subsequent decisions as to whether communications between a lawyer and expert will be waived upon service of the report and again, it likely depends upon whether the communication influenced the report;[87] and
(6) depending upon the jurisdiction, all instructing material and communications with the expert may have to be disclosed under the applicable rules or expert code of conduct in any event.[88]

The subsequent case law that refers to *Southcorp* does not identify whether the expert reports or lay statements in question were served under compulsion of law, with most of those cases therefore not referring to *Smoothdale*, *Akins*, *Sevic* or s 122(5)(a)(iii) of the *EA*.[89] It is therefore apt to now consider the few cases that have attempted to tackle, and provide potential solutions to, these authorities so as to produce a result that aligns with modern case management principles.

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[85] For a closer consideration of these statements of principle see Stowe, n 27, 73; T Kearney, "The Unresolved Problem of Expert Evidence" (2018) 92 ALJ 127, 140–144. For a summary of the common law prior to *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438, see P Mendelow, "Expert Evidence: Legal Professional Privilege and Experts' Reports" (2001) 75 ALJ 258.

[86] For example, see *Tirango Nominees v Dairy Vale Foods Ltd [No 2]* (1998) 83 FCR 397; *Collins Debden Pty Ltd v Cumberland Stationery Co Pty Ltd* [2005] FCA 1194, [9]; *Kentish Council v Bellenjuc Pty Ltd* (2011) 21 Tas R 189, [31], [52]; *Fairhead v West Australian Newspapers Ltd [No 2]* [2015] WASC 368, [10]ff.

[87] *Temwell Pty ltd v DKGR Holdings Pty ltd (in liq) (No 7)* [2003] FCA 985, [6]; *Brown v Forestry Tasmania (No 3)* [2006] FCA 469, [27]–[28] and *Matthews v SPI Electricity Pty Ltd (No 8)* [2013] VSC 628, [49], [55] to *Interchase Corporations Ltd (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141, 162; *Greenhill Nominees Pty Ltd v Aircraft Technicians of Australia Pty Ltd* [2001] QSC 7, [11].

[88] See, eg, *Federal Court Rules 2011* (Cth) r 23.13 and Expert Evidence Practice Note (GPN-EXPT), 5.2.

[89] The primary instances where both streams of authority have been referred to are: *Mackinnon v BHP Steel (AIS) Pty Ltd* [2004] NSWSC 1027 (*ex temp* judgment holding that waiver does not arise until expert gives evidence); *R v Ronen* [2004] NSWSC 1305

Solutions for Gaining Access to Lay Evidence and Underlying Privileged Material Once the Lay Evidence Is Served

Three cases have distinguished *Smoothdale*, *Akins* and *Sevic* where lay evidence were served pursuant to court order.

The first case is the Full Federal Court decision of *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (*Liberty Funding*)[90] where an affidavit from a prior proceeding that was ordered to be filed and served was sought in subsequent proceedings. The Full Court held, at common law, that once the affidavit was served in a proceeding it was no longer confidential, which was necessary for the maintenance of legal professional privilege. That is, any privilege that existed in the affidavit was waived upon its service:[91]

> The essence of waiver is not general fairness – it is the inconsistency of the posited act with the confidentiality protected by the privilege (in which analysis fairness may play a part): *Mann v Carnell* at [29] and [34]. Here, whatever confidentiality had existed was destroyed by the service of the Jeffery affidavit. The Jeffery affidavit was given to the applicants so that they would place immediate reliance upon it, including for the purpose of the mediation.

The Full Court felt it was unnecessary to analyse *Smoothdale*, *Akins* and *Sevic* in detail, but did say in *obiter* that "there is a real issue as to the correctness of those decisions, at least in so far as they deal with the question of waiver at common law by service of statements (or affidavits) of witnesses in advance of the trial".[92] In particular, the Full Court was critical of the reliance *Smoothdale* and *Akins* place (which *Sevic* is therefore impliedly premised) on the *Harman* undertaking to invoke the so-called "limited waiver" concept.[93]

The second case is the Full Federal Court[94] decision of *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* (*Schweppes*).[95] In that case, the appellant had served in an earlier proceeding a large number of finalised proofs of evidence over which legal professional privilege was claimed in the subsequent proceeding. The primary judge ruled that the proofs were not privileged. On appeal, the Full Federal Court identified that although the facts in *Akins* and *Sevic* were analogous, privilege *had not* been challenged in those cases such that the Court of Appeal had only addressed the subsequent question of waiver.[96] With respect to the ancillary question of legal professional privilege at common law, the Full Federal Court said that an essential ingredient was confidentiality and non-disclosure to one's opponent.[97] This had the consequence that litigation privilege could not attach to the finalised proofs of evidence as they were created for the dominant purpose of serving them on the party's opponent as opposed to keeping them confidential from that opponent.[98] The Full Court also made an

(where *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438 and *Sevic v Roarty* (1998) 44 NSWLR 287 were relied upon for the proposition that privileged material sent to an expert witness but is not relied upon as a basis for the expert's opinion remains privileged); *Watkins v State of Queensland* [2008] 1 Qd R 564; *Kentish Council v Bellenjuc Pty Ltd* (2011) 21 Tas R 189 (where *Sevic v Roarty* (1998) 44 NSWLR 287 was relied upon to conclude at common law that service of privileged material in compliance with the rules was under compulsion and therefore did not amount to waiver); *Westgem Investments Pty Ltd in its own right trustee for Hossean Pourzand and Jenny Maria Pourzand Atf the Helen Trust v Commonwealth Bank of Australia* [2018] WASC 71 (where compulsion of law did not arise as an issue).

[90] *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283.

[91] *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283, [22], [23].

[92] *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283, [24].

[93] *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283, [26].

[94] Mansfield, Kenny and Middleton JJ.

[95] *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* (2009) 174 FCR 547.

[96] *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* (2009) 174 FCR 547, [70].

[97] *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* (2009) 174 FCR 547, [37] and see also [42] and [54].

[98] In *Helicopter Aerial Surveys Pty Ltd v Robertson* [2015] NSWSC 2104, [37] and [42] Brereton J commented on the voluntary nature of affidavits and expressed the view that – in contrast to a witness statement – once an affidavit (other than one concerning ordered discovery) is sworn it is no longer confidential or privileged.

effort to clarify that there is no element of compulsion in serving a witness statement pursuant to court orders:[99]

> While a party's ability to lead oral evidence at the trial is conditioned on notice of that evidence being provided in the form of a proof of evidence, the party is not compelled to disclose any particular information, document, or possible item of evidence. The party has the absolute discretion to decide what, if any, evidence is to be adduced on that party's behalf. Until that decision is made proofs of potential witnesses, or other documents assembled for the purposes of the litigation, remain privileged from production. Any party may keep such information or documentary material to itself. It may decide not to call a particular witness, even though it has a final proof of that possible witness' statement. These are the same options a party has at a trial without the direction being given of advance proofs of evidence.

The Full Federal Court held that to the extent the facts of *Smoothdale* were applicable and King CJ's *obiter* conclusion concerning privilege had to be addressed, the decision was incorrect.[100] The Full Federal Court was also not persuaded by King CJ's reliance in *Smoothdale* on authorities concerned with the *Harman* undertaking to infer privilege:[101]

> [76] The Harman principle seems to us to be the principle to apply in the case of disclosure to an opponent pursuant to a rule of court, or court direction, not by recourse to principles of litigation privilege. If the principles are as we have stated them, then the argument that the finalised proofs of evidence did not attract legal professional privilege is to be readily accepted. While clearly created for the purposes of existing litigation, they were created to be served upon Visy, the opponent in adversarial litigation, and thus no privilege could arise. However, the principles of Harman (as explained by the High Court in *Hearne*) would provide the protection needed so that the information contained in the finalised proofs of evidence could not be misused.
>
> [77] We consider, therefore, that the principles enunciated in *Smoothdale* on this issue, if they apply directly on the present facts, are inconsistent with the rationale of litigation privilege and are clearly wrong, and should not be followed.

Having concluded that the proofs of evidence were not privileged, waiver did not arise. However, in *obiter*, the Full Court again distinguished *Smoothdale*, saying there was no compulsion to serve the proofs of evidence pursuant to case management orders and agreeing that the waiver conclusion reached in *Liberty Funding* was "persuasive and sensible"[102] such that service of the proofs of evidence was inconsistent with the maintenance of privilege.[103]

Liberty Funding and *Schweppes* both decided the issue of waiver at common law and as such did not squarely address the operation of the law when the *Uniform Evidence Acts* apply. In contrast, the third case *Buzzle Operations Pty Ltd (In Liq) v Apple Computer Australia Pty Ltd*[104] (*Buzzle*) involved a claim of client legal privilege under s 119 of the *EA* over evidentiary statements from earlier proceedings. The basis of the claim was that the statements had not been read into evidence in the initial proceedings and had been prepared for the dominant purpose of the respective clients being provided with professional legal services relating to a proceeding. White J[105] identified, by reference to *Schweppes*, that *Akins*, *Sevic* and *Dubbo City Council* had not decided the question of privilege and had only been concerned with waiver.[106] His Honour was also of the view, based on *Schweppes*, that the analysis of *Smoothdale*

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[99] *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd Ltd* (2009) 174 FCR 547, [51].

[100] *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd Ltd* (2009) 174 FCR 547, [73].

[101] *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283 and *Smoothdale v State Bank of South Australia (No 2) Ltd* (1995) 64 SASR 224 were recently considered by McGrath J in *Paul Graham Unicomb v Gregory Scott Blais* [2024] NSWSC 903, [76]–[83], [117]–[121] in the context of the *Harman v Secretary of State for the Home Department* [1983] 1 AC 280 undertaking as stated in *Hearne v Street* (2008) 235 CLR 125, [96] (not with respect to the question of privilege).

[102] *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd Ltd* (2009) 174 FCR 547, [97], citing *Australian Competition and Consumer Commission v Construction, Forestry, Mining and Energy Union* [2008] FCA 678, [127].

[103] *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd Ltd* (2009) 174 FCR 547, [102], [103].

[104] Followed in *Morony v Reschke* [2014] NSWSC 359, [50] (Black J); *Buzzle Operations Pty Ltd (In Liq) v Apple Computer Australia Pty Ltd* (2009) 74 NSWLR 469.

[105] As his Honour then was.

[106] *Buzzle Operations Pty Ltd (In Liq) v Apple Computer Australia Pty Ltd* (2009) 74 NSWLR 469, [12], [30].

should not be followed.[107] His Honour held that the statements were not privileged under s 119 of the *EA* because there was no obligation to not disclose the evidentiary statements (see above s 117 of the *EA* definition of confidential communications and confidential documents: "under an express or implied obligation not to disclose its contents").[108] Although this was enough to dispose of the application, his Honour also determined that the evidentiary statements were not created for the dominant purpose of providing advice (s 118) or professional legal services (s 119) but rather they were created for the dominant purpose of telling the court and parties the facts the deponents sought to establish such that they were not privileged under s 118 or 119 of the *EA* in any event.[109]

Since client legal privilege was not established, waiver did not need to be decided. However his Honour said if he had been required to resolve that question, he would be bound by *Akins* and *Sevic* to conclude that the statements had been served in the first proceeding under compulsion of law and thus there had been no waiver.[110] This is to be contrasted with the Full Federal Court's conclusion in *Liberty Funding* and *Schweppes* that even though the evidence was served in the initial proceeding pursuant to a court order, once they were served, this resulted in a complete waiver because maintenance of privilege would be inconsistent with deciding to serve evidence the content of which is privileged.[111] Logically, the same conclusion is arrived at when the *EA* applies. That is because the act of inserting content into an affidavit, lay statement or other proof of evidence, with the knowledge that it is to be served on your opponent, is a voluntary one that is inconsistent with claiming privilege over such material. To the extent *Akins* and *Sevic* suggest otherwise, the Full Federal Court appears to be of the view that those decisions are plainly wrong.

Liberty Funding, *Schweppes* and *Buzzle* provide a potential solution for parties, regardless of whether the *EA* or common law applies, to gain access to lay evidence from other proceedings and underlying legal advice to the extent it is disclosed in the lay evidence, on the basis of express or implied waiver (the latter will always be fact specific and depend on what the lay evidence says with respect to the legal advice). In contrast to *Smoothdale*, *Akins* and *Sevic* which would otherwise prohibit such an outcome until the lay evidence is read at the final hearing, *Liberty Funding*, *Schweppes* and *Buzzle* provide a solution that adheres to modern case management principles whereby relevant evidence will be disclosable in advance of the trial to promote the just, quick and cheap resolution of the real issues in dispute. In short, although not addressed in *Liberty Funding*, *Schweppes* and *Buzzle*, modern case management principles provide an additional reason why *Smoothdale*, *Akins* and *Sevic* should not be followed.

Liberty Funding and *Schweppes* go even further than *Buzzle* to conclude that service also constitutes a waiver of privilege, given that the decision to insert into an evidentiary statement privileged information, while knowing that it will be served, is inconsistent with keeping any such content confidential. There is accordingly a clear divide in the intermediate appellant case law on this issue. The more recent authorities are arguably more persuasive, and have been decided in the contemporary context of modern case management principles. The primary issue that those more recent cases do not address, however, is whether a party is entitled to seek material that has influenced an expert's report or been unilaterally generated by the expert (see *Southcorp* above) once the export report has been served.

[107] *Buzzle Operations Pty Ltd (In Liq) v Apple Computer Australia Pty Ltd* (2009) 74 NSWLR 469, [12].

[108] *Buzzle Operations Pty Ltd (In Liq) v Apple Computer Australia Pty Ltd* (2009) 74 NSWLR 469, [6]–[13].

[109] *Buzzle Operations Pty Ltd (In Liq) v Apple Computer Australia Pty Ltd* (2009) 74 NSWLR 469, [22], [29]. This same conclusion was reached at common law in *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd Ltd* (2009) 174 FCR 547, 559 [55], 564 [73].

[110] *Buzzle Operations Pty Ltd (In Liq) v Apple Computer Australia Pty Ltd* (2009) 74 NSWLR 469, [30].

[111] *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283, [22], [23]; *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* (2009) 174 FCR 547, [97].

GAINING ACCESS TO UNDERLYING MATERIAL ARISING FROM SERVED EXPERT EVIDENCE

Unfortunately, there does not appear to be any authoritative case law that has addressed the correctness of *Smoothdale*, *Akins* and *Sevic* in the context of expert reports served pursuant to case management orders. Nonetheless, it is of note that only *Akins* and *Sevic* involved expert reports, and it was only *Sevic* where the expert report had been served in the same proceeding where access to the underlying material was sought (in *Akins* lay and expert material was sought from an earlier proceeding, not the underlying material provided to the expert). Accordingly, *Sevic* is really the principal authority to focus on and, as already identified above, the correctness of the decision is doubtful, not least because of the three differing judgments, the non-analogous authorities relied upon and the subsequent introduction of codified case management principles that provide a unifying rationale for the Federal Court and NSW Supreme Court to conclude that service in advance of a hearing constitutes a loss of privilege.

Sevic did not address the question of privilege (it was only concerned with waiver), such that it should not be assumed, based on *Sevic* alone, that an expert report (and thus the underlying material relied upon or generated by the expert) is privileged once served. Indeed, Lindgren J in *Southcorp* appears to proceed on the assumption that privilege over the expert report is lost once disclosed, therefore waiving privilege over any material that influenced the content of the final report.[112] The analysis of *Schweppes* and *Buzzle* with respect to lay evidence is arguably also applicable to expert reports. A party that is ordered to serve an expert report is not compelled to serve a particular report that says a particular thing. The party chooses who and how many experts to engage, what questions to ask the expert, what material to provide the expert and can conference with the expert (acting in accordance with the applicable expert code of conduct and party obligations) to have the report prepared, all while knowing that the report is being prepared with the aim of serving it on the party's opponent (assuming the report is helpful and, in turn, the applicable rules permit a party to withhold service). This does not carry with it an element of compulsion, let alone confidentiality, once served.[113] Similarly, it is arguable that the expert report to be served is not created for the dominant purpose of litigation services, but rather, to disclose the expert evidence sought to be established in the proceeding.[114] However, these same arguments may not be applicable to the underlying material sought as none of that material has been served and may have been created for a different purpose.[115]

To the extent that all expert reports and underlying material provided by the expert meets the standard of being privileged, then parties may still argue, in line with *Southcorp*, *Liberty Funding* and *Schweppes*, that, once served, the report and therefore certain underlying material is no longer privileged because disclosure through service is inconsistent with the maintenance of privilege.[116] As outlined in *Southcorp*, at common law, for the underlying material to be disclosable it either must have been generated unilaterally by the expert (such as working notes, field notes, and the witness's own drafts of his or her report)[117] or the material must have influenced the content of the final report.[118] This will be fact specific, depend upon the individual case, turn on what the expert report says about any associated material and likely require the court to inspect the underlying material.

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[112] *Australian Securities and Investments Commission (ASIC) v Southcorp Ltd* (2003) 46 ACSR 438, [21(4)]. See also *Department of Community Services v D* (2006) 66 NSWLR 582, [32] (Brereton J, as his Honour then was); *Thomas v State of New South Wales* [2006] NSWSC 380, [17], [20].

[113] Compare *New Cap Reinsurance Corp Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258, [22] (White J, as his Honour then was).

[114] Compare *New Cap Reinsurance Corp Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258, [35].

[115] Compare *New Cap Reinsurance Corp Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258, [35]–[37]. For an analysis of the utility of obtaining underlying expert material, see Stowe, n 27, 75–77.

[116] Compare *New Cap Reinsurance Corp Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258, [40]. See also *Bourns Inc v Raychem Corp* [1999] 3 All ER 154, 166.

[117] *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438, [21(3)].

[118] *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438, [21(4)].

In *New Cap Reinsurance Corp Ltd (in liq) v Renaissance Reinsurance Ltd* (*New Cap*)[119] White J identified (at least in that case) that there could be two distinct questions to ask with respect to waiver, particularly where the served expert report does not disclose the substance of the underlying material relied upon and communicated with the expert. *First*, whether any expert report served pursuant to court order was still privileged, thus requiring parties to grapple with *Smoothdale*, *Akins*, *Sevic* and *Dubbo City Council* and the potential application of s 122(2)(c) of the *EA*.[120] *Second*, whether privilege in the unserved draft reports, prior communications between the solicitor and the expert, and related documents, had been waived.[121] His Honour only had to address the second question, which turned on whether the material sought 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, such as, where it would be unfair for the party to rely on the report without disclosure of those materials.[122] His Honour concluded, after inspecting the material sought, that he did not consider that the material had influenced the content of the final report that had been served.[123] To the extent the *EA*, not the common law, is engaged, the same questions are likely to arise since the test will again be one of inconsistency under s 122(1)of the *EA*.

At common law, 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, privileged communications. Further, based on *Southcorp*, once the expert report is served, the report is no longer privileged and any underlying material that influenced the content of the report is also no longer privileged. The latter assessment will ordinarily require an inspection by the court of the material sought, as occurred in *New Cap*. However, until *Sevic* is disapproved in the context of expert reports by intermediate appellate authority, the correctness of the latter argument will remain the subject of debate.[124] That debate may be quelled, however, by the Federal Court and the NSW Supreme Court also applying modern case management principles to the issue which dictate that a party should not have to wait until trial, when an expert report is tendered, to obtain access to the relevant underlying expert material. It is the marrying of the logical conclusions that (1) privilege does not survive service and (2) access to relevant evidence should be given in advance of the hearing, which provides a coherent basis for the Federal Court and the NSW Supreme Court to not follow *Sevic*.

Conclusion

This article has explored the conflicting intermediate appellant authority addressing how privilege and waiver will be affected by the service of expert and lay evidence. Full Federal Court authority suggests, at least with respect to the service of lay evidence, that the reasoning in the earlier decisions of *Smoothdale*, *Akins* and *Sevic* should not be followed as service of lay evidence either does not give rise to a claim of privilege or gives rise to an express or implied waiver over such evidence. This approach accords with modern case management principles and strikes a fair balance, given that privilege should only be concerned with material over which confidentiality (including from one's opponent) is to be maintained.

The Full Federal Court has not addressed, however, whether the same approach should be applied to the service of expert evidence (and, in turn, underlying material relied upon by the expert). It is respectfully suggested, having regard to the cogent reasoning given in *Liberty Funding*, *Schweppes* and *Buzzle*, that when an expert report or lay affidavit is served, such a document is not privileged and, in any event,

[119] *New Cap Reinsurance Corp Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258.

[120] *New Cap Reinsurance Corp Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258, [42]–[43].

[121] *New Cap Reinsurance Corp Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258, [43].

[122] *New Cap Reinsurance Corp Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258, [53].

[123] *New Cap Reinsurance Corp Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258, [54]. Although a different result, applying White J's approach, was reached in *R v Sawyer-Thompson (Ruling No 1)* [2016] VSC 316, [28]–[31] (again, each case will turn on its own facts).

[124] For a helpful summary of potential strategies to maintain privilege over expert material, see Stowe, n 27, 77. With respect to the ethical considerations to keep in mind when engaging experts, see H Stowe, "Preparing Expert Witnesses – A (Continuing) Search for Ethical Boundaries", *Bar News* (Spring 2018) 72.

service constitutes a waiver over that document, which then invites the court to consider whether any underlying material should also be disclosed. Disclosure is to occur when the underlying material sought is not privileged or maintenance of privilege would be inconsistent with the service of the principal document. This will require an analysis of the underlying material (usually by the court inspecting that material) and comparing it to what the principal document reveals.

Regardless of whether one is dealing with expert or lay evidence, and irrespective of the differences in procedure or the application of the *EA* in the Federal Court compared to the NSW Supreme Court, the logic that service constitutes a waiver accords with modern case management principles in both forums. Parties should not have to wait until the trial, when evidence is tendered or read, to obtain that evidence or relevant underlying material. The days of trial by ambush are over. The resolution of disputes post *Aon Risk* in line with ss 56–60 of the *CPA* and ss 37M–37P of the *FCA* provides a unifying basis for the Federal Court and the NSW Supreme Court to adopt a consistent approach to this issue that does not follow the outdated and unpersuasive approach seen in *Smoothdale*, *Akins* and *Sevic*. That is, service of evidence permits opposing parties to obtain that evidence and relevant underlying material without having to wait for the evidence to be tendered or read at trial. The time is ripe for this issue to be addressed by appellate courts having regard to modern case management principles so as to bring clarity to this complex and important area of law.