EXPERT EVIDENCE AND THE PROBLEM OF PRIVILEGE

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This is to certify that to the best of my knowledge, the content of this thesis is my own work. This thesis has not been submitted for any degree or other purposes.

I certify that the intellectual content of this thesis is the product of my own work and that all the assistance received in preparing this thesis and sources have been acknowledged.

Andrew Stuart Murray 26 February 2018

ABSTRACT

The giving of admissible evidence of opinion by experts and the concept of 'litigation privilege' have much in common: each developed progressively in England from around the middle of the sixteenth century; each occupies an anomalous position within our legal system; and each is thought to justify the anomaly it occupies as a matter of principle, namely, to promote ends desirable for the administration of justice that could not otherwise be redressed within the framework of the law as it would otherwise have stood.

Expert evidence is evidence provided to a court to assist a judge or jury to determine questions of science or professional skill that lie beyond their experience or expertise. It is, at heart, an exception to the rule that prohibits the adducing of opinion evidence and, in the case of the party-engaged expert, requires that the expert owe a paramount duty to the court rather than the party instructing him or her.

Litigation privilege is a species of legal professional privilege (also known as 'client legal privilege') and a principle of public policy that operates to restrict the obligation of a party to disclose documents evidencing certain protected communications — and in some cases, documents — in response to applications for disclosure. It is an exception to the principle that evidence that is relevant to a fact in issue is admissible.

But what of communications between a solicitor and an expert retained to give opinion evidence in a case? Should such communications also be subject to litigation privilege in light of the expert's paramount duty to the court? Approaches of judges to the determination of such questions have frequently been inconsistent.

The issue raises, at its heart, questions about the role of the solicitor in the preparation of expert evidence and questions about the role of the expert as an independent authority upon whom the courts can rely in circumstances in which a

party is deploying that expert to adduce evidence to its favour in adversarial proceedings.

The current orthodoxy, positing as it does, a significant role for the solicitor in the preparation of expert evidence and, by and large, maintaining the cloak of legal professional privilege in relation to draft reports and communications with the expert, does little to alleviate the inherent tension between the principles of litigation privilege and expert independence.

This thesis seeks to explore these issues and to postulate reforms that may ameliorate the problems that the current orthodoxy has engendered within the federal and New South Wales civil jurisdictions with respect to the party-engaged expert and the application of legal professional privilege to documents created by, and communications with, such an expert.

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All errors and omissions in this work are my own.

CONTENTS

INTRODUCTION

> Gentlemen of the jury, there are three kinds of liars, – the common liar, the damned liar, and the scientific expert.
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> Judge William L. Foster (quoting an unnamed attorney) [1]

I An Overview of the Problem

A The Expert Witness

Anyone involved with law reform and access to justice issues towards the end of the 20th century would be forgiven for thinking that something perverse and unprecedented had descended upon the common law world.

In his 1991 publication *Galileo's Revenge: Junk Science in the Courtroom*, Amercian author Peter W. Huber encapsulated what he perceived to be the source of a nascent hysteria:

> [t]he pursuit of truth, the whole truth, and nothing but the truth has given way to reams of meaningless data, fearful speculation, and fantastic conjecture. Courts resound with elaborate, systematised, jargon-filled, serious-sounding deceptions that fully deserve the contemptuous label used by trial lawyers themselves: junk science.[2]

Huber's thesis is that expert testimony was once constrained by the courts in a satisfactory manner, such that expert tesimony would only be received where it was 'founded on theories, methods and procedures "generally accepted" as valid among other scientists in the same field'. [3] However, Huber contends that this constraint was abandoned during the late 20th century, such that '[m]ost courts have slouched

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1 William Foster, 'Expert Testimony - Prevalent Complaints and Proposed Remedies' (1897) 11(3) *Harvard Law Review* 169.
2 Peter Huber, *Galileo's Revenge: Junk Science in the Courtroom* (Basic Books, 1991) 2.
3 Ibid 14.

towards what federal judge Patrick Higginbotham dubs the let-it-all-in approach to testimony', with the result that:

> [b]y the 1980s, countless courts have opened their doors wide to claims based on methods or theories not generally accepted as reliable by any scientific discipline … [a]nd so, diligent lawyers have set off in pursuit of scientific mystics, speculators, cranks and iconoclasts, and rushed to the waiting arms of the far-siders straight out of a Gary Larson cartoon.[4]

Across the Atlantic, serious commentators seemed to concur. In 1994, the English advocates' journal *Counsel* produced an elegiac editorial:

> Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns: there is a new breed of litigation hangers on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients.[5]

This lament was taken up by Lord Woolf, who was charged by the Lord Chancellor in 1994 with reviewing and reporting on the then current rules and procedures of the civil courts in England and Wales. In his interim report, published a year later, Lord Woolf commented that 'the change in the role of experts into additional advocates of the parties is a phenomenon well known in the United States of America and one which is causing real concern in Australia'.[6]

Was there such a change and was it causing real concern in Australia? Apparently so. A 1999 report published by the Australian Institute of Judicial Administration, based on a detailed survey completed by approximately 60 per cent of trial judges within the Australian judiciary found that:

> …[the] tension between the expert being responsive to the party paying his or her fee and at the same time providing assistance to the decision-maker creates challenges for fact-finding in a great many cases heard in the courts… Sometimes the deficit identified was in the form of overt bias; on other occasions the partisanship in the expression of opinions was less obvious; in some instances it was an unwitting lack of neutrality. However, to the concerns expressed by judges in answer to specific questions in the survey instrument were added many caustic and cynical comments from respondents about the

4 Ibid 17.
5 (November/December 1994), cited in Lord Woolf, 'Access to Justice Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales' (June 1995) 183.
6 Ibid 184.

> propensity of (too many) experts to be affiliated with the side commissioning their reports and calling them to give evidence.[7]

What had precipitated this apparent crisis?

The concept of the expert witness is not new. English courts have made use of experts, in one form or another, since at least the 16th century and there is evidence of party-engaged expert witnesses being used since at least 1678, before becoming a more common feature of English civil litigation from around 1750.[8] However, it has primarily been in the last two or so decades that, in England and Australia, detailed consideration of, and attempts to reform the law with respect to, expert evidence have become commonplace.[9] Contrary to the theories of Peter Huber and the elegies of certain English periodicals, this does not appear to be the result of any recent revelation regarding the inherent unreliability of the party-engaged expert – – judicial scepticism of such experts having been voiced since at least the mid 19th century.[10] It is more likely that a range of factors relevant to issues such as access to justice, case management (including the cost of civil proceedings),[11] the growth in complexity of fields of technological specialisation and the rise of 'mega-litigation'[12] have resulted in a revival of scrutiny on the role of the party-engaged

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7 Ian Freckleton, Prusana Reddy and Hugh Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* (The Australian Institute of Judicial Administration Incorporated, 1999) 2–3.

8 This is discussed in Chapter 2 of this thesis.

9 See for example: Lord Woolf, above n 5; Lord Woolf, 'Access to Justice Final Report to the Lord Chancellor on the Civil Justice System in England and Wales' (July 1996); *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia 1998*; NSW Law Reform Commission, 'Expert Witnesses' (109, NSW Law Reform Commission, 2005); Victorian Law Reform Commission, 'Civil Justice Review Report' (14, Victorian Law Reform Commission, March 2008) Chapter 7.

10 This is discussed in Chapter 2 of this thesis.

11 See for example: Justice Peter McClellan, 'Contemporary Challenges For the Justice System - Expert Evidence' (at the Australian Lawyers' Alliance Medical Law Conference 2007, 20 July 2007) <http://www.austlii.edu.au/au/journals/NSWJSchol/2007/10.pdf>; Justice Patricia Bergin, 'Case Management' (at the National Judicial Orientation Program, Broadbeach, 3 August 2008) <http://www.austlii.edu.au/au/journals/NSWJSchol/2008/15.pdf>; Justice TF Bathurst, 'Three Contemporary Issues in Civil Litigation: Expert Evidence, Discovery and Alternative Dispute Resolution' (at the Annual Civil Litigation Seminar, 5 March 2015) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2016%20Speeches/Bathurst%20CJ/Bathurst_20150305.pdf>; Peter McClellan, 'Civil Justice Reform - What Has It Achieved?' [2010] *NSWJSchol* 5.

12 *Idoport Pty Ltd v National Australia Bank Ltd [No 37]* [2001] NSWSC 838, [87]; Justice Murray Gleeson, 'Valuing Courts' <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_family.htm>; *Seven Network Limited v News Limited* [2007] FCA 1062, [2] to [7]; *Seven Network Ltd v News Ltd* (2009) 182 FCR 160, [70]-[73] (Dowsett and Lander JJ).

expert within the Australian legal system. These issues are discussed in Chapter 2 of this thesis.

B The Doctrine of Legal Professional Privilege

At around the same time that the party-engaged expert witness grew in prominence as a tool in English litigation, the concept of 'legal professional privilege' — which had existed in one form or another since the Roman Republic and continued to surface in incomplete records from time to time in England since the Norman conquest — emerged as a fully formed doctrine in the various judgments emanating from a state trial in 1743, *Annesley v Richard Earl of Anglesea*.[13] The trial was presided over by Lord Chief Baron Bowes, Baron Mountenay and Baron Dawson of the Court of Exchequer in Ireland. At issue was a matter of an inheritance, to be determined by reference to whether the late Baron of Altham (the brother of the Defendant), had a living son.[14]

In his judgment, Baron Mounteney observed that:

> …the law hath very justly established, an inviolable secrecy to be observed by attornies, in order to render it safe for clients to communicate to their attornies all proper instructions for the carrying out on those causes which they found themselves under a necessity of intrusting to their care.[15]

This is as succinct as any statement of the doctrine of legal professional privilege.[16]

The trajectory of the development of the privilege has been one of expansion and is the subject of Chapter 1 of this thesis. By the mid-1800s, it was clear that legal professional privilege extended not only to communications between clients and solicitors, but between third parties, clients and solicitors made for the purpose of

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13 Recorded in TB Howell, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783* (T. C Hansard, 1816) [1140]-[1454].

14 Justice Paul Brereton, 'Legal Professional Privilege' in *Historical Foundations of Australian Law* (Federation Press, 2013) vol 2, 127, 134. Justice Brereton provides a fulsome description of the trial and its background.

15 Howell, above n 13, 1242.

16 The privilege is discussed in detail in Chapter 1 of this thesis.

litigation. One category of third party to which the doctrine applies is the expert witness. Therein lies the essence of the issue explored by this thesis.

II Approach

A The Intersection of Anomalies and the Structure of this Thesis

Exceptions to established principle abound within Australian law. Indeed, the law's inherent adaptability can, in one sense, be demonstrated by its ability to temper fast rules with public policy considerations. Thus, the doctrine of penalties constitutes an exception to parties' freedom to contract;[17] relief against forfeiture ameliorates the strict consequences of certain species of default;[18] the rule against perpetuities tempers testamentary freedom;[19] and the general refusal of courts to grant specific performance in connection with contracts for personal service or where damages are an appropriate remedy operates as an exception to the notion that parties will generally be held to the terms of their bargains.[20]

Each of the exceptions referred to above is the subject of a significant body of well established law. However, despite the ingenuity with which courts and legislators devise such exceptions as a means of overcoming the tendency of a fast rule to engender injustice in particular instances, this thesis contends that insufficient regard is paid to circumstances in which legal anomalies may intersect.

Legal professional privilege constitutes an exception within the Australian legal system. It is an exception to the rule that evidence relevant to a fact in issue is capable of being adduced in proceedings.

Likewise, expert witnesses also constitute an exception within the Australian legal system. They are an exception to the rule that a person cannot give admissible

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17 *Andrews v Australia and New Zealand Banking Group Limited* (2012) 247 CLR 205, 216–217 (French CJ, Gummow, Crennan, Kiefel and Bell JJ.

18 *Legione v Hateley* (1983) 152 CLR 406, 10 (Gibbs CJ and Murphy J).

19 *Air Jamaica Limited v Charlton* [1999] 1 WLR 1399, 1408 (Lord Millett).

20 *Co-operative Insurance Society Limited v Argyll Stores (Holdings) Limited* [1998] AC 1, 15–16 (Lord Hoffman).

evidence of an opinion.[21] Expert witnesses have other characteristics that set them apart from lay witnesses, which are also discussed in Chapter 2 of this thesis.

It is now well established that expert witnesses owe a paramount duty to the court.[22] However the expert witness is the only vehicle through which parties can adduce evidence of opinion.[23] In the context of adversarial systems of justice such as prevail in England and Australia, it is contended that this creates a fundamental tension. Furthermore, the notion that communications and, in certain jurisdictions, documents, sent by lawyers and clients to experts, prepared by experts, and sent by experts to clients and lawyers, can be the subject of legal professional privilege and withheld from disclosure at the application of other parties, serves to exacerbate this tension.

These issues are further complicated by discrepancies between the common law tests for the existence and waiver of legal professional privilege and the corresponding tests under the *Uniform Evidence Law* which tests can operate side-by-side in the same proceedings[24] — not least of which is that the former protects communications and the latter both communications and documents brought into existence for the requisite purpose.

And overlaid above these difficulties is a fierce divergence between authorities even within the realms of the common law and the *Uniform Evidence Law* respectively. For example, in *Interchase Corporation Limited (in liquidation) v Grosvenor Hill*

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21 See for example, section 76 of the *Uniform Evidence Law*. The circumstances in which lay persons can give evidence of opinion are tightly circumscribed — section 77 of the *Evidence Act 1995* (NSW) states 'the opinion rule does not apply to evidence of an opinion that is admitted because it is relevant for a purpose other than proof of the existence of a fact about which the existence of which the opinion was expressed'. Likewise, section 78 of the *Evidence Act 1995* (NSW) excepts from operation of the opinion rule, evidence of an opinion expressed by a person if the opinion is based upon that which 'the person saw, heard or otherwise perceived about a matter or event' and such evidence was necessary adequately to understand the person's perception of that matter or event. A further exception (section 78A of the *Evidence Act 1995* (NSW)) applies to create an exception for evidence of an opinion 'expressed by a member of an Aboriginal or Torres Strait Islander group about the existence or non-existence, or the content, of the traditional laws and customs of the group'.

22 See for example Schedule 7 to the *Uniform Civil Procedure Rules 2005* (NSW); *Expert Evidence Practice Note* (GPN-EXPT) 2016 Federal Court of Australia.

23 Apart from in respect of the limited circumstances referred to in n 21.

24 See discussion below in Chapter 3.

(Qld) Pty Limited (No 1),[25] Thomas J of the Supreme Court of Queensland (applying the common law test for the existence and waiver of privilege) stated:

> [A]n expert is a third person from whom the client, represented by a solicitor, hopes to obtain an advantage ... The solicitor is deliberately converting the expert into a witness. The community has some interest in ultimately being able to ensure (through the courts) that this process is not abused. It is desirable that the rules be such that the courts, or the adversary, be able to explore fairly fully the circumstances of the formation of the opinion...I would hold that in general … documents generated by the expert and information recorded in one form or another by the expert in the course of forming an opinion are not a proper subject to a claim of legal professional privilege.[26]

Whereas, in *Linter Group Limited v Price Waterhouse (a firm),*[27] Harper J of the Supreme Court of Victoria, applying the same test, stated:

> Just as a Judge ought never to allow publication of a draft of a judgment, in part because it is necessary to preserve the freedom to change his or her mind on further reflection about the case, so experts should not be inhibited by fear of exposure of a draft from changing their minds when such change is warranted by the material before the expert.[28]

Chapter 3 of this thesis seeks to establish the current (arguably, unsatisfactory) 'orthodoxy' with respect to the existence and waiver of legal professional privilege in the context of expert evidence. That orthodoxy, it will be shown, requires the application of different criteria to the same question depending on when, in the timeline of proceedings, and upon whose instigation, the question arises. Chapter 3 also surveys the failure of superior courts properly to identify and apply these criteria, the first attempts by legislators to remedy the differential operation of rules and the extent to which the courts once again misapplied the legislators' 'remedy'.

Chapter 4 of this thesis considers whether the current orthodoxies with respect to expert witnesses and client legal privilege warrant reform. It addresses expert witness 'bias' and the phenomenon identified in Chapter 2 as 'the paradigm of expert exceptionalism' — the tendency of opposing parties to call experts who will give opinions favourable to their respective cases and thereby provide the court with alternatives tending to the extreme (a concept manifested in the practice known as

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25 *Interchase Corporation Limited (in liq) v Grosvenor Hill (Qld) Pty Limited (No 1)* (1999) 1 Qd. R 141.
26 Ibid 162,164.
27 *Linter Group Limited v Price Waterhouse (a firm)* [1999] VSC 245.
28 Ibid [16].

'expert shopping'). The chapter also discusses the role of lawyers in the creation of expert evidence and the courts' problematic reliance upon *Attorney-General (NT) v Maurice*[29] to determine questions of waiver of privilege. It concludes by identifying a number of criteria that meaningful law reform should address, drawing upon the matters identified in the preceding chapters.

The primary focus of this thesis is the identification and examination of the problem lying at the intersection of legal professional privilege and expert evidence. However, Chapter 5 is devoted to the brief consideration of four approaches that might best satisfy the criteria for reform identified in Chapter 4, namely: mandating the use of court-appointed experts; mandating the use of joint party-engaged witnesses; abolishing client legal privilege in the context of expert evidence (in whole or in part); and finally, adopting a hybrid model based upon (but with some critical amendments to) the approach to limiting the application of legal professional privilege to expert witnesses adopted by the Supreme Court of South Australia. Ultimately, the postulated hybrid model is put forward as most closely corresponding to a solution capable of satisfying the identified criteria.

B Scope and Limitations

About legal professional privilege, much has been written. Likewise, abundant literature has been generated in connection with the existence, role and problems associated with the party-engaged expert witness. However, lying at the intersection of these two exceptions is the kernel of a problem, which has not, it is contended, received adequate attention.

To the extent addressing these matters, authoritative Australian texts on expert witnesses and the law of evidence respectively, tend to focus only upon the current state of the law with respect to the application of legal professional privilege to expert witnesses. Thus, in *Expert Evidence: Law, Practice, Procedure and*

29 *Attorney General (NT) v Maurice* (1986) 161 CLR 475.

Advocacy,[30] less than 13 pages of the work relates to the issue of privilege,[31] a significant proportion of which is devoted to an explanation of the concept of legal professional privilege and of the differences in application between the common law and the *Uniform Evidence Law*.[32] Similarly, *Cross on Evidence*[33] offers an even briefer consideration of the application of privilege to the party-engaged expert.[34] Given the broad scope of these works, these limitations are not surprising and the above comments are intended in no way to constitute criticism.

Perhaps the only study squarely addressing the confluence of legal professional privilege and expert evidence appearing in a peer reviewed Australian publication is Paul Mendelow's 'Expert Evidence: Legal Professional Privilege and Experts' Reports' from the *Australian Law Journal* published in April 2001.[35] Mendelow's brief article, which focuses upon issues of waiver in connection with expert reports, offers a thorough discussion of the then current state of the law with respect to waiver,[36] identifies a number of conflicting authorities in the area[37] and provides some suggestions to legal practitioners as to the means through which prospects of inadvertant waiver of privilege may be minimised.[38] The article has been referred to in two judgements in connection with its provision of a summary of caselaw on the issue[39] and was described in a third as being 'illuminating'.[40]

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30 Ian Freckelton and Hugh Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (Lawbook, 5th ed, 2013).
31 Ibid 316–327.
32 Ibid 316–318, 324–327.
33 LexisNexis Australia, *Cross on Evidence* ((loose-leaf), 2018) vol 1.
34 Ibid [25235], [25300].
35 Paul Mendelow, 'Expert Evidence: Legal Professional Privilege and Experts' Reports' (2001) 75 The Australian Law Journal 258. A number of other publications exist but are brief in nature and directed more towards providing legal practitioners with practical guidance as to the then current state of the law with respect to privilege and expert evidence — for example: Justice Robert McDougall, 'The Debatable Privilege' (2007) 27(335) Lawyers Weekly 14; Hugh Stowe, 'Expert Reports and Waiver of Privilege' Summer 2006/2007 Journal of the NSW Bar Association 71.
36 Mendelow, above n 35, 259–262.
37 Ibid 262–273.
38 Ibid 273.
39 *Lovegrove Turf Services Pty Ltd v Minister for Education* [2003] WASC 213, 17; *Spassked Pty Ltd v Commissioner of Taxation (No 4)* (2002) 50 ATR 70, [14].
40 *Lampson & Ors v McKendry* [2001] NSWSC 373, [13] (Harrison M).

However, Mendelow's article is now more than 15 years old and is a work very much focussed upon the practical consequences of then recent caselaw[41] in terms of the issue of waiver of privilege in expert reports. It does not (nor does it purport to) trace the historical background to the concepts of legal professional privilege and expert evidence and their intersection. Nor does it deal with the problems of the party-engaged expert or consider options for reform.

Issues relating to legal professional privilege in the context of expert witnesses have also, it is contended, received scant attention in law reform reports. These matters are taken up in more detail in Chapters 4 and 5. However, by way of example, the detailed report on 'Expert Witnesses' produced by the New South Wales Law Reform Commission in 2005[42] in response to extremely broad terms of reference[43] spent only seven pages considering amendments to rules and procedures regarding disclosure to improve transparency of expert evidence.[44] It concluded that the existing provisions of the *Uniform Civil Procedure Rules*[45] 'are appropriate in relation to disclosure and other measures to increase transparency'.[46]

There is, it is contended in this thesis, a considerable gap in the literature with respect to the particular issues engendered by the interaction between legal professional privilege and expert evidence. The gap is all the more surprising given the extensive amount of research undertaken into expert evidence and the problems it raises within adversarial systems of justice such as those found in England and Australia — legal professional privilege operating as a cloak, as it were, obscuring from scrutiny communications between experts and those who engage them. Reforming the operation of that privilege (whether ultimately desirable or not) is one means of returning this problem, created by the adversarial system, to the adversarial system for resolution by allowing opposing litigants to access, evaluate

41 Namely, *Esso Australia Resources v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49 ('*Esso v FCT*'); and *Mann v Carnell* (1999) 201 CLR 1.
42 NSW Law Reform Commission, above n 9.
43 Namely, 'To inquire into and report on the operation and effectiveness of the rules and procedures governing expert witnesses in New South Wales'. Ibid 2.
44 Ibid 86–92.
45 2005 (NSW).
46 NSW Law Reform Commission, above n 9, 86, 92.

and raise for consideration by the relevant trier of fact, such communications as may be appropriate and relevant in the circumstances. This thesis attempts to bridge this gap in the literature by providing both a backward and forward-looking assessment of these issues and identifying potential, practical options for reform that are consonant with the current procedural imperatives for the conduct of civil litigation within the prevailing adversarial system.

Because of the myriad ways in which different fora approach the issues of expert evidence and legal professional privilege, this thesis limits its focus in terms of identifying the law and options for reform principally to the New South Wales and federal jurisdictions. However in doing so, it draws upon relevant comparative material from other Australian and international sources.

New South Wales and the federal jurisdictions have been chosen because they were two of the first within Australia to adopt the *Uniform Evidence Law* and as a consequence, may be considered to have the richest seam of reported caselaw governing the introduction of this legislation and its interaction with the common law — which, for the reasons set out in Chapter 3, it has not entirely abrogated. These are also among the jursdictions in which the problem relating to the intersection between legal professional privilege and the expert witness is at its most florid. This is because they are jurisdictions in which it is held that service of an expert report does not, without more, have the effect of waiving privilege that may otherwise inhere in draft reports prepared by, or prior communications of parties and solicitors with, the expert. Once again, these issues are discussed in Chapter 3 and also explored in Chapter 4 in the context of the question as to whether reform is warranted and, if so, the criteria such reform should satisfy.

The thesis also primarily focuses upon civil procedure, although it does draw on caselaw derived from the exercise of criminal jurisdictions by the courts. Once again, this is because such law reform proposals as have been raised in England and Australia and which are discussed in succeeding chapters, have predominantly focused on civil rather than criminal jurisdictions. It is also because this thesis identifies, in chapter 2, the locus of the recently revived concern over partisan

conduct of experts as being the movement of courts towards more stringent civil case management processes, with a renewed focus upon the overriding purpose of achieving the 'just, quick and cheap' resolution of real issues in proceedings.[47]

It must also be recognised that there is a lack of meaningful data regarding the incidence of bias and expert shopping practices within the Australian legal system. Chapter 4 of this thesis considers the results, and criticism, of such fieldwork as has been undertaken with judicial officers to identify the frequency with which they have considered that they have encountered bias on the part of a party-engaged expert and its effect on their ability to discharge their role. Nevertheless, the self-evident problem in dealing with issues such as 'bias' is their inherent unamenability to objective measurement. This has led the New South Wales Law Reform Commission, when considering reforms relating to expert evidence, to conclude that:

> What is difficult, however, is to determine the extent of adversarial bias … Although it is not possible to quantify the extent of the problem, in the Commission's view it is safe to conclude that adversarial bias is a significant problem, at least in some types of litigation. Measures that would reduce or eliminate adversarial bias, therefore, are likely to have potential benefits, even if the extent of those benefits cannot be accurately determined.[48]

That conclusion was also adopted by the Victorian Law Reform Commission in its 2008 review into the Civil Justice System in Victoria.[49]

The performance of field work to attempt to ascertain more precisely the incidence of expert bias and expert witness shopping behaviours is, for similar reasons, beyond the scope of this thesis.

However, the reasons as to why procedural reform may be warranted in the absence of such data are addressed in Chapter 4 and the proposals for reform canvassed in Chapter 5 take into account hardship to parties that may flow from the introduction of elaborate measures to counterract the perceived effects of bias which may be inherent within our legal system to a greater or lesser degree. Certainly, the case

47 See for example section 56 of the *Civil Procedure Act 2005* (NSW).
48 NSW Law Reform Commission, above n 9, 74.
49 Victorian Law Reform Commission, above n 9, 512.

studies that have been identified in this thesis suggest that the problems associated with the application of legal professional privilege in the context of the party-engaged expert are far from nebulous — the irony of the situation being that, absent a reform of legal professional privilege in this area, we may never know how many cases might otherwise belong in the *Universal Music v Sharman*[50] category of notoriety.

C Methodology

It is recognised that there is some value in an author of a higher degree by research thesis identifying the approach to legal research and writing adopted in it, even where the work is primarily the product of a methodology that might conventionally be described as 'doctrinal'.[51]

There is by no means consensus over the meaning of 'doctrinal research'.[52] However, Terry Hutchinson identifies its essential nature as involving 'a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation'.[53] A more fulsome decription is contained in her jointly authored work with Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research', in which it is emphasised that the crux of the doctrinal method is the 'location and analysis of the primary documents of the law in order to establish the nature and parameters of the law'.[54]

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50 *Universal Music v Sharman* (2005) 220 ALR 1 (discussed later in Chapter 4 of this thesis).

51 See generally, Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83. The authors comment that 'legal academics may argue that a statement of doctrinal methodology would be out of place in a doctrinal thesis … [o]ne commentator, Paul Chynoweth, asserts that "no purpose would be served by including a methodology section within a doctrinal research publication" because the process is one of "analysis rather than data collection"' (a proposition with which the authors disagree). However the authors note that Chynoweth goes on, despite this assertion, to recommend that legal academic 'reflect upon our own previously unquestioned assumptions about the practices in our own discipline' and identify these for the benefit of interdisciplinary colleagues and others within the field — an approach they endorse. Ibid, 100.

52 See for example: Council of Australian Law Deans, 'Council of Australian Law Deans Statement on the Nature of Legal Research' (October 2005) <https://cald.asn.au/wp-content/uploads/2017/11/cald-statement-on-the-nature-of-legal-research-20051.pdf>; Hutchinson and Duncan, above n 51; Terry Hutchinson, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 3 *Erasmus Law Review* 130.

53 Hutchinson, above n 52, 132.

54 Hutchinson and Duncan, above n 51, 113.

This thesis includes, but is not limited to, an approach of this nature. Its starting point is a detailed examination of caselaw and legislation relevant to the development of the concepts of legal professional privilege and expert evidence respectively and then the caselaw and legislation lying at the intersection of the two, in order to establish a positive statement of the current orthodoxy with respect to the determination of privilege claims involving communications and documents generated by and passing between experts and solicitors.

Hutchinson and Duncan contend that the approach undertaken by higher degree by research candidates conducting legal research is similar in methodology to that used by judges and legal practitioners, but tending towards the production of different objectives and outcomes.[55] From a methodological perspective, this observation is apt in the context of the first three chapters of this thesis. Caselaw has been identified on the basis of extensive searches of, and cross-referencing of results within, usual repositories of cases (such as the databases maintained by AUSTLII, BAILII, Jade, LexisNexis and Westlaw) as well as on some more novel repositories that have become recently available for remote interrogation such as the index and paraphrase of the Printed Year Book Reports, 1268-1535 compiled by David J. Seipp at Boston University.[56] At the risk of being criticised for excessive adoption of quotations, the approach largely adopted in this thesis has been to let, where appropriate, and particularly in the first three chapters, judges speak for themselves by replicating the relevant passages of decisions in order to permit the reader a greater opportunity to form their own views as to the meaning and intention of the decisions that have shaped the law with respect to legal professional privilege and expert evidence, rather than adopting potentially contentious summaries of them. To this end, recourse to secondary material has also been intentionally limited.

Chapters 4 and 5 of the thesis seek to move away from the explicatory approach of the opening chapters. They place greater emphasis upon establishing the existence of the problem postulated by this thesis, by reference to a broader range of sources.

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55 Ibid 109.

56 David Seipp J, *An Index and Paraphrase of Printed Year Book Reports, 1268 - 1535* <http://www.bu.edu/law/seipp>.

These include law reform reports, some fieldwork conducted in relation to issues of judicial apprehension of expert bias and the adoption of a limited number of proceedings as case-studies to depict the manner in which reliance of a party on legal professional privilege may have a tendency to obscure deficiencies in expert evidence led by that party. As stated above, this thesis does not involve the performance of fieldwork or multi-disciplinary approaches to its subject matter, but it does seek to critically evaluate relevant fieldwork performed by others and which is taken into account in reaching the conclusions identified in Chapters 4 and 5.

These chapters in particular, move beyond that which may be conventionally considered as a 'doctrinal' approach by considering practical reforms that may ameliorate the problems arising from the application of legal professional privilege to expert evidence. In this sense, they more readily fall within the third category of legal research identified in the report produced in 1987 by Dennis Pearce, Enid Campbell and Don Harding ('Pearce Report'), namely 'reform oriented research' which 'evaluates the adequacy of existing rules and recommends changes to any rules found wanting'.[57]

The Pearce Report identified a third putative category of legal research, namely 'theoretical research', the focus of which is the fostering of 'a more complete understanding of the conceptual bases of legal principles and of the combined effects of a range of rules and procedures that touch on a particular area of activity'. Because of the more practical and reform-oriented purpose of this thesis, it does not, in terms, seek to challenge or move beyond certain of the underlying features of Ausralia's current legal landscape and may not, in this sense, constitute 'theoretical research' as that term might perhaps be understood.[58] For instance, this thesis takes as a given that civil and criminal processes within Australia will always

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57 Dennis Pearce, Enid Campbell and Don Harding, 'Australian Law Schools: A Discipline Assessment for the Commonwealth Territory Education Commission' (AGPS, 1987); quoted in Council of Australian Law Deans, above n 52, 1. Despite the comparative antiquity of the Pearce Report, its approach to the categorisation of legal research was described by the Council of Australian Law Deans in 2005 as 'remaining pivotal in the concept of legal research', if a little narrow.

58 See for example Terry Hutchinson, *Research and Writing in Law* (Lawbook Co, Second, 2006) 44–54.

be conducted within that which is fundamentally an adversarial system of justice.[59] However, as intimated at the beginning of this introduction, to the extent that this thesis encompasses a more theoretical and jurisprudential theme, it is that particular care must be taken when fashioning laws that lie at the intersection of anomalies. It is hoped that this work provides a meaningful analysis of one such phenomenon.

[59] Albeit, with the possibility of some procedural measures that might sit outside of traditional adversarial processes, such as the concept of the court-appointed expert, discussed in Chapter 5.

CHAPTER 1 – LEGAL PROFESSIONAL PRIVILEGE

> And further, did Lucullus then in Macedonia, know more of this than you did, Hortensius—you who were in Rome, you from whom Dio sought help, you who wrote to Verres earnestly protesting against Dio's wrongs? Is all this new and surprising to you? Does this charge now come to your ears for the first time? Did you hear nothing of it from Dio—nothing from that highly-respected lady your mother-in-law Servilla, so long Dio's guest and hostess? Are not many of the facts unknown to my witnesses and known to you? It is not your client's innocence, but the exemption the law gives you, that has deprived me of calling you as a witness to the truth of this charge.
>
> Marcus Tullio Cicero, *Against Verres* [60]

I The Nature of the Privilege

The text of Cicero's second speech in the prosecution of Gaius Verres, former Roman Governor of Sicily, evidences a plan to goad Verres' advocate, Hortensius, over his state of knowledge of his client's crimes. However, as the speech makes clear, despite Cicero's rhetorical insinuation, he could not have taken the further step of calling Hortensius as a witness for the prosecution. This was not because of any rule regarding property in a witness, but because of an exception recognised by Roman law and expressly recorded by Cicero, that considered an advocate not to be a competent witness in a cause for which he has furnished his services.

This exception has established itself in English law as part of the concept known as 'legal professional privilege' or 'client legal privilege'.[61] Variously described as a 'doctrine',[62] 'a rule of substantive law',[63] a 'fundamental and general principle of the common law',[64] and 'a fundamental condition on which the administration of

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60 Cicero, *The Verrine Orations* (Harvard University Press, 1928) vol 1, 317.

61 The terms 'legal professional privilege' and 'client legal privilege' can essentially be used interchangeably but for an interesting discussion of the nomenclature, see Justice Brereton, above n 14, 171–172. The *Uniform Evidence Law* adopts the term 'client legal privilege' but the majority of caselaw referred to in this thesis adopts the term 'legal professional privilege' and accordingly, the latter term is primarily adopted in this work.

62 *Baker v Campbell* (1983) 153 CLR 52, 119 (Dean J).

63 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 552 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

64 *Baker v Campbell* (1983) 153 CLR 52, 116–117 (Deane J).

justice as a whole rests',[65] the modern concept of legal professional privilege does not admit precisely of description. Its conceptual fluidity has been aptly described in the following terms:

> It seems that the concept of the privilege has never been based on any precise and generally accepted theory. Because of this lack of theory, the scope of privilege has always been somewhat flexible. Thus, as Wigmore stated, one of the four fundamental conditions for its existence was that 'the injury that would be done to the relation by the disclosure of the communication must be greater than the benefit thereby gained for the correct disposal of the litigation' (Evidence, 1961 vol 8, p 527, para 2285).[66]

These 'four fundamental conditions' identified by John Henry Wigmore at the beginning of the twentieth century in *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*,[67] are:

> (1) The communications must originate in a *confidence* that they will not be disclosed; (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relationship between the parties; (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*; and (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.[68]

It is a feature of Wigmore's analysis that the notion of a duty of confidence does not, of itself, confer a right to withhold the communication the subject of that duty from inquisitorial judicial processes. The scope of Wigmore's survey was wider than that of solicitor and client. He uses the four conditions as a benchmark against which to assess the extent to which any given relationship should be sanctioned as giving rise to a privilege against disclosure. Thus, it is the failure to satisfy the second condition which deprives the relationship between patient and physician of the status, despite there being a duty of confidentiality clearly owed by the latter to the former. And the failure to satisfy the third condition similarly disentitles the relationship between priest and penitent.

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65 *R v Derby Magistrates' Court; Ex Parte B* (1995) 4 All ER 526, 541 (Lord Taylor CJ), quoted in *Telstra Corporation Limited v Minister for Communications, Information Technology and the Arts (No 2)* [2007] FCA 1445, [19] (Graham J).

66 *Re Bell; Ex parte Lees* (1980) 146 CLR 141, 158–159 (Murphy J).

67 John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Little Brown and Company, 1940).

68 Ibid §2285.

It was axiomatic to Wigmore that, in the case of solicitor and client, 'all four [conditions] are present'[69]. With a notable protest,[70] this appears to be the orthodoxy that emerged from the nineteenth century and this is clear from the sources relied upon by Wigmore himself, including the explication of the rule in the 1814 text *Phillipps on Evidence* in which it is stated:

> The expediency of the rule must depend not on the impropriety of violating the confidence reposed, but on a consideration that the collateral inconvenience, which would ensue if no such confidence were reposed, would preponderate over the direct mischief produced by a chance of the failure of justice resulting from the exclusion of evidence.[71]

The rationale is also clear from the 1851 decision of Wigram V.C. in *Russell v Jackson*:

> The rule which protects from disclosure confidential communications between solicitor and client, does not rest simply upon the confidence reposed by the client in the solicitor, for there is no such rule in other cases in which at least equal confidence is reposed … it seems to rest not upon the confidence itself but upon the necessity of carrying it out.[72]

In Australia, the policy rationale for legal professional privilege was explained in the High Court case of *Grant v Downs*[73] in the following terms:

> The rationale ... is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure for the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available.[74]

Given the centrality of this 'public policy' element to the conferral of the privilege on the solicitor and client relationship as we now know it, it is somewhat surprising that, despite the comparative antiquity of the concept of legal professional

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69 Ibid.

70 The lively opposition of Jeremy Bentham in 'Rationale of Judicial Evidence' to the continued operation of the privilege is discussed in more detail below.

71 Wigmore, above n 67, §2285 n 1.

72 *Russell v Jackson* (1851) 9 Hare 387, 391 quoted in Wigmore, Ibid §2285 n 1.

73 *Grant v Downs* (1976) 135 CLR 674.

74 Ibid 685 (Stephen, Mason and Murphy JJ).

privilege,[75] the public policy rationale does not find its way into recorded decisions until the eighteenth century. A brief survey of the appearance and development of legal professional privilege is discussed later in this chapter. However, it is convenient firstly to identify the current position in Australia.

II The Current Formulation of the Privilege under the Uniform Evidence Law

As now recognised, legal professional privilege comprises two overlapping species of privilege: 'legal advice privilege'; and 'litigation privilege'. The development of the two were, for the reasons set out below, historically intertwined.

In this thesis, the term '*Uniform Evidence Law'* is used to denote the *Evidence Act 1995* (Commonwealth) and the *Evidence Act 1995* (New South Wales) and each of those acts is separately identified[76] where material differences arise. Key differences between the position under the *Uniform Evidence Law* and the position at common law are discussed in more detail in chapter 3 of this thesis.

The requirements for the existence of legal advice privilege under the *Uniform Evidence Law* are currently reflected in the wording of section 118 in the following terms:

> Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:
>
> (a) a confidential communication made between the client and a lawyer; or
>
> (b) a confidential communication made between 2 or more lawyers acting for the client; or
>
> (c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person;
>
> for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

[75] The historical survey below dates the initial recorded case of its application to the early 15th century.
[76] As *NSW Evidence Act* and *Commonwealth Evidence Act* respectively.

Under the *Uniform Evidence Law* then, the current conditions for legal advice privilege to apply, insofar as it relates to communications, are: a *confidential* communication; between a client and a lawyer (or two or more lawyers acting for the client); for the dominant purpose of the lawyer providing legal advice to the client.[77]

The first of these current conditions, namely, the requirement of confidence, correlates precisely with that identified by Wigmore. The second, for the reasons identified below, corresponds with the second, third and fourth conditions identified by Wigmore. The third current condition, is, in fact, the consequence of a relaxation of the principle that the *sole* purpose of the communication be the provision of legal advice to the client (which was the position at common law at the time the *Uniform Evidence Law* was enacted and remained the common law position for a period thereafter).[78] For this reason, it is not a condition expressly recognised by Wigmore, nor does it feature in the early decisions from which the doctrine came to be expressed.

As to the concept of a 'confidential communication', section 117(1) of the *Uniform Evidence Law* relevantly states:

> ***"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.

[77] Subsection 118(c) brings within the scope of the rule the contents of a confidential document created by a client, lawyer or another person. The extension of the latter to 'another person' is the result of the decision in P*ratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357. That decision is discussed in more detail later in this chapter. It should be noted that communications (not in the nature of a document) with such other person do not, pursuant to section 118, enjoy the privilege.

[78] Further discussed at the end of this chapter.

The judgment which has been widely recognised as providing some content as to the application of the requirement of confidence[79] is that of Megarry J in *Coco v A N Clark (Engineers) Ltd*[80] in which his Honour stated:

> … the information must have been communicated in circumstances importing an obligation of confidence. However secret and confidential the information, there can be no binding obligation of confidence if that information is blurted out in public or is communicated in other circumstances which negative any duty of holding it confidential. From the authorities cited to me, I have not been able to derive any very precise idea of what test is to be applied in determining whether the circumstances import an obligation of confidence.[81]

Although it is trite to affirm that the relationship between solicitor and client will almost inevitably furnish the requirements for the imposition of an obligation of confidence, which is implied in the retainer,[82] in most circumstances, the involvement of others in such communications, the voluntary disclosure of the communications to others, or other factors influencing the relationship between solicitor and client, may alter the character of the communications and defeat the privilege. The exceptions to the principle that communication of privileged information to third parties has the effect of waiving the privilege are rare and can principally be found in the provisions of section 122 of the *Uniform Evidence Law* (disclosure to agents or those with common interests) and section 119 of the *Uniform Evidence Law*, which governs litigation privilege, discussed below. For the reasons there stated, seemingly fine distinctions between classes of person (and capacities in which they act) to whom disclosure is made are often determinative of whether privilege in a communication can be maintained. Further, as intimated above, uncertainty regarding the status of the relationship between solicitor and

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79 *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39, 51 (Mason J); *Half Court Tennis Pty Limited v Seymour* (1980) 53 FLR 240, 255 (Dunn J); *O'Brien v Komesaroff* (1982) 150 CLR 310, 326 (Mason J, with whom Murphy, Aicken, Wilson and Brennan JJ agreed); *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 443 (Gummow J); *Smith Kline & French Laboratories (Aust) Ltd v Department of Community Services and Health* (1990) 22 FCR 73, 86–87 (Gummow J); *Armstrong Strategic Management and Marketing Pty Limited & Ors v Expense Reduction Analysts Group Pty Ltd & Ors* (2012) 295 ALR 348, 389 (Campbell JA, with whom Macfarlan JA and Sackville AJA agreed); *Marshall v Prescott (No 3)* [2013] NSWSC 1949, [150] (Beech-Jones J); *Streetscape Projects (Aust) Pty Ltd v City of Sydney (No 2)* [2013] NSWCA 240, [17] (Meagher, Barrett and Ward JJA).

80 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

81 Ibid 47.

82 Meagher, Gummow and Lehane, *Equity Doctrine and Remedies* (Butterworths LexisNexis, 4th ed, 2002) [41-015]; and *Parry-Jones v Law Soc* (1969) 1 Ch 1 there quoted.

client, and considerations associated with the context in which communications are made, can also defeat the operation of the privilege.

In *Seven Network Limited v News Limited*[83] a question arose as to the capacity in which an 'in-house lawyer' who also acted in a number of commercial capacities within the News Group of companies was giving advice. Tamberlin J said, of the position of 'in-house lawyer':

> The courts recognise that being a lawyer employed by an enterprise does not of itself entail a level of independence. Each employment will depend on the way in which the position is structured and executed.
>
> …
>
> The authorities recognise that in order to attract privilege the legal adviser should have an appropriate degree of independence so as to ensure that the protection of legal professional privilege is not conferred too widely.[84]

However, disclosure of information to and by third parties can, in the right circumstances, be brought within the scope of section 118 of the *Uniform Evidence Law*[85] or the species of legal professional privilege known as 'litigation privilege'.

Litigation privilege is a concept distinct from legal advice privilege. It has, as its object, 'the facilitation of access to legal advice [a point in common with advice privilege], the inducement to candour in statements prepared for the purposes of litigation, and the maintenance of the curial procedure for the determination of justiciable controversies'.[86] Or, as has been put more succinctly, 'as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for the brief'.[87]

The formulation of litigation privilege reflected in section 119 of the *Uniform Evidence Law*[88] is as follows:

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83 *Seven Network Limited v News Limited* [2005] FCA 142.
84 Ibid [4], [5] and [38].
85 See discussion of *Pratt*, commencing on page 60.
86 *Baker v Campbell* (1983) 153 CLR 52, 108 (Brennan J).
87 *Waugh v British Railways Board* [1980] AC 346, 346 (Lord Simon), quoted in *Baker*, ibid.
88 The common law and *Uniform Evidence Law* tests for litigation privilege are discussed below in Chapter 3.

> Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:
>
> (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made, or
>
> (b) the contents of a confidential document (whether delivered or not) that was prepared,
>
> for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

The key points of distinction between litigation privilege and legal advice privilege are that the former extends to communications between the client and 'another person' or a lawyer acting for the client and another person but only arises in the context of the provision of legal services relating to a proceeding or an anticipated or pending proceeding.[89]

Litigation privilege, although springing from the same jurisprudential root as legal advice privilege (as identified in the historical survey below), has developed along a different trajectory to the latter — a trajectory which, it is contended as the basis of this thesis, places it directly in conflict with the principles of law with respect to party-engaged expert witnesses.

A detailed account of the current orthodoxy in respect of the application of 'litigation privilege' to the field of expert evidence is set out in Chapter 3 of this thesis.

III Origins and the Development of Legal Professional Privilege

A The Starting Point

Many contemporary references to the origins of legal professional privilege take as a starting point the first extant modern law reports of the latter part of the sixteenth

[89] See discussion of *Pratt*, commencing on page 60.

century.[90] Such records are, themselves, (as was customary at the time) little more than an account of the factual circumstances of the case in question and a record of the decision made. Scholars of the early twentieth century attributed the rise of the privilege to conditions that did not come into being until the fifteenth century:

> The history of this privilege goes back to the reign of Elizabeth, where the privilege already appears as unquestioned [quoting *Berd v Lovelace* from 1577] … In as much as the testimony of witnesses (in the modern sense) did not come to be a common source of proof in jury trials till the early 1500s and as testimonial compulsion does not appear to have been generally authorised until the early part of Elizabeth's reign … it would seem that the privilege could hardly have come much earlier into existence; for there could have been but little material for its application. It thus appears to have commended itself, at the very outset, as a natural exception to the then novel right of testimonial compulsion.[91]

The recent compilation of the great repository of medieval English legal history, *The Year Books*, into a searchable database by David Seipp of Boston University[92] has provided an opportunity to discover the extent to which (if at all), the privilege was identified in the period from 1268 to 1535. In fact, and consistently with Wigmore's postulation regarding the historical circumstances in which the privilege came into being, there appears to be scant recognition of the privilege in this period.

However, if analogous features of Roman law are put to one side, certain of the doctrine's theoretical underpinnings at common law may be inferred from pronouncements in one of the earliest recorded English cases dealing with an example of 'conflict of interest' involving a solicitor.

In 1433, during the reign of Henry VI, a plaintiff by the name of John (or William) Somerton brought an action against a solicitor whom he alleged he had retained to purchase or lease a manor and whom, it was further alleged, had permitted himself to be retained by another in respect of the same transaction ('*Somerton's case*').[93] William Babington, the Chief Justice of Common Pleas, delivered a judgment in the following terms:

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90 Brereton, above n 14, 129.
91 Wigmore, above n 67, §2290.
92 Seipp, above n 56.
93 *Somerton's Case* [1433] Seipp Number 1433.010.

> if he becomes counsel with another in this matter, I will have an action on my case, because he has deceived me, for he is bound to keep my counsel while he is retained with me; but if one shows his title deeds to a man of law, even though afterwards he becomes the counsel of another, and discovers counsel of the said title deeds, he will not have an action against him on this matter, inasmuch as he was not retained by him but if he discloses his counsel, and becomes of counsel to another to purchase this manor for him, now this is a deceit for which I will have an action on my case.[94]

John Martin, Judge of Common Pleas said:

> the cause of action … is that defendant had disclosed his counsel, and had become counsel to another.[95]

Despite their lack of clarity, which is perhaps more to do with the translation than the original reports, it is possible to discern from these reasons some recognition of elements necessary for the existence of legal professional privilege, namely: a relationship of solicitor and client (the status of which is conferred by the retainer); and a confidential communication between the two which ought not be disclosed (provided the communication is made in the course of the retainer). However, the case does not go so far as to evidence a protection from disclosure of such communication, only the consequences if such disclosure is made.[96] Nor is a public policy dimension identified. The remedy is recognised as being a cause of action for deceit. One further notable element of *Somerton's* case is that it may constitute an early (if not the first) recognition of the distinction between the role of a solicitor when acting in that professional capacity and when not 'he will not have an action against him on this matter, inasmuch as he was not retained by him'. This simple point, which seems here to have been wholly accepted by the court in the context

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94 Ibid also refer 1433.023 (http://www.bu.edu/phpbin/lawyearbooks/display.php?id=17601) and 1433.087(http://www.bu.edu/phpbin/lawyearbooks/display.php?id=17665) being related decisions in this matter.

95 Ibid.

96 A further reported decision, from a case in 1470, may reference some concept of client confidentiality, but the comments of the justices are too ambiguous to lead with any certainty to such a conclusion. The case, in which the parties are not named, (Seipp Number 1470.003 http://www.bu.edu/phpbin/lawyearbooks/display.php?id=20169) concerned a claim for repayment of a debt arising from an annuity said to be payable by the defendant to the plaintiff under a deed by which the plaintiff was to provide 'counsel' to the defendant. What is missing is some indication that the plaintiff was a solicitor and the 'counsel' he was retained to provide was in the nature of legal advice. If the plaintiff were a solicitor, and the advice in question legal advice, the comments made by Justice Nedeham as follows, suggest some acknowledgment as to the secrecy of solicitor/client communications: Nedeham JCP said 'perhaps the counsel ought to have been given in such a matter that the party had not wanted to have discovered'.

of the existence or not of a cause of action for breach of confidence, was the subject of extensive debate well into the eighteenth century, as will be discussed below.

It is not until the sixteenth century that recorded cases provide some proof of the existence of legal professional privilege, or something quite akin to it. In *Berd v Lovelace*,[97] dating to 1576, the plaintiff served the defendant's solicitor with a process to testify in the proceedings. Upon learning that Thomas Hawtry, the man the subject of the process, was the defendant's solicitor, the Master of the Rolls held that he was 'not … compelled to be deposed' and was 'in no danger of any contempt, touching the not executing of the said process'.[98]

A year later, in 1577, reports indicate that in two separate decisions, the courts discharged and refused to admit for examination, solicitors who had been served with subpoenas to testify in the very matters in which they acted for a party.[99] The rationale is not given, save that in the second case, the discharge is said to have been 'by reason he was solicitor in the cause'.[100] This suggests the existence of a rule of law, axiomatic with the existence of a retainer for the matter in question, that a solicitor could not be compelled to testify as a witness.

Then, in the 1578 case of *Creed v Trap*,[101] a Mr Colwell was served with process to testify but upon finding that he had been engaged as 'Solicitor' or 'Counsel' for the defendant in the matter, it was 'ordered that Colwell shall not be examined upon any Interrogatories which shall compel him to discover any matter which came to his knowledge as a Solicitor or as a Councel in this case; but for any other matter it shall be lawful for the plaintiff to examine him'.[102]

97 *Berd v Lovelace* [1576-1577] Cary 62.
98 Ibid.
99 *Austen v Vesey* [1577] Cary 63; *Hartford v Lee* [1577-1578] Cary 63.
100 *Hartford v Lee* [1577-1578] Cary 63.
101 *Creed v Trapp* (1578) 121 Choyce Cases.
102 Ibid.

In 1579, a plaintiff sought to have a legal practitioner by the name of Master Oldsworth 'examined touching a matter in variance, wherein he hath been of counsel'.[103] It was ordered that:

> he shall not be compelled by subpoena, or otherwise, to be examined upon any matter concerning the same, wherein he the said Mr Oldsworth was of counsel, either through the indifferent choice of both parties, or with either of them by reason of any annuity or fee.[104]

Oddly, despite the profusion of cases concerning solicitors being subpoenaed to give evidence in matters concerning their clients in the late sixteenth century, recorded decisions on the topic throughout the seventeenth century are sparse. It is unclear whether this is a reflection upon the reporting of the era or the acceptance by the profession that the question of a solicitor's compellability in the very matters in which he is engaged had been settled. Having regard to the volume of reported cases from the nineteenth century (discussed below), the latter proposition can be doubted.

Two of the 17th century decisions that touch on the issue most directly are the 1654 case of *Waldron and Ward*[105] and the 1676 case of *Bulstod v Letchmere*.[106] The report of the former is pithy:

> In a tryal at the Bar between Waldron plaintiff, and Ward defendant, one Mr. Conye a counceller at the Bar was examined upon his oath to prove the death of Sir Thomas Conye. Whereupon Serjeant Maynard urged to have him examined on the other part, as a witness in some matters whereof he had been made privy as of counsel in the cause. But Roll Chief Justice answered, He is not bound to make answer for things which may disclose the secrets of his clients cause, and thereupon he was forborn to be examined.[107]

Bulstod v Letchmere decided that a 'counsellor at law, shall not be bound to answer concerning any writings which he hath seen, nor for any thing which he knoweth in the cause as counsellor'.[108] This matter differed from those of the 16th century by

103 *Dennis v Codrington* 1579–1580 Cary 100.
104 Ibid.
105 *Waldron v Ward* [1658] Sty 449.
106 *Bulstod v Letchmere* (1676) 2 Freeman 6.
107 *Waldron v Ward* [1658] Sty 449, 450.
108 *Bulstod v Letchmere* (1676) 2 Freeman 6, 6.

reason of the fact that the solicitor himself was a defendant, not a mere witness and the proceedings a bill for discovery for documents in his possession.

The case is also noteworthy because it (along with the decision in *Waldron and Ward*) identifies a limitation of the doctrine, which is consistent with the requirement that the solicitor be acting in a professional capacity before the privilege is engaged: 'but if any thing came into his knowledge before he was counsellor, or upon any other account, he shall … have the privilege of the bar and is not obliged to answer'.[109] The context suggests that the word 'not' has been inserted in the incorrect place and this is indeed noted in the commentary. However, and more significantly, this is identified by Paul Brereton as being the first reported case in which the word 'privilege' is used.[110]

It is apparent from the reported decisions that follow, that sometime between 1676 when *Bulstod v Letchmere* was decided and 1712, not only had the scope of the privilege become fully developed, but its policy underpinnings have been largely expounded upon by authoritative judgments, not all of which have made their way down to us.

The exposition of the policy underpinnings of the concept of litigation privilege was not, in this period, confined to England. The Dutch jurist Johannes Voet in his *Commentarius ad Pandectas*, published in 1698,[111] gave the following justification for the rule prohibiting a solicitor from being a witness in a matter in which he had been engaged:

> An advocate or an attorney is also not a competent witness in a cause for which he has furnished his services in the respective capacity; whether he is called on behalf of the client or against him. He is at any rate not to be compelled to reveal things which he has ascertained from no other source than the laying bare of them by his client … As regards other things learned from other sources nothing forbids an advocate being forced to make a statement in reference to them against his client; lest otherwise it should be in the power of a litigant to

109 Ibid.

110 Justice Brereton, above n 14, 133.

111 Voet, Johannes and Johannes Van Der Linden, *The Selective Voet Being the Commentary on the Pandects by Johannes Voet [1647 - 1713] and the Supplement to That Work by Johannes Van Der Linden [1756 - 1835] Translated with Explanatory Notes and Notes of All South African Cases by Percival Gane* (Butterworth & Co (Africa) Limited, 1956) vol 3.

> rob his opponent of the opportunity of giving proof by adopting as his supporters those who have knowledge of the matter.[112]

The consistency of the reasoning that can be seen between the commentaries of Voet and the decision in *Creed v Trap*[113] suggest that the concept of litigation privilege was not merely a construct of English law – a matter borne out by Cicero himself.[114]

Returning to England, in 1712, the case of *Lloyd d Fiennes & Mignon v Lord Saye & Sele* ('*Lord Say and Seal's case*')[115] came before the Court of Kings Bench. In it, a question arose as to the date upon which a certain deed was executed. The plaintiffs contended it was executed on the date it bore, namely, 23 October 1701. Lord Say and Seal contended that the deed was in fact executed five months later, in March 1702. To prove this, counsel for Lord Say and Seal attempted to call as witness an attorney engaged by the plaintiffs. The plaintiffs objected:

> because as an attorney has a privilege not to be examined as to the secrets of his client's cause, so the attorney's privilege was likewise the client's privilege; for the client intrusts an attorney with secrets of his cause, upon confidence not only that he will not, but also that though he would yet he should not, be admitted by the law to betray his client; and for this, *Holbeche's case* was relied upon…[116]

The Court agreed with that argument:

> The Court were of the opinion, that *Holbeche's case* was good law; and that an attorney's privilege was the privilege of his client; and that an attorney, though he would yet should not be allowed to discover the secrets of his client. But notwithstanding this, they thought [the solicitor's] evidence was to be received; for that a thing of such a nature as the time of executing a deed could not be called the secret of his client, that it was a thing that he might come to the knowledge of without his client's acquainting him, and was of that nature, that an attorney concerned, or anyone else, might inform the Court of.[117]

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112 Ibid 765. Voet relevantly goes on to state: 'It seems clearly not to be doubted that he rightfully gives evidence in another cause in which he is not assisting as advocate or attorney, whether it be given for or against one to whom he earlier furnished his professional services or is still furnishing them in a different transaction. He ought not to be presumed to be swayed by private feelings in a cause which he has never handled'.

113 See discussion on page 34.

114 See the quote with which this chapter is opened.

115 *Lloyd d Fiennes & Mignon v Lord Saye & Sele* (1712) 10 Mod 40 ('*Lord Say and Seal's Case*').

116 Ibid 41.

117 Ibid.

Unfortunately, as intimated above, *Holbeche's case* was unreported and is not now available. Even the date upon which it was decided is unknown.[118] By reason of this lacuna, it is impossible to identify with precision the point by which the doctrine was so developed and by which it can be said, with some degree of certainty, that the notion that the 'privilege' belonged to the client and not the attorney — a notion that Wigmore considered, perhaps erroneously, persisted in fact well into the 18th century.

The other case relied upon by the Court in *Lord Say and Seal's case* in support of the proposition that an attorney's privilege is that of the client and a thing that the attorney should not be allowed to disclose without the consent of a client is that of *Lindsay v Talbot*.[119] A record of this case (the date of which is uncertain but must be earlier than 1712), exists in the compendium produced by Sir John Strange in 1754, in the following terms:

> On a Trial at Bar the Court refused to hear the Evidence of an Attorney, of Matters revealed to him by his Client, and *Trin. 3 George*, *Astrey* against *Alsop*, an Attorney turned off by the Plaintiff offered to give Evidence against her; and Parker Chief Justice refused to hear him, and reproved him.[120]

Lindsay v Talbot is also quoted and relied upon in the 1795 text, *A Treatise of Equity* on the topic of the compellability of witnesses:

> With respect to the exclusion of the testimony of counsel, &c. against their clients, this disqualification of the counsel, &c. is the privilege of the client, it being against the policy of law to permit any person to betray a secret with which the law has intrusted him, *Lindsay v Talbot*, T. 12 G.[121]

Then, from amidst the missing and incomplete records of cases heard, from 1743 comes a complete account of a State Trial between Campbell Craig, Lessee of James Annesley and Richard Earl of Anglesea ('*Annesley v Anglesea*').[122] The trial was presided over by Lord Chief Baron Bowes, Baron Mountenay and Baron

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118 Michael Macnair, *The Law of Proof in Early Modern Equity, Comparative Studies in Continental and Anglo-American Legal History* (Duncker & Humblot, 1999) 241 n 85.

119 *Lindsay v Talbot* Bull. N. P. 284.

120 Sir John Strange, *A Collection of Select Cases Relating to Evidence* (Henry Lintot, 1754) 140. *Astrey v Alsop* is lost to the ages.

121 Henry Ballow and John Fonblanque, *A Treatise of Equity* (Messrs. P. Byrne, J. Moore, W Jones, and H Watts) vol 2, 459.

122 Howell, above n 13.

Dawson of the Court of Exchequer in Ireland. At issue was a matter of inheritance, to be determined by reference to whether the late Baron of Altham (the brother of the Defendant), had a living son.[123] In the course of the hearing, counsel for the Plaintiff sought to call Mr Gifford who he described in the following terms:

> Mr Gifford is an attorney of reputation in England, and as such has been twenty years or thereabouts employed by this noble earl [the Defendant] in his business, as he had occasion for him. When my unfortunate client was to be tried at the Old Bailey, that was the time Lord Anglesea had greatest occasion for this Mr Gifford; and … disclosed his intentions to him…[124]

Those intentions, are said to have included the statement made by the Earl to Mr Gifford in respect of the Plaintiff, to the effect of 'he would spend 10,000*l*. to get him hanged'.[125]

Not surprisingly, counsel for the defendant objected to Mr Gifford being called as a witness in the case. The reasoning given included the following, which is worth quoting at some length:[126]

> …formerly persons appeared in court themselves; but as business multiplied and became more intricate, and titles more perplexed, both the distance of places and the multiplicity of business, made it absolutely necessary that there should be a set of people who should stand in the place of the suitors, and these persons are called attornies. Since this has been thought necessary, all people and all courts have looked upon that confidence between the party and attorney to be so great, that it would be destructive to all business, if attornies were to disclose the business of their clients … Now, if an attorney was to be examined in every case, what man would trust an attorney with the secret of his estate, if he should be permitted to offer himself as a witness? If an attorney had it in his option to be examined, there would be an entire stop to business; nobody would trust an attorney with the state of his affairs.
>
> The reason why attornies are not to be examined to any thing relating to their clients or their affairs is, because it would destroy the confidence that is necessary to be preserved between them.

The solicitor for the plaintiff agreed, but with certain qualifications. He relevantly stated:

> [T]his rule can never be extended either to a case where the matter was not communicated to him as a secret, in the cause wherein he was employed, or before he was employed as attorney in that cause; because there the client was

123 Brereton, above n 14, 134. Justice Brereton provides a fulsome description of the trial and its background.
124 Howell, above n 13, [1223] and following.
125 Ibid.
126 Ibid [1225].

> not under any necessity of disclosing the fact to him; and if it were otherwise, this inconvenience must happen, that no attorney could ever be witness against a person, if he ever happened, upon any occasion whatsoever, to be his attorney.[127]

The debate continued between the parties on this matter for some time. In its course, the question arose as to whether Mr Gifford had the discretion to waive the privilege. At this point, *Lord Say and Seal's case* was invoked as authority for the proposition that 'an attorney's privilege is the privilege of his client; and that an attorney, although he would, yet shall not be allowed to discover the secrets of his client'.[128]

Eventually, and following the parties arguing 'at large, every point arising in the cause, which could possibly bear the least debate', [129] the Barons delivered their judgments on the issue of Mr Gifford's compellability. The Lord Chief Baron relevantly stated:

> Now, admitting the policy of the law in protecting secrets disclosed by the client to his attorney, to be, as has been said, in favour of the client, and principally for his service, and that the attorney is *in loco* of the client, and therefore his trustee, does it follow from thence, that every thing said by a client to his attorney, falls under the same reason? I own, I think not; because there is not the same necessity upon the client to trust him in one case as in the other; and of this the Court may judge, from particulars of the conversation. Nor do I see any impropriety in supposing the same person to be trusted in one case as an attorney or agent, and in another as a common acquaintance. In the first instance, the Court will not permit him, though willing, to discover what came to his knowledge as an attorney, because it would be in breach of that trust which the law supposes to be necessary between him and his employer: but where the client talks to him at large as a friend, and not in the way of his profession, I think the Court is not under the same obligations to guard such secrets, though in the breast of an attorney.[130]

His Lordship then seemed to prevaricate over whether the obligation of secrecy, if it arose in the context of a particular cause, ceased once that cause is ended, but ultimately decided that the words in question were uttered as 'casual conversation', and found that was enough to mean that there was no bar to them being disclosed.[131]

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127 Ibid [1230].
128 Ibid [1236].
129 Ibid [1242].
130 Ibid [1239].
131 Ibid [1240].

Baron Mounteney's judgment included the following pertinent statements:

> …the law hath very justly established, an inviolable secrecy to be observed by attornies, in order to render it safe for clients to communicate to their attornies all proper instructions for the carrying out on those causes which they found themselves under a necessity of intrusting to their care.
>
> In [*Lord Say and Seal's case*] the Court were of the opinion (and I think most rightly) that the privilege of an attorney is the privilege of his client; (and so I have always understood the law to be) but, notwithstanding that, the Court admitted the very attorney, who had been intrusted in suffering the common recovery, to prove that the deed to lead the uses of that very recovery was antedated.[132]

Each of the Lord Chief Baron and Mounteney and Dawson BB agreed, despite recognising the existence of the privilege and its rationale, that the matter sought to be disclosed was a conversation between Mr Gifford and the Defendant made other than in the context of a secret divulged by a client to a lawyer. Rather, this was instead, a matter discussed between the two as acquaintanances. Mr Gifford was sworn and examined. He duly testified that the Defendant had spoken the impugned words.[133]

The significance of *Annesley v Anglesea* to the history of the development (or explication) of the concept of legal professional privilege cannot be overestimated. Not only does it establish that, by 1743, the concept was fully formed, but also that it had been properly settled since at least the time of the *Lord Say and Seal's case* in 1712, which, in turn, had affirmed the state of the concept as espoused in *Holbeche's case* some indeterminate time before that. A number of the key modern qualifications to the operation of the privilege were also clearly articulated: the need for the solicitor to be engaged by the client; for the communication to be made in the context of such a professional relationship (and not merely between parties as acquaintanaces); and for the communication to be confidential. Even a matter that returned to vex some judges in the nineteenth century, namely, whether the privilege arose only upon a suit being on foot, was adjudged in clarion terms by Dawson B in his statement of reasons, in which he said:

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132 Ibid [1241]-[1242].
133 Ibid [1244]-[1254].

> If I have an apprehension that a man intends a suit against me, and I employ an attorney to draw a state of my case from my papers, though there is no cause depending, there I apprehend it would be a breach of trust to disclose the contents of those papers, and that the attorney ought not to be admitted to disclose what has been so intrusted to him.[134]

One further development of the law during the course of the eighteenth century should be noted. In 1791, an issue arose as to whether the privilege could be maintained when communications passed between client and solicitor through and in the presence of an interpreter. In *Du Barré v Livette*,[135] the plaintiff sought to call as witness a Mr Rimond who had acted as translator between the defendant and the defendant's solicitor. It was hoped that the plaintiff could thereby establish an admission on the part of the defendant in those conversations that he had taken the jewels that were the subject-matter of the action. In his judgment, Lord Kenyon said:

> …the relation between attorney and client is as old as the law itself. It is absolutely necessary that the client should unbosom himself to his attorney, who would otherwise not know how to defend him. In a case like the present, it is equally necessary that an interpreter should be employed: everything said before that interpreter was equally in confidence as if said to the attorney when no interpreter was present; he was the organ through which the prisoner conveyed information to the attorney, and it is immaterial whether the cause for the defence of which the conversation passed is at an end or not, it ought equally to remain locked up in the bosoms of those to whom it was communicated.[136]

This latter point, regarding the immateriality of the passing of the particular cause of action the subject of the communication, provides the unequivocal response to the matter over which the Lord Chief Baron in *Annesley v Anglesea* appears to have prevaricated.

B The Nineteenth Century and the Benthamite Objection

As may be expected having regard to the general improvement in the detail and reliability of legal reporting, the nineteenth century contains numerous examples of

134 Ibid [1243].
135 *Du Barre v Livette* [1791] Peake 107.
136 Ibid 110.

the recognition of legal professional privilege and reflects attempts to define the scope of litigation privilege.

One of the first significant cases of the nineteenth century concerning the development of legal professional privilege is the decision of Lord Chancellor Lyndhurst in *Hughes v Biddulph* from 1827.[137] The case concerned certain letters passing between the defendant, her country solicitor (and general agent), Mr Douglas and her town solicitor, Mr Williams. The solicitors for the plaintiff argued that the communications were not immune from production and pointed out that Mr Douglas was her agent in the matters the subject of the suit as well as being her solicitors.[138]

The Lord Chancellor held that:

> confidential communications between the Defendant and her solicitors, or beween the country solicitor and the town solicitor, made in their relation of client and solicitors, either during the cause or with reference to it, though previous to its commencement, ought to be protected…[139]

For reasons that will shortly be discussed, this decision is of considerable importance to the development of the concept of litigation privilege.

In precisely the same year as the Lord Chancellor espoused this view, a challenge to its jurisprudential basis, and a direct assault upon the reasoning adopted by Lord Kenyon in *Du Barré v Livette*[140] emerged in the form of Jeremy Bentham's *Rationale of Judicial Evidence*.[141] In a section titled 'The Exemption Improper', Bentham rails not only against the concept of legal professional privilege, but those who would espouse it as being conducive to the ends of justice:

> English judges have taken care to exempt the professional members of the partnership from so unpleasant obligation as that of rendering services to justice. 'Counsel and attorneys … ought not to be' (say rather are not) 'permitted to discover the secrets of then clients, though they offer themselves for that purpose.'

137 *Hughes v Biddulph* (1827) 38 ER 777.
138 Ibid 777.
139 Ibid.
140 *Du Barre v Livette* [1791] Peake 107.
141 Jeremy Bentham, 'Rationale of Judicial Evidence' in *The Works of Jeremy Bentham* (William Tait, 1843) vol 7.

> On which of the two above-mentioned grounds does the exemption rest in those learned bosoms? Is it that the client would sufffer so much more from being hurt by his lawyer's testimony than by his own? or that a man is so much dearer to his advocate and his attorney, than to himself?
>
> The oracle has given its response:– 'The privilege is that of the client, not of the attorney'… The law adviser is neither to be compelled, nor so much as suffered, to betray the trust thus reposed in him. Not suffered? Why not? Oh, because to betray a trust is treachery; and an act of treachery is an immoral act.[142]

Sarcasm aside, it is apparent that the focal point of Bentham's critique is his perception that the privilege somehow works to pervert the ends of justice by subverting utilitarian principles:

> If [the confidence between solicitor and client], when reposed is permitted to be violated, and if this be known (which, if such be the law, it will be) the consequence will be, that no such confidence will be reposed. Not reposed? – Well: and if it be not, by the supposition there is nothing to betray: let the law adviser say everything he has heard, everything he can have heard from his client, the client cannot have anything to fear from it … What, then, will be the consequence? That a guilty person will not in general be able to derive so much assistance from his law adviser, in the way of concerning a false defence, as he may do at present.
>
> Except the prevention of such pernicious confidence, of what other possible effect can the rule for the requisition of such evidence be productive? Either none at all, or of the conviction of delinquents, in some instances in which, but for the lights thus obtained, they would not have been convicted.[143]

There is little in Bentham's sophistry to commend itself. Not only is the argument advanced by Bentham (which in essence amounts to the wholesale adoption of the adage that 'those with nothing to hide have nothing to fear') completely inapplicable to the field of civil law, in which field the disclosure and the misuse of confidential information has the capacity to harm interests irrespective of criminality, but it also appears inconsistent with tenets of the Anglo-Australian criminal justice system that posits rights to legal advice, a presumption of innocence and due process.

142 Ibid 758.
143 Ibid 759.

These are perhaps the primary reasons why Bentham's sustained polemic against legal professional privilege does not appear to have gained any substantial influence over the course of the doctrine's development.

In 1833, Lord Chancellor Brougham delivered a judgment that succinctly picked up and developed the threads of the reasoning of Dawson B in *Annesley v Anglesea* in respect of the time at which privilege arises and also identified the prevailing rationale for the existence of the privilege:

> The foundation of this rule is not difficult to answer. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection, though certainly it may not be very easy to discover why a like privilege has been refused to others, and especially medical advisers.
>
> But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on, without the aid of men skilled in jurisprudence, in the practice of the Courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilled person, or would dare only to tell his counsellor half his case. If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous.[144]

This is a significant judgment and one of the clearest expositions of the policy behind the rule to be recorded in a reported decision in this era. In the words 'a man would not venture to consult any skilled person, or would dare only to tell his counsellor' can be found the germ of the notion that the privilege, through the involvement of the attorney, may be extended to others whose skill is required to provide technical advice in respect of issues the subject of the case, a modern feature of the doctrine of litigation privilege.

A further key foundation of the doctrine of litigation privilege can (perhaps for the first time) be found clearly articulated in a judgment delivered in 1835 by Sir Charles Pepys (then Master of the Rolls)[145] in the case of *Curling v Perring*[146]. At

144 *Greenough v Gaskell* (1833) 1 MY & K 98, 103.
145 The jurist who would later become known as Lord Cottenham and hold the office of Lord Chancellor.
146 *Curling v Perring* (1835) 2 MY & K 380.

issue was the question of whether correspondence between the solicitor of the defendants and a third party, on a matter directly relating to the key issue in dispute in the proceedings — namely, the Plaintiff's title — was privileged. Counsel for the plaintiff ventured to state, in support of his application for disclosure of the communications, that 'there was no case in which it had ever been held that a communication between a solicitor and a person who was no party to the suit was protected on the ground of privilege'.

In refusing the application for disclosure of the communications, Sir Charles is reported to have said that:[147]

> the correspondence, having taken place after the dispute which was the subject of litigation had arisen between the parties, formed no part of the Plaintiff's title, and that the Plaintiff was not entitled to the inspection of it. If the right of inspecting documents were carried to the length contended for by the Plaintiff, it would be impossible for a Defendant to write a letter for the purpose of obtaining information on the subject of the suit without the liability of having the materials of his defence disclosed to the adverse party.

This is, self-evidently, a key decision in the development of the concept of litigation privilege.

By 1842, despite the keen sophistry of Bentham, the circumstances in which the privilege (as between solicitor and client) would arise appeared beyond doubt. In *Herring v Clobery*,[148] Lord Chancellor Lyndhurst, after surveying the authorities, including the decision in *Greenough v Gaskell*, said:

> I therefore entertain no doubt as to the principle upon which I ought to act in this case with respect to [the solicitor] and I lay down this rule with reference to this cause, that where an attorney is employed by a client professionally, to transact professional business, all communications that pass between the client and the attorney in the course, and for the purpose, of that business, are privileged communications; and that the privilege is the privilege of the client and not of the attorney.[149]

Shortly after his determination in *Herring v Clobery*, Lord Chancellor Lyndhurst was, in the matter of *Steele v Stewart*,[150] required to rule on a question of the

147 Ibid 381.
148 *Herring v Clobery* (1842) 1 Ph. 89.
149 Ibid 96.
150 *Steele v Stewart* (1844) 1 Ph. 471.

applicability of the privilege to letters which contained communications between a Mr Warren, who was sent to India by the defendant at the suggestion of the defendant's solicitors to collect evidence on behalf of the defendant in support of a defence that the ship the subject of the suit was not seaworthy, and the defendant in person.[151] The letters in question 'were written by [Mr Warren] to the Defendant and his solicitors in this country whilst he was in Calcutta, acting by the direction and as the agent of the Defendant's said solicitors in procuring evidence in support of the action in the amended bill mentioned'.[152] The content of the letters related to and concerned the evidence collected by Mr Warren.[153]

The case constituted an appeal by the plaintiffs from an earlier decision, made in July 1843,[154] of the Vice-Chancellor, who had refused the application for production of the letters. In refusing the application, the Vice-Chancellor considered the extent to which the circumstances of the case constituted an extension of or departure from the decision of the Lord Chancellor in *Hughes v Biddulph*. The Vice-Chancellor stated:

> The authorities that have been cited establish that, if the party who was sent to collect the evidence had been a clerk of the Defendant's solicitors, his communications would have been privileged. And, in my opinion, there is no difference in principle whether the communications are made by the clerk to a solicitor, or by a person whom the solicitor has employed specially as his agent to collect evidence on behalf of the client. I admit this is an extension of the rule; but it seems to me that the principle on which the Lord Chancellor acted in *Hughes v Biddulph* applies to the present case; and accordingly I think that the letters were written by the captain of the ship to the Defendant and his solicitors, relative to the evidence which the captain had collected in support of the action, are privileged and ought not to be produced.[155]

On appeal, the Lord Chancellor concurred with the Vice-Chancellor and delivered a judgment in the following terms:

> When a solicitor is employed to collect evidence for his client in a pending suit, it is clear that his communications with his client respecting such evidence are privileged. But a solicitor cannot always act in his own person in the collection of evidence. Distance and communications may render this impossible. Such was the case here … [i]t was necessary therefore that the

151 Ibid 471.
152 Ibid 474.
153 Ibid 472.
154 *Steele v Stewart* (1843) 13 Sim 533.
155 Ibid 535–536.

> solicitor should employ an agent, and whether that agent was a clerk to the solicitor or any other person appears to me wholly immaterial. In performing this duty he represented the solicitor, and his communications to the client, on the subject of the evidence, were the communications of the solicitor, falling within the same principle and entitled to and requiring the same protection.[156]

The decision marks a critical juncture in the refinement of legal professional privilege and a milestone on the trajectory of the expansion of the doctrine. It is one of the earliest cases in which the concept of 'litigation privilege' arises. Although the decision in *Curling v Perring*[157] was referred to by counsel in the course of argument, it does not feature in the judgment of the Lord Chancellor, the reasoning processes within which, are by no means transparent. It appears quite plausible to construe the decision as a mis-statement of the classic formulation of legal professional privilege per se rather than an early explanation of the litigation privilege distinction. This is largely due to the rather 'loose' characterisation of the role of Mr Warren in the judgments of the Vice-Chancellor and the Lord Chancellor. It is tolerably clear from the background contained in the report of the case that Mr Warren was not a legal practitioner and was not an employee of the solicitor in question. He was the master of the ship that had been lost and possibly an employee of or contractor to the defendant.[158] The letters that he wrote in connection with the gathering of evidence were sent variously to the defendant himself and to the defendant's solicitor.[159] Privilege was claimed in respect of both categories of correspondence and upheld by the Vice-Chancellor and then the Lord Chancellor.

Insofar as the correspondence was sent by Mr Warren to the defendant directly, it is unclear how such a communication falls within the scope of legal professional privilege as articulated in by the Lord Chancellor himself in *Herring v Clobery*. However, such communications would potentially be capable of being characterised as the subject of litigation privilege by the modern test set forth in section 119 of the *Uniform Evidence Law*, by reason of them being 'a confidential communication between the client and another person … that was made … for the

156 *Steele v Stewart* (1844) 1 Ph. 471, 474–475.
157 *Curling v Perring* (1835) 2 MY & K 380 discussed above.
158 *Steele v Stewart* (1844) 1 Ph. 471, 473.
159 Ibid 474.

dominant purpose of the client being provided with professional legal services relating to an [Australian or overseas] proceeding, or an anticipated or pending [Australian or overseas] proceeding'.

If the Lord Chancellor was, at the time of giving judgment in *Steele*, conscious of the distinction that could be drawn between legal professional privilege as it had (until that time) been formulated and litigation privilege as a related concept, the judgment gives no sign of it. It adopts an unquestioning assumption of Mr Warren being 'the solicitor's agent'[160] before going on to state that 'whether that agent was a clerk to the solicitor or to any other person appears to me wholly immaterial'.[161] As to his Lordship's earlier statement of principle that 'when a solicitor is employed to collect evidence for his client in a pending suit, it is clear that his communications with his client respecting such evidence are privileged'— this is not a matter of controversy and, as his Lordship's own reasons in *Herring v Cloberry* make clear, such privilege applies whenever a solicitor 'is engaged or is employed by a client professionally, to transact professional business'.[162] It is not changed by reason of there being litigation on foot or pending.

For this reason, one might approach with some caution his Lordship's concluding statement, namely 'I do not … concur with [the Vice-Chancellor] in considering this an extension of an admitted principle. I consider the case as coming within the same principle on which the communication of the solicitor himself would, under similar circumstances, be privileged'.[163] The warrant for that caution is justified by analysis of the next decision of relevance to the issue – ironically, that of the very same Vice-Chancellor in *Steele's* case, Sir J. L. Knight Bruce.

Pearse v Pearse[164] was decided in December 1846. At issue was whether communications between a client and solicitor made prior to proceedings and without reference to such proceedings could be the subject of legal professional

160 Ibid.
161 Ibid 475.
162 *Herring v Clobery* (1842) 1 Ph. 89, 96.
163 *Steele v Stewart* (1844) 1 Ph. 471, 475.
164 *Pearse v Pearse* (1846) 1 DE G & SM 12.

privilege. Not surprisingly, during the course of argument, the Vice-Chancellor expressed some surprise that the issue remained alive and referred the parties back to the decision in *Herring v Clobery*.[165] Nevertheless, counsel for the plaintiff persisted and sought to draw a distinction between the entitlement of a solicitor to insist on the privilege for the benefit of a client and the entitlement of a client to withhold from disclosure communications made to his or her attorney other than in contemplation of or pending a suit.[166] In doing so, counsel called to aid the decision in *Hughes v Biddulph*.[167] and presumably the Lord Chancellor's statement in that case as to privilege applying to a communication with a solicitor 'during the cause or with reference to it'.[168]

The Vice-Chancellor, in upholding the decision of the Lord Chancellor in *Herring v Clobery*, gave one of the most comprehensive and, indeed, stirring judgments on the issue of legal professional privilege and its rationale. Before quoting the Vice-Chancellor, it is appropriate to recall the rationale of Bentham, which is encapsulated in the following tract:

> A counsel, solicitor, or attorney, cannot conduct the cause of his client' (it has been observed) 'if he is not fully instructed in the circumstances attending it: but the client' (it is added) 'could not give the instructions with safety, if the facts confided to his advocate were to be disclosed.' Not with safety? So much the better … The argument employed as a reason against the compelling of such disclosure, is the very argument that pleads in favour of it … Expect the lawyer to be serious in his endeavours to extirpate the breed of dishonest litigants! Expect the fox-hunter first to be serious in his wishes to extirpate the breed of foxes.[169]

The Vice-Chancellor first quoted the words of Lord Lyndhurst in *Herring v Clobery*, discussed above,[170] before proceeding to state:

> This I take to be not a peculiar but a general rule of jurisprudence. The civil law, indeed, considered the advocate and the client so identified or bound together, that the advocate was, I believe, generally not allowed to be a witness for the client. 'Ne patroni in causa, cui patrocinium proestiterunt, testimonium

165 Ibid 17.
166 Ibid 17–18.
167 Ibid 18.
168 *Hughes v Biddulph* (1827) 38 ER 777, 777.
169 Bentham, above n 141, 762.
170 Namely, 'where an attorney is employed by a client professionally to transact professional business, all the communications that pass between the client and the attorney in the course and for the purpose of that business are privilege communications, and that the privilege is the privilege of the client and not of the attorney' *Herring v Clobery* (1842) 1 Ph. 89, 96.

> dicant,' says the Digest … An old jurist, indeed, appears to have thought that, by putting an advocate to the torture, he might be made a good witness for his client; but this seems not to have met with general approbation. Professors of the law probably were not disposed to encourage the dogma practically. Voet puts the communications between a client and an advocate on the footing of those between a penitent and his priest.[171]
>
> …
>
> The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects; which cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficiency of torture is not, I suppose, the most weighty objection to that mode of examination …. Truth, like all other good things, may be loved unwisely – may be pursued too keenly – may cost too much. And surely the meanness and the mischief of prying into a man's confidential consultations with his legal advisor, the general evil of inducing reserve and dissimulation, uneasiness, and suspicion and fear, into those communications which must take place, and which, unless in a condition of perfect security must take place uselessly or worse, are too great a price to pay for truth itself.[172]

It is perhaps the most eloquent exposition of the jurisprudential basis for the doctrine which, from this point onwards, must be considered to have been fully formed within the English system.

Scarcely a decade later, the position with respect to communications between solicitors, clients and lay witnesses also appears to have been substantially resolved. In *Lafone v The Falkland Islands Company (No 1)*,[173] a situation similar to that in *Steele v Stewart* had arisen. The question was whether answers to inquiries addressed by the defendants to their agent in the Falkland Islands by direction of their solicitor for the purpose of procuring evidence in support of the defendants' case were protected from production. However, the facts of this case differed from those in *Steele v Stewart*. In this case, a report addressed to the defendants was prepared by their agent, Thomas Hevers. The report responded to a number of inquiries, some of which had been asked at the instigation of the defendants' solicitor and others at the instigation of the defendants themselves. When the

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171 Johannis Voet... *Commentarius ad Pandectas: in quo praeter Romani* ...Volume 1 'An advocate or an attorney is also not a competent witness in a cause for which he has furnished his services in the respective capacity; whether he is called on behalf of the client or against him. He is at any rate not to be compelled to reveal things which he has ascertained from no other source than the laying bare of them by his client; in the same way as it is impious for a priest also to lay bare things which he has learned from an auricular confession.' Voet, Johannes and Van Der Linden, above n 111, 765.

172 *Pearse v Pearse* (1846) 1 DE G & SM 12, 25–26, 28.

173 *Lafone v The Falklands Island Company (No 1)* (1857) 4 K & J. 32 ('*Lafone*').

plaintiff called for production of the report, disclosure was made of it, save for the passages that constituted responses to the solicitor's inquiries.[174] The plaintiff pressed for disclosure of those passages.

Vice-Chancellor Sir W. Page Wood, in deciding that the passages were privileged and ought not be disclosed, provided a useful summary of the law on this point,[175] before going on to state:

> Here, as in *Steele v Stewart*, the matter in litigation was at a considerable distance, and probably it was not convenient to send one of his regular clerks for such a purpose. He, therefore, applies to the managing director of the company, describes to him the evidence he requires in support of the Defendants' case, and directs him to communicate with the company's agent in the Falkland Islands, and desires him to procure the evidence required and transmit it to England. That agent procures the requisite evidence and transmits it to England, and, of course, he transmits it for a purpose which will bring it within the rule as laid down by Lord Lynhurst in *Steele v Stewart*.[176]

Critically, the Vice-Chancellor continues:

> It is true the solicitor does not go on to depose that it was transmitted to the Defendants in order to be communicated to him, otherwise the question would have been simply a repetition, in so many terms, of that in *Steele v Stewart*. But it is clear from the affidavit, that this was the purpose for which he directed the Defendants, or rather the managing director, to procure it; and that it has been so procured for the purpose of being communicated to the solicitor, and in order that it may be made use of as evidence in the cause.[177]

The report the subject of the application, therefore, had not in fact been delivered to the solicitor. It was enough that the sections of it over which privilege was claimed had been intended for delivery to the defendants' solicitor for the purpose of being used for evidence in the proceedings. *Lafone v The Falkland Islands*

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174 Ibid 34.

175 'The previous decision of Lord Cottenham, when Master of the Rolls, in the case of *Curling v Perring* (2 My. & K. 380), although it might not extend the principle, went further, in some respects, than any case which had then been previously decided. There, a solicitor for the purpose of obtaining evidence in the cause, had entered into a correspondence with a witness. It was urged that the relation of solicitor and client did not exist between the solicitor and a witness, and that the correspondence between them was not protected. But Lord Cottenham held that it was; for it would be impossible——resting it again on the same ground of necessity on which all these cases as to protection are decided—for persons to have their causes fairly conducted, unless solicitors were protected in all their communications with such persons as they supposed capable of giving evidence in favour of their clients. Then *Steele v Steele* went a step further, for there the protection was extended not merely to correspondence that had passed between a witness and a solicitor, but to letters written by a person who had been sent abroad to obtain evidence in the cause, and addressed some to the solicitors and others to the defendant himself.' Ibid 36–37.

176 Ibid 37–38.

177 Ibid 38.

Company would appear to be the first reported instance of the rule that would find its ultimate expression in that part of section 119 of the *Uniform Evidence Law* that provides privilege will inhere in a document, *whether delivered or not*, if the requisite intention is present and other criteria are met. It is another instance of the expansion of the doctrine.

However, the cases thus far have not addressed communications with, or reports prepared by, experts. In the 1863 case of *Walsham v Stainton*,[178] a solicitor engaged on behalf of the defendant sought a report from an accountant on books of the company of which Henry Stainton was a manager. It was alleged in the proceedings that Mr Stainton and other managers of the company had engaged in fraud. The accountant's reports had been used by the solicitor in the preparation of pleadings filed in the proceedings. The plaintiffs sought production of the reports of the accountant.[179]

Vice-Chancellor Sir W. Page Wood found that the reports of the accountant having been prepared at the direction of the solicitor, fell within the principle of both *Curling v Perring* and *Steele v Stewart*:

> Therefore, as regards the actual reports, I have no doubt whatever that they were prepared by the accountant qua clerk of the solicitor, and fall within the scope of the privilege. If this were not so a client would have to tell his solicitor 'Here is a heavy matter of account to be investigated; you must take care to have no inferences from the books put upon paper, lest they should become liable to production.' That would not leave the means of free and unreserved communication, to which the client is entitled.[180]

Despite involving expertise of an accountant, the case of *Walsham v Stainton* was not one in which expert evidence from the accountant was sought to be adduced in the proceedings. The early treatment of expert reports for the purposes of the determination of privilege claims is best illustrated through a series of English cases involving medical reports procured by railway companies following accidents occasioning personal injury.

178 *Walsham v Stainton* (1863) 2 H & M. 1.
179 Ibid 1,2.
180 Ibid 5.

In *Baker v London and South Western Railway Co*,[181] Richard Baker, a passenger on a train belonging to the defendant company, sustained a serious injury as a consequence of an unspecified incident. The railway company sent a clerk and a medical officer to visit Mr Baker for the purpose of ascertaining the extent of his injuries and making an offer of financial compensation. The medical officer, Dr Vine, visited Mr Baker on 3 and 14 April 1866, examined him and prepared reports to the company. The company alleged that Mr Baker's claim in negligence against it was satisfied for the payment of 75*l.* on 11 May 1866 being the date on which Mr Baker signed a receipt acknowledging the payment had been made. Shortly after that date, Mr Baker died. The proceedings were brought by executors of his estate for damages consequent upon the defendant's negligence. In the course of those proceedings, the plaintiff sought the production of the reports prepared by Dr Vine and of the clerk.

In granting access to the reports, Cockburn CJ relevantly stated:

> …when confidential communications have taken place between you and your agent, who has been sent to inquire and report about the subject matter of the litigation, you are not in general to be compelled to tell your adversary what the result of the inquiries may be. But when you send your agents to see and negotiate with the other party, whatever passes at such interviews ought to be made known, and the other party or those representing him, have a right to inspect the communications respecting them.[182]

The decision is somewhat surprising — not least because it is nowhere made plain whether the content of the medical reports evidenced communications between the deceased and Dr Vine in the nature of, or regarding negotiations.

A contrary conclusion was reached by the court in the 1870 case of *Cossey and Wife v London, Brighton, and South Coast Railway Company*.[183] In that case, the plaintiffs claimed to have been injured when a train owned by the defendant collided with another train at New Cross station on 23 June 1869. On 12 July 1869, Mr Cossey wrote to the railway company's secretary complaining of his injuries. On 23 July 1869, the railway company sent its 'regular and permanent medical

181 *Baker v London and South Western Railway Co* 3 Q. B. 93.
182 Ibid 94.
183 *Cossey and Wife v London, Brighton and South Coast Railway Company* (1870) 5 CP 146.

officer', Dr Maclure, to examine Mr and Mrs Cossey with a view to advising the company on their alleged injuries. Thereafter Mr and Mrs Cossey commenced proceedings against the company and sought production of the report prepared by Dr Maclure following the principle set down in *Baker v London and South Western Railyway Co*. The court refused and sought to distinguish the outcome of *Baker* in the following manner:

> It has been said that the effect of the decison in *Baker v London and South Western Ry. Co*. … is that, where the plaintiff has submitted to be examined by the medical officer of the company, there is an implied understanding that any reports made by him shall be produced. I cannot, however, consider that there is any such implied undertaking. The nature of the reports is stated in the affidavits which much govern our decision; and these shew that they were made by a person who went for the purpose of examining the plaintiffs as to the nature and extent of the injuries they had received and the compensation they had claimed, with a view to advising thereon and meeting the claim. Complaint had been made to the company, and the investigation took place with the view of compensating the plaintiffs. I think the facts clearly bring this case within [the rule] which protects the party against the production of documents which are obtained with a view to impending litigation, and not within the exceptional case of *Baker*…[184]

In fact it is not immediately clear why the same considerations should not have applied in *Baker's* case. Nevertheless, the principle identified in *Cossey* is consistent with the contemporary approach to the upholding of claims for privilege in reports prepared for the purpose of use by a party in evaluating a matter in circumstances in which litigation was reasonably anticipated.[185]

It is appropriate to give the last word on the topic of litigation privilege in the nineteenth century to the judgment of Jessel MR in *Wheeler v Le Marchant*[186] because his Honour's reasoning not only constitutes an eloquent explanation and restatement of the rule as it had developed in the English courts to that point (by way of comparison in respect of advice privilege generally), but an exposition of the rule that continued, until comparatively recently, to be applied to the determination of claims based upon the rule in courts throughout Australia.[187] At

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184 Ibid 151–152 (Bovill CJ).

185 See the discussion in Section II of this Chapter and also *Pacey v London Tramways Company* [1875] 2 ExD 440 (Jessel MR, Lord Coleridge CJ, Mellish LJ and Denman J); *Friend v The London, Chatham and Dover Railway Company* [1875] 3 ExD 437 (Cockburn CJ, Bramwell and Brett LJJ).

186 *Wheeler v Le Marchant* (1881) 17 Ch D 675.

187 See for example *Dingle v Commonwealth Development Bank of Australia* (1989) 23 FCR 63, 66 (Pincus J); *Telebooth Pty Ltd v Telstra Corporation* [1994] 1 VR 337, 342 Hedigan J; *Somerville v Australian*

issue in *Le Marchant* was whether communications between surveyors engaged by a client and a solicitor advising the client were the subject of privilege in circumstances in which, at the time they were made, litigation was not commenced or in contemplation.[188]

Jessel MR summarised the law with respect to legal professional privilege as it stood at the time in the following terms:

> …The cases, no doubt, establish that such documents are protected where they have come into existence after litigation commenced or in contemplation, and when they have been made with a view to such litigation, either for the purpose of obtaining advice as to such litigation, or of obtaining evidence to be used in such litigation, or of obtaining information which might lead to the obtaining of such evidence, but it has never hitherto been decided that documents are protected merely because they are produced by a third person in answer to an inquiry made by the solicitor. It does not appear to me to be necessary, either as a result of the principle which regulates this privilege or for the convenience of mankind, so to extend the rule. … [I]t must not be supposed that there is any principle which says that every confidential communication which it is necessary to make in order to carry on the ordinary business of life is protected.[189]

Jessel MR then went on to consider whether the circumstances of the case warranted the extension of the privilege to circumstances in which no litigation was anticipated.

> But what we are asked to protect here is this. The solicitor, being consulted in a matter as to which no dispute has arisen, thinks he would like to know some further facts before giving his advice, and applies to a surveyor to tell him what the state of a given property is, and it is said that the information given ought to be protected because it is desired or required by the solicitor in order to enable him the better to give legal advice. It appears to me that to give such protection would not only extend the rule beyond what has been previously laid down, but beyond what necessity warrants.[190]

Jessel MR's refusal to extend the privilege remained undisturbed in Australia until the decision in *Pratt Holdings Pty Ltd v Commissioner of Taxation*,[191] discussed in subsequent sections of this chapter.

Securities Commission (1995) 60 FCR 319, 334 (Jenkinson J); *Health & Life Care Limited v Price Waterhouse* (1997) 69 SASR 362 (Lander J); *Galway v Constable* (2002) 2 Qd R 146, 150–151 (Holmes J).

188 *Wheeler v Le Marchant* (1881) 17 Ch D 675, 681.

189 Ibid.

190 Ibid 682.

191 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357.

C The Early Twentieth Century

By 1881, the law with respect to the application of legal professional privilege comprehending both advice privilege and litigation privilege was predominantly settled. The only substantive issue that remained to be determined was the extent to which the *purpose* of the confidential communication qualified or disqualified the communication from the application of the privilege.

This issue was resolved (but not finally) in the 1913 case of *Birmingham and Midland Motor Omnibus Company Limited v London and North Western Railway Company*[192] in which a party challenged the adequacy of an affidavit of discovery for the purposes of establishing privilege over a set of otherwise discoverable documents. Buckley LJ stated:

> It is not I think necessary that the affidavit should state that the information was obtained solely or merely or primarily for the solicitor, if it was obtained for the solicitor, in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated.[193]

A different perspective was adopted by Hamilton LJ, who stated:

> To hold such documents privileged merely because it can be shewn of them, not untruthfully, that the principal, who made them part of the regular course of business and of the duties of his subordinates, foresaw and had in mind their utility in the case of litigation, feared, threatened, or commenced, would in my opinion be unsound in principle and disastrous in practice … The only authority cited to us for the proposition that the formula need not contain the statement that submission to the solicitor was the primary or the substantial purpose with which the document was brought into existence, and may even negative it, is *London and Tilbury Ry Co. v. Kirk & Randall* [(1884) 28 Sol. J 688], a decision which, if correctly reported, I think is wrong.[194]

Vaughan Williams LJ stated:[195]

> I have read the judgments of Buckley LJ and Hamilton LJ and I entirely agree in the result of those. Dealing with the details I would like to say I rather prefer the way in which Buckley LJ has put his judgment to that in which Hamilton LJ has put his, but I entirely agree with the result.

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192 *Birmingham and Midland Motor Omnibus Company Limited v London and North Western Railway Company* (1913) 3 KB 850.
193 Ibid 856.
194 Ibid 859–860.
195 Ibid 855.

The Court upheld the trial judge's finding that the documents in question were privileged but that finding must be read, in light of the above judgments, as requiring that it must be shown that provision of the communications were made primarily or substantially for the purpose of provision to the solicitor for legal advice.

IV The Australian Position

It would not be for another 60 years that an Australian court, unconvinced about the weight of Vaughan Williams LJ's concurrence with Buckley LJ in *Birmingham and Midland Motor Omnibus Company*, would revisit the issue with a view towards establishing a definitive rule by which to determine whether a communication was privileged on the grounds of it having been created for more than one purpose (namely, the obtaining of legal advice). That court was the High Court of Australia in *Grant v Downs*.[196] Australia had, by this time, received the English doctrine of legal professional privilege in its fullest form.[197] However, in their joint majority judgment, Stephen, Mason and Murphy JJ found the issue regarding the purpose for which communications were brought into existence had not been conclusively decided (and in doing so, relied upon the fact that the decision of Hamilton LJ in *Birmingham and Midland Motor Omnibus Company* left open the interpretation that a 'sole purpose' test should apply) in determining whether communications were susceptible to a claim for legal professional privilege. In order to do this, they characterised the nature of Vaughan Williams LJ's concurrence in the following terms:

> Vaughan Williams LJ 'rather' preferred 'the way in which Buckley LJ' had 'put his judgment'.[198]

This is a marginally selective reading of the nature of that concurrence.

196 *Grant v Downs* (1976) 135 CLR 674.
197 See for example, the survey of Stone J in *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357, 376–383.
198 *Grant v Downs* (1976) 135 CLR 674, 684.

This majority (with whom Jacobs J agreed), concluded that:

> All that we have said ... indicates that unless the law confines legal professional privilege to those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings the privilege will travel beyond the underlying rationale to which it is intended to give expression and will confer an advantage and immunity on a corporation which is not enjoyed by the ordinary individual. It is not right that the privilege can attach to documents which, quite apart from the purpose of submission to a solicitor, would have been brought into existence for other purposes in any event, and then without attracting any attendant privilege.[199]

Barwick CJ, in dissent, adopted a different approach. His Honour relevantly stated that he was prepared to agree with Buckley LJ's judgment in *Birmingham and Midland Motor Omnibus Company* to the extent that the latter found that the document must have been produced for the solicitor but not solely for the solicitor. Likewise, he accepted the view of Hamilton LJ to the effect that the mere fact that the document in question could prove useful in litigation would not qualify it as a privileged document. Barwick CJ concluded:

> For my part, I prefer the word 'dominant' to describe the relevant purpose. Neither 'primary' nor 'substantial', in my opinion, satisfies the true basis of the privilege.[200]

The majority prevailed.

However, the strictness of the sole purpose test met with criticism. In its interim report on evidence law in 1986, the Australian Law Reform Commission expressed the following view:

> It is suggested that the 'dominant' purpose test strikes the correct balance and should be adopted. It is an expression that has been used in other fields. It is a severe test, as it denied protection to the internal reports in *Waugh's* case and *Grant v Downs*. The difference between it and the 'sole' purpose test is likely to emerge, however, in relation to communications which occur after litigation has been expressly threatened or commenced. A 'dominant' purpose test may be more difficult to apply than a 'sole' purpose test. There is, perhaps, more room for argument and false claims of the appropriate purpose. An examination of the document will often be sufficient for the 'sole' purpose test but not for the 'dominant' purpose test.[201]

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199 Ibid 688.
200 *Grant v Downs* 135 CLR 674, 678.
201 Australian Law Reform Commission, 'Evidence (Interim)' (26, Australian Law Reform Commission, 21 August 1985) [881].

The final Australian Law Reform Commission report into evidence law recommended the implementation of the recommendations of the Interim Report made in respect of the privilege.[202] Accordingly, when it was enacted, sections 118 and 119 of the *Uniform Evidence Law* adopted the 'dominant purpose' test. The ongoing disparity between this test and the position that prevailed at common law is discussed in greater detail in Chapter 3 of this thesis.

All that then remained ultimately, and following a period of some uncertainty, was for it to be resolved whether the common law of Australia would be aligned with the test in the *Uniform Evidence Law* or continue with the sole purpose test arising from *Grant v Downs*. In *Esso Australia Resources v Commissioner of Taxation of the Commonwealth of Australia*,[203] a majority of the High Court considered that the 'dominant purpose' test should prevail. Gleeson CJ, Gaudron and Gummow JJ (with whom Callinan J relevantly agreed) considered that, although '[a]t first sight, sole purpose appears to be a bright-line test, easily understood and capable of ready application',[204] the 'dominant purpose test should be preferred. It strikes a just balance, it suffices to rule out claims of the kind considered in *Grant v Downs* and *Waugh*, and it brings the common law of Australia into conformity with other common law jurisdictions'.[205]

The final development of particular relevance to the history of legal professional privilege in Australia is the expansion of the concept of the doctrine to documents prepared by a third party for the dominant purpose of a lawyer providing legal advice to a client *other than* in the context of existing or anticipated legal proceedings. This development is clearly contrary to the reasoning adopted in *Wheeler v Le Marchant*, in which Jessel MR considered such an approach as extending the rule not only 'beyond what has been previously laid down, but beyond what necessity warrants'.[206] Indeed, the judgment of Finn J in *Pratt* opens with an

202 Australian Law Reform Commission, 'Evidence' (38, Australian Law Reform Commission, 5 June 1987) [195]-[200].
203 *Esso v FCT* (1999) 201 CLR 49.
204 Ibid 72.
205 Ibid 73.
206 *Wheeler v Le Marchant* (1881) 17 Ch D 675, 681.

expression of surprise that 'the legal principle in issue can still be a matter of contest'.[207]

The proceedings concerned whether an accounting report prepared by Price Waterhouse at the instigation of Pratt Holdings and for the dominant purpose of enabling Pratt Holdings to obtain legal advice in respect of taxation obligations could be the subject of legal professional privilege despite it not having been obtained for the purpose of anticipated or pending proceedings.

Finn J (with whom Merkel J agreed), considered that there existed clear policy reasons for extending legal professional privilege to documents authored by third parties to enable a client to obtain such legal advice, particularly having regard to matters in which the client lacked the 'aptitude, knowledge, skill and expertise, or resources' to provide the solicitor with the information required to obtain legal advice.[208]

Stone J (with whom Merkel J also agreed), considered that the rationale for the existence of legal professional privilege articulated by the High Court did not 'lend itself to artificial' distinctions regarding the source of assistance being provided by an agent or alter ego of the client on the one hand or by a third party on the other.[209] Both judges considered that the extension was warranted on the proviso that the company could demonstrate that the dominant purpose for the creation of the relevant document was the provision of legal advice.[210]

The decision modified the common law by extending legal professional privilege to documents created by third parties for the dominant purpose of a lawyer providing legal advice to the client and the *Uniform Evidence Law* was amended to incorporate the extension in a new section 118(c).[211]

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207 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357, 359 (Finn J).
208 Ibid 368 (Finn J).
209 Ibid 386 (Stone J).
210 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357, 369 (Finn J), 387 (Stone J).
211 *Evidence Amendment Act 2007* (NSW) Schedule 1, [56]; *Evidence Amendment Act 2008* (Commonwealth) Schedule 1, [61].

This is the relevant background to the development of legal professional privilege and the form in which it was received by the Australian legal system. From the single proposition that a solicitor be not compellable as a witness in respect of an action in which he or she has acted,[212] to extension of the principle to communications with agents of the solicitor or client,[213] to the further extension of the principle to third parties in the case of anticipated or pending litigation,[214] the further extension of advice privilege to documents prepared by third parties,[215] to the adoption of a 'dominant purpose' test for the application of the privilege — the 'discovery' of the common law features of legal professional privilege and, in particular, litigation privilege, reveal a trajectory of expansion.

The touchstone of that expansion is perhaps captured by the following observation of Stone J in *Pratt*:

> The history of legal professional privilege shows that the courts have been willing to adapt the doctrine to ensure that the policy supporting the doctrine is not sabotaged by rigid adherence to form that does not reflect the practical realities surrounding the application of privilege …[216]

Subsequent chapters will examine the current state of the privilege and how it is that the privilege, the rationale of which has now been extensively surveyed, both interacts and conflicts with similarly adopted principles associated with the party-engaged expert witness.

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212 See, for example, this chapter's discussion of *Berd v Lovelace* and *Creed v Trapp*.
213 See, for example, this chapter's discussion of *Curling v Perring*, *Steele v Stewart* and *Walsham v Stainton*.
214 See, for example, this chapter's discussion of *Lafone v Falkland Islands Company* and *Wheeler v Le Marchant*.
215 *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357.
216 Ibid 386 (Stone J).

CHAPTER 2 – THE EXPERT AND EXPERT EVIDENCE

> And first I grant, that if matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns. Which is an honourable and commendable thing in our law. For thereby it appears that we do not despise all other sciences but our own, but we approve of them and encourage them as things worthy of commendation.
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> *Buckley v Rice-Thomas* (1554)[217]

I Overview

In his 1933 lecture to the Medico-Legal Society of Melbourne, Justice Owen Dixon (then a puisne judge of the High Court) described what he considered to be the three true functions of the scientific or medical expert witness, namely: to supply the court with abstract or general knowledge which is necessary to enable it to understand the considerations which should determine its opinion upon scientific or medical matters involved in the issue before it; to describe the material facts of medical or scientific knowledge which the witness has observed; and to give the witness's own inferences and opinions and the grounds upon which they proceed.[218]

This much is uncontroversial. The difficulty lies in its application within the context of an adversarial system of justice where experts are typically engaged by parties. As Justice Dixon went on to state:

> Now, the object of the parties is always victory, not abstract truth. They will rely upon the considerations and arguments which will actually affect the result, and accordingly, the course they take in the conduct of a case is inevitably determined by their estimate of what will, in fact, influence the tribunal, whether judge or jury, before whom their litigation is tried.[219]

Therein lies the difficulty of relying upon experts proferred by parties in an adversarial system.

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217 *Buckley v Rice-Thomas* (1554) 1 Pl. 118, 124 (Saunders J).
218 Justice Owen Dixon, *Jesting Pilate* (The Law Book Company, 1965) 18.
219 Ibid.

Courts have made use of expert opinion for centuries and the manner of such use has varied. At least by the 15th century in England, it was common in certain categories of case for a jury of persons possessing specialist skills or experience to be empanelled so as to assist the court to make findings of fact. Examples of these juries include the 'jury of matrons', formed to advise a court of the pregnancy (or otherwise) of a woman; the jury of tradesmen, formed to advise a court of the quality or propriety of an impugned good; and the jury of 'cooks and fishmongers, to try those accused of selling bad food'.[220]

The Year Books[221] include a case from the Court of Common Pleas in 1422 during which Serjeant-at-Law Thomas Rolf for the defendant stated that it was the law of the land that the issue of a woman claiming pregnancy by her deceased husband 'will be tried by the writ *de Ventre inspiciendo*, by women [a jury of matrons] by certain secret signs'.[222] Another method, at least of a similar antiquity,[223] by which courts traditionally received expert opinion (and a method which remains very much alive today), is the appointment of a 'court expert' or 'assessor'.[224] Such an expert is called by and gives testimony to the court. Although the court-appointed expert could be characterised as a 'witness', such experts are not witnesses engaged on behalf of or called by parties to the litigation.

Reporting of cases involving party-engaged expert witnesses appears not to have become common in civil cases until at least the 1750s.[225] However, Dwyer has found evidence of party-engaged expert witnesses being used in criminal courts of England by 1678.[226]

This chapter considers the rise of the party-engaged expert and the historical features of the relationship between the party-engaged expert and the courts, in

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220 J Thyer, A Preliminary Treatise on Evidence at Common Law, Cambridge, MA 1898, 94, quoted in DM Dwyer, 'Expert Evidence in the English Civil Courts, 1550 - 1800' (2007) 28 *Journal of Legal History* 93, 101.

221 Seipp, above n 56.

222 Seipp Number: 1422.042ss https://www.bu.edu/phpbin/lawyearbooks/display.php?id=16788.

223 Dwyer, above n 220, 98.

224 See for example, Subdivision 5 of Division 2 of Part 31 of the *Uniform Civil Procedure Rules 2005* (NSW).

225 Dwyer, above n 220, 100.

226 *R v. Pembroke (Earl)* (1678) 6 St Tr. 1337; *R v Green* (1679) 7 St Tr. 185, quoted in ibid 112.

order to reach an understanding of the current orthodoxy within Australian courts as to the reception of expert evidence. It concludes with an examination of those features of the expert which differentiate him or her from other categories of witness. It is contended that these features only serve to reinforce the exceptional nature of party-engaged experts within the Australian legal system and to underscore the problem posed by legal professional privilege when it comes into contact with them.

II The Archetype of the Unscrupulous Expert

Despite the comparative antiquity of the concept of the party-engaged expert, towards the end of the twentieth century, there was something of an explosion of professional, academic and quasi-academic literature regarding the topic.

In his 1991 publication, *Galileo's Revenge: Junk Science in the Courtroom*, Peter W. Huber espouses the thesis that '[t]he pursuit of truth, the whole truth, and nothing but the truth has given way to reams of meaningless data, fearful speculation, and fantastic conjecture. Courts resound with elaborate, systematised, jargon-filled, serious-sounding deceptions that fully deserve the contemptuous label used by trial lawyers themselves: junk science.'[227] Huber's account provides scant detail on the history of expert testimony.[228] The overriding message is that expert testimony was once constrained by the courts in a satisfactory manner, such that expert tesimony would only be received where it was 'founded on theories, methods and procedures 'generally accepted' as valid among other scientists in the same field'.[229] However, Huber contends that this constraint was abandoned during the 1970s, such that '[m]ost courts have slouched towards what federal judge Patrick Higginbotham dubs the let-it-all-in approach to expert testimony'.[230]

227 Huber, above n 2, 2.
228 The historical background to the reception of expert evidence in America and its status up until the 1970s occupies barely a page and a half see Ibid 13–14.
229 Ibid 14.
230 Ibid 17.

Although Huber's focus is jurisdictions within the United States of America, similar views were, at that time, being expressed across the Atlantic.

In 1994, the English advocates' journal *Counsel* editorialised as follows:

> Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns: there is a new breed of litigation hangers on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients. The disclosure of expert reports, which originally seemed eminently sensible, has degenerated into a costly second tier of written advocacy. Costs of experts have probably risen faster than any other element of litigation costs in the last 20 years. This deplorable development has been unwittingly encouraged by a generation of judges who want to pre-read experts' reports before coming into court, and by practice directions stipulating that the reports be lodged in court to enable them to do so. What litigant can ignore an opportunity to implant his case in the judge's mind before the hearing begins?[231]

Lord Woolf, charged by the Lord Chancellor in 1994 with the task of reviewing and reporting on the current rules and procedures of the civil courts in England and Wales, evidently concurred, and in his interim report, after quoting the *Counsel* editorial, commented that 'the change in the role of experts into additional advocates of the parties is a phenomenon well known in the United States of America and one which is causing real concern in Australia'.[232]

There emerged from this period, a renewed focus on constraining the party-engaged expert. Lord Woolf's final report states:

> …a new approach is required which emphasises experts' impartiality. … In my view, clarification in the rules of court is also needed. Contributions to the Inquiry from experts themselves suggests that there is a degree of uncertainty among them as to their duties, and a perceived conflict between their professional responsibilities and the demands of the client who is paying their fee. Experts would welcome some formal recognition of their role as advisers to the court rather than advocates of the parties. The rules will provide that where an expert is preparing evidence for potential use in court proceedings, or is giving evidence in court, his responsibility is to help the court impartially on the matters within his expertise. This responsibility will override any duty to the client.[233]

The call to clarify the rules around party-engaged experts was taken up by the Federal Court of Australia shortly after publication of Lord Woolf's final report.

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231 Quoted in Lord Woolf, above n 5, 183.
232 Ibid 184.
233 Lord Woolf, above n 9, 143.

The Court sought submissions from the profession and the public regarding the introduction of a set of Federal Court Expert Usage Guidelines. In an article published in the *Australian Bar Review*, Justice Richard Cooper, writing extra-judicially, explained the rationale for the step in the following terms:

> The content of the proposals is best considered against the background of the common law rules relating to the reception of expert eivdence and the changing nature of the role adopted by the experts in the litigation process. The proposals as formulated for consideration by the Federal Court reflect the recommendations of Lord Woolf in his report on the 'Civil Justice System in England and Wales'. As his report acknowledges, the perceived problem in relation to experts and expert evidence has been receiving attention for some time in Australia and it was the subject of consultations between his Lordship and the court during the course of his inquiry. The importance of the Woolf Report is the confirmation that the problem he identifies is common to the United Kingdom, the United States, Canada, South Africa and Australia. That result immediately suggests that the common law evidentiary rules and the adversarial approach to litigation may have some part to play in the problem.[234]

A truism though it may be to cite the inherent features of common law systems as generating a form of tension, particularly where expert witnesses may be considered to owe competing duties to the court and the party that called them, there is no apparent lack of difficulty in accommodating expert evidence within civil law systems either. A recent report commissioned on behalf of the European Parliament made the following observation:

> A succinct comparative analysis of the different systems reveals the gulf between common law and Continental law countries. Fundamentally, judges in common law countries have a passive role in the conduct of proceedings, limiting themselves to an appraisal of the evidence presented to them and considering that it is the parties who are principally responsible for gathering and presenting evidence, it being in their interest to unravel what actually happened. In Continental law, the judge actively participates in seeking the truth. If this division were taken to be definitive, this would lead to a distinction between countries in which experts are appointed by the judge and those where experts are appointed and paid by the parties, and would lead to a proposal to harmonise only court appointed experts, as was the case with the CEPEJ best practices.
>
> In our opinion, this approach is too narrow: on the one hand, Continental law countries such as Spain have recently adopted provisions to limit the power of judges to commission expert reports by, in most cases, allowing only expert reports produced by the parties to be used in court; on the other hand, the

[234] Justice RE Cooper, 'Federal Court Expert Usage Guidelines' (1997) 16 *Australian Bar Review* 203, 203–204.

> quintessential common law country, England, has increased the power of judges to nominate experts in the wake of Lord Woolf's reforms.[235]

If accurate, the report underscores the irony of common law countries retreating from the use of party-engaged expert and civil law countries rushing to embrace it. But it is the notion that there is a problem, of comparatively recent provenance, with the whole concept of party-engaged experts across the common law world that is especially curious. Lord Woolf's Interim Report appears to take at face value the lamentations appearing in the editorial of *Counsel*. It even goes further to infer, through oddly circumstantial reasoning, that the situation was worsening:

> The subject of expert witnesses has figured prominently throughout the consultative process … Concern was also expressed as to their failure to maintain their independence from the party by whom they had been instructed.
>
> The scale of the problem appears to have increased since the time of the Civil Justice Review [1988] and the Heilbron/Hodge report [1993] since experts were not the subject of specific recommendations in those reports.[236]

A casual observer would be forgiven for thinking that the idea that there was something inherently problematic with expert testimony emerged for the first time towards the end of the twentieth century in response to a comparatively recent phenomenon.

However, properly analysed, there does not seem to be much support for the notion that there was a 'change in the role of experts', as identified by Justice Cooper, or at all. Judicial and academic concern over the role of expert witnesses does not have a recent provenance.

Certainly, at least by the late 19th century, a hundred years before the lamentations of *Counsel* and Lord Woolf, courts had grown wary of the unscrupulous use of party-engaged experts:

> Now I will consider the evidence on this point, but before doing so, I must say how the Plaintiffs contest it. They contest it by producing the evidence of some experts, whose evidence was met by at least as many experts on the part of the

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235 Alain Nuée, 'Civil-Law Expert Reports in the EU: National Rules and Practices' (European Union, 2015) 10 <http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519211/IPOL_ID(2015)519211_EN.pdf>

236 Lord Woolf, above n 5, 181.

> Defendants. As to this, I may say what I think I have often said before, that in matters of opinion I very much distrust expert evidence…[237]

And at the end of that century, judges were openly opining about the same issues regarding expert testimony that we are now confronted with, with that debate appropriately bookended by two papers written for the *Harvard Law Review* — the first, by William L. Foster, written in 1897[238] — making a pragmatic case for the retention of the party-engaged expert process, and the second, by Learned Hand, written in 1901[239] — vehemently seeking its abolition.

In order properly to consider the application of the doctrine of legal professional privilege to party-engaged experts, it is necessary to consider the historical advent, and current status of, party-engaged witnesses within the Australian legal system.

III Historical Adoption of Expert Testimony

A The Early Usage

The 1554 report of the case *Buckley v Rice Thomas*[240] is useful not only for its explication of the attitude of early English courts to experts, but also for its survey of the uses the courts to that time had made of experts. The case concerned, inter alia, the meaning of the Latin term 'licet'. In the course of his judgment, Staunford J stated:

> And in order to understand it truly, being a Latin word, we ought to follow the steps of our predecessor Judges of the law, who, when they were in doubt as to the meaing of any Latin words, enquired how those that were skilled in the study thereof took them, and pursued their construction.[241]

In the same case, Saunders J made the following, oft-quoted statement:

> …if matters arise in our law which concern other sciences or faculties, we commonly apply for the aid of that science or faculty which it concerns which is an honourable and commendable thing in our law. For thereby it apears that

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237 *Lord Abinger v Ashton* (1873) 17 LR Eq 358, 373 (Jessel MR).
238 Foster, above n 1.
239 Learned Hand, 'Historical and Practical Considerations Regarding Expert Testimony' (1901) 15(1) *Harvard Law Review* 40.
240 *Buckley v Rice-Thomas* (1554) 1 Pl. 118.
241 Ibid 122.

> we do not despise all other sciences but our own, but we approve of them and encourage them as things worthy of commendation,[242]

and usefully went on to provide examples of instances in which the law had called other sciences in aid and the mechanisms by which that was performed, such as judges in appeals of mayhem being informed by surgeons and in relation to pleadings concerning excommunication being informed by those well versed in canon law.[243]

It is to be inferred that the manner in which such experts were called, and evidence taken, was predominantly at the behest of the court and the experts were not themselves engaged by the parties to the litigation. However, the use of an expert jury appears also to have been utilised during this period and well beyond.

The 1761 case of *Lewis v Rucker*,[244] concerned the appropriate measure of damage for an insured to recover pursuant to a policy of insurance for goods damaged during a sea voyage. In the course of his judgment, Lord Mansfield referred to a special jury that had been empanelled to hear the parties' conflicting arguments regarding the proper rule of estimation for the loss:

> The special jury, (amongst whom there were many knowing and considerable merchants), found the defendant's rule of estimation to be right, and gave their verdict for him. They understood the question very well, and knew more of the subject of it than any body else present; and formed their judgment from their own notions and experience, without much assistance from any thing that passed.[245]

A curious feature of the decision, however, is the informality of the manner in which Lord Mansfield considered it appropriate to obtain for himself expertise in such matters:

> As I expected the other cause would be tried, I thought a good deal of the point, and endeavoured to get what assistance I could by conversing with some gentlemen of experience in adjustments. The point has now been fully argued at the Bar; and the more I have thought, the more I have heard upon the subject, the more I am convinced that the jury did right to pay no regard to [the

242 Ibid 124.
243 Ibid 124–125.
244 *Lewis v Rucker* (1761) 2 Burr 1167.
245 Ibid 1168.

> circumstances of the market at the time the goods may otherwise have been sold].[246]

The above judgments appear not to overly concern themselves with formalities of admission into evidence of the 'expertise' in question save that by the late 18th century, the question of admissibility of that which is essentially 'opinion' evidence became a key question in a further case upon which Lord Mansfield was called to deliberate upon in the circumstances described below.

B The Party-Engaged Expert

By the late 18th century, the practice of party-engaged experts and the exchange of evidence by those experts appears to have become fully formed and used in a manner not disimilar to its usage today. The case was *Folkes v Chad*,[247] the factual circumstances of which concerned whether a bank that had been established as a de facto sea-wall, had contributed to the 'choking and filling up' of a harbour by preventing back-flow.

The plaintiff was the owner of land which had the benefit of the bank. The defendants were trustees for the preservation of Wells Harbour. The trustees considered that the presence of the bank was the cause of the deterioration of the harbour and proposed to cut the bank. The plaintiff commenced injunctive proceedings to restrain them. He also called to give evidence Mr Milne, an engineer, who opined that the bank was not the cause of the decay of the harbour. The plaintiff obtained a verdict in his favour but the defendants were subsequently granted a new trial on the basis that they were surprised by the evidence of Mr Milne. For the purposes of the new trial, directions were given to the parties 'to print and deliver over to the opposite side the opinions and reasonings of the engineers whom they mean to produce on the next trial, so that both sides might be prepared to answer them',[248] the very procedure commonly adopted today in matters in which each party has engaged its own expert.

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246 Ibid 1172.
247 *Folkes v Chad* (1782) 3 Doug. 157.
248 Ibid.

In the course of the new trial, expert evidence was proposed to be given by Mr Smeaton, an engineer. Mr Smeaton opined that 'mathematically speaking, the bank may contribute to the mischief, but not sensibly'.[249] Called to give judgment on the issue of an objection to the admissibility of Mr Smeaton's evidence on the grounds that it was mere opinion, the reasoning adopted by Lord Mansfield has become a key tract in the explication of the law with respect to the admissibility of expert evidence. His Lordship stated:

> An instance frequently occurs in actions for unskilfully navigating ships. The question then depends on the evidence of those who understand such matters; and when questions come before me, I always send for some of the brethren of the Trinity House. I cannot believe that where the question is, whether a defect arises from a natural or an articifial cause, the opinions of men of science are not to be received. Hand-writing is proved every day by opinion; and for false evidence on such questions a man may be indicted for perjury… [t]he cause of the decay of the harbour is also a matter of science, and still more so, whether the removal of the bank can be beneficial. Of this, such men as Mr Smeaton alone can judge. Therefore we are of the opinion that his judgment, formed on facts, was very proper evidence.[250]

The force of Lord Mansfield's decision in *Folkes v Chad* is explained in annotations appearing in the report of the case, which relevantly note that:

> This may be regarded as the principal case on the admissibility of matter of opinion. It has been followed and confirmed in a variety of similar decisions. In *Thornton v Royal Exchange Assurance Company*, Peake, N. P. C. 25, Lord Kenyon admitted the evidence of a ship-builder on a case of sea-worthiness, though he had not been present at the survey. And in subsequent cases, his Lordship received the evidence of underwriters in explanation of the terms of a policy. The Scotch law is the same as our own on this subject. 'Professional men, when examined on the subject of their art or science, are of necessity allowed to state their opinions, and to speak to the best of their skill and judgment. In homicides, the *corpus delicti* is, in many cases, established by no other evidence.' Burnett on the Criminal Law of Scotland.[251]

Contrary though to the handwriting cases referred to by Lord Mansfield, it is further noted that such 'expert' evidence was subsequently rejected in the later cases of *Cary v Pitt*,[252] and in *Gurney v Langlands*,[253] 'in which the Judges expressed great doubts as to the admissibility of such evidence and, observed that, at all events, it was entitled to no weight, and was much too loose to be the foundation of a judicial

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249 Ibid.
250 Ibid 157–158.
251 Ibid 160 n(b).
252 *Cary v Pitt* Peake Ev. Appendix 84.
253 *Gurney v Langlands* 5 B & A 330.

decision either by Judges or juries.'[254] However it is evident that each of those cases turned upon the unfamiliarity of the 'expert' with the handwriting of the person in question – '[i]t is impossible for any person to speak to hand-writing being an imitation, unless he has seen the original; and it does not appear to me necessarily to follow that an inspector of franks has peculiar means of ascertaining imitated hand-writing'.[255] It is clear that in each of these cases the concept of 'expert evidence' was not the subject of criticism, but rather, the party calling the 'expert' failed to establish any expertise that was relevant to the issue in question. Indeed, in the matter of *Gurney v Langlands*, the judge at first instance (Wood B) was at pains to draw such a distinction:

> There is no general known standard by which hand-writing can upon inspection only be determined to be counterfeited without some previous knowledge of the genuine hand-writing, the hand-writings of men being as various as their faces. Opinions of skilful engineers and mariners, &c. may be given in evidence in matters depending upon skill, viz. as to what effect an embankment in a particular situation may have upon a harbour, or whether a ship has been navigated skilfully. Because in such cases, the witness has a knowledge of the alleged cause, and his skill enables him to judge and form a belief of the effect.[256]

Influential though it may have been, absent from Lord Mansfield's reasoning in *Folkes v Chad* is a critical evaluation of the relationship between the expert and the party seeking to adduce his or her evidence. Even the other cases referenced above, that rejected the evidence of handwriting experts, did so on the tenuousness of the expertise, rather than the motivation of the expert.

C The Rise of Judicial Scepticism

By the mid-19th century, judicial scepticism regarding expert testimony becomes apparent in a number of reported decisions.

In *The Tracy Peerage*,[257] Lord Campbell said of Sir Frederick Madden, a handwriting witness called by the claimant in the case:

254 Ibid.
255 Ibid [333] (Best J).
256 Ibid [330]-[331].
257 *The Tracy Peerage* (1843) 10 Clark & Finnelly 154.

> I dare say he is a very respectable gentleman, and did not mean to give any evidence that was untrue; but really this confirms the opinion I have entertained, that hardly any weight is to be given to the evidence of what are called scientific witnesses; they come with a bias on their minds to support the cause in which they are embarked; and it appears to me that Sir Frederick Madden, if he had been a witness in a cause and had been asked on a different occasion what he thought of this handwriting, would have given a totally different account of it.[258]

In 1863, the Privy Council delivered judgment in the matter of *Brown v Gugy*.[259] The original action concerned the effect of a newly erected wharf on the navigability of a river and its impact on the plaintiff's flour mill on the opposite bank. Thereafter, the Superior Court for the District of Quebec in Canada ordered that three experts be appointed to report to the Court on various technical matters concerning the impact of the wharf. It is evident that one of the experts was the nominee of the Court and each of the other experts a nominee of a party.[260] The experts ultimately issued reports and there was a division of opinion. Lord Kingsdown felt the need to make the following remark in the course of judgment:

> Much of these evils is no doubt to be attributed to the parties, who seem to have been more anxious to indulge their feelings of hostility towards each other than to arrive at a cheap and speedy termination of their rights. But much must also be attributed to the unfortunate course adopted by the Court in directing the reference to Experts – a step which appears to us to have been unnecessary and to have led to no satisfactory result, but rather interposed difficulties in the way of the decision, and to have occcasioned crimination and recrimination amongst persons acting as Officers of the Court, little creditable to the administration of justice…[261]

But it is the judgment of Jessel MR in *Lord Abinger v Ashton*[262] that marks one of the first reported judicial critiques that engages with what might be characterised as the systemic difficulty posed by the concept of the party-engaged expert within the adversarial system. The case concerned the effect of the terms of a covenant upon the ability of the defendents to work contiguous mines. Expert evidence was led by the parties as to the extent of ventilation requirements in large mines so as to ensure worker safety. The critique of Jessel MR was two-fold. Firstly, that because the expert is a witness of opinion and not of fact, 'although the evidence is given upon

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258 Ibid 191.
259 *Brown v Gugy* [1863] II Moore N. S. 341.
260 Ibid 347.
261 Ibid 364–365.
262 *Lord Abinger v Ashton* (1873) 17 LR Eq 358.

oath, in point of fact the person knows he cannot be indicted for perjury, because it is only evidence as to a matter of opinion. So that you have not the authority of legal sanction'.[263] However, his Honour's more pervasive criticism related not only to bias on the part of the expert – whether conscious or unconscious – but also to the nature of the witness of opinion in an adversarial context. His Honour stated:

> Expert evidence of this kind is evidence of persons who sometimes live by their business, but in all cases are remunerated for their evidence. An expert is not like an ordinary witness who hopes to get his expenses, but he is employed by and paid in the sense of gain, being employed by the person who calls him.
>
> Now it is natural that his mind, however honest he may be, should be biased in favour of the person employing him, and accordingly we do find such bias. I have known the same thing apply to other professional men, and have warned young counsel against that bias in advising on an ordinary case. Indoubtably there is a natural bias to do something serviceable for those who employ you and adequately remunerate you. It is very natural, and it is so effectual, that we constantly see persons, instead of considering themselves witnesses, rather consider themselves as the paid agents of the person who employs them.[264]

To illustrate his point, Jessel MR referred to the example of expert valuation evidence:

> Suppose a person wants to sell a house, and as he wants a very high value put upon it, he sends to ten valuers, and out of these he selects the three who have put the highest value on the house. The purchaser wants a very low value, and selects out of a number of valuers three of the lowest. Each set of valuers values high or low, according to the requirements of the person who employs them. I have known the same sort of thing done even as regards medical evidence. The consequence is, you do not get fair professional opinion, but an exceptional opinion by evidence selected in this way.[265]

These extracts are of central importance to the discussion of expert evidence and legal professional privilege which is the subject of the susbsequent chapters of this thesis. Accordingly, quite apart from the issue of bias on the part of party-engaged experts, it is convenient to refer to Jessel MR's identification of the tendency of parties only to call experts who are supportive of their case, as 'the paradigm of expert exceptionalism', commonly manifested in the practice of 'expert shopping'.[266]

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263 Ibid 373.
264 Ibid 374.
265 Ibid.
266 This is discussed in more detail in Chapter 4 of this thesis.

Four years after delivering judgment in *Lord Abinger v Ashton*, Jessel MR delivered judgment in *Thorn v Worthing Skating Rink Company*,[267] the subject matter of which concerned an alleged patent infringement. His Honour repeated his critique, but in these terms:

> [A]s usual, the evidence of experts on the one side and on the other, and, as usual, the experts do not agree in their opinion. There is no reason why they should. As I have often said since I have had the honour of a seat on this Bench, the opinion of an expert may be honestly obtained, and it may be quite different from the opinion of another expert also honestly obtained. But the mode in which the expert evidence is obtained is such as not to give the fair result of scientific opinion to the Court. A man may go, and does sometimes, to half-a dozen experts … I was told in one case, where a person wanted a certain thing done, that they went to sixty-eight people before they found one. I was told that by the solicitor in the cause. That is an extreme example case no doubt, but it may be done and therefore I have always the greatest possible distrust of scientific evidence of this kind, not only because it is universally contradictory, and the mode of its selection makes it necessarily contradictory, but because I know of the way in which it is obtained... [268]

Interestingly, his Lordship did not stop there, but in a prefigurement of the academic debates that would circulate around the end of the 19th century, went on to postulate why it is that the Court, when faced with conflicting party-led expert evidence, does not appoint an expert of its own. His Honour stated:

> First of all the Court has to find an unbiased expert. That is very difficult. The Court does not know how many of these experts have been consulted by the parties, either in the case of this particular patent or of a similar patent. It may turn out that a particular expert has been largely employed by the particular solicitor on the one side or the other in the case, and it is so extremely difficult to find a really unbiased expert and a man who has no preconceived opinion or prejudice, that I have, hitherto abstained from exercising the power which, no doubt, the Court has of selecting an expert to give evidence before the Court.[269]

The complaints of Jessel MR were not unique to the English experience. In the 1899 case of *Mary A. Keegan v Minneapolis & St Louis Railroad Company*,[270] Mitchell J of the Supreme Court of Minnesota remarked that:

> From this general outline of evidence, it is apparent that much of the expert testimony as to the origin of the disease, and as to the particular way by which, if at all, the injury produces articular rheumatism, consists, not of demonstrated or discovered facts, but mainly of mere theory or opinion, approaching very nearly to mere speculation... Experts are nowadays often the mere paid

267 *Thorne v Worthing Skating Rink Company* (1877) 6 Ch D 415.
268 Ibid 416.
269 Ibid.
270 *Mary A Keegan v Minneapolis & St Louis Railroad Company* (1899) 76 Minn. 90.

> advocates of partisans of those who employ and pay them, as much so as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called 'experts'... This evil has become so great in the administration of justice as to attract the serious consideration of courts and legislatures. [271]

The language is striking in its similarity to that used almost a century later in the *Counsel* editorial relied upon by Lord Woolf as a catalyst for reform. And the debate about the appropriate uses of expert evidence and the dangers of the party-engaged expert was, at the end of the 19th century, taken up by prominent jurists across the Atlantic outside of the courtroom.

D The Tracts of Warring Judges

On 22 May 1897, William L Foster delivered an address to the New Hampshire Medical Society. The substance of the address was subsequently published in the *Harvard Law Review*.[272] After a brief survey of recent judgments that were scathing of expert testimony, Foster made the following observation:[273]

> This 'bias', or inclination in favor of the party by whom the witness is employed, is probably the most frequent complaint of all against the expert witness; and the inclination or partiality is often characterized by terms indicating dishonesty and corruption; but it is my belief, resulting from the observation and experience of many years, that there are few instances in which a scientific witness permits himself to testify or to be engaged on a side contrary to his convictions derived from a careful examination of the case.
>
> It is not unnatural that a man of strong conviction (at the same time honest and unpurchasable) should become the earnest advocate of his theory, and the zealous assistant of the attorney in preparing, and to some extent conducting his case in court; and the attorney does well to secure his testimony and service (and would be negligent and wanting in fidelity to his client if he did not) by suitable recognition of his value to him and his cause…

Thus it may well be, as Foster goes on to state, that 'the bias of the expert witness may not always be incidental to his calling or profession, but a purely scientific bias, due to some peculiar view of theory'.[274] Accordingly, without misconduct, a solicitor will be drawn to a prominent expert who adheres to a scientific opinion which is consistent with an outcome in litigation desired by the solicitor's client –

271 Ibid [95].
272 Foster, above n 1.
273 Ibid 171.
274 Ibid.

to the exclusion of other perhaps equally prominent experts who espouse a different scientific opinion. This is a key feature of the confluence of thought and agenda that lies at the heart of the 'the paradigm of expert exceptionalism' described by Jessel MR.

But is there anything inherently problematic with this situation? The common law approach to the determination of litigated issues is based upon an adversarial system of fact-finding. After a brief survey of the manner in which expert evidence is called in civil law countries (judge-appointed in most cases in which the parties do not agree on the identity of the expert)[275] and proposals by other theorists calling for the removal of all experts from testimony and placing them in the realm of arbitration – to decide competing issues for the court[276] – Foster concludes his address by favouring the current approach, even allowing for its flaws. This is not only because it allows the parties to select their own witnesses (which his Honour asserts to be a constitutional right)[277] but also because, in his view, the well-defined rules of practice in America, and broad latitude given for examination and cross-examination, best equips judges and juries to decide between competing evidence given by experts.[278] He concludes with the words:

> Finally, my belief is, that the supposed evils of the present system are much exaggerated, and to a great extent imaginary that they are not to be cured by any remedy that has been or seems likely to be deivsed, and that, on the whole, it is best to 'let well enough alone'.[279]

The pragmatic approach of Foster finds its counterpoint in the writings of the famous jurist, Learned Hand. In a paper titled 'Historical and Practical Considerations Regarding Expert Testimony',[280] published four years after Foster's piece, and in the same journal, titled Learned Hand provides an historical overview of the development of expert testimony before turning to the central elements of his thesis, namely, that the party-engaged expert is an anomaly from which serious

275 Ibid 180.
276 Ibid 181.
277 Ibid 180.
278 Ibid 185.
279 Ibid.
280 Hand, above n 239.

practical difficulties arise.[281] As to the anomalous nature of the party-engaged expert witness, Learned Hand considers that this arises from the very nature of expert testimony and the fact that it consists of evidence of opinion, going on to assert that it is the giving of evidence of opinion that usurps the role of judge and jury as triers of fact by, as it were, presenting the relevant conclusion.[282]

That which did not particularly trouble William Foster, Learned Hand could not abide:

> There can be, in my opinion, no legal anomaly which does not work evil, because, forging an illogical precedent, it becomes the mother of other anomalies and breeds chaos in theory and finally litigation.
>
> …
>
> That the present position is not satisfactory to any one will, I believe, be admitted. True it is that some are found hardy enough to support it [here Learned Hand expressly references Foster's address] but there are not many, and the criticism comes with great unanimity.[283]

Learned Hand raises two serious objections with expert testimony: '[first] that the expert becomes a hired champion of one side; second that he is the subject of examination and cross-examination and of contradiction by other experts'.[284] The first objection can readily be understood. The basis of the second objection is not immediately clear. The essence of the argument though appears to be that the effect of cross-examination of an expert witness differs from the effect of cross-examination of the lay witness. Learned Hand sees the difficulty as lying 'in the logical fulfilment of the expert's position, as witness and not as adviser of the jury', with the result that 'the ordinary means successful to aid the jury in getting at the facts, aid, instead of that, in confusing them'.[285] The argument is, in effect, that juries cannot be competent to decide questions of science or other fields of expertise in the face of contradictory evidence between experts in such fields – 'how can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own? It is just because they are incompetent for such a task

281 Ibid 50.
282 Ibid 50–53.
283 Ibid 52–53.
284 Ibid 53.
285 Ibid.

that the expert is necessary at all'.[286] In Learned Hand's view, the very fact of contradictory expert evidence renders the jury incompetent as a tribunal of fact.[287] Rather peremptorily, the conclusion expressed is that a board of experts or a single expert exercising the role of an advisor – or assessor – to the jury. However, the details of how such a board or assessor would be appointed are not discussed and are left to others to identify.[288]

The general difficulty with Learned Hand's analysis is that it does not advance beyond a style of a priori reasoning which considers differences of opinion between experts to be incapable of evaluation by non-experts. In circumstances in which experts are required to identify the material their opinions are based upon, expose their reasoning processes and be subjected to cross-examination, such an approach does not appear to be entirely justifiable. It is also curious that Learned Hand, despite having obviously read the address of William Foster,[289] did not engage with any of the practical difficulties identified by him.

There was no revolution along the lines espoused by Learned Hand. The existing system persisted in America and in England. Eighty-seven years after the decision of Mitchell J in *Keegan v Minneapolis & St Louis Railroad*, the same remarks were quoted by the United States Court of Appeal for the Seventh Circuit in *Chaulk v Volkswagen* as evidencing 'the age-old problem of expert witnesses'.[290]

And in 1947, it was written in the English journal *Modern Law Review*:

> …since no very stringent tests are applied in assessing the amount of scientific or technical qualifications required to enable a man to set himself up before the Court as an expert, the parties are encouraged to search for experts who support their case. Frequently diametrically opposed expert opinions are propounded at the hearing. Experts tend by experience in English Courts to be biased in favour of the side which called them, took a proof of their evidence and is paying their 'expenses',[291]

286 Ibid 54.
287 Ibid 55.
288 Ibid 56, 58.
289 See note 283 above.
290 *Chaulk v Volkswagen of America & Anor* (1986) P11 CCH Prod. Liab. Rep. 248, [18].
291 HA Hammelmann, 'Expert Evidence' (1947) 10 *Modern Law Review* 82, 84.

thus suggesting a continuity of judicial and academic scepticism towards the party-engaged expert witness that tends to contradict any latent nostalgia exhibited at the end of the 20th century regarding the demise of the 'honourable expert'.

E Towards a Modern Orthodoxy

On 1 November 1951, the steamship *Wagon Mound* was berthed at Mort's Bay in Balmain, Sydney Harbour and being supplied with oil when a fire broke out and was transmitted by oil floating on the surface of water in the vicinity, thereby severely damaging a number of other ships.[292] The owners of the damaged ships commenced proceedings against the owner of *Wagon Mound*, seeking damages arising from, amongst other things, the negligence of the latter.

The judge at first insance, Walsh J, was presented with evidence from a number of scientists regarding the reasonable foreseeability of fire damage caused by the presence of oil on the surface of water. His Honour did not find the evidence to be of much assistance because, to the extent that there were conflicts between the evidence given by such scientists, 'they were upon points about which no definite knowledge or opinion would have been expected in the mind of a practical man'[293] — being the touchstone upon which reasonable foreseeability was to be ascertained. However, it is his Honour's casual remarks about expert evidence that indicate the extent to which judicial attitudes toward party-called experts had become ingrained in this country by that time. His Honour said:

> Professor Hunter, Mr Parker and Mr Tuddenham called for the defendant, and Professor Kirov for the plaintiffs, are all learned and intelligent men, and I have no doubt that they gave their evidence honestly, although affected in greater or less degree by the kind of unconscious bias which is a well-known characteristic of expert evidence…[294]

Despite the undesirable features of party-engaged expert testimony being a more or less constant feature of judicial complaint since at least the mid-eighteenth century,

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292 *Miller Steamship Company Pty Limited v Overseas Tankship (UK) Limited; R W Miller & Co Pty Limited v Same* [1963] 1 Lloyd's List Reports 402, 403 ('*The "Wagon Mound" No. 2*').
293 Ibid 415.
294 Ibid.

deliberate attempts made positively to circumscribe the role of the party-engaged expert do not appear to have become prevalent until the 1980s.

In *Whitehouse v Jordan*,[295] a case concerning medical negligence, Lord Wilberforce concluded his judgment with these words:[296]

> One final word. I have to say that I feel some concern as to the manner in which part of the expert evidence called for the plaintiff came to be organised... While some degree of consultation between experts and legal advisers is entirely proper, it is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation. To the extent that it is not, the evidence is likely to be not only incorrect but self defeating.

A starkly different view appears to have been advanced in the 1987 case of *Polivitte Limited v Commercial Union Assurance Co PLC*,[297] in which Garland J of the Queen's Bench Division of the High Court of England, made the following remarks:

> I have almost considered the role of an expert to be two-fold: first to advance the case of the party calling him, so far as it can properly be advanced on the basis of information available to the expert in the professional exercise of his skill and experience; and secondly, to assist the Court, which does not possess the relevant skill and experience, in determining where the truth lies…[298]

The notion that part of the orthodox role of the party-engaged expert is to advance the case of that party not only contradicts the words of Lord Wilberforce in *Whitehouse v Jordan* but was, inferentially, wholly repudiated in the later case of '*The Ikarian Reefer*'.[299]

The Ikarian Reefer concerned the issue of whether the eponymous vessel was deliberately set alight and run aground in order to receive proceeds of an insurance policy or whether the cause of the fire was accidental.[300] Not unexpectedly in these circumstances, expert evidence as to the cause of the fire was a significant feature

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295 *Whitehouse v Jordan* [1980] 1 All ER 650.
296 Ibid 256.
297 *Polivitte Limited v Commercial Union Assurance Co PLC* [1987] 1 Lloyd's Law Reports 379.
298 Ibid 386.
299 *National Justice Campania Naviera S A v Prudential Assurance Co Limited* [1993] 2 Lloyd's Law Reports 68 ('*The Ikarian Reefer*').
300 Ibid.

of the litigation. Cresswell J, apparently exasperated by the manner in which expert evidence was adduced in the course of the trial and hearing, said:

> I will refer to some of the duties and responsibilities of experts in civil cases because I consider that a misunderstanding on the part of certain of the expert witnesses as to their duties and responsibilities contributed to the length of the trial. [301]

Cresswell J then laid out a number of duties and responsibilities of expert witnesses as he saw them.[302] These have since become highly influential not only in England but in Australia. In summary, these were:[303]

1. expert evidence presented to the Court should both be and be seen to be the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation;

2. expert witnesses should provide independent assistance to the Court by way of unbiased opinion in relation to matters within their expertise;

3. expert witnesses should state the facts or assumptions upon which their opinion is based and should not omit to consider material facts which could detract from their concluded opinion;

4. expert witnesses should make it clear when a particular question or issue falls outside their expertise;

5. if an expert's opinion is not properly researched because the expert considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one and in cases where the expert who has prepared a report cannot assert that the report contains the truth, the whole

301 Ibid 81.
302 Ibid 81–82.
303 Ibid.

truth and nothing but the truth without some qualification, the qualification must be stated in the report;

6. if after exchange of reports, an expert changes his or her view on a material matter having read the other side's report or for any other reason, such change of view should be communicated to the other side without delay and where appropriate, to the Court;

7. where the expert evidence refers to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the oppposite party at the same time as the exchange of reports.

Curiously, and despite contradicting the first duty of the expert identified by Cresswell J, his Honour identified Garland J's decision in *Polivitte* as the basis for the second enumerated duty.[304] This presumably was only intended to be a reference to that part of Garland J's decision that said: 'and secondly, to assist the Court, which does not possess the relevant skill and experience, in determining where the truth lies', because Cresswell J took the trouble expressly to add to the formulation of that second duty, the words '[a]n expert witness in the High Court should never assume the role of an advocate' which is inconsistent with the first part of Garland J's decision, namely 'to advance the case of the party calling him…'.[305]

F The Rise of the Codes

Cresswell J's decision has been influential. The duties and responsibilities of experts identified by his Honour have come to form, in large part, the backbone of all expert codes of conduct now published by superior courts in common law jurisdictions throughout Australia. The categories set forth in the decision of Cresswell J are not only referenced, but wholly extracted by Justice Cooper in the

304 Ibid.
305 *Polivitte Limited v Commercial Union Assurance Co PLC* [1987] 1 Lloyd's Law Reports 379, 386.

article referenced above 'Federal Court Expert Usage Guidelines' concerning the proposed implementation of expert guidelines in that Court.[306]

As intimated in Justice Cooper's work, the Australian Federal Court was one of the first jurisdictions in Australia to introduce guidelines for expert witnesses. The 'Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia' were first published in 1998[307] ('*Initial Federal Court Guidelines*') and include the following:

> **General Duty to the Court**
>
> An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.
>
> An expert witness is not an advocate for a party.
>
> An expert witness's paramount duty is to the Court and not the person retaining the expert.
>
> **The Form of the Expert Evidence**
>
> …
>
> All assumptions made by the expert should be clearly and fully stated.
>
> …
>
> The expert should give reasons for each opinion.
>
> At the end of the report the expert should declare that '[the expert] has made all inquiries which [the expert] believes are desirable and appropriate and that no matters of significance which [the expert] regards as relevant have, to [the expert's] knowledge, been withheld from the Court'.
>
> There should be attached to the report, or summarised in it, the following:
>
> (i) all instructions (original and supplementary and whether in writing or oral) given to the expert which define the scope of the report;
>
> (ii) the facts, matters and assumptions upon which the report proceeds; and
>
> (iii) the documents and other materials which the expert has been instructed to consider.
>
> If, after exchange of reports or at any other stage, an expert witness changes his or her view on a material matter, having read another expert's report or for

306 See note 234 above.

307 Federal Court of Australia Practice Direction 'Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia' (1998).

> any other reason, the change of view should be communicated in writing (through legal representatives) without delay to each party to whom the expert witness's report has been provided and, where appropriate, to the Court.
>
> If an expert's opinion is not fully researched because the expert considers that insufficient data is available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, the qualification must be stated in the report…

The *Initial Federal Court Guidelines* are clearly based upon, to a very large extent, the duties of an expert witness identified by Cresswell J in *The Ikarian Reefer*.[308] They have also largely formed the basis of corresponding expert witness guidelines adopted throughout the various Australian states, territories and in other tribunals of federal jurisdiction.[309]

Similarly, in 2001, the *Australian Federal Court Rules* were reformulated to contain the following statement intended to complement the *Initial Federal Court Guidelines*:

> **Duty to Court and form of expert evidence**
>
> For an expert's duty to the Court and for the form of expert evidence, an expert witness should be guided by the Federal Court practice direction guidelines for expert witnesses.
>
> Note: While not intended to address all aspects of an expert's duties, the key points in the guidelines are:
>
> - an expert witness has a duty to assist the Court on matters relevant to the expert's area of expertise
> - an expert witness is not an advocate for a party
> - the overriding duty of an expert witness is to the Court and not to the person retaining the expert
> - if expert witnesses confer at the direction of the Court it would be improper for an expert to be given or to accept instructions not to reach agreement.[310]

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308 Ibid.

309 See for example Schedule 7 to the *Uniform Civil Procedure Rules 2005* (NSW); Form 44A to the *Supreme Court (General Civil Procedure) Rules 2015* (Vic); Rules 514, 515 and 516 of the *Supreme Court Rules 2000* (Tasmania); Schedule 1 to the *Supreme Court rules 2006* (ACT)

310 *Federal Court Rules 2001* (Commonwealth), r 15.07.

However, neither the revised Federal Court Rules nor the *Initial Federal Court Guidelines* (or subsequent revisions thereto for that matter) adopt the proposition contained in the proposal referered to in Justice Cooper's paper on the proposed expert usage guidelines, namely, the proposal that '[o]nce an expert has been instructed to prepare a report for the use of a court, any communication between the expert and the client or his/her advisers should no longer be the subject of legal privilege'.[311] This is a matter discussed in subsequent chapters of this thesis.

The introduction of the *Initial Federal Court Guidelines* and the adoption of corresponding guidelines by other courts and tribunals throughout Australia and in the United Kingdom[312] marks the end of any period of uncertainty as to the proper role and the responsibilities of a party-engaged expert. Despite this, for the reasons set out in Chapter 4, notwithstanding the apparent clarity of the guidelines and codes of conduct and the uniformity of their application, they have clearly failed to prove to be a panacea to the issue of expert witness bias. Nevertheless, the expert witness guidelines and codes of conduct are among the most tangible legacy of the Lord Woolf reports and the late 20th century's renewed focus upon case management and the problems associated with party-engaged experts.

IV The Current Position in Australia

Putting to one side guidelines and rules regarding the giving of expert evidence in Australia's various jurisdictions, the criteria for admissibility of expert evidence generally falls to be determined by reference either to common law rules or to the position under the *Uniform Evidence Law*, depending upon the forum in which the evidence is adduced.

A Admissibility of expert evidence at common law

311 Cooper, above n 234, 210.
312 See, for example, the new *Civil Procedure Rules 1998* (England and Wales).

At common law, Ian Freckelton has identified five 'rules of expert evidence' governing admissibility, namely: the expertise rule; the area of expertise rule; the common knowledge rule; the basis rule and the ultimate issue rule.[313]

In order to satisfy the 'expertise rule', a person must qualify as an 'expert'. In *Galvin v Murray*,[314] Murphy J of the Supreme Court of Ireland said that generally, 'an expert may be defined as a person whose qualifications or expertise give an added authority to opinions or statements given or made by him within the area of his expertise'.[315] In order to satisfy the 'area of expertise rule' and not fall foul of the 'common knowledge rule', such area of expertise must be 'sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience'[316] and must, although there remain areas of controversy on this point,[317] not fall within the scope of that 'which may be competently approached or dealt with by the … judge or jury'.[318]

The 'basis rule' has been identified by the plurality in *Dasreef v Hawchar*[319] as 'a rule by which opinion evidence is to be excluded unless the factual bases upon which the opinion is proffered are established by other evidence'.[320] In the same judgment, the plurality refused to make a finding as to whether such a rule formed part of the Australian common law.[321] The status of a 'basis rule' at common law remains the subject of some controversy, particularly in light of the fact that Heydon J in *Dasreef* delivered a dissenting judgment that categorically asserts the persistence of a 'basis rule' (which his Honour characterised as being more aptly

313 Freckelton and Selby, above n 30, 17.
314 [2001] 1 ILRM 234 (239), quoted in ibid 34 although it appears that the text mis-identifies Murphy J as Murray J.
315 Ibid.
316 Freckelton and Selby, above n 30 quoting King CJ in *R v Bonython* (1984) 15 A Crim R 364, 266.
317 See the discussion more generally in ibid 104–107.
318 *Smith v The Queen* (1990) 64 ALJR 588 quoted in ibid 88.
319 *Dasreef v Hawchar* (2011) 243 CLR 588.
320 Ibid 605 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
321 Ibid.

described as a 'proof of assumption rule') at common law.[322] This controversy is further discussed later in this chapter.

The final rule identified by Freckelton is the 'ultimate issue rule', the basic effect of which is to exclude an expert witness from giving evidence about that which is the 'ultimate issue' in the case, lest the expert be inappropriately substituted for the trier of fact.[323] As Freckelton notes, that rule has been abolished under the *Uniform Evidence Law* and in certain other fora, but may be said to persist in certain jurisdictions in which the common law governs the criteria for admissibility of expert evidence.[324]

B Admissibility of expert evidence under the Uniform Evidence Law

Under the *Uniform Evidence Law*, admissibility of expert evidence is governed by the interaction between sections 76(1) and 79(1). Section 76(1) of the *Uniform Evidence Law* ('the opinion rule') relevantly states:

> Evidence of an opinion is not admissible to prove the existence of a fact about which the existence of which the opinion was expressed.

Section 79(1) of the *Uniform Evidence Law* ('the expert exception') operates as an exception to the opinion rule. It relevantly states:

> If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

Makita (Australia) Pty Limited v Sprowles[325] has, since the introduction of the *Uniform Evidence Law*, been a leading authority within Australia for determining the admissibility of evidence given by an expert pursuant to that legislation. The case concerned a claim for damages in negligence by the plaintiff at first instance and respondent on appeal, Ms Sprowles, who slipped and fell down a flight of stairs

322 Ibid 612–622 (Heydon J); See also Miiko Kumar, 'Admissibility of Expert Evidence: Proving the Basis for an Expert's Opinion' (2011) 33 *Sydney Law Review* 427, 454; Freckelton and Selby, above n 30, 122–128.

323 Freckelton and Selby, above n 30, 147.

324 Freckleton, Reddy and Selby, above n 7, 147–149 and see for example section 80 of the *Uniform Evidence Law*.

325 *Makita (Australia) Pty Limited v Sprowles* (2001) 52 NSWLR 705.

at her place of employment. A significant portion of the hearing was devoted to expert testimony regarding the slipperiness of surfaces in question and corresponding issues of safety. That expert testimony was of particular significance to the outcome of the hearing because but for it, the court considered that a conclusion that the stairs in question were not slippery would have been inevitable.[326]

After a lengthy survey of caselaw from Australia and the United Kingdom, including reciting the duties propounded by Cresswell J in *The Ikerian Reefer*, and the wording of section 79 of the *Uniform Evidence Law*, which had since been enacted, Heydon JA set out the following criteria for the admissibility of expert evidence:

> In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of 'specialised knowledge'; there must be an identified aspect of that field in which the witness demonstrates that by reason of the specified training, study or experience, the witness has become an expert; the opinion proferred must be 'wholly or substantially based on the witness's expert knowledge'; so far as the opinion is based on facts 'observed' by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on 'assumed' or 'accepted' facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of 'specialised knowledge' in which the witness is expert by reason of 'training, study or experience', and on which the opinion is 'wholly or substantially based', applies to the facts assumed or observed so as to produce the opinion propounded.[327]

Heydon JA concluded by explaining that the consequence of a failure to make the above matters explicit would be that 'it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge' and hence 'the evidence is strictly speaking, not admissible, and, so far as it is admissible, of diminished weight'.[328] It is particularly noteworthy that Heydon J's judgment emphasises the criticality of the expert explaining how his or her

326 Ibid 728 (Heydon JA).
327 Ibid 743–744.
328 Ibid 744.

specialised knowledge 'applies to the facts assumed or observed so as to produce the opinion propounded'.

Despite some notable exceptions in which the criteria have been viewed as a 'counsel of perfection',[329] Heydon JA's formulation for the admissibility of expert evidence in *Makita* was widely followed[330] until the operation of section 79 of the *Uniform Evidence Law* was further clarified in the 2011 decision of the High Court in *Dasreef*.[331]

As intimated above in the discussion of the rules of admissibility of expert evidence at common law, *Dasreef* has laid bare, without resolving, some controversies within this area. There is undoubtably some overlap between the position in respect of admissibility at common law and under the *Uniform Evidence Law*. For example, in *HG v The Queen*,[332] Gaudron J (with whom Gummow J agreed)[333] stated:

> The position at common law is that, if relevant, expert or opinion evidence is admissible with respect to matters about which ordinary persons are unable 'to form a sound judgment … without the assistance of [those] possessing special knowledge or experience … which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience'.[334] There is no reason to think that the expression 'specialised knowledge' gives rise to a test which is in any respect narrower or more restrictive than the position at common law.[335]

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329 These are succinctly identified in Kumar, above n 322, 439–441.

330 *Idoport Pty Ltd v National Australia Bank Ltd* [2001] NSWSC 995, [6]-[10] (Einstein J); *Australian Securities and Investment Commission v Adler* [2001] NSWSC 1103, [19] (Santow J); *Sendy v Commonwealth of Australia* [2002] NSWSC 546, [7] (Dunford J); *Bevillesta Pty Ltd v Sovereign Motor Inns Pty Ltd* [2002] NSWCA 279, [62] (Sheller JA, with whom Handley JA and Foster AJA agreed); *R v Gary Allan Ryan* [2002] VSCA 176, [9] (Ormiston JA, with whom Chernov JA and Eames JA agreed) a; *McDonald t/as BE McDonald Transport v Girkaid Pty Ltd* [2004] Aust Torts Reports 81, [101], [118], [121] (McColl JA, with whom Beazley JA and Young CJ in Eq agreed); *Brown v Harding* [2008] NSWCA 51, [24] (Hodgson JA, Hidden and Hislop JJ); *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* (2011) 192 FCR 445, [217] (Keane CJ, Lander and Besanko JJ).

331 *Dasreef v Hawchar* (2011) 243 CLR 588.

332 *HG v The Queen* (1999) 197 CLR 414.

333 Ibid 449. In this case, it should be noted that although Gaudron and Gummow JJ delivered judgments that, in part, dissented from those of the majority, the extracted quote has not been impugned and in fact has been expressly approved by the New South Wales Court of Appeal in *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229, [99] (Spigelman CJ, with whom Giles JA and Ipp JA agreed).

334 Relying upon: *R v Bonython* (1984) 38 SASR 45, 47–47 (King CJ); *Murphy v The Queen* 167 CLR 94, 111 (Mason CJ and Toohey J); and 130 (Dawson J); *Farrell v The Queen* (1988) 194 CLR 286, 292–294 (Gaudron J); *Osland v The Queen* (1998) 197 CLR 316, 336 (Gaudron and Gummow JJ); *Clark v Ryan* (1960) 103 CLR 486, 491 (Dixon CJ).

335 *HG v The Queen* (1999) 197 CLR 414, 432.

However, in light of the decision of the plurality in *Dasreef*, care must be taken not to unnecessarily import concepts applicable to the common law into the interpretation of the *Uniform Evidence Law*.

At issue in *Dasreef*, was the admissibility of expert evidence given by a Dr Basden regarding the amount of silica to which Mr Hawchar had been exposed in the course of his employment. A majority of the judges of the High Court made the following statement, which must now be taken as the authoritative pronouncement as to the rule regarding admissibility of expert evidence under the *Uniform Evidence Law* in Australia:

> It should be unnecessary, but it is none the less important, to emphasise that what was said by Gleeson CJ in *HG* (and later by Heydon JA in the Court of Appeal in *Makita (Australia) Pty Limited v Sprowles*) is to be read with one basic proposition at the forefront of consideration. The admissibility of opinion evidence is to be determined by the application of the requirements of the Evidence Act rather than by any attempt to parse and analyse particular statements in decided cases divorced from the context in which those statements were made. Accepting that to be so, it remains useful to record that it is ordinarily the case, as Heydon JA said in *Makita*, that 'the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded'. The way in which s79(1) is drafted necessarily makes the description of these requirements very long. But that is not to say that the requirements cannot be met in many, perhaps most, cases very quickly and easily.[336]

In *Dasreef*, Dr Basden's evidence as to the numerical or quantitative level of Mr Hawchar's exposure to silica dust was not demonstrated to have been based (wholly or substantially) upon any specialised knowledge acquired by Dr Basden through training, study or experience and was consequently found not to be admissible as expert evidence for the purposes of section 79 of the *Uniform Evidence Law*.

The manner in which the plurality in *Dasreef* recast the judgment of Heydon JA in *Makita* has since been characterised by Simpson JA in the New South Wales Court of Criminal Appeal in the following terms:

> The plurality in *Dasreef* refined Heydon JA's seven admissibility criteria in *Makita* to two:

[336] *Dasreef v Hawchar* (2011) 243 CLR 588, 604.

> - that the witness who gives the evidence 'has specialised knowledge based on the person's training, study or experience'; and
>
> - that the opinion expressed in the evidence by the witness 'is wholly or substantially based on that knowledge'.
>
> The plurality added (citing [85] of *Makita*) that:
>
> > 'ordinarily … "the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study, or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded.'
>
> This, it appears to me, states a third criterion of admissibility.[337]

It is that 'third criterion' as recognised by Simpson JA, that appears in fact to resemble a form of 'basis rule', although the plurality in *Dasreef* was not prescriptive as to its manner of application and considered that, depending upon the circumstances of the case, it may require 'little explicit articulation or amplification once the witness has described his or her qualifications and experience, and has identified the subject matter about which the opinion is proffered'.[338] As Kumar has pointed out, that which was particularly important to Heydon J in his dissenting judgment, namely, a need 'for the expert to "state the criteria necessary to enable the trier of fact to evaluate that the expert's conclusions are valid"'[339] is not the focus of the plurality's judgment. The focus of the latter was, rather, upon the giving by the expert of 'evidence of training, study or experience to provide a connection to their opinion' and 'not for the purpose of validating the expert's conclusions'.[340]

The dissenting judgment of Heydon J in *Dasreef* represents something of a sustained defence of the need, as a matter of practicality as much as principle, for the maintenance of a 'basis rule' both at common law and under the *Uniform Evidence Law*. A key element of his Honour's argument is based upon his belief that the 'basis rule' operates so as to expose as irrelevant, expert opinion based upon assumptions that are not themselves the subject of 'primary evidence'[341] and to

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337 *Taub v R* [2017] NSWCCA 198, [27]-[29] (Simpson JA, with whom Walton and Button JJ agreed). Simpson JA's characterisation of *Dasreef* has since been referred to with approval by Schmidt J (with whom Hoeben CJ at CL and Campbell J agreed) in *Nisan v R* [2017] NSWCCA 265, [36]-[37].

338 *Dasreef v Hawchar* (2011) 243 CLR 588, 604.

339 Kumar, above n 322, 453.

340 Ibid.

341 *Dasreef v Hawchar* (2011) 243 CLR 588, 622 (Heydon J).

overcome the situation in which an opposing party is 'left to find out about the expert's thinking for the first time in cross-exmaintion'.[342]

It is contended that the absence of clear authority on this point only serves to heighten the importance of providing parties with the means of evaluating the validity of an expert's conclusions by reference to the information with which the expert was briefed and which may not adequately be exposed in the reports of that expert served on those parties. It is this information that may under the current orthodoxy, be subject to legal professional privilege and not amenable to disclosure. This issue is further explored in Chapters 4 and 5 of this thesis.

This constitutes the relevant background to the reception of expert evidence in the Australian legal system and the identification of a number of the key criteria regarding the admissibility of such evidence that will be further examined in the context of the operation of legal professional privilege in connection with communications with experts.

It is apparent that, putting aside any lingering disparities between the tests for admissibility of expert evidence between the *Uniform Evidence Law* and the common law, and despite a significant outpouring of concern towards the end of the 20th century in relation to the role of the party-engaged expert, there is little associated with the concept that had not been previously raised and carefully considered more than a century earlier. What then, was responsible for the resurgence of interest in that which was essentially an age-old problem?

V Case Management and the Rise of 'Mega-Litigation'

Writing extra-judicially, Justice Peter McClellan identified economic forces as a key catalyst for reforms of the adversarial system towards the end of the 20th century — unlike many other sectors of common law economies, the cost of litigation had not, by this time, put access to justice within the ready reach of all.[343] Chief Justice

342 Ibid 623 (Heydon J).
343 Justice McClellan, 'Civil Justice Reform - What Has It Achieved?', above n 11.

Tom Bathurst, speaking more recently,[344] characterised civil litigation in this period as having a decidedly Dickensian air,[345] with a 'strong *laissez faire* flavour', such that discovery was of virtually unlimited scope and interrogatories involved the asking of 'every possible question of the other side'.[346]

The change in focus from early laxity and comparative freedom in the running of litigation to the application of strict principles of case management within Australia even between 1997 and 2009, can be starkly illustrated by comparing these words from the decision of the High Court in *Queensland v J L Holdings*:

> Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties,[347]

with those of the same Court (differently constituted) twelve years later:

> Statements in *JL Holdings* which suggest only a limited application for case management do not rest upon a principle which has been carefully worked out in a significant succession of cases. On the contrary, the statements are not consonant with this Court's earlier recognition of the effects of delay, not only upon the parties to the proceedings in question, but upon the court and other litigants. Such statements should not be applied in the future…
>
> In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone.[348]

The incompatibility between the more '*laissez faire*' approach to litigation with one in which case management is given a significant role to play finds its nexus with the issue of the party-engaged expert in a number of cases running during the first decade of the 21st century which became examples of so-called 'mega-litigation'.

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344 Justice Bathurst, above n 11.
345 In the sense of resembling the fictional saga of *Jarndyce v Jarndyce*.
346 Justice Bathurst, above n 11, 1–2.
347 *State of Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146, 155 (Dawson, Gaudron, McHugh JJ).
348 *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175, 217 (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

In *Idoport Pty Ltd v National Australia Bank Limited*,[349] Einstein J quoted with approval from a speech given by then High Court Chief Justice Murray Gleeson in which his Honour stated:

> if thought is given to some modern mega litigation, usually fought out between substantial corporations, it may be very difficult to assess what the parties are intending to achieve, or what public purpose is being served by a judge who devotes many months to presiding over proceedings that are ultimately settled. Court time is not allocated evenly amongst litigants. Especially in commercial disputes, some litigants consume hugely disproportionate amounts of scarce judicial resources…[350]

In *Idoport*, Einstein J was faced with numerous experts sought to be adduced by the parties and concluded that the time required to be taken for cross-exmination of such experts would be 'somewhere up to a calendar year of court hearing time'.[351] His Honour decided to appoint an examiner in order to assist with that task.

In *Seven Network Limited v News Limited*,[352] Sackville J opened his judgment with the following comments:

> The case is an example of what is best described as '*mega-litigation*'. By that expression, I mean civil litigation, usually involving multiple and separately represented parties, that consumes many months of court time and generates vast quantities of documentation in paper or electronic form. An invariable characteristic of mega-litigation is that it imposes a very large burden, not only on the parties, but on the court system and, through that system, the community.[353]

His Honour then proceeded to provide statistical support for the assertion, including references to the trial having lasted for 120 hearing days, having involved pleadings which ran to 1,028 pages, lay evidence which ran to 1,613 pages and expert reports in evidence which ran to 2,041 pages excluding 'many hundreds of pages in appendices, calculations and the like'.[354] Of the expert evidence sought to be adduced by the parties to the litigation, Sackville J was particularly critical. After

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349 *Idoport Pty Ltd v National Australia Bank Ltd [No 37]* [2001] NSWSC 838.
350 Ibid [87] quoting Gleeson, above n 12.
351 *Idoport Pty Ltd v National Australia Bank Ltd [No 37]* [2001] NSWSC 838, [70] to [71].
352 *Seven Network Limited v News Limited* [2007] FCA 1062.
353 Ibid [2].
354 Ibid [4], [6].

commenting on the expense of the parties' reliance upon expert evidence, his Honour stated:

> …a substantial proportion of the costs incurred by the parties in producing this material was wasted. Some reports were inadmissible; some were largely repetitive of other reports …; at least one … I did not find particularly helpful; some expressed opinions on the basis of elaborate factual assumptions that have not been borne out by the evidence; and some, given the conclusions I have reached, have turned out to be unnecessary,[355]

going on to refer to the propensity of parties in the age of mega-litigation to engage in 'heavy, often unthinking reliance on expert evidence'.[356]

Likewise, *ASIC v Rich*[357] was a case in which the final hearing ran for 232 days and resulted in 16,642 pages of transcript[358] and which involved significant reliance upon expert evidence that proved to be inadmissible.[359]

These cases took place in an environment in which the Lord Woolf reports were at the forefront of judicial minds. Justice Peter McClellan was also of the view that the Lord Woolf inquiry and reports into access to justice issues in England had the effect of generating 'considerable discussion' within Australia in relation to the issue of expert evidence and were the impetus for the implementation of the first expert witness codes of conduct. Such an analysis is supported by the extra-curial writing of Justice Richard Cooper, quoted earlier in this chapter, which draws a direct correlation between the Lord Woolf inquiry and the introduction of the first Federal Court Expert Witness Code of Conduct.[360]

In short, although there was nothing new about the difficulty of adversarial systems of justice accommodating party-engaged expert witnesses, the extent and cost of reliance upon such witnesses in cases emerging in this period appears to have

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355 Ibid [22].

356 Ibid [23]. An interlocutory determination of Sackville in those proceedings, *Seven Network Limited v News Limited (No 15)* [2006] FCA 515 provides the example of a party leading an expert report of 143 pages (excluding appendices) from an expert witness ultimately found by the Court to be incompetent to give evidence about the Australian market the subject of the report (ibid [2], [31]-[32] (Sackville J).

357 *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229.

358 Ibid [23].

359 Ibid [33] and see above comments relating to *Australian Securities and Investment Commission v Rich* (2005) 218 ALR 764.

360 McClellan, 'Contemporary Challenges For the Justice System - Expert Evidence', above n 11, 2; Cooper, above n 234.

generated a momentum for reform of the law with respect to the receipt of evidence from expert witnesses that continues to this day.[361]

It is appropriate before leaving the topic of the expert witness at large, to identify some other unique characteristics of the party-engaged expert, the existence of which need to be taken into account in considering the extent of the problem identified in Chapter 4 and the proposals for reform identified in Chapter 5 of this thesis.

VI The Peculiar Characteristics of Expert Witnesses

A Overview

To consider, as subsequent chapters of this thesis shall, the case for any differential operation of legal professional privilege as between expert and lay witnesses, it is important to identify some of the other key characteristics that mark out the expert witness from the lay witness (other than the ability to give admissible evidence of opinion) and to identify other characteristics of an expert witness that differentiate him or her from professional colleagues not involved in the giving of evidence.

The key differences between an expert witness and a lay witness are that an expert witness receives renumeration for the giving of evidence in the proceedings, whereas the lay witness is entitled only to recover expenses in connection therewith and, further, that the expert witness is less amenable to sanction for perjury because of the inherent difficulty of proving misleading conduct in respect of an opinion, as opposed to a fact.

The key difference between a professional who is engaged to provide expert evidence and a professional who is not, is that the former has the benefit of the

[361] For example the introduction of a revised Expert Evidence Practice Note (GPN-EXPT) on 25 October 2016 in the Federal Court and the amendments to the Expert Witness Code of Conduct contained in Schedule 7 to the *Uniform Civil Procedure Rules 2005* (NSW) made in December 2016.

doctrine of immunity from suit in connection with critical features of that engagement, whereas the latter does not.

B Remuneration of Expert Witnesses

Firstly, as Jessel MR stated in *Lord Abinger*, an expert witness is remunerated by payment of professional fees:

> An expert is not like an ordinary witness who hopes to get his expenses, but he is employed by and paid in the sense of gain, being employed by the person who calls him.[362]

This situation is to be compared with the position of a lay witness who, for example, when called to give evidence in response to a subpoena is entitled only to be compensated for 'reasonable loss or expense'.[363]

In fact, where a lay witness is paid amounts in excess of reasonable losses or expenses in connection with the giving of evidence, the credibility of that witness can be impugned and, in certain circumstances, particularly in the context of witnesses for the prosecution in criminal trials, such conduct is capable (in an extreme case) of giving rise to an abuse of process.[364]

C Sanction for Perjury (or lack thereof)

Secondly, and as Jessel MR also noted:

> although the evidence is given upon oath, in point of fact the person knows he cannot be indicted for perjury, because it is only evidence as to a matter of opinion. So that you have not the authority of legal sanction.[365]

The classic definition of 'perjury' is that it 'consists in giving upon oath, in a judicial proceeding … evidence which was material to some question in the proceeding and was false to the knowledge of the deponent or not believed by him to be true'.[366]

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362 *Lord Abinger v Ashton* (1873) 17 LR Eq 358, 373.
363 See for example, rule 33.11 of the *Uniform Civil Procedure Rules 2005* (NSW).
364 See for example, *Marsden v Amalgamated Television Services Pty Ltd* [2000] NSWSC 384, [1]-[11] (Levine J); *Julian Ronald Moti v R* (2011) 245 CLR 456, 464–466 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
365 *Lord Abinger v Ashton* (1873) 17 LR Eq 358, 373.
366 *R v Traino* (1987) 45 SASR 473, 475 (King CJ).

True it is that all witnesses are required to give evidence upon oath, the traditional sanction for perjury is inapt to deal with the expert witness who gives evidence not of fact, but of opinion, about which reasonable minds may differ.

D Immunity from Suit

A question also arises as to whether an expert witness can even be subject to a claim in negligence by the party that engaged him or her or subject to disciplinary proceedings in connection with a professional opinion given by that expert as part of a trial process. In *Palmer and Another v Durnford Ford (a firm) and Another*,[367] the English High Court said:

> It is well settled that witnesses in either civil or criminal proceedings enjoy immunity from any form of civil action in respect of evidence given during those proceedings. The reason for this immunity is so that witnesses may give their evidence fearlessly and to avoid a multiplicity of actions in which the value of their truth or their evidence would be tried over again...This immunity has been held to apply to the preparation of evidence which is given in court.[368]

The witness in *Palmer* was a party-engaged expert witness in the field of engineering. He was retained to advise from an engineering perspective whether a civil claim lay against the vendor and subsequent repairer of a lorry tractor unit. In the course of proceedings against the vendor and repairer, the plaintiffs abandoned their claim and thereafter sued their expert and the solicitor for breach of a duty of care (the former for accepting a retainer that he was unqualified to accept or, in the alternative, failing to advise that the claim was unjustified and the latter, for instructing this expert in the first place). Ultimately the judge found that the expert was immune from suit in respect of work involved in giving evidence in proceedings and, to the extent intimately connected with the giving of evidence in proceedings, in respect of pre-trial work.[369] His Honour went on to clarify the position in the following terms:

> [T]he immunity would only extend to what could fairly be said to be preliminary to his giving evidence in court judged perhaps by the principal purpose for which the work was done. So the production or approval of a report

[367] *Palmer and Another v Durnford Ford (a firm) and Another* [1992] 2 All ER 122, 126 (Simon Tuckey QC).
[368] Ibid 125–126.
[369] Ibid 127.

> for the purposes of disclosure to the other side would be immune but work done for the principal purpose of advising the client would not. Each case would depend upon its own facts with the court concerned to protect the expert from liability for the evidence which he gave in court and the work principally and proximately leading thereto…[370]

It is clear from the foregoing, an expert will not be liable in negligence to his or her client *at least* in respect of the content of a report prepared for use in proceedings or for the giving of evidence in court.

In *Meadow v General Medical Council*,[371] the English Court of Appeal considered the case of a paediatrician who gave evidence for the prosecution in the trial of a mother for the murder of her two sons. The mother was initially convicted on the strength of Professor Meadow's evidence and the mother's first appeal against conviction was unsuccessful. However, a subsequent appeal was allowed and the convictions set aside on the basis that Professor Meadow, 'in his use of certain statistics in his capacity as an expert witness, had acted outside the range of his expertise and that his evidence had been so flawed that it had amounted to serious professional misconduct'.[372]

In his judgment, Sir Anthony Clarke MR restated the principles regarding a witness's immunity from suit, namely:

> [N]o action lies against parties or witnesses for anything said or done, although falsely and maliciously and without any reasonable or probable cause, in the ordinary course of any proceeding in a court of justice.[373]

and found that such immunity extends to an expert witness.[374] The rationale being that the administration of justice would be impeded if persons declined to come forward to give evidence in fear of being sued by a party.[375]

However, in *Meadow*, the key question was whether an expert witness was subject to disciplinary sanction in respect of conduct in court proceedings which would, in any other circumstance, give rise to an issue of unsatisfactory professional conduct

370 Ibid.
371 *Meadow v General Medical Council* [2007] 1 All ER 1 ('*Meadow*').
372 Ibid 31 (Auld LJ).
373 Ibid 7.
374 Ibid 8.
375 Ibid.

or professional misconduct. By differentiating the purpose of disciplinary proceedings (ie. protection of the public by the exercise of a protectionary jurisdiction) from those of civil proceedings, Sir Anthony Clarke MR found that an expert witness could still be liable for disciplinary sanction in respect of evidence given in proceedings.[376] This approach has since been followed in Australia.[377]

E No Property in a Witness?

Finally, it should be observed that despite it now being clarified in most jurisdictions that an expert witness owes a paramount duty to the court and not to the party calling him or her, it is clear that an expert can be restrained to a very significant extent from giving evidence on behalf of a party in certain circumstances.

In *Harmony Shipping Co SA v Davis*,[378] Lord Denning MR stated:

> So far as witnesses are concerned, the law is as plain as can be. There is no property in a witness. The reason is because the court has a right to hear every man's evidence. Its primary duty is to ascertain the truth. Neither one side nor the other can debar the court from ascertaining the truth either by seeing a witness beforehand or by purchasing his evidence or by making communication to him. In no way can one side prohibit the other from seeing a witness of fact, from getting the facts from him and from calling him to give evidence or from issuing him with a subpoena.[379]

Harmony Shipping concerned whether an expert witness who had been engaged by a party can be called to give evidence by another party. Lord Denning found that, subject to the right of the first party to object to the adducing before court of any communications falling within the scope of legal professional privilege, the law with respect to expert witnesses was no different than that with respect to lay witnesses.[380]

Importantly, Lord Denning's reasoning went further:

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376 Ibid 13–15.
377 *James v Keogh* [2008] SASC 156, at [72] to [74] per Debelle J.
378 *Harmony Shipping SA v Davis* [1979] 3 All ER 177.
379 Ibid 180. Lord Denning relied upon: Law Society 'Guide to Professional Conduct of Solicitors' (1944) 41 *LS Gaz* 8; and the 'Guide to Professional Conduct of Solicitors' (1963) 60 *LS Gaz* 108.
380 *Harmony Shipping SA v Davis* [1979] 3 All ER 177, 181.

> I would add a further consideration of public policy. If an expert could have his hands tied by being instructed by one side, it would be very easy for a rich client to consult each of the acknowledged experts in the field. Each expert might give an opinion adverse to the rich man, yet the rich man could say to each, 'Your mouth is closed and you cannot give evidence in court against me'. We were told that in the Admiralty courts where there are a very limited number of experts, one side may consult every single one of them. Does that mean that the other side is debarred from getting the help of any expert evidence because all the experts have been taken up by the other side? The answer is clearly No. It comes back to the proposition which I stated at the beginning. There is no property in a witness as to fact.[381]

Harmony Shipping has been followed in Australia, to a point,[382] but a number of more recent decisions appear to be more in favour of applying some restraints on the extent to which expert witnesses who have been exposed to confidential information or communications the subject of a claim for legal professional privilege in connection with one party, can be called to give evidence for another.

In *Rapid Metal Developments (Australia) Pty Limited v Anderson Formrite Pty Limited*,[383] Johnson J of the Supreme Court of Western Australia was required to determine an application by a defendant for an injunction to restrain the plaintiff from dealing with an independent engineering consulting firm. The firm had acted for the defendant in a number of capacities in connection with a project on which the defendant provided formwork. The failure of that formwork was an issue in the proceedings. The defendant also engaged the firm to provide advice to the defendant in connection with matters the subject of the proceedings, namely, the reasons for the failure of the formwork. The solicitor for the plaintiff subsequently sought to engage the engineering firm to provide an expert opinion in respect of certain matters associated with the proceedings. The defendant applied to restrain the firm from dealing with the plaintiff on the basis that the firm's confidential information obtained in the course of the engagement by the defendant may thereby be wrongfully disclosed and the confidence breached.

Johnson J surveyed the existing law with respect to restraining threatened breaches of an equitable duty of confidentiality and concluded that three elements were

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381 Ibid.

382 See for example: *Kimbers Pty Ltd v Harley* (1998) BC9807400 Unreported 7–8 (Wheeler J); *Wimmera Industrial Minerals Pty Ltd v Iluka Midwest Ltd* [2002] FCA 653, [44]-[46] (Sundberg J).

383 *Rapid Metal Developments (Australia) Pty Limited v Anderson Formrite Pty Limited* [2005] WASC 255.

required to establish such breach, namely: the information was required to have the necessary quality of confidence about it; the information must have been imparted in circumstances importing an obligation of confidence; and there must be an unauthorised use of that information to the detriment of the party communicating it.[384] His Honour found that the duty of confidentiality existed in this case.[385] In order to balance that finding, and the ability of a court to restrain the threatened breach of such an obligation with the principle that there is 'no property in a witness', his Honour said:

> …assuming for the present purposes that [the plaintiff is entitled to call the director of the engineering firm] as a witness, there would be no impediment to asking [the witness] for his expert engineering opinion based on established facts, provided that in the course of providing that opinion, [the expert] does not rely on any confidential information passed to [the engineering firm] during the course of its engagement by [the defendant]. However, pre-trial discussions, held as they are in the absence of a representative of the opposing party protecting that party's interest, would run the risk of a breach of confidentiality … Consequently, in my view, the trial process is the more appropriate arena to deal with this issue, as [the defendant] through its counsel, will then be in a position to immediately raise any issue of breach (sic) confidentiality arising from a specific question put to the witness.[386]

A similar view was reached by Habersberger J in *Protec Pacific Pty Limited v Brian Cherry*,[387] a matter in which the expert was privy not only to confidential information, but communications between a party and the expert which were the subject of a claim for legal professional privilege. In that case, his Honour found that the need to restrain the expert from having any communication with the other party before hearing was justified because, inter alia 'what is to happen if [the expert witness] unwittingly blurted out some privileged or confidential information? … One only has to ask these questions to see, in my opinion, that the only way to avoid the drastic consequences of the real and sensible possibility of the misuse of privileged and confidential information is to prevent [the expert] from speaking any further with [the lawyers for the other party].'[388]

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384 Ibid [62] relying upon *Coco v AN Clark (Engineers) Limited* [1969] RPC 41, 47-48 (Robert Megarry J).
385 Ibid [125].
386 Ibid [138].
387 *Protec Pacific Pty Ltd v Brian Cherry* [2008] VSC 76.
388 Ibid [69].

Habersberger J relied on the rationale adopted by Johnson J in *Rapid Metal Developments (Australia)* for concluding that such a restraint did not contravene the principle of 'no property in a witness' because the expert could still be called at trial (albeit without any opportunity to confer with those calling him prior thereto). And in *Australian Leisure Hospitality Group Pty Limited & Anor v Dr Judith Stubbs & Anor*[389] Nicholas J of the Supreme Court of New South Wales reached the same conclusion, despite the proferring of an undertaking by the expert in question not to divulge any confidential information, because of the risk of 'inadvertent or subconscious breach by [the expert] of [that undertaking]'.[390]

It is clear from the foregoing that, although the principle that 'there is no property in a witness' applies to expert witnesses as it does to lay witnesses, and although both expert witnesses and lay witnesses are capable of being restrained from acting in breach of an obligation of confidentiality,[391] the approach of the courts has been to preserve the principle by permitting the calling of the expert to give evidence at trial but prohibiting pre-trial communications between that expert and the side that wishes to call him or her. Such a situation clearly places the side wishing to call the expert at significant forensic disadvantage, because not only will the party be denied the opportunity of ascertaining the expert's likely response to any given set of facts or assumptions, but also because in such circumstances the party calling the expert will be unable to obtain a report from that expert for use in the proceedings and will ordinarily be denied the opportunity of asking leading questions of the expert.[392]

The result is that the very situation postulated by Lord Denning MR in *Harmony Shipping* (ie. that of the rich man engaging the eminent experts in a given field and thereafter saying '[y]our mouth is closed and you cannot give evidence in court against me') although perhaps not being capable of arising in an absolute sense, could still be engineered so as to place opposing parties at a significant forensic disadvantage in any litigation. The possibility of this 'Croesus litigant' (ie. a

389 *Australian Leisure Hospitality Group Pty Ltd & Anor v Dr Judith Stubbs & Anor* [2012] NSWSC 215.
390 Ibid [41].
391 See for example *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464 (restraining an employee from breaching an obligation of confidentiality to a former employer).
392 See section 37 of the *Uniform Evidence Law*.

wealthy litigant seeking to monopolise expert witnesses) is something furthered by the current orthodoxy with respect to client legal privilege and expert evidence, as further discussed in Chapters 4 and 5 of this thesis.

VI Conclusion

The foregoing highlights the exceptional and problematic nature of the party-engaged expert, now embedded within the framework of the Australian legal system.

It also suggests that the difficulties perceived as being associated with the party-engaged expert are by no means a recent phenomenon or the product of any 'fall from grace' of experts from once noble professionals. Rather, the difficulties are more appropriately explained in light of the inherent tension between the role of the expert in adducing evidence on behalf of a party (but holding a paramount duty to the courts), the need of the courts to be able to rely upon the testimony of experts to reach conclusions in matters of technical complexity and renewed scrutiny on issues such as access to justice and case management in the era of 'mega-litigation'.[393]

In subsequent chapters, the current state of the law with respect to expert evidence and client legal privilege will be considered, further problems with these concepts distilled and suggestions for reform given. However, to be beneficial, such reform will need to meaningfully address at least the two issues highlighted in this Chapter, namely, the tendency of experts toward bias (conscious or unconscious) and the tendency of parties to give effect to the paradigm of expert exceptionalism by engaging in 'expert shopping'.

[393] It may be, although it is beyond the scope of this thesis, possible to align the trajectory of judicial and legislative concern regarding the role of the party-engaged expert with the passage through the courts of evidence of, and based upon, increasingly sophisticated technologies, heightening the reliance by the triers of fact on expert witnesses while at the same time reducing the susceptibility to scrutiny of expert opinions by reason of the complexity of their subject-matter.

CHAPTER 3 – FRAGMENTATION, INCONSISTENCY AND A DIFFERENTIAL ORTHODOXY

> The verb 'adduce', used in the [*Evidence Act 1995* (Commonwealth)], means nothing more than to bring forward for consideration. A great deal of inconvenience would be avoided if the bringing forward of evidence for use in a later trial (as by responding to an order for discovery, a subpoena or some other ancillary process) were held to fall within the Act… A host of undesirable and even irrational distinctions between the law applicable to the ancillary and the substantive parts of the same proceedings would be avoided if a broad view were taken of the phrase 'adducing of evidence'.
>
> Kirby J, *Mann v Carnell*[394]

I Overview

As discussed in the preceding chapters of this thesis, expert evidence is evidence provided to a court to assist the judge or jury to determine questions of science or professional skill that lie beyond their expertise.[395] It is, at heart, an exception to the rule that prohibits the adducing of opinion evidence. The price of obtaining the exception is the expert's affirmation that his or her paramount duty is to the court and not to the client.[396]

Litigation privilege is a species of client legal privilege and a principle of public policy that operates to restrict the obligation of a party to disclose protected communications (and in some cases documents) in certain circumstances.[397] It is an exception to rules of evidence which would otherwise require the disclosure of documents or communications relevant to matters in issue in proceedings.

It is not surprising that the point at which these anomalies intersect has long been and, to a significant extent remains, an area characterised by complexity, confusion and divergence of judicial opinion.

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394 *Mann v Carnell* (1999) 201 CLR 1, 45.

395 See for example Hammelmann, above n 291, 82.

396 See for example the Expert Witness Code of Conduct, Schedule 7 to the *Uniform Civil Procedure Rules 2005* (NSW); Expert Witness Guidelines, Practice Note GPN-EXT, Federal Court of Australia and Rule 23.12 of the *Federal Court Rules 2011*.

397 *Bullivant & Ors v The Attorney-General for Victoria* [1901] AC 196, 200 (Lord Halsbury LC).

Putting these problems to one side for the moment, in order to identify the current orthodoxy (if any) regarding the application of litigation privilege to expert witnesses, it is necessary to recognise that a number of the complexities that remain in this area relate to issues of jurisdiction and the application (or non-application) of legislation and rules of evidence, and not necessarily divergent concepts of jurisprudence.

II Differential Application of Laws

A The Spectrum

To the extent that there is a current orthodoxy with respect to the application of the concept of legal professional privilege to the expert witness within New South Wales and the federal jurisdictions, it is a *differential* orthodoxy. This is because, depending on the range of factors discussed below, the applicable test for privilege either falls to be determined under the *Uniform Evidence Law* or falls to be determined by reference to common law principles — with potentially different outcomes.

To understand why this is the case notwithstanding the enactment of the *Uniform Evidence Law*, reference first needs to be made to the application of the *Uniform Evidence Law* itself because, to the extent (if any) that it does not apply, the common law fills its place.[398]

Section 4(1) of the *NSW Evidence Act* relevantly states:

> This Act applies to all proceedings in a NSW court, including proceedings that:
>
> (a) relate to bail, or
>
> (b) are interlocutory proceedings or proceedings of a similar kind, or
>
> (c) are heard in chambers, or
>
> (d) … relate to sentencing.

[398] See for example *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 552–553 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

A 'NSW Court' is defined in the Dictionary accompanying the *NSW Evidence Act* to mean:

> (a) the Supreme Court, or
>
> (b) any other court created by Parliament,
>
> and includes any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence.

Similar provisions but incorporating a definition of 'federal court', are contained in section 4 of the *Commonwealth Evidence Act*, which states:

> (1) This Act applies to all proceedings in a federal court, including proceedings that:
>
> (a) relate to bail; or
>
> (b) are interlocutory proceedings or proceedings of a similar kind; or
>
> (c) are heard in chambers; or
>
> (d) subject to subsection (2), relate to sentencing.

A 'federal court' is defined in the Dictionary accompanying the *Commonwealth Evidence Act* in the following terms:

> (a) the High Court; or
>
> (b) any other court created by the Parliament (other than the Supreme Court of a Territory);
>
> and includes a person or body (other than a court or magistrate of a State or Territory) that, in performing a function or exercising a power under a law of the Commonwealth, is required to apply the laws of evidence.

The first restriction, then, upon the operation of the *Uniform Evidence Law*, is that it only applies to courts, persons or bodies 'required to apply the laws of evidence'. This means that the *Uniform Evidence Law* does not apply to fora in which adherence to the laws of evidence is either excluded or discretionary and in those circumstances, the relevant test for the applicability of legal professional privilege to expert witnesses continues to fall to be determined by reference to the common law.

By way of illustration, examples of New South Wales and Commonwealth courts, persons or bodies not required to apply the laws of evidence include (without limitation): referees the subject of a reference under rule 20.14 of the *Uniform Civil Procedure Rules 2005* (NSW);[399] arbitrations conducted pursuant to the *Commercial Arbitration Act 2010* (NSW)[400] or pursuant to the UNCITRAL Model Law on International Commercial Arbitrations;[401] proceedings of the Small Claims Division of the Local Court of New South Wales;[402] processes of the Independent Commission against Corruption (New South Wales);[403] the NSW Civil and Administrative Tribunal;[404] processes of the Industrial Relations Commission (NSW);[405] coronial proceedings in New South Wales[406]; proceedings in the Drug Court of New South Wales;[407] the Administrative Appeals Tribunal (Commonwealth);[408] procedures of the Australian Competition and Consumer Commission;[409] and the National Native Title Tribunal.[410]

Critically, however, even in fora that *are* required to apply the *Uniform Evidence Law*, the *Uniform Evidence Law* itself is not always engaged by the procedures through which privilege claims in respect of expert witnesses are determined.

This is because the section of the *Uniform Evidence Law* governing litigation privilege in the context of expert evidence[411] commences with the words '[e]vidence is not to be adduced if…'. The preamble is significant.

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399 *Uniform Civil Procedure Rules 2005* (NSW), rule 20.20(2)(b);
400 See section 19(3) of the *Commercial Arbitration Act 2010* (NSW);
401 See Article 19(2) of the *UNCITRAL Model Law on International Commercial Arbitration* (as adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006) forming Schedule 2 to the *International Arbitration Act 1974* (Commonwealth).
402 *Local Court Act 2007* (NSW), section 35(3)
403 *Independent Commission Against Corruption Act 1988* (NSW), section 17(1).
404 *Civil and Administrative Tribunal Act 2013* (NSW), section 38(2), save in respect of proceedings in the exercise of the enforcement jurisdiction of the Tribunal and proceedings for the imposition by the Tribunal of a civil penalty in the exercise of its general jurisdiction, section 38(3).
405 *Industrial Relations Act 1996* (NSW), section 163(1)(b).
406 *Coroners Act 2009* (NSW), section 58(1).
407 *Drug Court Act 1998* (NSW), section 26(3).
408 *Administrative Appeals Tribunal Act 1975* (Commonwealth), section 33(1)(c)
409 *Competition and Consumer Act 2010* (Commonwealth) section 44ZF(1)(a); section 95R(7); section 103(1)(c)
410 *Native Title Act 1993* (Commonwealth), section 109(3).
411 *Uniform Evidence Law*, section 119.

In its report accompanying the bill that formed the basis for the *Uniform Evidence Law*, the Australian Law Reform Commission gave the following explanation of the meaning of 'adduced' in the context of section 119:

> The Bill is drafted on the basis that a witness in the witness box is 'giving' evidence. The party who is questioning the witness (whether in examination in chief or in cross-examination) is 'adducing' the evidence that the witness is giving. It is the court's function to admit or refuse to admit the evidence so adduced.[412]

The report also went on to clarify that section 119 was not intended, in terms, to apply to ancillary processes to the adducing of evidence in a courtroom. It stated:

> The Terms of Reference limit the Commission to considering the application of the privilege in the courtroom where evidence is sought to be given. Situations may arise where a party obtains access to documents outside the courtroom which are protected in the courtroom by the proposed privilege. Under the proposal, the privilege will still apply in the courtroom unless the client voluntarily disclosed the document. Having wider access on discovery or under a search warrant is usual. Access is not determined by the rules of admissibility such as relevance and hearsay. It is not unreasonable to have wider access in the investigative stage.[413]

Shortly after the commencement of the *Uniform Evidence Law* in New South Wales, courts attempted to make sense of the potential discrepancy between the operation of that law in certain aspects of proceedings and the continued application of the common law in others. And, to the extent that the High Court is the authoritative voice for the determination of justiciable controversies within Australia, it is clear that a number of other distinguished bodies reached erroneous conclusions in connection with this issue.

B Curial Misconceptions (Part 1)

In *Trade Practices Commission v Port Adelaide Wool*,[414] Branson J sitting in the Federal Court of Australia, considered the effect of the enactment of sections 118 and 119 of the *Commonwealth Evidence Act* on the common law with respect to the application of legal professional privilege in relating to ancillary processes of the

412 Australian Law Reform Commission, 'Evidence', above n 202, [58].
413 Ibid [199].
414 *Trade Practices Commission v Port Adelaide Wool* (1995) 60 FCR 366 ('*Port Adelaide Wool*').

Court. Her Honour's statement, which was initially met with broad judicial approval, was as follows:

> It would be a curious result, in my view, if a party to proceedings in this Court could be required to produce for inspection by the other party or parties during pre-trial procedures, or indeed in court, a confidential document prepared, for example, for the dominant, but not the sole, purpose of a lawyer providing legal advice to that party, notwithstanding that at trial that party could successfully object on the ground of client legal privilege to any evidence being adduced which would result in disclosure of the contents of the document. That is, logic at least would seem to suggest that the ambit of client legal privilege should be constant throughout the litigation process. That logic is reflected in the fact that historically legal professional privilege with respect to the contents of documents has had the same ambit whether invoked as a privilege against production of documents outside of the courtroom as part of the discovery process, or as a privilege against disclosing the contents of such documents within the courtroom either by their physical production or by disclosure of their contents in response to questions asked in cross-examination.[415]

Branson J's decision was delivered at the time when the 'sole-purpose' test for the existence of legal professional privilege was still ascendant – as discussed above, it was not until the High Court's decision in *Esso* that the 'dominant purpose' test became legitimised outside the ambit of the *Uniform Evidence Law*. But the 'sole purpose' versus the 'dominant purpose' tests were not the only point of differentiation between the common law and the *Uniform Evidence Law*. Another key differentiating factor (which is discussed in greater detail later in this chapter), is the fact that the *Uniform Evidence Law* is concerned with *communications* and *documents* – section 119 of the *NSW Evidence Act* for example, relevantly states:

> [e]vidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in the disclosure of: (a) a confidential *communication* between the client and another person … or (b) the contents of a confidential *document* (whether delivered or not) that was prepared, for the dominant purpose… (emphasis added)

whereas the privilege under the common law is concerned only with *communications*.[416]

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415 Ibid 370.

416 *Commissioner of Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 552 ('*Propend*') (McHugh J).

Branson J refused to require the production as part of pre-trial processes, documents that could have been the subject of a claim for legal professional privilege if sections 118 or 119 of the *Commonwealth Evidence Act* were invoked at hearing.

The following year, Sackville J, also sitting in the Federal Court, quoted Branson J's decision in *Port Adelaide Wool* with approval and reached a similar conclusion.[417]

A year after Sackville J's determination, in *Telstra Corporation v Australis Media Holdings & Ors* [No 1],[418] McLelland Chief Judge in Equity of the Supreme Court of New South Wales, was faced with an application for leave to inspect certain documents the subject of a subpoena to a non-party, Publishing & Broadcasting Limited. Publishing & Broadcasting Limited asserted that the documents in question were the subject of legal professional privilege and resisted disclosure.

McLelland CJ in Eq was required to ascertain whether Division 1 of Part 10 of the *NSW Evidence Act* (including, for the purposes of this thesis, sections 118 and 119) had any role to play in determining claims for privilege that arose during ancillary processes of the court (being processes such as discovery, interrogatories and the production of documents under subpoena or notices to produce).[419] The question had already been resolved for the purposes of discovery and interrogatories because the *Supreme Court Rules* expressly applied the *NSW Evidence Act* tests to those processes. However, no similar provision had at that time been made in respect of subpoenas or notices to produce.[420]

McLelland CJ in Eq was also persuaded by the reasoning of Branson J in *Port Adelaide Wool* and considered that the enactment of the *NSW Evidence Act* 'in respect of the adducing of evidence at a hearing has resulted, as an indirect or flow-

417 *BT Australasia Pty Ltd v The State of New South Wales & Ors* (1996) 140 ALR 268.
418 *Telstra Corporation v Australis Media Holdings & Ors [No 1]* (1997) 41 NSWLR 277.
419 Ibid 278.
420 Ibid; S*upreme Court Rules 1970* (NSW), Pt 23, r 1(c) and Pt 24, r 6(3)(c).

on effect, in the application of equivalent principles to all ancillary processes'.[421] His Honour's approach is encapsulated by his statement:

> For the above reasons, the *Evidence Act* principles should be treated as applying, not directly, but derivatively, to the claims of privilege presently under consideration.[422]

C Dissent

McLelland CJ in Eq's approach was not universally accepted. In *Esso Australia Resources Limited v The Commissioner of Taxation of the Commonwealth of Australia*,[423] at first instance, Foster J, having canvassed the opinions of Branson J and McLelland CJ in Eq discussed above, felt unable to reach a similar conclusion. His Honour focused upon the disparity between the 'sole purpose' test that was then ascendant under the High Court decision of *Grant v Downs* and the 'dominant purpose' test as set out in sections 118 and 119 of the *Commonwealth Evidence Act* to lay out four propositions:

1. The common law was authoritatively declared by the High Court in *Grant v Downs.* The test to be applied was the sole purpose test in both trial and pre-trial situations.

2. The law as so stated can be altered only by the High Court itself or by an Act of the Parliament.

3. The *Evidence Act* has altered the test in relation to trial proceedings only.

4. The sole purpose test in relation to pre-trial proceedings remains the test until altered by the High Court or a further Act of Parliament.[424]

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421 Ibid 270.
422 Ibid 271.
423 *Esso Australia Resources Limited v Federal Commissioner of Taxation* (1997) 150 ALR 117.
424 Ibid 121–122.

The application of these propositions made the documents susceptible to discovery because the evidence did not support the view that the documents were created for the *sole* purpose of obtaining legal advice. The facts at issue in the case before Foster J related to the discoverability of certain documents that had been prepared, it was said, in contemplation of litigation and hence potentially within the scope of operation of section 119 of the *Commonwealth Evidence Act* if it had application to the ancillary process of discovery. Perhaps in recognition of the contestability of his finding, his Honour, apparently unprompted, granted leave to appeal his own decision.[425]

In the meantime, a separate case made its way to the Full Court of the Federal Court. In *Adelaide Steamship Co Limited & Anor v Spalvins & Ors*,[426] that court, constituted by Olney, Kiefel and Finn JJ, was required to determine whether the issue of waiver of privilege in the context of subpeonaed material fell to be determined under the *Commonwealth Evidence Act* or the common law. The Court adopted the same approach as that of Branson J and McLelland CJ in Eq and respectfully expressed disagreement with Foster J. The gravamen of the Court's reasoning can be found in the following passage:

> In our view the issue that needs to be faced is what are the common law principles that are to be … applied. With the greatest respect to those who have expressed the contrary view (see, for example, *Esso Australia Resources Limited v FCT*) we do not consider that those well known decisions of the High Court dealing generally with the common law to which we have earlier referred conclude the matter. In those decisions the High Court considered the common law in a setting unencumbered by the Act. In our view such is the significance of the Act's provisions in this that their advent has created an entirely new setting to which the common law must now adapt itself, and adapt itself in such a way as to 'include [the Act] as a fundamental part of its fabric'.[427]

Accordingly, the Court considered that the common law must be 'adapted' in a manner that was consistent with the *Commonwealth Evidence Act*.

425 Ibid 126.
426 *Adelaide Steamship Co Ltd v Spalvins & Ors* (1998) 152 ALR 418.
427 Ibid 428.

D Initial Resolution

Because of the differences of judicial opinion on the issue (including the decision in *Spalvins*), the Full Court of the Federal Court constituted to hear the appeal from the decision of Foster J in *Esso Australia Resources Limited v The Commissioner of Taxation of the Commonwealth of Australia* comprised five judges: Black CJ, Beaumont, Sundberg, Merkel and Finkelstein JJ.[428] It is illustrative of the divisiveness of the issue that the court split, with a narrow majority (comprising Black CJ, Sundberg and Finkelstein JJ) holding that the common law continued to apply to the determination of issues of privilege required to be made in connection with ancillary processes.[429] Interestingly, an issue that appeared to be persuasive to the conclusion of the majority was quite similar to that which seems to have swayed the minority — incongruity in the application of laws. Whereas the minority found it absurd, as a matter of statutory construction, for the *Commonwealth Evidence Act* test to apply to the determination of privilege claims during the hearing of a matter and yet have the common law apply to the determination of privilege claims during processes leading up to trial,[430] the majority found persuasive the asserted impossibility of having the common law modified by a statute which, at that stage, applied to a small number of jurisdictions:

> there is but one common law in Australia: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-563, and it seems to us impossible to have a common law dominant purpose test applicable to discovery in New South Wales and in other parts of Australia when the issue arises in a federal court, and a common law sole purpose test at all other times and in all other places…[431]

Prior to the decision of the Full Court of the Federal Court in *Esso* making its way to the High Court, in *Northern Territory v GPAO*,[432] Gleeson CJ and Gummow J made the following comments, suggestive of a view that the *Commonwealth*

428 *Esso Australia Resources Limited v Commissioner of Taxation* (1998) 83 FCR 511.
429 Ibid 518–519, 564–576.
430 Ibid 555 (Merkel J, with whom Beaumont J agreed).
431 Ibid 525 (Black CJ and Sundberg J).
432 *Northern Territory v GPAO* (1999) 196 CLR 553.

Evidence Act had not somehow infiltrated the common law so as to apply to ancillary processes as well as the adducing of evidence at hearing:

> …the *Evidence Act* is concerned with the adducing of evidence (Ch 2), the admissibility of evidence (Ch 3), proof (Ch 4) and certain ancillary matters (Ch 5). It does not deal with the obligations of a party to whom an order in the nature of a subpoena is addressed to produce documents to the court in question. Nor does the *Evidence Act* deal with the grant of leave by the court to inspect or otherwise make use of documents which have been produced in answer to a subpoena.[433]

Later that year, the High Court finally delivered judgment on the appeal in *Esso* from the Full Court of the Federal Court. A majority, comprised of Gleeson CJ, Gaudron and Gummow JJ and Callinan J (who issued a separate judgment), agreed with the reasoning of the majority of the Full Court of the Federal Court to the effect that the common law applicable to the determination of claims regarding legal professional privilege should not be treated as having been affected by the enactment of the *Evidence Act* and continued to apply to ancillary processes of courts even in circumstances in which the *Evidence Act* applied to the determination of similar questions at hearing.[434] The majority also took a step that the Federal Court was precluded from doing, namely, confirming that, in light of the decision of the majority of the High Court in *Grant v Downs*,[435] the dominant purpose test and not the sole purpose test was relevant to the determination of claims for the existence of legal professional privilege at common law.[436] In this manner, the common law test and the provisions of sections 118 and 119 of the *Uniform Evidence Law* were harmonised in one respect, but importantly, not in others.

E The 'Fix'

The undesirability of having a 'dual system' in which questions of privilege are subject to different regimes within the same jurisdiction was considered in a joint report on the operation of the *Uniform Evidence Law* prepared by the Australian, New South Wales and Victorian Law Reform Commissions in 2006 ('*Law Reform*

433 Ibid 571.
434 *Esso v FCT* (1999) 201 CLR 49, 54–73 (Gleeson CJ, Gaudron and Gummow JJ), 93-108 (Callinan J).
435 *Grant v Downs* (1976) 135 CLR 674.
436 *Esso v FCT* (1999) 201 CLR 49, 64–73 (Gleeson CJ, Gaudron and Gummow JJ), 101-107 (Callinan J).

Commissions 2005 Report').[437] A detailed section of that report was devoted to the issue of the extension of privileges to pre-trial matters. The report was critical of the 'dual system', stating that:

> It is the clear position of the courts in Australia since *Baker v Campbell* that legal professional privilege is a fundamental right that applies to court, administrative and investigative proceedings. The Commission's view is that, in the interests of clarity and uniformity, the client legal privilege sections of the uniform Evidence Acts should be extended to respond to these pre-trial contexts, as currently regulated by the common law rules of legal professional privilege.[438]

The report canvassed various ways of achieving greater harmony of tests for privilege within each relevant jurisdiction by: amending relevant court rules;[439] inserting a 'mutatis mutandis' provision in the *Uniform Evidence Law* to require the application of the tests for privilege applicable under the Acts to all circumstances in which disclosure is required;[440] and amending Part 3.10 of the *Uniform Evidence Law* to replace the more limited concept of evidence 'adduced' with disclosure under a 'compulsory process'.[441] Each of these methods was characterised in the report as being 'imperfect' with the exhortation that, until mirror legislation across jurisdictions was enacted to give uniform effect to the test for privilege under the relevant evidence legislation, 'uniform Evidence Act jurisdictions will have to determine the means and extent to which uniform Evidence Act privileges are to apply in pre-trial and other contexts'.[442]

In fact, by the time of the *Law Reform Commissions 2005 Report*, changes had been made to procedural rules applicable to most Supreme, District and Local Court proceedings in New South Wales, to extend the operation of the *NSW Evidence Act* to certain pre-trial procedures.

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437 Australian Law Reform Commission, 'Final Report "Uniform Evidence Law"' (ALRC Report 102, Australian Law Reform Commission, December 2005); NSW Law Reform Commission, 'Final Report "Uniform Evidence Law"' (NSWLRC Report 112, NSW Law Reform Commission, December 2005); Victorian Law Reform Commission, 'Final Report "Uniform Evidence Law"' (VLRC Report 186, Victorian Law Reform Commission, December 2005).

438 Ibid 467.

439 Ibid 460-461.

440 Ibid 461-462

441 Ibid 462-263.

442 Ibid 463.

The *Uniform Civil Procedure Rules 2005* (NSW) contained a definition of 'privileged document' (being 'a document that contains privileged information') and a definition of 'privileged information' being information which relevantly, 'could not, by virtue of the operation of Division 1 of Part 3.10 of the *NSW Evidence Act*, be adduced in the proceedings over the objection of any person'.

In addition, a new rule 1.9 was introduced, which relevantly states:

> (1) This rule applies in the following circumstances:
>
> (a) if the court orders a person, by subpoena or otherwise, to produce a document to the court or to an authorised officer,
>
> (b) if a party requires another party, by notice under rule 34.1, to produce a document to the court or to an authorised officer,
>
> (c) if a question is put to a person in the course of an examination before the court or an authorised officer.
>
> …
>
> (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.

There appears to have followed a period in which it was assumed that the wording of the *Uniform Civil Procedure Rules* resolved the 'dual system' problem – at least insofar as pre-trial court processes were concerned.[443] This proved not to be the case.

F Curial Misconceptions (Part 2)

In *Westpac Banking Corporation v 789Ten Pty Limited*,[444] Tobias JA (with whom Beazley JA and Campbell AJA agreed), was faced with an application for access to documents subpoenaed by a party from a third party (not being a party to the proceedings) and in respect of which a claim for legal professional privilege was

[443] These amendments could obviously have no effect to tribunals and other bodies not bound to apply the rules of evidence and which did not have processes governed by the *Uniform Civil Procedure Rules*.

[444] *Westpac Banking Corporation v 789Ten Pty Limited* [2005] NSWCA 321.

made by a party to the proceedings. His Honour applied the test set out under the *NSW Evidence Act* for the determination of the claim.[445]

In the matter of Bauhaus Pyrmont Pty Limited (in liquidation),[446] Austin J likewise applied the *NSW Evidence Act* test for the existence of legal professional privilege, stating:

> Submissions were made, correctly, on the basis that [ss 118 and 119] of the Evidence Act are applicable to the production of the documents in context here. Rule 1.9 of the *Uniform Civil Procedure Rules 2005* (NSW) applies, inter alia, if the court orders a person by subpoena to produce a document to the court. That is the case here.[447]

In *ML Ubase Holdings Co Limited v Trigem Computer Inc*,[448] Brereton J was required to rule in respect of a privilege claim regarding documents relating to an expert report prepared by a Mr Jhe in that case, which had been the subject of a subpoena issued by the plaintiff to a related body-corporate of the defendant. His Honour stated:

> As I think is appropriate under the present rules [UCPR r 1.9], I treated this as an objection to production of documents on the ground that the documents were privileged documents … I upheld the claim for privilege and refused access, concluding that the documents were enittled to privilege under (NSW) Evidence Act 1995, s 119 (being confidential communications between Mr Woods, a lawyer acting for Trigem Australia, the client, and Mr Jhe) for the dominant purpose of Trigem Australia being provided with professional legal services relating to these proceedings…[449]

Each of these decisions failed properly to address the correct legal principles. It was not until the subsequent decision of Brereton J in *Carbotech-Australia Pty Limited v Yates*[450] that the inadequacy of the attempts to harmonise pre-trial and trial processes under the *NSW Evidence Act* became truly apparent. The lacuna identified by Brereton J in that case lies in the fact that rule 1.9 (3) is directed towards the production of documents and entitles a person to object to producing a document,

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445 Ibid [6]-[7].
446 *In the matter of Bauhaus Pyrmont Pty Ltd (in liquidation)* [2006] NSWSC 543 ('*Bauhaus*').
447 Ibid [19].
448 *ML Ubase Holdings Co Ltd v Trigem Computer Inc* (2007) 69 NSWLR 577.
449 Ibid 586.
450 *Carbotech-Australia Pty Ltd v Yates* [2008] NSWSC 1151 ('*Carbotech*').

inter alia, in response to a subpoena, on the ground that the document is a privileged document. As his Honour noted in *Carbotech*:

> …providing, as it does, that a person may object to producing a document - is addressed only to an objection by the person required to produce the document, and not an objection or claim for privilege by someone else in respect of a document so produced.[451]

Accordingly, the rules seeking to invoke the *NSW Evidence Act* principles in relation to the existence of privilege in an ancillary stage of proceedings were inapplicable where the entity objecting to production was a party to the proceedings and not the person required to make production. Confirming that each of the decisions in *Westpac Banking Corporation v 789Ten Pty Limited*, *In the matter of Bauhaus Pyrmont Pty Limited (in liquidation)*, and *ML Ubase Holdings Co Limited v Trigem Computer Inc* were made without reference to the distinction between the common law and *Evidence Act* approaches to the question of the existence and waiver of privilege, Brereton J declined to follow the path of McLelland CJ in Eq in *Telstra Corporation v Australis Media Holdings & Ors* [No 1][452] to 'apply the statutory provisions "derivatively"' to the objection-taking stage of the production of documents pursuant to subpoena in light of the decision of the High Court in *Esso Australia Resources v The Commissioner of Taxation*.[453]

As a consequence of the recommendations contained in the *Law Reform Commissions 2005 Report*, the *NSW Evidence Act* was amended[454] to introduce a new section 131A, which relevantly provides that a court is to determine any objection to the giving of information or the provision of documents pursuant to a 'disclosure requirement', by applying the provisions of Part 3.10 of the *NSW Evidence Act*. A 'disclosure requirement' is defined to mean:

> … a court process or court order that requires the disclosure of information or a document and includes the following:
>
> (a) a summons or subpoena to produce documents or give evidence;

451 Ibid [8].
452 *Telstra Corporation v Australis Media Holdings & Ors [No 1]* (1997) 41 NSWLR 277.
453 *Carbotech* [2008] NSWSC 1151, [11].
454 *Evidence Amendment Act 2007* (NSW), s [63]

(b) pre-trial discovery;

(c) non-party discovery;

(d) interrogatories;

(e) a notice to produce;

(f) a request to produce a document under Division 1 of Part 4.6 of the *Evidence Act*.[455]

There followed yet a further round of conflicting decisions, the vicissitudes of which were succinctly put by White J in *Singtel Optus Pty Limited v Weston*,[456] wherein his Honour stated:

> In *Waugh Asset Management v Merrill Lynch* [2010] NSWSC 197 McDougall J held that s 131A also applied at the stage of production and did not apply at the second stage where inspection is sought of documents produced to the court, so that the relevant principles to be applied were those of the common law (at [9]-[12]). I followed his Honour's decision in *d'Apice v Gutkovich (No. 1)* [2010] NSWSC 1336 at [10], as did Adams J in *Alderman v Zurich* [2011] NSWSC 754 at [12].
>
> However, in *TransGrid v Members Lloyd's Syndicate 3210* [2011] NSWSC 301, Ball J, without deciding the question, raised doubts as to whether this was the better construction of s 131A (at [10]). On further consideration I consider that these doubts are well founded. Relevantly subs 131A(1) applies where a person is required by a 'disclosure requirement' to 'produce' a document. Prima facie, as McDougall J held, the section applies at the stage of production. However, the definition of 'disclosure requirement' as meaning a process or an order that requires the 'disclosure' of a document, including by way of production of a document on subpoena or a notice to produce, indicates that the draftsman intended the section to apply to the entire process by which the production of a document on subpoena or by notice to produce (or by the other means referred to in subs 131A(2)) would result in the disclosure of the document.
>
> …
>
> In my view, where the objection to inspection is taken by the person required to produce the document on subpoena or notice to produce, the Evidence Act, and not the common law, applies.
>
> However, as Allsop P held in State of *New South Wales v Public Transport Ticketing Corporation* [2011] NSWCA 60 at [32] and as the terms of s 131A clearly provide, the section only applies where the person objecting to disclosure on the ground of privilege is the same person who was required to produce the document. The section does not apply when a claim for privilege

[455] It should be noted for completeness that the corresponding amendment to introduce section 131A in the *Evidence Act 1995* (Commonwealth) extends that Act's concepts of privilege only to disclosure requirements insofar as they may apply to the disclosure of journalist sources.

[456] *Singtel Optus Pty Ltd v Weston* (2011) 81 NSWLR 526.

> is made by persons other than the person required to produce the documents. In such cases, the common law applies. [457]

This remains the case. Where objection to the production of a document by a third party is taken by an entity other than that third party, the *NSW Evidence Act* does not apply, despite the elaborate amendments made to it and the *Uniform Civil Procedure Rules* intended to bring about that result.[458]

G Conclusions as to Fragmentation

In the federal jurisdiction, the situation remains complicated by the lack of provisions in the *Federal Court Rules* corresponding with r 1.9 of the *Uniform Civil Procedure Rules 2005* (NSW) and the fact that the amendment to the *Commonwealth Evidence Act* that corresponds with the introduction of s131A into the *NSW Evidence Act* is limited in scope to documents that would disclose the identity of an informant the subject of journalistic privilege under section 126K of that Act.

By reason of the foregoing, in the determination of claims for the existence or loss of privilege in New South Wales, the common law tests continue to apply: to bodies and proceedings which do not apply the laws of evidence; and to objections to the inspection of documents produced pursuant to subpoena where such objections are not made by the party producing such documents, and the tests under the *NSW Evidence Act* apply to the determination of such claims on all other occasions.

In the federal jurisdiction, the common law tests continue to apply: to bodies and proceedings which do not apply the laws of evidence; and to the determination of claims for privilege arising during all ancillary processes of federal courts, and the tests under the *Commonwealth Evidence Act* apply to the determination of such questions on all other occasions.[459]

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457 Ibid 531–532.

458 See for example, *Tavcol Pty Ltd v Valbeet Pty Ltd* [2016] NSWSC 1002, [8]-[12] (McDougall J); *North Shore Real Estate Pty Ltd v Real Estate Property Management Services Pty Ltd (No 2)* [2017] NSWDC 77, [17]-[18] (Dicker SC DCJ).

459 With the exception of proceedings for indictable offences governed by Part III, Division 1A of the *Federal Court Act 1976* (Commonwealth).

This fragmentation is self-evidently undesirable[460] — all the more so because the application of the common law and *Uniform Evidence Law* tests can yield different results to similar factual scenarios regarding the production of expert-related material. These are matters taken into account in the identification of the criteria and proposals for reform set out in Chapters 4 and 5.

III The 'Orthodoxy' under the Uniform Evidence Law

A Restatement of the Legislation

The relevant sections of the *NSW Evidence Act* (and in this regard, the provisions of the *Commonwealth Evidence Act* are identical) provide as follows:

> **118 Legal advice**
>
> Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:
>
> (a) a confidential communication made between the client and a lawyer, or
>
> (b) a confidential communication made between 2 or more lawyers acting for the client, or
>
> (c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person,
>
> for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.
>
> **119 Litigation**
>
> Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:
>
> (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made, or
>
> (b) the contents of a confidential document (whether delivered or not) that was prepared,
>
> for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or

[460] Not to mention the Law Reform Commission and judicial criticism referred to in the preceding paragraphs.

> overseas proceeding, in which the client is or may be, or was or might have been, a party.

Apart from the limited circumstance adverted to in section 118(c) 'or another person',[461] only section 119 of the *Uniform Evidence Law* has the capacity to extend the scope of the interactions to which privilege may attach beyond solicitor/client interactions to third parties, notably for the purpose of this thesis, expert witnesses. This is because the protection is afforded to: confidential communications between, 'the client and *another person*' or between a 'lawyer acting for the client and *another person*'; and also to the contents of a 'confidential document (whether delivered or not)' prepared by *any person*.

As to the meaning of 'dominant purpose', Branson J in *Sparnon v Apand Pty Ltd*[462] stated:

> It will be a question of objective fact whether in any case any one purpose 'dominated' the decision to bring the document into existence…
>
> Plainly if two purposes were of equal weight, one would not dominate the other … It seems to me that … the choice of the expression 'dominant purpose' rather than 'sole purpose' in s 119 of the Act is intended to bring within the scope of client legal privilege, a document brought into existence for the purpose of a client being provided with professional legal services notwithstanding that some ancillary use of the document was contemplated at that time.[463]

As to the meaning of 'legal services', it is perhaps sufficient for present purposes to quote White J in *New Cap Reinsurance Corp Limited (in liquidation) v Renaissance Reinsurance Limited*:[464]

> A lawyer will provide professional legal services in relation to a witness statement of evidence where the lawyer is asked to advise on what the statement should contain and settle the form of the statement. The deployment of the final report by the plaintiff's lawyers through its service on the opposite

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461 See the previous discussion of *Pratt Holdings Pty Ltd v Commissioner of Taxation* in Chapter 1. It is curious to compare the rationale for the Full Court of the Federal Court in *Pratt* departing from the strict wording of section 118 of the Act on the grounds that to do so would be contrary to 'practical realities surrounding the application of privilege' with the strict adherence to form mandated by the High Court in respect of the non-application of sections 118 or 119 of the Evidence Act to ancillary processes of the Federal Court in *Esso* (discussed above). The lament of Kirby J in *Mann v Carnell* that opens this chapter might be said to have been justly made.

462 *Sparnon v Apand Pty Ltd* (1996) 68 FCR 322.

463 Ibid 328.

464 *New Cap Reinsurance Limited (in liquidation) v Renaissance Reinsurance Ltd* [2007] NSWSC 258 ('*New Cap*').

> party and its tender into evidence will also constitute the provision of professional legal services relating to the proceedings.[465]

As to the meaning of 'an anticipated or pending Australian or overseas proceeding', the Victorian Court of Appeal in *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority*[466] framed the appropriate consideration in the following manner when considering the common law test, which for these purposes is identical to the test under section 119 of the *Uniform Evidence Law*:

> …as a general rule at least, there must be a real prospect of litigation, as distinct from a mere possibility, but it does not have to be more likely than not.[467]

Sections 122 and 126 of the *Uniform Evidence Law* concern circumstances in which client legal privilege (including litigation privilege) may be lost.

Section 122 of the Act relevantly states:

> **122 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 a client or party has knowingly and voluntarily disclosed to another person the substance of the evidence.

Section 126 of the Act states:

> **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.

Reliance upon an expert report in proceedings will therefore constitute either the consent of the client or the knowing and voluntary disclosure of the report and any privilege inhering in the report itself will be waived.

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465 Ibid [28].Ibid, [28].

466 *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* (2002) 4 VR 332.

467 Ibid 341 (Batt JA, with whom Charles and Callaway JJA agreed). This approach has since been followed in New South Wales, including in *Singapore Airlines v Sydney Airports Corporation* [2004] NSWSC 380, [19] (McDougall J) and in *State of New South Wales v Jackso*n [2007] NSWCA 279, [67] (Giles JA).

Similarly, privilege in a communication or document may be waived if: the substance of such communication or document is disclosed in the expert report or by the expert; the expert has identified the communication or document as having been relied upon by the expert in reaching the opinion the subject of his or her report or testimony; or it is otherwise reasonably necessary to enable a proper understanding of the report or testimony made by the expert. The issue of waiver is discussed in greater detail in Chapter 4 of this thesis.

B Creation and loss of privilege under the Uniform Evidence Law – some illustrations regarding expert evidence

The position under the *Uniform Evidence Law* in the context of expert evidence has been aptly summarised by White J in *New Cap*[468]. In respect of the creation of privilege, his Honour relevantly stated:

> Section 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. The question however is what that purpose is. If an expert prepares a draft report, or notes for the report, with the dominant purpose of a draft report (whether the precise draft then prepared by the expert or an intended later draft) being furnished for comment or advice by the lawyer, then it is privileged. If not, it is not.
>
> The issue may not be an easy one to determine. 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.
>
> In this way, in the case of claims for privilege over working notes and expert's draft reports not communicated to a client's lawyer, the same practical outcome may be reached in many cases whether the privilege is claimed at common law or under s 119 of the Evidence Act. However, the analysis of the claims must proceed on different paths. [469]

In the course of hearing the application before him, White J also considered it appropriate to inspect the documents the subject of the privilege claim. In this regard, he stated:

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468 See n 464 above.
469 *New Cap* [2007] NSWSC 258, [34]-[36].

> Following the course taken by Einstein J in *Integral Energy Australia v EDS (Australia) Pty Ltd* [2006] NSWSC 971, I thought it appropriate to inspect the documents for which privilege is claimed in order to consider whether such documents may have influenced the content of the report. There are limits to whether this is a useful exercise. It would be impossible, as a matter of practice, and inappropriate, as a matter of principle, for a judge to approach that question in the same way as a party might wish to do so if preparing a cross-examination of the expert.[470]

It should be noted that this is a course expressly authorised by section 133 of the *Uniform Evidence Law*, which relevantly states:

> If a question arises under this Part in relation to a document, the court may order that the document be produced to it and may inspect the document for the purpose of determining the question.

Such an approach was endorsed by Gleeson CJ and Gaudron and Gummow JJ in *Esso* in which their Honours stated that:

> A claim for privilege is not conclusively established by the use of a verbal formula. A court has power to examine documents in cases where there is a disputed claim, and it should not be hesitant to exercise such a power.[471]

Given that the majority decision in *Esso* constituted the reversal of the majority decision in *Grant v Downs* which had, until that time, maintained the 'sole purpose' test in determining the existence of privilege and the upholding of Barwick CJ's notable dissent in that case advocating just such a change, it is perhaps ironic that in *Esso*, some other words of Barwick CJ in *Grant v Downs* were clearly ignored, namely:

> Whether or not a document does so qualify [for privilege] is a question ultimately to be decided, if need be, upon an inspection by the judge of the document itself, and by the application of the stated principle. I say 'if need be' because where the judge who hears the application for inspection may possibly be the trial judge, sitting without a jury, it may be better to decide the matter upon the evidence as to the purpose of the production of the document rather than upon an inspection of it, thus avoiding any complication which might arise from the document having been seen by the judge and the privilege from inspection accorded to it.[472]

It is contended that a rule of law precluding the disclosure of certain classes of documents is itself problematic if the only reliable means of enforcing it is for those

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470 Ibid [51].
471 *Esso v FCT* (1999) 201 CLR 49, 70.
472 *Grant v Downs* (1976) 135 CLR 674, 677.

documents to be inspected by the relevant decision-maker. Further comments on this issue are made in subsequent chapters of this thesis.

The explication of the creation and loss of litigation privilege in the context of expert evidence under the *Uniform Evidence Law* made by White J in *New Cap* was further refined by Ball J in *Traderight (NSW) Pty Limited v Bank of Queensland Limited (No. 14)*[473].

Traderight 14 was one of a number of interlocutory judgements issued in respect of protracted litigation against the Bank of Queensland ('*BoQ*') by franchisees of the Bank of Queensland (referred to as "OMB [owner manager branch] Parties") against the BOQ. At a general level, the proceedings concerned the claim by the OMB Parties that the BoQ had, by inducing them to become interstate franchisees, engaged in misleading and deceptive conduct.

The OMB Parties briefed an expert, Professor Suzan Burton to provide a report regarding the adequacy of marketing investigations undertaken by the BoQ prior to its decision to offer interstate franchises. The OMB Parties had served a copy of the report in the proceedings and parts of the report had been accepted into evidence (and other parts rejected).[474]

The BoQ served a subpoena on Professor Burton, seeking production of a range of documents related to the preparation of her report. The OMB Parties claimed privilege over three categories of documents to which the subpoena related, namely:[475] draft reports of Professor Burton, containing comments, requests or advice made by the OMB Parties' legal advisors and communicated to Professor Burton in connection with the proceedings; draft reports of Professor Burton created for the dominant purpose of or with the expectation that those draft reports would be provided to the OMB Parties' legal advisors for the purpose of those advisors considering or providing comment or advice on those draft reports and

473 *Traderight (NSW) Pty Ltd v Bank of Queensland Ltd (No 14)* [2013] NSWSC 211 ('*Traderight 14*').
474 These matters were the subject of *Traderight (NSW) Pty Ltd & Ors v Bank of Queensland Ltd (No 13)* [2013] NSWSC 90 ('*Traderight 13*').
475 *Traderight 14* [2013] NSWSC 211, [3].

communication to those advisors in connection with these proceedings; and documents recording communications between Professor Burton and the OMB Parties' legal advisors concerning the draft reports or preparation of those draft reports for the dominant purpose of those legal advisors considering or providing comment or advice on those draft reports in connection with these proceedings.

The BoQ challenged these claims for privilege, contending that they were not made in accordance with section 119 of the *NSW Evidence Act* because, inter alia, it was inconsistent for the OMB Parties to rely upon the report and at the same time maintain a claim for privilege over the other documents sought, on the basis of the exception to the operation of section 119 which is contained in section 122(2) of that Act,[476] namely:

> 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 the kind referred to in section 118, 119 or 120.

After reviewing a number of authorities, Ball J determined that it was appropriate, when deciding whether the exception in section 122(2) had been enlivened, to adopt the approach taken by White J in *New Cap* when dealing with a similar question in respect of section 122(1). That approach was encapsulated in the following statement by White J in *New Cap*:

> The question is not merely whether it could be said that the privileged materials were used in such a way that they could be said to influence the content of the report, but whether it could be said that they influenced the content of the report in such a way that the use or service of the report would be inconsistent with maintaining privilege in those materials, such as, where it would be unfair for the party to rely on the report without disclosure of the materials.[477]

Of particular interest to White J was identifying the proper role of parties' legal representatives in the preparation of an expert report. His Honour considered that there was indeed a positive role to play in influencing the admissibility or form of the report, rather than its substance.[478] His Honour concluded that:

476 Ibid [7]-[8].
477 *New Cap* [2007] NSWSC 258, [53].
478 Ibid.

> Likewise, privileged communications between an expert and the party's lawyers have influenced the content of the report, in the sense of its form, although not in the sense of the formulation of the substantive opinions expressed by the expert. Likewise, privileged communications between an expert and the party's lawyers whereby material information is provided to the expert in the form of assumptions or documents may well influence the content of the report.
>
> However, an expert's report is required to state what materials and assumptions are relied on. Use of a final report, which refers to such materials and assumptions, is not inconsistent with maintaining confidentiality in the communications which produced the final report.[479]

Applying that reasoning to the matter before him, Ball J found that there was nothing in the Burton Report that suggested the conclusions stated by Professor Burton were not her own or were based upon material other than that disclosed in her report.[480]

In reaching this conclusion, his Honour frankly emphasised the court's heavy dependence upon parties' legal advisors 'to ensure that any opinion expressed by an expert is an opinion the expert holds for the reasons that the expert gives and that the expert otherwise complies with the Expert Witness Code of Conduct',[481] which requirement was 'reinforced by the acknowledgment that the expert is required to give concerning the code'.

The decision in *Traderight No 14* amounts to this: by reason of implied duties of a party's lawyers and the express acknowledgments of an expert made in accordance with the Expert Witness Code of Conduct, a court will presume, absent evidence to the contrary, that communications between lawyer and expert have not affected the substance of an expert report and that such communications may remain the subject of a valid claim for legal professional privilege despite reliance by the party on that report.

This is, in certain circumstances discussed in subsequent chapters of this thesis, a dangerous assumption.

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479 Ibid.
480 *Traderight 14* [2013] NSWSC 211, [23].
481 Ibid.

C Summary of expert related privilege in relation to the Uniform Evidence Law

Uniform Evidence Law applies to all proceedings in New South Wales and the Commonwealth before a person or body that is required to apply the laws of evidence, with the exception of ancillary processes in the Commonwealth jurisdiction and the determination of disputes regarding production of documents upon subpoena made by a person other than the producing entity in New South Wales.[482] The common law applies to determination of privilege claims arising outside of these parameters.[483]

The *Uniform Evidence Law* affords privilege to confidential communications between clients and third parties and lawyers and third parties and confidential documents (whether delivered or not) prepared: for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding or an anticipated Australian or overseas proceedings in which the client is or may be or was or might have been, a party.

Privilege is lost: with the client's consent; if the substance of the document or communication is knowingly and voluntarily disclosed; or in a document or communication which is reasonably necessary to enable a proper understanding of another communication or document that is not privileged.

Documents created by an expert (other than for the limited purposes now permitted by section 118(c) of the *Uniform Evidence Law*) will only be privileged if the dominant purpose for their creation is the provision of professional legal services to a client in relation to an existing or anticipated Australian proceeding; will lose privileged status if: the substance of the document is disclosed to another person; or their content is reasonably necessary to enable a proper understanding of another communication or document that is not privileged (such as an expert report that has been disclosed in proceedings — however, absent some lacuna established in

482 See pages 119-124 above.
483 See n 398 above.

respect of such a disclosed expert report, service of the report will not waive privilege in such communications and documents).

IV The 'Orthodoxy' at Common Law

A The Position

By reason of the discussion above in the context of the *Uniform Evidence Law*, it is clear that the common law continues to apply to the determination of privilege claims not governed by the *Uniform Evidence Law* including, as discussed in greater detail above, in procedures before bodies not bound to apply the rules of evidence. The only exception to this would appear to be bodies whose legislative framework expressly excludes the operation of the rules of evidence and the right to maintain claims for privilege, such as under the *Crime Commission Act 2012* (NSW).[484]

In *Trade Practices Commission v Sterling*,[485] Lockhart J attempted to define the various classes of documents to which litigation privilege attached at common law. These relevantly included:

> (e) Communications and documents passing between the party's solicitor and a third party if they are made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence.[486]

As previously foreshadowed, it is important to note that litigation privilege at common law does not extend to documents which are 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.

As to the meaning of 'dominant purpose', the same considerations as identified by Branson J in *Sparnon v Apand* (discussed above) apply. Similarly, the meaning of

484 See sections 23 and 39 of that Act.
485 *Trade Practices Commission v Sterling* (1979) 36 FLR 244.
486 Ibid 245–246.

the phrase 'when litigation is anticipated' is relevantly explained in *Mitsubishi Electric Australia Pty Limited v Victorian WorkCover Authority*.

At common law, the loss of privilege was explained with, perhaps deceptive, succinctness by Mason and Brennan JJ (as they then were) in *Attorney-General for the Northern Territory v Maurice & Ors* (1986) 161 CLR 475 in the following terms:

> A litigant can, of course, waive his privilege directly through intentionally disclosing protected material. He can also lose that protection through a waiver by implication. An implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege. The holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication … In order to ensure that the opposing litigant is not misled by an inaccurate perception of the disclosed communication, fairness will usually require that waiver as to one part of a protected communication should result in waiver as to the rest of the communication on that subject matter ... Hence, the implied waiver inquiry is at bottom focused on the fairness of imputing such a waiver.[487]

Accordingly, at common law, legal advice privilege and litigation privilege can be waived either intentionally or impliedly. Where implied waiver is alleged, the court will be required to consider whether waiver has taken place by reference to the *fairness* of depriving the other party access to the material in all the circumstances of the case. The substance of the decision in *Maurice* is discussed in some detail in Chapter 4 of this thesis.

B Creation and loss of litigation privilege at common law – some illustrations regarding expert evidence

In *Australian Securities and Investment Commission v Southcorp Limited,*[488] Lindgren J considered in a reasonably comprehensive manner, the way in which common law privilege attaches (or does not attach) to documents and communications typically generated during the course of an expert's retainer. His Honour relevantly stated:

> I will apply the following principles which I did not understand to be in dispute:

487 *Attorney General (NT) v Maurice* (1986) 161 CLR 475, 487–488.
488 *Australian Securities and Investment Commission v Southcorp Limited* [2003] FCA 804 ('*Southcorp*').

> 1. Ordinarily the confidential briefing or instructing by a prospective litigant's lawyers of an expert to provide a report of his or her opinion to be used in the anticipated litigation attracts client legal privilege...
>
> 2. Copies of documents, whether the originals are privileged or not, where the copies were made for the purpose of forming part of confidential communications between the client's lawyers and the expert witness, ordinarily attract the privilege...
>
> 3. Documents generated unilaterally by the expert witness, such as working notes, field notes, and the witness's own drafts of his or her report, do not attract privilege because they are not in the nature of, and would not expose, communications...
>
> 4. Ordinarily disclosure of the expert's report for the purpose of reliance on it in the litigation will result in an implied waiver of the privilege in respect of the brief or instructions or documents referred to in (1) and (2) above, at least if the appropriate inference to be drawn is that they were used in a way that could be said to influence the content of the report, because, in these circumstances, it would be unfair for the client to rely on the report without disclosure of the brief, instructions or documents; cf *Attorney-General (NT) v Maurice*…
>
> 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…
>
> 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...[489]

Lindgren J's approach has been widely followed by courts applying the common law test to claims for privilege over expert-related documents[490] and, on occasion, by way of apparent mistake, by courts that ought to have applied the corresponding tests under the *Uniform Evidence Law*.[491]

However, policy considerations articulated by the courts in respect of the existence and loss of privilege at common law are marked by inconsistencies. For example, in *Interchase Corporation Limited (in liquidation) v Grosvenor Hill (Qld) Pty Limited (No 1)*, Thomas J of the Supreme Court of Queensland, applying the

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489 Ibid [21].

490 *Watkins as litigation guardian for Watkins v State of Queensland* [2007] QCA 430, [13]-[14] (Jerrard J), [92]-[94] (MacKenzie J); *Matthews v SPI Electricity Pty Ltd* [2013] VSC 33, [44] (Derham AsJ); *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 948, [7]-[8], [12] (Ryan J).

491 *Integral Energy Australia v Eds (Australia) Pty Ltd* [2006] NSWSC 971, [3] (Einstein J); *Gourmet Gate Australia Pty Ltd (in liq) v Gate Gourmet Holding AG* [2004] NSWSC 768, [28] (Einstein J); *Ryder v Frohlich* [2005] NSWSC 1342, [10]-[11] (Barrett J).

common law test to an issue regarding claims for privilege over the contents of draft reports prepared by an expert, said:

> [A]n expert is a third person from whom the client, represented by a solicitor, hopes to obtain an advantage … The solicitor is deliberately converting the expert into a witness. The community has some interest in ultimately being able to ensure (through the courts) that this process is not abused. It is desirable that the rules be such that the courts, or the adversary, be able to explore fairly fully the circumstances of the formation of the opinion...I would hold that in general … documents generated by the expert and information recorded in one form or another by the expert in the course of forming an opinion are not a proper subject for a claim of legal professional privilege.[492]

In respect of the same issue and also applying the common law, Harper J of the Supreme Court of Victoria in *Linter Group Limited v Price Waterhouse (a firm)*, said:

> Just as a Judge ought never to allow publication of a draft of a judgment, in part because it is necessary to preserve the freedom to change his or her mind on further reflection about the case, so experts should not be inhibited by fear of exposure of a draft from changing their minds when such change is warranted by the material before the expert.[493]

Despite the tenet that 'there is but one common law',[494] the disparate approaches taken in these decisions cannot readily be reconciled.[495]

C Summary in relation to the common law

The common law test for privilege and its loss applies to: all proceedings in New South Wales and the Commonwealth before a person or body that is not required to apply the laws of evidence (provided that privilege has not been expressly abrogated by statute); ancillary processes in Commonwealth courts that are required to apply the laws of evidence; the determination of claims for privilege in New

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492 *Interchase Corporation Limited (in liq) v Grosvenor Hill (Qld) Pty Limited (No 1)* (1999) 1 Qd. R 141, 164.

493 *Linter Group Limited v Price Waterhouse (a firm)* [1999] VSC 245, [16].

494 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

495 In *Filipowski v Island Marine Limited & Anor* [2002] NSWLEC 177, Lloyd J intimates that the decision in *Interchase Corporation Limited (in liq) v Grosvenor Hill (Qld) Pty Limited*, op cit, can be explained other than by reference to principles regarding privilege because 'the position in Queensland at that time was governed by the operation of O 35 r 5(2) of the Queensland Supreme Court Rules which says that a document consisting of a statement or report of an expert is not privileged from disclosure' ([at 18]). A close examination of *Interchase* suggests that this is not the case and the rule did not apply to the documents the subject of the application (see *Interchase*, 159-160 (Thomas J)).

South Wales courts that are required to apply the laws of evidence where the application is in relation to documents produced pursuant to a subpoena and the applicant is not the entity producing those documents.

The common law affords privilege to: confidential communications between clients and third parties and lawyers and third parties made, confidential documents but only to the extent exposing confidential communications made or prepared when litigation is anticipated or commenced, for the purpose of litigation for the dominant purpose of the client being provided with legal advice or evidence to be used or information which may result in the obtaining of such evidence.

Privilege is lost if the substance of the communication is exposed or in circumstances in which it is unfair to deprive the other party of access to the material.

V The Locus of the Remaining Discrepancy

In many of the cases referred to above, despite a court's failure adequately to grapple with the anterior question of whether the common law or *Uniform Evidence Law* test for the existence or loss of privilege applies, the ultimate decision was not demonstrably incorrect. This is because, once *Esso* conclusively resolved the disparity between the 'sole purpose' and the 'dominant purpose' tests, the common law and *Uniform Evidence Law* approaches are quite similar, save in one key respect. As intimated above, the common law approach to the existence of privilege is focused only upon communications and not documents which are not in the nature of, or record, communications. In *Commissioner of Federal Police v Propend Finance Pty Limited*,[496] McHugh J said:

> This point, however trite it may seem, is fundamental to the determination of the present appeal. Much of the confusion present in the case law arises from a failure to apply it. Legal professional privilege is concerned with

[496] *Propend* (1997) 188 CLR 501.

> communications, either oral, written or recorded, and not with documents per se.[497]

By contrast, section 119 of the *Uniform Evidence Law* protects both communications *and* documents (whether delivered or not) that satisfy the other criteria.

In the context of expert witnesses, this distinction may be critical. In respect of category 3 of the taxonomy of expert-related documents identified by Lindgren J in *Australian Securities & Investments Commission v Southcorp Limited*,[498] namely: 'documents generated unilaterally by the expert witness, such as working notes, filed 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', where the common law applies, absent direct evidence that a draft report or other document generated by the expert was in the nature of, or would expose a communication made for the dominant purpose of the client receiving legal advice, privilege cannot be maintained in such a document. Indeed, whether a document falling within these categories could ever constitute or expose such a communication is itself a matter of controversy — in *Ryder v Frohlich*,[499] Barrett J stated:

> The point made here is that privilege can only attach to documents which embody communication between the expert and the litigant by whom the expert is retained (or the litigant's lawyer). *A draft report prepared by the expert is not, of its nature, such a communication*. It may be that the draft report is, in fact, given or sent by the expert to the litigant ot the litigant's lawyer, but that does not change its character as something prepared by the expert which is not intended to be a means of communication with the litigant or lawyer.[500]

whereas in *New Cap Reinsurance*,[501] White J stated:

> It was submitted that the fact of the draft reports being communicated did not change the fact that the purpose of their creation was not that they be communications between the expert and the client, or between the expert and the lawyers for the client.

497 Ibid 552.
498 *Southcorp* [2003] FCA 804, [21].
499 *Ryder v Frohlich* [2005] NSWSC 1342.
500 Ibid [12] (emphasis [italics] added).
501 *New Cap* [2007] NSWSC 258.

> I doubt that this would be a proper ground for rejecting a claim for privilege at common law in respect of the communication of a draft report to the lawyers for the client. *I would infer that the draft reports were produced for the purpose of being communicated in that way*. A document brought into existence by the expert for the purpose of being communicated to the client's lawyer for the purposes of the litigation would be privileged on any view of the authorities at common law, provided they have the necessary quality of confidentiality.[502]

Other judges have been less likely to accept an inference of the nature adverted to by White J. In *Tavcol v Verbeet*,[503] McDougall J said:

> Further, but only if the position is to be analysed according to the common law, there is another reason why there would be no privilege in the draft report. This is because [here his Honour quotes Lindgren J's third category, discussed above]. I accept that there may be cases where a draft expert report might expose communications of the relevant kind. However, there is no evidence that the draft report of Mr Hines would fall into that category, rather than into the more general category to which Lindgren J referred.[504]

The result of the foregoing can be summarised in this manner: many documents typically generated by an expert in the course of an engagement (such as working notes, field notes and draft reports) are substantially less likely to be the subject of a successful claim for privilege if challenged in circumstances in which the common law applies than in corresponding situations where the *Uniform Evidence Law* applies.

The common law continues to apply not only in fora which do not apply the laws of evidence, but to all ancillary processes in federal courts and to the determination of privilege claims made in New South Wales courts regarding access to documents produced pursuant to subpoenas but only where the party objecting to access is not the producing party.

This means that, after the passage of more than two decades since the enactment of the *Uniform Evidence Law* in New South Wales and the federal jurisdiction, the answer to the question of whether a draft expert report is privileged may differ depending upon the forum of the proceedings and the time and by whom in a single set of proceedings at which the relevant objection is made. As intimated by Kirby J

502 Ibid [21]-[22] (emphasis [italics] added).
503 *Tavcol Pty Ltd v Valbeet Pty Ltd* [2016] NSWSC 1002.
504 Ibid [49].

in the quote that opened this chapter, this state of affairs is manifestly unsatisfactory and the complexity of the issue only serves to accentuate the desirability of reform regarding the availability of legal professional privilege to documents relating to expert witnesses, a topic discussed in the remaining chapters of this thesis.

CHAPTER 4 – THE ROLE OF LAWYERS AND THE ESSENCE OF THE PROBLEM

> The consequences for the plaintiff when Mr Richards attempted, during Mr Dohrmann's evidence, to shift the basis for Mr Dohrmann's opinions to that expressed in the third version that I described above, were catastrophic. Mr Richards did not reveal his role in the third version of the report during the trial, but the deceptive and misleading nature of his conduct, which was attributed to the 'plaintiff's legal team', was revealed once Mr Dohrmann was cross-examined.
>
> Dixon J in *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd*[505]

I Overview

Chapter 2 of this thesis suggested that much of the recent angst regarding the position of the party-engaged expert within common law judicial systems can be explained as the product of a form of imagined nostalgia — a phenomenon that appears to have a certain *fin de siècle* recurrence and force. The reality is that the problems associated with the use of the party-engaged expert have been widely canvassed and endured for centuries such that, much like the Churchillian refrain on democracy, its use can perhaps be described as constituting the 'worst [approach], except for all the others'. Indeed, this appears to have been Judge Foster's advice from 1897 'the supposed evils of the present system are much exaggerated, and to a great extent imaginary that they are not to be cured by any remedy that has been or seems likely to be devised, and … on the whole, it is best to "let well enough alone"'.[506]

A threshold question therefore, is whether discussion of reforming the law with respect to the party-engaged expert is even warranted.

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505 *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (No 8)* [2014] VSC 567, [203].
506 Foster, above n 1, 185.

This chapter seeks to answer that question by exploring the two problems of party-engaged experts identified in Chapter 2: the issue of 'bias'; and the paradigm of expert exceptionalism.

Not only does the only existing survey of the Australian judiciary on expert evidence suggest that the presence of 'bias' to some degree is a common feature of the Australian legal system, but a number of reported decisions highlight the practical difficulties faced by triers of fact (be they judge or jury) in assessing the degree to which expert opinion evidence is or may be materially affected by such bias.

The paradigm of expert exceptionalism, manifested in this context by the practice of 'expert shopping' is something notoriously difficult to identify in practice because the veil of legal professional privilege will typically extend around communications with and documents produced by experts such that the visibility of interactions between parties and their experts to courts and opponents will only become evident upon the occurrence of an extraordinary event, such as a party seeking to change a disclosed expert. English courts have developed rules around such circumstances and protocols more likely to flush out such practices. On the whole, these practices are currently unchecked by formal rules in New South Wales and the federal jurisdictions.

A common thread to many problems associated with the use of party-engaged experts is the role of the lawyers in the engagement and management of the experts and their involvement in the settling of expert reports. It is at each of these instances that documents and communications the subject of legal professional privilege are generated and under the current orthodoxy (such as it is) discussed in Chapter 3, most of such documents and communications remain protected even after service of the relevant expert report in proceedings. This chapter concludes with a discussion of the role of lawyers in connection with the party-engaged expert and the shortcomings of the current approach to assessing claims for waiver of privilege over communications and documents generated in exchanges between experts and lawyers.

II The Problem of Expert 'Bias'

A Judicial Perspectives

In 1999, Ian Freckleton, Prasana Reddy and Hugh Selby published the work 'Austalian Judicial Perspectives on Expert Evidence: An Empirical Study'[507] ('*Judicial Perspectives'*). *Judicial Perspectives* centres upon a survey of Australian judicial officers conducted in mid-1997 regarding their experiences of expert evidence. The authors indicate that the response rate to the survey was such that approximately 60% of all trial judges across Australia participated in the survey, thus suggesting the collection of meaningful data.[508] This figure excludes magistrates, who were the subject of a separate survey.[509]

A key aspect of the survey related to the 'problems posed by expert evidence'. The authors of *Judicial Perspectives* commented on the responses to this issue in the following manner:

> Judges were asked in the survey whether they had encountered a number of problems that could impact upon the utility of expert evidence. Two thirds of those who answered the question (68.10% n=158) reported that they 'occasionally encountered' bias on the part of experts, while just over a quarter (27.59% n=64) reported that they encountered this phenomenon 'often'… This latter statistic is in some ways more significant. If bias is so prevalent that over a quarter of judges meet it 'often', this has ramifications for the functioning of the civil and criminal trial processes, especially if the bias is not readily detectable and measurable.[510]

To interpolate, this suggests that approximately 95.69% of participating Australian judges experience bias by expert witnesses to the extent that it could impact upon the utility of the evidence given by such witnesses *at least* occasionally. Further, as set out below, a number of the respondents appeared to be somewhat circumspect regarding the use of the word 'bias' and these responses should be viewed in that

507 Freckleton, Reddy and Selby, above n 7.
508 Ibid 1.
509 Ian Freckleton, Hugh Selby and Prusana Reddy, *Australian Magistrates' Perspectives on Expert Evidence: A Comparative Study* (The Australian Institute of Judicial Administration, 2001).
510 Freckleton, Reddy and Selby, above n 7, 25.

light. This is indicative of the presence of a systemic problem with the party-engaged expert witness.

As to the usage of the term 'bias', the authors stated:

> A number of judges cavilled at the term 'bias', linking it with deliberate disingenuousness and locating the source of frequent disagreements amongst experts in other factors. One respondent commented that experts tend to favour the party calling them, but that to call this propensity 'bias' was too strong a use of the term. A similar view was expressed by another respondent: 'I have never found an expert who has put forward a view which he/she does not genuinely hold, for the sake of merely supporting a case. Some views become untentable, but not because of "bias" in the sense of a desire to further the case dishonestly'. Another intepreted 'bias' as a 'dishonest attempt to support the party calling the expert'.[511]

Certain individual responses to the survey are also revealing, with one respondent stating:

> I suspect that the expert says what she/he believes the party paying for the report/evidence wishes to read/hear.[512]

and another:

> [b]ias is almost inevitable given that the expert is paid by one party and only called if his/her evidence helps the party's case.[513]

and yet another:

> [m]any experts are predictable in the sense of it is easy to know in advance what tack they will take. They are honest, but not necessarily objective.[514]

It appears that, had the term 'lack of impartiality' been used in lieu of 'bias', the responsiveness may have been greater still. Nevertheless, when asked to rate the most serious problem with expert evidence, judges consistently identified 'bias'.[515] This, out of a field containing (in descending order of frequency): bias; failure to prove bases of expert opinions; poor examination-in-chief; poor cross-examination;

511 Ibid.
512 Ibid 26.
513 Ibid.
514 Ibid.
515 Ibid 37.

difficult language used by the expert; other; exceeding parameters of expertise; and non-responsiveness by expert to questions.[516]

Not only was 'bias' identified with the most frequency in response to this question, but that frequency (85 respondents, equating to 34.84% of the total), was more than double that of the next most-identified problem, namely 'failure to prove bases of expert opinions' (34 respondents, equating to 13.93% of the total).[517]

Judicial Perspectives was published shortly after the introduction of the first Federal Court Code of Conduct for Expert Witnesses but before the introduction of mandatory codes for experts within various other Australian jurisdictions.[518] In addition to the usage of such codes, the authors of *Judicial Perspectives* recommended the introduction of a mandatory declaration to be given by party-called experts so as to emphasise the requirement of independence.[519] In relation to expert independence, they concluded that:

> The challenge is to address the culture amongst experts prepared to do forensic work that has tolerated a preparedness among a percentage of experts to compromise their objectivity and neutrality. Then, conceding that the culture will never be entirely eliminated, the task is to create checks and balances within the functioning of the litigation system to counteract what survives of the culture.[520]

The reliability of the methodology adopted by and the conclusions expressed in *Judicial Perspectives* has been questioned.

In 'Judging Surveys: Experts, Empirical Evidence and Law Reform',[521] Gary Edmond was particularly concerned about the efficacy of *Judicial Perspectives*' approach to the issue of bias amongst expert witnesses. He stated:

> Perhaps the most revealing dimension in the treatment of bias is the fact that judges were actually asked about it. The authors appear to believe that bias is a stable, tangible, observable quality and that their questions will produce consensus around its meaning and distribution. We can be confident that these assumptions are intended because the Report does not treat the judicial

516 Ibid.
517 Ibid.
518 See Chapter 2.
519 Freckleton, Reddy and Selby, above n 7, 29, 113.
520 Ibid 29.
521 Gary Edmond, 'Judging Surveys: Experts, Empirical Evidence and Law Reform' (2005) 33 *Federal Law Review* 95. ('*Judging Surveys'*)

> responses ironically. That is, it makes no inquiry into what bias is or how it might be that judges consider themselves capable of ascertaining whether an expert is biased.[522]

Pausing there, it should be noted that *Judicial Perspectives* does recognise some difficulty about the usage of the word 'bias'.[523] In fact it suggests that many respondents were concerned that the term betokened deliberate dishonesty. In this sense, it might be considered that the study under-, rather than over-emphasises the incidence of judicial concern over partisan behaviours by experts.

Nevertheless, Professor Edmond considers that the assumptions underpinning the conclusions expressed in *Judicial Perspectives* are ultimately 'self-defeating - especially in relation to the reform agenda',[524] rhetorically noting:

> …if judges are able to identify incidents of bias and we can rely upon their observations, then why should we (or they) regard bias as a serious problem. This leads to something of a paradox. If judges can identify bias then presumably they can deal with it. Alternatively, if they are unable to identify bias, or experience difficulty ascertaining it, then on what grounds can we rely on the judicial responses (to various questions in the survey)?[525]

Nice though it may be, such a summation may not appropriately encapsulate the real issue. The expert so biased that his or her testimony must be ignored entirely is a rare (though extant, as discussed below[526]) creature. The danger of the approach in *Judging Surveys* is that it appears to set up the notion that 'unbiased expertise is attainable' as a straw man:

> [f]or those who believe in the possibility of obtaining unbiased expertise the presence of bias may represent a very serious threat to legal institutions and social order. However, once we adopt more theoretically and empirically plausible models of expertise such simplistic models of bias and objectivity become both less tenable and less threatening. Only when we recognise that strong forms of objectivity are unattainable can we begin to craft more pragmatic means of identifying forms of expertise which are understood as adequate for the purposes of legal decision making.[527]

The actual problem, as articulated by judges, is, by contrast, the more subtle and complex problem of evaluating competing expert opinions (which, by definition are

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522 Ibid 103.
523 See n 511 above.
524 Edmond, above n 521, 105.
525 Ibid.
526 See for example the case referred to at n 535 below.
527 Edmond, above n 521, 136.

beyond the expertise of the decision-maker) where either or both is influenced to some opaque degree by bias.[528]

By way of example, in *Knight v Stocken*,[529] a medical negligence case, Simpson J of the Supreme Court of New South Wales was faced with a situation in which the plaintiff's only expert to 'directly inculpate the defendant in any breach of duty' was an inherently problematic witness. The difficulty of assessing such evidence, despite an awareness of potential bias, is illustrated by her Honour's reasoning, which included the following passage:

> It is always difficult to assess the opinions of competing expert witnesses. In this case the task was made more than usually difficult. I am bound to disclose that Dr J. was as aggressive a witness as I have ever observed, particularly when consideration is limited to professional witnesses. She was combative, and, it seemed to me, perceived herself to be sparring with counsel who cross-examined her. She sought to score points…[530]

But it was not so much the aggression, as the potential lack of objectivity that most concerned Simpson J:

> I did not gain the impression that she saw her role as attempting to assist the court to come to the correct result, or to inform the court on matters within her expertise. Rather, she appeared to see herself as advancing or defending a position. The extent to which her evidence can be relied upon suffered as a result. That is not solely because of her aggressive manner, but because I concluded that her aggressive manner bespoke an absence of the requisite objectivity which the court relies upon expert witnesses to display. Without that objectivity an expert witness' credibility is diminished.[531]

The result was that her Honour was forced to attempt to 'make a fair evaluation' of the evidence, 'disregarding the manner in which it was given'.[532] Such an approach is self-evidently difficult and that difficulty is also illustrated by one of the seminal cases regarding the admissibility of evidence given by an expert witness who cannot

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528 It is important to note that it will not always be possible to exclude expert evidence altogether where partisanship is suspected or even demonstrated, see for example: *United Rural Enterprises Pty Limited v Lopmand Pty Limited* [2003] NSWSC 870, [12] (Campbell J); *Australian Securities and Investments Commission v Rich* [2009] NSWSC 1229, [333] (Austin J); *Commonwealth Development Bank of Australia Pty Ltd v Cassegrain* [2002] NSWSC 980, [9] (Einstein J).

529 *Knight v Stocken* [2002] NSWSC 1161.

530 Ibid [48].

531 Ibid.

532 Ibid.

claim to be wholly independent, namely that of *Fagenblat v Feingold Partners Pty Ltd*,[533] discussed later in this chapter.

B Manifestations in Caselaw – some examples

A rare example of the exhibition of bias so patent that the trial judge had little difficulty in substantially disregarding all evidence given by an expert witness can be found in the case-study within Justice Cooper's article referred to above in Chapter 2.[534] The article references the English case of *Cala Homes (South) Limited v Alfred McApline Homes East Limited*,[535] in which a Mr Goodall was called to give expert testimony on matters related to architecture. In the course of the proceedings, Mr Goodall was confronted with an article that he had previously written titled 'The Expert Witness: Partisan with a Conscience'.[536] The content of the article is so astonishing to the contemporary practitioner, that it is worth quoting in detail:

> …the man who works the Three Card Trick is not cheating, nor does he incur any moral opprobium, when he uses his sleight of hand to deceive the eye of the innocent rustic and to deny him the information he needs for a correct appraisal of what has gone on. The rustic does not have to join in; but if he chooses to, he is 'fair game'.
>
> If by an analogous 'sleight of mind' an expert witness is able to present the data that they seem to suggest an interpretation favourable to the side instructing him, that is, it seems to me, within the rules of our particular game, even if it means playing down or omitting some material consideration. 'Celatio veri'[537] is, as the maxim has it, 'suggestio falsi'[538], and concealing what is true does indeed suggest what is false, but it is no more than a suggestion, just as the Three Card Trick was only a suggestion about the data, not an outright misrepresentation of them.

Mr Goodall admitted that he had approached the writing of his expert report from the perspective of a 'hired gun'.[539] Unsurprisingly, the judge did not appreciate being posited in the role of the 'innocent rustic' and Mr Goodall's evidence was given little weight.[540]

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533 *Fagenblat v Feingold Partners Pty Ltd* [2001] VSC 454.
534 See n 234 above.
535 *Cala Homes (South) Limited v Alfred McAlpine Homes East Limited* [1995] EWHC Ch 7.
536 Quoted in Cooper, above n 234 207.
537 Namely, the 'concealment of truth'.
538 Namely, the 'suggestion of deceit'.
539 Cooper, above n 234, 209.
540 Ibid.

In other cases, the fact of bias is evident from the outset but the manner in which the bias should be taken into account when receiving and weighing the evidence of the expert becomes challenging. Some of the difficulties faced by a trial judge in evaluating the impact of bias on expert testimony are demonstrated in the case of *Fagenblat v Feingold Partners Pty Limited*.[541] Here, the plaintiff sought to rely upon expert accounting evidence given by a Mr Borsky. That approach was impugned by the defendant on two key bases relating to the potential bias of Mr Borsky, namely: that Mr Borsky had been previously involved in the preparation of accounts for the firm the subject of the dispute; and that Mr Borsky was the brother-in-law of the plaintiff.

Pagone J, who delivered judgment at first instance, found that Mr Borsky was not disqualified from giving expert evidence merely by reason of these facts and provided that he otherwise satisfied the criteria for the giving of expert evidence.[542] However, his Honour considered that these facts should be taken into account in determining the weight to be accorded to Mr Borsky's evidence.[543] His Honour stated:

> Experts do have duties to the Court to be independent … [t]he risk that such duties might be breached permit a testing of the partiality of a witness so that the Court may assess the assistance that can be gained from the expert evidence which is given … [t]he reason for these duties, however, stem (sic) from the need to ensure that the evidence which is before the Court is useful in the sense of being probative and reliable.[544]

The conclusion reached by Pagone J was that '[i]t is for the Court to assess the value of evidence. It is easy to conceive of instances of expert evidence where partiality could have no conceivable impact upon the reliability of the expert evidence tendered'.[545]

Ironically, having articulated the appropriate test, his Honour failed to apply it and in fact appears to have misplaced confidence in Mr Borsky's assessments based

541 *Fagenblat v Feingold Partners Pty Ltd* [2001] VSC 454.
542 Ibid [10].
543 Ibid.
544 Ibid [9].
545 Ibid.

upon his impugned relationship with the parties rather than upon any specialised qualifications or training. Upon appeal, Pagone J's finding that issues as to the partiality of experts go to weight rather than admissibility, was upheld.[546] However, Pagone J's ultimate findings in the case were set aside. Ormiston JA, with whom Chernov and Eames JJA agreed, stated:

> Mr Borsky was not exactly an outsider in this dispute and, despite the fact that the judge felt that his expert opinion was not infected by his relationship to the respondent and his wife, the very factual issue here in dispute is one about which one should be especially cautious in accepting the conclusions of a witness of this kind, whatever may fairly be said about the reliability of his professional opinion. But, in any event, Mr Borsky's impressions were simply not relevant.
>
> …
>
> The difficulty in the present case is that the learned judge chose to ignore the actual events which later occurred, and yet he not only relied on certain evidence which could relate only to a period after 30 June but indeed placed heavy store on it. That evidence was the evidence of Mr Borsky and what the judge described as his 'special factual knowledge'.[547]

In such circumstances, in contrast to the position articulated in *Judging Surveys*, it cannot be reliably argued that an ability to identify bias equips a judge with the means of addressing it.

Judging Surveys is especially critical of the notion expressed in *Judicial Perspectives* that adherence to a mandatory form of 'experts' declaration' may ameliorate some of the problems identified:

> [t]his highly idealised - or, to adopt the authors' terminology, 'positivist' - approach implies that a declaration will change a partisan culture they associate with expert witnesses. It also implies that experts are generally inattentive to a range of existing ethical, legal and professional obligations.[548]

Once again, this perhaps overstates the degree of faith reposed by *Judicial Perspectives* in such a declaration.[549]

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546 *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA 33.

547 Ibid [71] and [83].

548 Edmond, above n 521, 122.

549 True it is that *Judicial Perspectives* expresses a view that 'in time, such a declaration is likely to forge a culture of obligation on the part of expert witnesses primarily to the courts' but equally, it states that '…practice directions and mandatory witness declarations can only go so far in addressing issues identified by the respondent judges as problematic….they can do very little to facilitate expert accountability in the courtroom'. It also comments that: 'conceding that the culture will never be entirely

Judging Surveys concludes that the imposition of such a declaration will achieve little other than the entrenchment of 'an existing symbolic order':

> How will the reforms change expert culture? … Once we accept (along with the authors at various places in the *Report*) that experts frequently and legitimately disagree, then the culture of partiality becomes highly suspect as an analytical tool. This seems to be confirmed by the difficulties determining whether a particular expert is biased, whether intentionally or not. We can always allege that an expert is biased. Usually, such an allegation will involve attributing various forms of interest or alignment. Proving that an expert is actually biased in a way that ought to change the status of their evidence may be harder.[550]

Indeed, this latter acceptance appears to go some way towards recognising that 'bias', 'partisanship' or a 'diminishment in objectivity', howsoever it is labelled, can affect and infect expert evidence in a manner that makes it fundamentally more difficult for the trier of fact to ascertain the extent of its influence over the opinion expressed. This tends to contradict the force of the author's argument with respect to the 'paradox' inherent in *Judicial Perspectives*.

But even if the conclusions expressed in *Judicial Perspectives* are flawed from a methodological perspective, where does this leave the status of expert evidence within the Australian civil and criminal trial systems? As Professor Edmond is quick to state, to debunk *Judicial Perspectives* is not to 'suggest that as it stands (or stood) everything is rosy, or that certain types of expert practice, perhaps including forms of partisanship, do not cause acute problems for legal practice'.[551]

Where then, lies evidence as to the extent of expert partisanship affecting the Australian justice system? Absent a further comprehensive study of judicial attitudes since the publication of *Judicial Perspectives*, or a more wide-ranging analysis of the kind advocated by Professor Edmond in *Judging Surveys*,[552] we are left with the potentially imperfect and now somewhat outdated conclusions

eliminated, the task is to create checks and balances within the functioning of the litigation system to counteract what survives of [a culture of experts prepared to compromise their objectivity and neutrality]'Freckleton, Reddy and Selby, above n 7, 115, 29.

550 Edmond, above n 521, 129.

551 Ibid 138.

552 Ibid 114, 115, 139.

expressed in *Juidicial Perspectives* which (perhaps unreliably) concludes that there is a problem that warrants redress.

But there are other sources — the best available evidence of the existence of expert witness partisanship in the criminal and civil justice systems in Australia appears to be reported decisions that expressly identify the issue and its effect on the determination of matters the subject of the decision. In referring to such decisions, it is important to be mindful, not only of the rhetorical paradox regarding the identification of bias referred to in *Judging Surveys*,[553] but also to the significant number of proceedings that settle before hearing and delivery of judgment[554] and those cases in which biased conduct is not identified because the veil of legal professional privilege is not pierced by reason of there being no evident lacuna in an expert report or testimony or it not being identified by the other party or court.[555] Accordingly, it may be inferred that references to partisanship of expert witnesses in reported decisions understate the presence and extent of partisan experts operating within the system.

In *Wood v R*,[556] the New South Wales Court of Criminal Appeal considered, in the context of Gordon Wood's appeal against conviction for the murder of Caroline Byrne, expert testimony given by Associate Professor Cross at the original trial and once again in light of a book published by Associate Professor Cross after the trial but, somewhat extraordinarily, whilst the decision of the Court of Criminal Appeal was pending. McClellan CJ at CL, with whom Latham J and Rothman J relevantly agreed, found that the content of Associate Professor Cross's book was such that it:

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553 See n 525 above.

554 Reliable statistics in this area are lacking. A 2005 case-study using the District Court of New South Wales suggested that figures from 2002 identified an overall pre-trial settlement rate of 71 per cent: David Spencer, 'The Phenomenon of the Vanishing Civil Trial' (2005) 8(2) *ADR Bulletin* 2. The 2015 Annual Review published by the Supreme Court of New South Wales identified that of the 518 cases listed for court-annexed mediation, 51 per cent settled at mediation and a further 27 per cent of cases were noted as "still negotiating" at the conclusion of the court-annexed mediation. The Court does not keep records of private mediations or matters settled after court-annexed mediation. Supreme Court of New South Wales, '2015 Annual Review' (Supreme Court of New South Wales, 2015) 32 <http://www.supremecourt.justice.nsw.,gov.au/Documents/Publications/Annual%20Reviews%20Stats/Annual_Review_2015.pdf>.

555 See the discussion in Chapter 3.

556 *Wood v R* (2012) 84 NSWLR 581.

> makes plain that he approached his task with the preconception that, based on his behaviour [disclosed to him by police], as reported after Ms Byrne had died, the applicant had killed her. He clearly saw his task as being to marshal the evidence which may assist the prosecution to eliminate the possibility of suicide and leave only the possibility of murder.[557]

The case constitutes a striking example of a matter in which the relevant expert evidence 'was critical to the Crown case … because, without it, the Crown could not exclude the reasonable hypothesis that Ms Byrne had committed suicide'[558] and yet it was this expert evidence that was the product of an expert who:

> …took upon himself the role of investigator and became an active participant in attempting to prove that the applicant had committed murder. Rather than remaining impartial to the outcome and offering his independent expertise to assist the Court he formed the view … that the applicant was guilty and it was his task to assist in proving his guilt.[559]

In the circumstances of this case, it was the performance of lectures by the expert in question and the publication of a book regarding his role in the proceedings that constituted 'fresh evidence' upon which the Court of Appeal based its conclusion that:

> if the book and speech had been available to the defence and the extent of A/Prof Cross' partiality made apparent, his evidence would have been assessed by the jury to be of little if any evidentiary value on any controversial issue.[560]

It is evident that during the course of the hearing at first instance, a subpoena was served on Associate Professor Cross. It is unclear from the available judgment whether production of any material the subject of that subpoena was resisted on the grounds of legal professional privilege although it is inferred in any event that the manner in which Associate Professor Cross collated material responsive to that subpoena involved the adoption of questionable practices:

> A/Prof … resisted production of the material. When the material was finally produced, A/Prof Cross claimed that a prior 'crash' of his hard drive meant that not all of the material subpoenaed could be produced. He went on to explain that as a consequence of this 'crash' he had needed to edit the recovered emails (278 of "about 30,000") to put them into 'readable' form … Following this A/Prof Cross admitted that in order to obtain leverage to enable him to claim a larger fee for the provision of the emails, he copied them onto a disc

557 Ibid 617.
558 Ibid 628–629 (Latham J).
559 Ibid 625 (McClellan CJ at CL).
560 Ibid.

> that he was aware there would be trouble reading, expecting the applicant's solicitor to have to contact him again at which point he could request more money.[561]

It is also clear that certain relevant emails passing between Associate Professor Cross and those who had engaged him were not made available until the Court of Appeal proceedings,[562] once again suggesting that only limited production had been made in the original proceedings out of a total body of material that was germane to the findings of the jury.

Lest it be considered that the involvement of Associate Professor Cross in the prosecution case in *Wood v R* constituted an extreme and unique instance of circumstances in which the independence of an expert may be eroded by over-involvement in a party's assembly of a case (or defence), the decision of Austin J in *ASIC v Rich*[563] provides a similar (if less spectacular) example.

In *ASIC v Rich*, Paul Carter, a forensic accountant employed by PricewaterhouseCoopers was not only involved in the decision making process of the Australian Securities and Investments Commission ('*ASIC*') to commence proceedings against four former directors of the failed corporation 'One.Tel Limited' (proceedings 'in which he then was proferred as an expert witness'[564]) but also, the PricewaterhouseCoopers 'team, but not Mr Carter personally, continued to have a role in assisting ASIC in connection with the proceedings, in circumstances where the arrangements to prevent the flow of information from them to him were neither adequate nor wholly effective'.[565]

These difficulties were of such a magnitude that Austin J refused to admit into evidence an expert report prepared by Mr Carter for ASIC, noting that 'this is not a case where particular propositions can be identified and excised with surgical precision … [the problem] has affected the entire process of formation of the opinions ultimately expressed in [the Carter] Report', the essence of which was 'the

561 Ibid 622–623.
562 Ibid 624.
563 *Australian Securities and Investments Commission v Rich* (2005) 53 ACSR 110.
564 Ibid 192.
565 Ibid.

probably unconscious use of excluded material and a consequent failure to state the full and real factual basis and reasoning process'.[566]

In *Wood v R* and *ASIC v Rich*, the potential lack of objectivity of the expert in question was so pervasive as to militate against the placing of any weight upon the evidence of that expert. However, on occasion, an expert's lack of objectivity may be capable of determination not from extensive accounts of involvement in a party's case, but from the merest piece of evidence. *Universal Music v Sharman*[567] concerned claims by the applicants that the respondents had, through use of their developed technology, infringed copyright in a number of recordings.

Two of the expert witnesses called by respondent parties were Professor Ross, a Professor of Computer Science at the Polytechnic University in Brooklyn New York,[568] and Dr Clarke.

The presiding judge, Wilcox J, considered that Professor Ross was 'obviously well qualified to give expert evidence in this case'.[569] However, the cross-examination of Professor Ross caused his Honour to lose confidence in him. The event in question involved the production of a draft report prepared by Professor Ross which depicted communications between Professor Ross and his instructing solicitors. Wilcox J's judgment includes the following account:

> Professor Ross initially wrote the words: 'The Altnet TopSearch Index works in conjunction with the Joltid PeerEnabler to search for Gold Files'. The solicitor crossed out this sentence on the draft and suggested a substitute sentence: 'TopSearch searches its own Index file of available Altnet content and PeerEnabler is not needed or used for this, other than to assist in the periodic downloading of these indexes of available content'. Professor Ross replied: 'I was not aware of this, even after our testing. But if you say it is so, then fine by me'. He left the solicitor's words in the draft.

566 Ibid 205.
567 *Universal Music v Sharman* (2005) 220 ALR 1.
568 Ibid 57.
569 Ibid.

Professor Ross responded to this line of cross-examination by relying on a recollection that he was not comfortable with the solicitor's proposed wording and took it out of his report, upon which:[570]

> Mr Bannon … showed Professor Ross the email showing the solicitor's response to his 'fine by me' reaction. The solicitor said: 'Keith, we want to try to avoid you being exposed to criticism so how about'. The solicitor then suggested the sentence that appears in Professor Ross' final report.[571]

Wilcox J concluded that 'Professor Ross was prepared seriously to compromise his independence and intellectual integrity' and accordingly, his Honour 'formed the view it might be unsafe to rely upon Professor Ross in relation to any controversial matter'.[572]

Dr Clarke fared even more dismally, with Wilcox J noting that, in respect of certain expert witnesses proferred by the parties, he 'was compelled to form an adverse view about the objectivity or intellectual integrity of the witness', singling out Dr Clarke 'whose evidence on behalf of the Altnet parties was little more than a partisan polemic'.[573]

The judgment of Wilcox J does not expressly reveal the circumstances in which the communications between Professor Ross and his instructing solicitors came to be exposed to the solicitors for the applicants. Presumably, it was the result of either a notice to produce served on the relevant respondent entity or a subpoena issued to Professor Ross. However, the primary position under either the common law or *Uniform Evidence Law* tests for the existence of legal professional privilege would have afforded protection to those communications because, inter alia, they were clearly communications made for the dominant purpose of the client being provided with professional legal services in connection with anticipated or commenced legal proceedings.[574] The lack of a published interlocutory hearing on the issue of privilege and the statement by Wilcox J that it was not until cross-examination that

570 Ibid.
571 Ibid.
572 Ibid.
573 Ibid 13.
574 See discussion at pages 124-133 above.

his view of Professor Ross was shaken[575] also suggest that the disclosure of the relevant communications in this matter by the respondents was inadvertent.

Irrespective of how the material in question came to light in this case, the assumptions that would typically be applied by the courts upon service of an expert report such as that of Professor Ross, were here not borne out. This is the very species of case that makes dangerous the assumption articulated by Ball J in *Traderight No 14* that, absence evidence to the contrary, a court will presume that communications between a lawyer and an expert have not affected the substance of the expert's report.[576]

A further example of the manner in which a failure by an expert and a client's legal representatives to adhere to codes of conduct has, when combined with the application of legal professional privilege, the ability to conceal material evidence is contained in *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Limited & Ors*.[577] In that case, the plaintiff's engaged expert witness and legal counsel were the subject of extensive criticism by the court in connection with conduct that only came to light in the course of examination of that expert.

The case concerned a damages claim in respect of injuries sustained by Ms Hudspeth when she fell whilst cleaning a toilet block. It had transpired that the expert had prepared a report dated 9 April 2010, in which he had initially written:

> Ms Hudspeth said that she had not previously seen any evidence of vandalism or missing soap dispensers during the few months over which they had been installed.[578]

This statement was consistent with the content of a discussion between Ms Hudspeth and the expert occurring shortly after his engagement.[579]

The report was served on the other parties on this date. However, this paragraph was inconsistent with instructions that the expert had been given by Ms Hudspeth's

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575 *Universal Music v Sharman* (2005) 220 ALR 1, 57.
576 See note 481 above.
577 *Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (No 8)* [2014] VSC 567.
578 Ibid [47].
579 Ibid [104], [129].

legal representatives.[580] The plaintiff's solicitor, upon becoming aware of this on or about 30 June 2010, spoke to an assistant to the expert who, at the solicitor's request, amended the paragraph to read:

> Ms Hudspeth said that she had previously seen evidence of vandalism on the soap dispensers during the few months over which they had been installed, to which she had advised her employer.[581]

In doing so, the assistant over-wrote the existing electronic version of the report and the revised report was re-issued to the plaintiff's solicitor who served it on the parties on 1 July 2010 as an 'updated report' (still bearing the date 9 April 2010 and the expert's signature) but without identifying the nature of the amendments or basis upon which the amendments were made.[582] When this came to light in the circumstances set out below, the court found that the affixing of the expert's signature in respect of the 'updated report' constituted a representation that the expert had read and authorised the report. However in the facts that transpired, the court found that representation in this case to be false.[583]

The second version of the report did not find its way into all agreed bundles and reference copies for the purposes of the trial, such that, when the plaintiff's senior counsel came to examine the expert witness in chief, he did so by reference to the amended report, but the expert witness had in front of him only the initial report. The confusion was compounded by the fact that the defendants had not until that point, realised that there were two different versions of the same report.[584]

Dixon J's judgment includes the following comments and extract from the transcript:

> Mr Dohrmann [the expert] then gave his evidence in chief by reading from his report until the following exchange occurred:
>
> > WITNESS: Ms Hudspeth said that she had not previously seen any evidence of vandalism"

580 Ibid [49]-[53].
581 Ibid [52].
582 Ibid [54].
583 Ibid [127].
584 Ibid [63].

> MR RICHARDS [Senior Counsel for the plaintiff] : I beg your pardon, read that again, please? --- 'Ms Hudspeth that [sic] said she had not previously seen any evidence'
>
> Try again, please, I think the word 'not', 4.24? --- 'Ms Hudspeth said that she had not previously seen' - -
>
> Is the word 'not' there? --- The word 'not' is in the one I'm reading from. It's in this copy here. This may not be the time but if I can - I will eventually have recourse to my notes on that point…
>
> This passage of transcript does not fully reveal the drama of the moment. For the plaintiff, this was a devastating turning point in her fortune in the trial. It is now apparent that Mr Richards was referring to the second version of Mr Dohrmann's report in leading his evidence but Mr Dohrmann was reading from the first version of the report. Each was unaware that the version in possession of the other existed.[585]

As a consequence of the above exchange, the plaintiffs were required to provide to the other parties a complete copy of the expert's file.[586] This disclosed the existence of a third report — a supplementary report prepared by the expert at the request of the plaintiff's senior counsel on or about 12 November 2012 (that is, during the course of the trial). The expert gave the following explanation of this report in the course of cross-examination:

> COUNSEL: Did you understand that he was requesting you to alter your report? --- No, he wasn't. He wouldn't do that. He wanted me to take those instructions, they are factual instructions, they are from the plaintiff ultimately, being her statement, and suggested that I might prepare an amended report which I did.
>
> So you prepared a third report? --- I did, in which - - -
>
> For what purpose? What were you going to do with this third report? --- I was awaiting directions on that point. I was just told to prepare it. I didn't know where it was going to be done. I believe nothing was done with it. It corrected the errors around the facts of the order of events.[587]

The court did not accept the expert's explanation. The court made adverse findings in respect of the conduct of both senior counsel for the plaintiff and the expert. In respect of the plaintiff's senior counsel, Dixon J said:

> The consequences for the plaintiff when Mr Richards attempted, during Mr Dohrmann's evidence, to shift the basis for Mr Dohrmann's opinions to that expressed in the third version that I described above, were catastrophic.

585 Ibid [98].
586 Ibid [109].
587 Ibid [113].

> Mr Richards did not reveal his role in the third version of the report during the trial, but the deceptive and misleading nature of his conduct, which was attributed to the 'plaintiff's legal team', was revealed once Mr Dohrmann was cross-examined.[588]

In respect of conduct of the expert, Dixon J made the following findings:

> When Mr Dohrmann explained that given he had provided the third version to the legal team, he felt it was not for him to mention it in his evidence if Mr Richards didn't go to it, he demonstrated that he was not adhering to the Expert Code of Conduct when giving his evidence in chief… It revealed that Mr Dohrmann [sic] not assisting the Court impartially on matters relevant to his expertise. He was acting as an advocate for the plaintiff. Mr Dohrmann was advocating for the plaintiff by his acquiescence in Mr Richards' forensic tactics. It is difficult to conceive of circumstances where it would be proper for an expert to engage in forensic tactics.[589]

Absent the discrepancy between the first and second reports and the confusion between expert and senior counsel during the expert's examination in chief, it is difficult to see how the third report and the revelations regarding the lack of impartiality of the expert would have come to light. This species of conduct is one that is preserved by the current orthodoxy with respect to the application of legal professional privilege to expert evidence and the inability of other parties to be able to access all communications and documents exchanged between an expert and those instructing the expert unless a discrepancy such as the one that emerged during evidence in chief in this case, occurs.

It should also be noted that each of *Wood v R, ASIC v Rich, Universal v Sharman* and *Hudspeth* took place after and in spite of the introduction of expert witness codes of conduct in the jurisdictions within which they were decided. This suggests that the existence of codes of conduct for expert witnesses is not itself a sufficient deterrent to the problem they seek to address. The efficacy of related approaches, such as that of a declaration to be given by experts, as proposed proponents of reform,[590] could be impugned for the same reason.

588 Ibid [203].
589 Ibid [207].
590 Freckleton, Reddy and Selby, above n 7, 113–115.

III 'Witness Shopping' and the Paradigm of Expert Exceptionalism

None of the above considerations, which deal with the difficulties posed by expert witness bias, squarely address the paradigm of expert exceptionalism,[591] namely, the tendency of parties to call only experts supportive of their case and thereby 'shop' for the appropriate expert to engage. This is because, absent circumstances in which a party is required to change experts mid-engagement, the courts have no visibility over the number of experts canvassed or engaged by a party and absent service of a report by an expert, the opposing party has no means of piercing the veil of privilege on the grounds of 'fairness' or any other criterion for the reasons set out in Chapter 3.

Apart from statements expressing opprobium at the practice of 'expert witness shopping', there is scant Australian authority on the issue itself.

In *Succar v Bankstown City Coucil*,[592] Pepper J sitting in the Land and Environment Court made the following comments when hearing an application on the part of the Council to vacate a hearing date on the basis that it needed to brief a new expert witness. Her Honour stated:

> It must be remembered that an expert witness' paramount duty is to the Court and not to the party engaging the expert … [c]learly a party who engages in 'expert witness shopping' in order to obtain the services of a witness willing to provide evidence favourable only to that party risks compromising the impartiality of that expert evidence.[593]

In *Richard Williams & Anor v Chief Executive, Department of Environment and Resource Management*,[594] a matter before the Land Court of Queensland, the respondent government agency, during the course of proceedings, ceased to engage its first nominated hydro-geological expert, Mr Lait and substituted a new expert,

591 Discussed in Chapter 2.
592 *Succar v Bankstown City Council* [2012] NSWLEC 157.
593 Ibid [12]-[13].
594 *Richard Williams & Anor v Chief Executive, Department of Environment and Resource Management* [2014] QLAC 10.

Dr Evans. Henry J, with whom MacDonald P agreed, gave consideration to this conduct in the context of an application for a costs order by the appellants:

> …the respondent's silence below and in this court as to why it abandoned use of Mr Lait as its expert is telling. There might sometimes be instances where an engaged expert provides evidence so lacking in expert reasoning, foundation or other necessary quality that the witnesss should not be relied on. But if that were the case in respect of Mr Lait it could readily have been revealed in explanation of his abandonment. It was not. Absent explanation, the obvious inference may have been even more safely drawn: Mr Lait's expert conclusion … did not suit the case the respondent wanted to run.[595]

Dr Evans had previously been engaged by the respondent, leading to the further comment from Henry J: '[t]he department's pre-existing dealings with Dr Evans no doubt meant it did not have to "shop" far to find another expert instead of Mr Lait but shop it must have'.[596] The conduct of the respondent in this regard was a factor in the Court ordering that the respondent pay a certain proportion of the appellant's costs on an indemnity basis.

In England, prescriptive mandatory regulations in some jurisdictions are directed towards discouraging the practice of expert shopping. For example, the Pre-Action Protocol for Personal Injury Claims[597] contains the following requirement:

> 7.3 Before any party instructs an expert, they should give the other party a list of the name(s) of one or more experts in the relevant speciality whom they consider are suitable to instruct.

This creates a mechanism by which subsequent changes of expert by a party can be identified by its opponent and appropriately addressed in the course of the proceedings. A comparable mechanism does not exist in the New South Wales or Federal jurisdictions.

In the English case of *Ricky Edwards-Tubb v JD Wetherspoon Plc*,[598] the plaintiff had, under an earlier iteration of the same rule, notified the defendant of three expert witnesses proposed to be relied upon.[599] However, expert evidence later served by

595 Ibid [70].
596 Ibid [63].
597 A copy of the protocol is available at https://www.justice.gov.uk/courts/procedure-rules/civil/protocol/prot_pic#7.2 (last accessed on 13 November 2017).
598 *Ricky-Edwards-Tubb v JD Wetherspoon PLC* [2011] EWCA Civ 136.
599 Ibid [6].

that party was from a witness (Mr Khan) not appearing on that list and that evidence made reference to an earlier medico-legal consultation (involving a Mr Jackson) that the plaintiff had participated in.[600] This suggested to the defendant the possibility of 'expert witness shopping' on the part of the plaintiff. The defendants applied for disclosure of the earlier report from Mr Jackson, despite it being admittedly subject to legal professional privilege.[601]

At first instance, the Deputy District Judge, relying on the need for the parties under the protocol to obtain leave of the Court to rely upon an expert witness opinion, granted an order permitting the claimant to rely on Mr Khan on the condition that the report of Mr Jackson be disclosed.[602] On appeal, the presiding judge discharged the condition 'because it impermissibly overrode privilege' in the report of Mr Jackson.[603] The respondent appealed to the Court of Appeal.

In delivering the leading judgment, Lord Justice Hughes relied heavily on an earlier decision of the same court in the matter of *Beck v Ministry of Defence*,[604] a case in which the defendant had lost confidence in an expert witness it had engaged and sought to have the claimant examined by a further medical expert. The other party refused and the Court held that it was appropriate to condition the grant of leave on the disclosure of the first expert's report, despite the associated abrogation of privilege in that report, stating:

> The answer in this case, and in any case where a situation similar arises is…that the permission to instruct a new expert should be on terms that the report of the previous expert be disclosed. Such a course should prevent the practice of expert shopping and provide a claimant in the position of Mr Beck with the reassurance that the process of the court is not being abused. In this way justice will be seen to be done.[605]

600 Ibid.
601 Ibid [7], [9].
602 Ibid [13].
603 Ibid.
604 *Beck v Ministry of Defence* [2005] 1 WLR 2206.
605 Ibid 2214 (Lord Phillips MR).

Lord Justice Hughes agreed, despite the effect of imposing the condition of disclosure essentially amounted to a forced waiver of privilege in the earlier expert report,[606] stating:

> An expert who has prepared a report for court is different from any other witness. The expert's prime duty is unequivocally to the court. His report should say exactly the same whoever instructed him. Whatever the reason for subsequent disenchantment with expert A may be, once a party has embarked on the pre-action protocol procedure of co-operation in the selection of experts, there seems to me no justification for not disclosing a report obtained from an expert who has been put forward by that party as suitable for the case …it is appropriate for the Court to exercise the control afforded by [the rule requiring approval for reliance upon expert evidence] in order to maximise the information available to the court and to discourage expert shopping.[607]

There are no comparable authorities in Australia and, as set out above, no comparable mechanism by which expert witness shopping practices of a litigant could be regularly identified and addressed.

It is contended that such is the self-evident nature of the conditions that give rise to the paradigm of expert exceptionalism and so difficult would objective evidence of its pervasiveness be to reliably gather, an approach to reform addressing the issue of biased conduct of expert witnesses should also seek, insofar as is reasonably practicable, to address the practice of expert witness shopping. Such reform options are discussed in Chapter 5.

The English position discussed above is also interesting insofar as it demonstrates a willingness in that jurisdiction to manage the issue of 'expert witness shopping' (at least in cases where other parties are on notice of a proposed change of expert) through a process akin to waiver of privilege — that is, the price to be paid for changing experts is the disclosure of prior reports of the original expert. The use of privilege (or the removal thereof) in this manner is discussed in Chapter 5 and suggested as a potentially appropriate means of returning a number of the problems in this area, which are created by the adversarial system, back to the adversarial system for resolution.

606 *Ricky-Edwards-Tubb v JD Wetherspoon PLC* [2011] EWCA Civ 136, [28].
607 Ibid [30].

Finally, it should be noted that although there exists scant statistical evidence about the conduct of parties in engaging experts to 'take them out of play' — a practice made possible by the unusual status of the expert witness who is privy to confidential information,[608] *Judicial Perspectives* contains a finding that 'over a quarter of judges' responding to the survey 'had heard cases in which … a key expert had been retained by one side just to make the expert less available as a witness for the other side'.[609] Somewhat candidly, a number of respondent judges admitted to adopting that practice whilst practising as solicitors or barristers.[610]

IV The Role of Lawyers in the Deployment of Expert Evidence

Courts have traditionally been sceptical over the involvement of lawyers in the preparation of expert evidence. In *Whitehouse v Jordan*,[611] Lord Denning MR stated:

> …their joint report suffers to my mind from the way it was prepared. It was the result of long conferences between the two professors and counsel in London and it was actually 'settled' by counsel. In short, it wears the colour of special pleading rather than impartial report. Whenever counsel 'settle' a document, we know how it goes. 'We had better put this in', 'We had better leave this out', and so forth. A striking instance is the way in which Professor Tizard's report was 'doctored'. The lawyer blacked out a couple of lines in which he agreed with Professor Strang that there was no negligence.[612]

Despite this, and a similar element of scepticism amongst Australian judges,[613] the orthodox view in Australia is that solicitors *should* be involved in the preparation of an expert report.

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608 See the discussion at the end of Chapter 2 regarding the application of the 'no property in a witness' rule to experts.

609 Freckleton, Reddy and Selby, above n 7, 55.

610 Ibid.

611 *Whitehouse v Jordan* [1980] 1 All ER 650.

612 Ibid 655 quoted in Freckleton, Reddy and Selby, above n 7, 42.

613 *Judicial Perspectives* contains the following commentary in respect of judicial views on lawyers' involvement in the preparation of expert reports: 'A notable response to the earlier question about the quality of expert reports had encapsulated the concern: "I have little faith in experts' reports which are really the work of solicitors/counsel." Judges were significantly divided in their responses to the question of whether it appeared to them that lawyers had played a role in settling the content of expert reports. This was a little surprising as it in effect constituted a subset of the questions posed about expert bias. A quarter of judges (25.85%, n=61) said they "never" formed the view that lawyers had participated in the composition of reports, apparently concluding that they were in a satisfactory position to tell, while just over half of the responding judges (53.39%, n=126) said that they thought this happened "occasionally".

In *Harrington-Smith (on behalf of the Wongatha People) v Western Australia (No 7)*,[614] Lindgren J stated:

> Lawyers *should* be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed.[615]

In *Traderight 14*, Ball J went further, relevantly stating:

> It is common for a party's legal advisors to communicate with an expert retained by the party for the purpose of giving instructions and commenting on the form of the expert's report. In some cases, those advisors may test tentative conclusions that the expert has reached and in doing so may cause the expert to reconsider his or her opinion. *In some cases, the legal advisors may suggest wording to be included in the report which expresses in admissible form an opinion stated by the expert in an inadmissible form*. *The court depends heavily on the parties' legal advisors to assist experts to address properly the questions asked of them* and to present their opinions in an admissible form and in a form which will be readily understood by the court. Equally, *the court depends heavily on the parties' legal advisors to ensure that any opinion expressed by an expert is an opinion the expert holds for the reasons that the expert gives and that the expert otherwise complies with the Expert Witness Code of Conduct*.[616]

This reliance, in the cases of *Sharman* and *Hudspeth*, was misplaced. Absent voluntary disclosure (deliberate or inadvertant) by a party, the only circumstances in which communications of the nature referred to in *Sharman* and *Hudspeth* will be revealed to the other party is where there is a lacuna in the report served by the expert that cannot be explained by the contents of the report itself and which lead to a line of enquiry that discloses the relevant communications. Where no such lacuna is present, it is unclear how another party will persuade a court that service of the report is inconsistent with the maintenance of privilege in anterior communications, given the decisions in *Traderight 14* or *New Cap*. In effect, these

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Nearly one in five judges (17.80%, n=42) on the other hand thought it happened "often", one respondent dryly commenting "I cannot imagine any other reality in an adversarial system of justice." Another respondent commented, "Sometimes I wish they had because one hopes that then some consideration would have been given to its impact, what was being proved by it, what was relevant etc." Many judges in the comment section indicated that they were in a poor position to answer the question as they simply saw a product and were not equipped by what transpired in the course of the trial to know how the product came to be in its ultimate shape'. Ibid 42.

614 *Harrington-Smith (on behalf of the Wongatha People) v Western Australia (No 7)* (2003) 130 FCR 424.

615 Ibid 427.

616 *Traderight 14* [2013] NSWSC 211, [23].

decisions rely upon an interpretation of the doctrine of waiver that is dependent upon the existence of such a lacuna.

The formulation of the test for waiver of privilege in the circumstances of the *Uniform Evidence Law*, being the circumstances that most typically arise in connection with determination of privilege claims regarding expert witnesses, was most succintly set out by Brereton J in *ML Ubase*:

> …I do not accept that 'a proper understanding of the communication or document' involves an appreciation of the manner in which the opinions contained in the document have been formed over time, or the iterations and evolutions through which they have passed. The test is concerned with the comprehensibility of the primary communication or document: if it can be completely or thoroughly understood without more, then access to the related communications or documents is not reasonably necessary.[617]

The same considerations apply where the test falls to be determined by reference to the common law, because absent a clear and relevant lacuna within the expert report itself, it cannot be said that there is any inherent unfairness in a party relying upon a final expert report without disclosing all communications between the expert and the instructing solicitors.[618]

Given the inevitability of lawyers' involvement in the preparation of expert evidence, the manner in which courts approach the issue of waiver of legal professional privilege in these circumstances is of critical importance.

V Waiver and the Trouble with *Maurice*

The decisions regarding waiver of privilege on the grounds of 'fairness' under the common law test or, where the *Uniform Evidence Law* applies, pursuant to section 126, namely:

> 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

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617 *ML Ubase Holdings Co Ltd v Trigem Computer Inc* (2007) 69 NSWLR 577, 593. *ML Ubase* was relied upon by Heerey J in *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 7)* [2008] FCA 323, [5], however the original decision was later impugned by Brereton J himself in *Carbotech* [2008] NSWSC 1151 although not in respect of this approach (see discussion in Chapter 3).

618 See discussion at page 134 above.

> another communication or document if it is reasonably necessary to enable a proper understanding of the communication or document.

rely fundamentally upon the decision of the High Court in *Attorney-General (NT) v Maurice* ('*Maurice*').[619]

Despite spending a considerable amount of judicial ink identifying the need to read section 126 of the *Uniform Evidence Law* on its own terms and not merely superimpose atop it the fairness test from *Maurice*, Sackville J in *Towney v Minister for Land and Water Conservation for New South Wales*[620] then stated:

> This is not to deny that there is likely to be considerable overlap between the considerations relevant to the common law test governing waiver of legal professional privilege and those relevant to the test for loss of client legal privilege, specified in s 126. For example, as [*Maurice*] makes clear, an important factor in determining whether the privilege has been impliedly waived under the common law is whether it would be misleading for a party to refer to or use certain privileged material, yet insist that the remainder of the privileged material should remain protected…[621]

Further, it is clear that *Maurice* forms the basis of much of the reasoning adopted by White J in *New Cap*, which governs the position of waiver under the *Uniform Evidence Law*.[622]

This thesis contends that *Maurice* is a fundamentally inapt vehicle through which to discuss and decide the issue of waiver of privilege in the context of expert evidence.

Maurice concerned the issue of whether service of a 'claim book' by claimants in an application for recognition of Aboriginal land rights had the effect of waiving

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619 *Attorney General (NT) v Maurice* (1986) 161 CLR 475. It is *Maurice* that is relied upon by Lindgren J in *ASIC v Southcorp* in establishing his fourth proposition regarding privilege in an expert brief or documents referred to in an expert report '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) or (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 disclosing the brief, instructions or documents' (at [21]). However the references to the respective judgments from *Maurice* such as are contained in *ASIC v Southcorp* are incorrect and the other cases relied upon in support of the proposition, namely, *Goldberg v Ng* (1995) 185 CLR 83, 96–98 (Deane, Dawson and Gaudron JJ); *Instant Colour Pty Ltd v Canon Australia Pty Ltd* [2003] FCA 89, (BC9506842) 51 (Nicholson J); *Australian Competition and Consumer Commission v Lux Pty Ltd* [2003] FCA 89, [46] (Nicholson J) each trace the origins of their holdings to *Maurice*.

620 *Towney v Minister for Land and Water Conservation for New South Wales* (1997) 147 ALR 402.

621 Ibid 413.

622 *New Cap* [2007] NSWSC 258, [40], [46].

legal professional privilege in relation to the source materials that had been used to prepare the book, despite those materials not forming part of the book or being mentioned in it.

As to the concept of a 'claim book', Mason and Brennan JJ in their joint judgment characterised it as having as its 'closest analogy',[623] a pleading but unlike a conventional pleading, it 'contains a substantial amount of historical and anthropological information'.[624] Their Honours pointed out that '[t]he inclusion of this material should not undermine the protection of the privilege. A claim book is not treated as evidence of the facts alleged in it'.[625]

The gravamen of the decision of Mason and Brennan JJ is that no prejudice could arise because, *inter alia*, the claim book 'never found its way into evidence' and 'the respondents have not sought to reveal beneficial parts while keeping injurious parts hidden'.[626]

Likewise, Gibbs CJ found that, 'so long as the claim book was not used in any other way, it is impossible' to identify any requisite unfairness that could operate to require disclosure of the sources of the statements contained within it.[627] His Honour went further, though, to state that had the claim book been admissible as evidence 'the appellant would have been entitled to test its accuracy and weight, and since that could hardly be done unless it was known on what sources it was based, considerations of fairness might have required those sources to have been produced'.[628]

Deane J stated:

> If the claim book had been actually used as evidence on the prior hearing, a real question would have arisen about whether, by so using it, the Aboriginal

623 *Attorney General (NT) v Maurice* (1986) 161 CLR 475, 489.
624 Ibid.
625 Ibid.
626 Ibid.
627 Ibid 483.
628 Ibid.

> claimants had waived any right to assert legal professional privilege in the source materials upon which it was based.[629]

Dawson J appears to have taken a fundamentally different course to reach a similar conclusion.[630]

A claim book in the nature of the subject-matter of *Maurice* is in no sense analogous to an expert report. It is clear from the foregoing that the former does not constitute a statement of evidence in respect of its contents whereas the latter is quintessentially, a statement of evidence of opinion, proferred as such, for the purpose of being relied upon by the trier of fact.

Accordingly, to the extent that the reasoning adopted from *Maurice* posits an expert report in the position of the claim book, the reasoning cannot be considered sound, because of the discrepancy between a claim book and an expert report; and, on the other hand, to the extent that the more general statements of principle from *Maurice* are adopted in the context of determining whether service of an expert report waives privilege in communications and documents relevant to its creation, the comments of the plurality in *Maurice* would support a view that fairness requires the disclosure of such communications and documents because an expert report would be itself evidence upon which the party serving it intends to rely.[631] The 'self-regulation' inherent in the caselaw regarding waiver in the context of expert evidence (ie. that the report is required to identify all evidence upon which the opinion is based) is, it is contended, anathema to the adversarial system because it deprives parties of the means of testing the conclusiveness of such a proposition.

Further, and more fundamentally, the concepts of the party-engaged expert, or even expert evidence in general, do not form part of the factual matrix or decision reached in *Maurice*. At no time could the High Court in that case have considered itself to be articulating a test for the discoverability of communications between a

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629 Ibid 492.

630 Ibid 497. 'The basis upon which the claim book would have become evidence is not entirely clear, but the proceedings were informal and no doubt such a course was permissible. It is plain, however, that if what was alleged in the claim book did not give rise to a waiver of privilege with respect to the documents which lay behind it, then the conversion of the allegations into evidence would not have done so'.

631 For example, ibid 483 (Gibbs CJ), 489 (Mason and Brennan JJ) and 492 (Deane J).

lawyer and an expert engaged by that lawyer. It is contended that courts' habitual reliance upon *Maurice* in the context of expert-related communications and documents is unsound for the very reason that it lies at the intersection of two anomalies within the legal system — the anomaly that treats as admissible evidence of opinion and the anomaly that treats as inadmissible, documents and communications that may otherwise be relevant to facts in issue. To rely upon a case such as *Maurice* in this context runs the risk of failing to appreciate that problems raised at the juncture of these anomalies cannot necessarily be resolved by simple application of conventional approaches to their constituent elements, devised in isolation to one another.

Maurice remains a golden thread of sorts, ostensibly binding together decisions regarding the circumstances in which service of an expert report affects privilege inhering in documents and communications created in the course of that report's creation and almost universally relied upon as a means of excluding disclosure of expert witness related communications and documents. It is considered for the reasons set out above that *Maurice* does not form a sound basis for the making of such decisions and, particularly in light of revelations such as those contained in *Sharman* or *Hudspeth*, a means of circumventing the continued application of *Maurice* regarding waiver in this context should be seriously considered. This issue is further addressed in Chapter 5.

VI Criteria for Reform

The foregoing analysis suggests the desirability of reform to ameliorate the effects of bias amongst experts and instances of expert shopping, despite the lack of statistical data regarding the incidence of these issues. Indeed, this was a conclusion expressed by the *NSWLRC Report* in these terms:

> What is difficult, however, is to determine the extent of adversarial bias … Although it is not possible to quantify the extent of the problem, in the Commission's view it is safe to conclude that adversarial bias is a significant problem, at least in some types of litigation. Measures that would reduce or

> eliminate adversarial bias, therefore, are likely to have potential benefits, even if the extent of those benefits cannot be accurately determined.[632]

It is further contended that the inherent unsoundness of the treatment of questions of legal professional privilege in the context of expert evidence, together with the differential application of tests for privilege, discussed in Chapter 3, also strongly militate in favour of reform. The locus of the latter issues also indicates that the reform should be directed towards the issue of privilege rather than be based upon an extension of existing rules of a self-regulatory nature (eg. additional or modified guidelines or requirements for mandatory statements to be given by experts). Focusing upon the removal or modification of legal professional privilege, as suggested in Chapter 5 of this thesis, re-opens the problem, which is, to a large extent, the product of the adversarial system, to that adversarial system for resolution by allowing other parties the opportunity to test the conclusiveness of the expert opinion against the documents and assumptions with which the expert was briefed and communications between the expert and those who instructed him or her made during the course of the engagement.

Taken together, the observations in the preceding chapters suggest a number of criteria for success of any reform which is to be worth undertaking, namely the need for such reform to:

1. address bias conduct of expert witnesses;[633]

2. address the paradigm of expert exceptionalism, expose the practice of expert-shopping and the deliberate conflicting of potential expert witnesses;[634]

3. not rely upon codes of conduct or similar self-executing statements by the experts themselves;[635]

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632 NSW Law Reform Commission, above n 9, 74.
633 In response to the considerations discussed at pages 65-69 and 143-160 above.
634 In response to the considerations discussed at pages 74-76, 102-106 and 161-165 above.
635 In response to the considerations discussed at pages 84-87 and 160 above.

4. be capable of operating within the adversarial system of justice that is entrenched within New South Wales and the federal jurisdictions;

5. be capable of harmonised application irrespective of whether the common law or *Uniform Evidence Law* applies;[636]

6. not require a distinction to be drawn between ancillary processes and hearings, so as to overcome the problems of the differential application of rules identified in Chapter 3; and

7. not require the relevant triers of fact to review the impugned material (without disclosure to other parties) in order to make a ruling as to admissibility.[637]

Finally, any recommended reforms need to be consistent with overriding principles of case management[638] and, accordingly, not impose unnecessary burdens on litigants or the courts in terms of time and cost. That is, not to fall foul of the very considerations that this thesis identifies in Chapter 3 as providing the impetus for a renewed focus upon the role of party-engaged experts within a common law legal system.

Some proposals for reform, measured against the above criteria are discussed in Chapter 5.

636 In response to the considerations the subject of Chapter 3.

637 In response to the considerations discussed at pages 128-129.

638 That is, the just, quick and cheap resolution of the real issues in proceedings (see section 56 of the *Civil Procedure Act 2005* (NSW)) and, in the case of the Federal Court in civil proceedings: 'to facilitate the just resolution of disputes: (a) according to law; and (b) as quickly, inexpensively and efficiently as possible' — see section 37M of the *Federal Court of Australia Act 1975* (Commonwealth).

CHAPTER 5 – SOME BASES FOR REFORM

> … [W]hatever be the criticism of expert witnesses, which has in fact been expressed in one form or another for at least 100 years if not far longer, the remedy has not been seen in denying the right of such witnesses to give evidence; rather it has been seen in devising court rules and protocols which will ensure that experts will try to be independent and that courts will not unnecessarily suffer the opinions of experts who may be thought to be in one camp or the other.
>
> Ormiston JA in *FGT Custodians Pty Limited v Fagenblat*[639]

I Overview

This concluding chapter will consider three alternative methods for reforming the law so as to ameliorate the effects of the current unsatisfactory orthodoxy with respect to legal professional privilege and expert evidence. Undoubtably, there are other options for reform. However, these three have been put forward on the basis that they appear capable of satisfying the criteria for reform identified at the conclusion to Chapter 4 above.

The three alternative reform methods discussed are: *firstly*, requiring courts and tribunals that hear expert witness testimony to mandate the use of court appointed or jointly engaged experts; *secondly*, abolishing legal professional privilege (in whole or in part) insofar as it relates to experts engaged by parties; and *thirdly*, to adopt a hybrid model of waiver and protection similar to that adopted in other jurisdictions within Australia, but with certain key amendments. The proposal for law reform is then discussed and perceived criticism of the proposal arising from the discussion of the other models below, addressed.

[639] *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA 33, [12].

II Transcending the Adversarial System

The first two options canvassed, namely, the adoption of a court appointed expert regime or a jointly engaged expert regime, have long been within the power of the court and the subject of considerable debate — particularly since the Lord Woolf reports of the late 20th century, as discussed in Chapter 2. These options seek to resolve some of the difficulties posed by the party-engaged expert by withdrawing the expert from adversarial processes.

A The Court Appointed Expert

Courts applying the *Uniform Civil Procedure Rules 2005* (NSW) ('*UCPR*') and *Federal Court Rules 2011* (Commonwealth) ('*FCR*') have long had express powers to appoint their own witness.

Pursuant to r 31.20(2), a court applying the *UCPR* is empowered, inter alia, to issue a direction: providing for the engagement and instruction of a parties' single expert in relation to a specified issue; or a direction providing for the appointment and instruction of a court-appointed expert in relation to a specified issue.

Subdivision 5 of Division 2 of Part 31 of the *UCPR* contains more prescriptive rules for courts engaging their own experts, including rule 31.52 which prohibits, except by leave of the court, a party adducing evidence of any expert on any issue arising in proceedings where a court-appointed expert has been appointed in relation to that issue. Corresponding powers are exercisable by a court applying the *FCR*.[640]

Although the machinery for the use of court appointed experts has existed for some time,[641] it is used infrequently. An apparent irony contained in the findings of *Judicial Perspectives* is that there was 'strong in-principle support' for the use of

[640] See rules 5.04(3)(14) and (17); and the effect of Rule 23.01(1) enabling a party to apply for the appointment of a court expert and Rule 1.40, entitling the court to make orders of its own volition.

[641] For example, the 1975 *Federal Court Rules of Evidence* contained Rule 706 which stated, inter alia, 'The court may on its own motion or on the motion of any party enter an order to show cause why an expert witness should not be appointed and may request the parties to submit nominations…'. Quoted in John Basten, 'The Court Expert in Civil Trials - A Comparative Appraisal' (1977) 40 *Modern Law Review* 174, 181. The author goes on to state that despite being approved in January 1975, there were 'so far … no reported cases of significance to indicate its usefulness in the federal courts'.

court-appointed experts but 'only a few respondents had ever appointed expert witnesses'.[642] *Judicial Perspectives* went on to report that:

> It was apparent, though, that the usage of court-appointed experts … troubled some judges who had not used them because of the inroads it was perceived that they would make upon the role of the judge as 'ring-keeper' within the adversarial model. Mostly, though, judges said that they had not used court-appointed experts either because they had not been asked to do so by the advocates appearing for them or because they had determined such a course not to be necessary.[643]

The survey responses indicated that of the judges who had the power to appoint experts, '81.88% (n=122)' had not used the power.[644] Of those that had used the power, '4.70% (n=7)' had done so once in the preceding five years, '8.05% (n=12)' had done so more than once and less than five times in the preceding five years and '5.37% (n=8)' had done so more than five times in the commensurate period.[645]

Judging Perspectives also found that: of the judges who had appointed an expert, '69.23%, n=27' considered that doing so had been 'helpful'; '28.21%, n=11' considered it had been 'very helpful'; and only one respondent stated that the exercise had been unhelpful.[646]

A number of the considerations (for and against) the use of the court-appointed expert are discussed in Chapter 2, in the context of the warring tracts of American jurists William Foster and Learned Hand. The issue was also the subject of extensive consideration by Lord Woolf in both the *Access to Justice Interim Report* and *Access to Justice Final Report*. In the interim report, Lord Woolf was reasonably vocal in advocating for broader usage of court appointed experts by the courts.[647] In his final report, Lord Woolf noted:

> Since the publication of the interim report, resistance to my proposals on single experts has remained particularly strong, and it is clear that the idea is anathema to many members of the legal profession in this country who are reluctant to give up their adversarial weapons.[648]

642 Freckleton, Reddy and Selby, above n 7, 8.
643 Ibid.
644 Ibid 101.
645 Ibid.
646 Ibid.
647 Lord Woolf, above n 5, 186–187, 192.
648 Lord Woolf, above n 9, 140.

Lord Woolf concluded that it would not be 'appropriate to specify particular areas of litigation where a single expert should or should not be used'[649] and opined that a single court appointed expert would not be appropriate in all proceedings, particlarly noting that in 'some large, complex and strongly contested cases where the full adversarial system, including oral cross-examination of opposing experts on particular issues, is the best way of producing a just result'.[650]

Coming down on the side of William Foster, writing extra-judicially, Justice Michael Kirby whilst on the High Court questioned the 'justness' and 'appropriateness' of adopting court appointed experts.[651] In his paper, 'The Judicial Review of Expert Evidence: Causation, Proof and Presentation', Justice Kirby refers to his experiences as a trial lawyer, during which he came to the following conclusion:

> in the case of cardiac catastrophes, there was a well-known list of physicians who would offer their opinions that coronary occlusion was never caused or precipitated by unusual effort. On the other hand, there was a list, equally long, of physicians who held that such cardiac catastrophes were often, if not invariably, related to some external or internal effort associated with work. The witnesses were equally impressive… Most importantly, I quickly came to the view that virtually all of them were speaking with complete sincerity, personal neutrality and integrity. They were doing so by reference to their individual experience and to a mass of conflicting research and scientific data. This was not a case of fraudulent evidence or evidence motivated by self-interest, in the hope of building a forensic practice. It was simply a difference, deeply held of medical aetiological opinion.[652]

The concern being that, in such an equation, the adoption of a court-appointed expert from one or other of these backgrounds could possibly determine the outcome of the case in circumstances in which other reasonably held conclusions were available.[653] Justice Kirby concluded that '[w]ith all its imperfections, committing a contested issue to an independent decision-maker, obliged to choose from the logic of the case and the evidence between contesting experts, seemed a

649 Ibid 141.
650 Ibid.
651 Michael Kirby, 'The Judicial Review of Expert Evidence: Causation, Proof and Presentation' (at the Law in the World of Science and Technology) 2 <http://www.hcourt.gov.au/assets/publications/speeches/formerjustices/kirbyj/kirbyj_expert.htm#_ftn9>.
652 Ibid 3.
653 Ibid.

better soluton than evading the problem by appointing a court "expert"'.[654] Such a view was also espoused by an anonymous judicial respondent in *Judicial Perspectives* who stated 'in cases of controversy between experts, it is usually because they come from different schools. Any court expert is likely also to come from one of the 2 "schools"'.[655]

A separate problem is articulated by Professor George Hampel, a former justice of the Supreme Court of Victoria, who has opined that in the interests of finding a suitably qualified expert to be appointed by the court, approaches to issues in dispute concerning newer or alternative technologies or procedures could be unduly limited:

> Such experts would be chosen from a pool of the established, conservative members of the professions, often resistent to new developments and approaches in their field. Consider a senior member of the Royal College of Surgeons as a court-appointed single expert in a case where it is contended that alternative medicine provides a sound conclusion to a medical problem.[656]

In *Tyler v Thomas*,[657] Branson J sitting as part of the Full Court of the Federal Court, noting 'the limited case law on the circumstances in which the discretionary power of a court to appoint a court expert should be exercised' set out some broad principles gleaned from available authorities.[658] These principles emphasised the importance of the appointment as being consistent with the purpose of 'ensuring the just, efficient and cost-effective management of litigation', and that ordinarily, the appropriate time for appointing a court expert 'is well before trial so that the parties have adequate time to give consideration to the report … and to make a decision on whether they wish to challenge any part of that report'.[659]

Curiously, her Honour also suggested that it would be an *improper* exercise of the discretion for a court to appoint an expert if 'principally motivated by a desire to avoid difficulties … perceived to attend the assessment of conflicting expert

654 Ibid.
655 Freckleton, Reddy and Selby, above n 7, 103.
656 George Hampel, 'A Case Against Single Experts' November/December 2013(119) *Precedent* 15, 15.
657 *Tyler v Thomas* (2006) 150 FCR 357.
658 Ibid 365.
659 Ibid.

evidence',[660] this being a common *raison d'etre* for the engagement of a court-appointed expert.[661]

In addition to the criticisms of the court appointed expert discussed above, it is self-evidently the case that use of a court-appointed expert as a means of seeking to circumvent the shortcomings of the party-engaged expert (including the paradigm of expert exceptionalism), is potentially problematic because, to the extent that the parties do not themselves also seek to adduce evidence from a party-engaged expert, there are limited means of adducing evidence of opinions that may be valid but contrary to those held by the court appointed expert.

The corollary is similarly problematic — where parties are forced or otherwise find it desirable to engage their own experts in addition to that of the court appointed expert, the total cost of the litigation is increased and the process runs the risk of falling foul of the overriding purpose of case management.[662]

Indeed, the approach of courts to the grant of leave for a party to rely upon evidence from a separate expert after the engagement of a court appointed expert is currently set at a reasonably low threshold. Brereton J in *In the matter of Optimisation Australia Pty Ltd*[663] said, in response to an application for leave to adduce evidence of an expert other than the court appointed expert in that case:

> The facility to appoint a Court expert is … a highly beneficial one. However, the risk that attends appointment of a Court expert, at least if parties are precluded from adducing their own expert evidence, is not only that trial by judge becomes trial by expert … but even more importantly, that error by the expert may go unexposed. The beauty of the adversarial system in this respect is that the competing opinions of two experts enable each other to be tested and refined so as at to least (sic) reduce the scope for error. If the Court relies solely on a Court expert, except where the parties are content with that approach, it runs the risk that error — even serious error — might not be exposed.[664]

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660 Ibid 368.

661 In the circumstances of the case it may have been that her Honour was commenting on the timing of the appointment rather than the bearing of this issue on the appointment per se. However, this is not clear from the face of the judgment.

662 See note 638 above.

663 *In the matter of Optimisation Australia Pty Ltd* [2015] NSWSC 2072.

664 Ibid [5].

As a consequence of this reasoning, Brereton J stated that the court 'should be relatively ready to grant leave to adduce evidence from a separate expert' where 'some arguable basis is shown to challenging the report of a single expert'.[665] It is contended that the establishment of an 'arguable basis' to challenge an expert opinion will not be, in cases where a party is able to find a suitably qualified expert contradictor, a difficult threshold to meet. These considerations appear largely to defeat the attractiveness of the court appointed expert as a means of resolving the problems engendered by the adversarial system.

Further, where the expert makes a fundamental error and has his or her conduct impugned in a manner that is relevant to the outcome of the proceedings, an issue arises to the appellable nature of such an error and even if an appeal is successful, the appellate court may have little choice other than remitting the matter to be re-heard given the likely lack of any competing factual consideration evaluated by the judge at first instance in such circumstances which is capable of being substituted for the impugned findings.[666]

Finally, where the apppointment of an expert by the court is made over the objection of either or both of the parties, the freedom of parties to conduct the litigation (within the confines of the rules and the overriding objectives of case-management) in the manner they see fit is hindered in a manner that has the capacity to work substantial injustice.[667]

The mere fact that the court appointed expert will not *always* be an appropriate means of adducing expert evidence in proceedings means that it cannot in all circumstances operate as an alternative to the party-engaged expert, with the effect that it does not constitute a solution to overcome the problem posed by the application of the doctrine of legal professional privilege to communications with and documents created by party-engaged experts.

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665 Ibid [6].

666 See for example, the comments of McClellan CJ at CL (with whom Latham and Rothman JJ agreed) *Wood v R* (2012) 84 NSWLR 581, 615–616, 626–627.

667 For example, where the court's appointment is not suitably qualified or is itself biased in favour of a particular theory or school of thought that may not be widely accepted within the relevant discipline.

B Parties' joint engagement of an expert

It was with some of the criticisms referred to above, at least in part, in mind, that the NSW Law Reform Commission in its 2005 report on expert evidence ('*NSWLRC 2005 Report*'),[668] placed particular emphasis on expanding the scope for litigants to make use of provisions for parties' jointly engaged experts.

In explaining the distinction between a court appointed expert and a jointly engaged expert, the *NSWLRC 2005 Report* said:

> A joint expert witness and a court-appointed expert are similar in that neither has been engaged by only one of the conflicting parties, and thus, in each case, the expert is free from adversarial bias.
>
> …Under this regime, the expert is not the court's witness. The expert is the parties' witness, to deal with as is expedient in their respective interests. It is necessary and appropriate that the parties, rather than the court, should have control and management of the process. And it is fundamental that, in the first instance at least, the parties should be precluded from calling other expert evidence on the same question.[669]

As with court appointed experts, there is ample machinery in the *UCPR* and *FCR* for the use of jointly-engaged experts.[670] And, as with court appointed experts, reliance upon jointly-engaged experts carries with it a number of disadvantages. A number of these disadvantages were recognised in the *NSWLRC 2005 Report* itself, including: that the cost and time benefits of jointly-engaged experts may be illusory because the parties would probably engage their own 'shadow' experts to assist them in briefing the jointly-engaged expert and preparing for cross-examination; and that jointly-engaged experts may also be inapt where divergent opinions on matters the subject of expert evidence would be justified.[671]

To these may be added the concerns expressed above regarding the effect of the courts' willingness to permit further expert evidence when an arguable basis for challenging a court appointed expert's evidence is established, error by the expert on the right to appeal and on options available to appellate courts other than

668 NSW Law Reform Commission, above n 9.
669 Ibid 117,119.
670 See *UCPR*, Subdivision 4 of Division 2 of Part 32; *FCR*, rules 5.04(3)(17).
671 NSW Law Reform Commission, above n 9, 109.

remittal, as well as the more fundamental issue of, absent consent of the parties as to the identity, brief and instructions to be provided to the expert, requiring agreement over matters that may not readily be capable of such.

Once again, the use of jointly-engaged experts cannot be seen as appropriate in *all* circumstances. This was also recognised by the *NSWLRC 2005 Report* which noted that even the most enthusiastic supporters of the concept 'did not seek to argue that they should be used in *all* cases',[672] with the consequence that the report proposed a series of amendments to the *UCPR* to empower courts to make orders for jointly-engaged experts 'in appropriate circumstances'.[673]

As with the concept of the court appointed expert, this innate lack of universality means that the option cannot adequately address the problems associated with expert evidence and legal professional privilege because circumstances in which party-engaged experts will be used will continue to arise in the vast majority of instances. It is contended, therefore, that any proposal for reform should be directed towards addressing the deployment of expert evidence *within* the confines of the adversarial system.

III Abolition of the Privilege

A Abolition in Toto

Lord Woolf's Access to Justice Interim Report opined that:

> most of the problems with expert evidence arise because the expert is initially recruited as part of the team which investigates and advances a party's contentions and then has to change roles and seek to provide independent evidence which the court is entitled to expect.[674]

In Chapter 2 of this thesis, Lord Woolf's lament in relation to the problem of expert witness bias was discussed, as was his view that the issue is widespread within the

672 Ibid 110.
673 Ibid.
674 Lord Woolf, above n 5, 182. This was the effect of the findings in the matters of *Wood v R* (2012) 84 NSWLR 581 and *Australian Securities and Investments Commission v Rich* (2005) 53 ACSR 110 discussed in Chapter 4.

common law world. At the conclusion of his interim report, Lord Woolf recommended that 'once an expert has been instructed to prepare a report for the use of a court, any communications between the expert and the client or his advisers should no longer be the subject of legal privilege'.[675]

In his *Access to Justice Final Report,* Lord Woolf clarified his intention around this interim recommendation in the following terms:

> My intention was to prevent the suppression of relevant opinions or factual material which did not support the case put forward by the party instructing the expert.[676]

Lord Woolf then went on to note the criticism that the recommendation had received and the notion that the 'expert must be free to submit drafts to clients and their legal advisers, so that factual misconceptions can be corrected'[677] and further noted the argument that a 'great deal of time could be wasted if all these documents were disclosable'[678] and the approach could be overcome by lawyers 'avoiding written communication in favour of off the record conversations'.[679]

Pausing there, it is interesting to note that these objections are practical and not grounded on any notion of some inherent inviolability of the doctrine of legal professional privilege. In any event, Lord Woolf accepted that such a reform 'would not be realistic' but instead provided an alternative recommendation to the effect that 'privilege should not apply to the instructions given to experts'.[680] This revised recommendation was to the effect that an expert report would not be admissible unless annexing all written instructions and a note of all oral instructions.[681]

675 Lord Woolf, above n 5, 192.
676 Lord Woolf, above n 9, 144.
677 Ibid.
678 Ibid.
679 Ibid.
680 Ibid.
681 Ibid 145.

Such an approach is not now novel in New South Wales or the Federal jurisdictions, given that the expert witness codes of conduct require similar attestations to be made.[682]

But was the apparent outcry against Lord Woolf's interim approach and his subsequent modification of recommendations associated with expert witnesses justified? If it is accepted that, as Thomas J opined in *Interchase*, '[a]n expert is a third person from whom the client, represented by a solicitor, hopes to obtain an advantage' and is being deliberately converted into 'a witness',[683] should any entitlement to privilege remain, particularly in light of the string of cases referred to above in Chapters 4, in which the prospect of bias was not sufficiently brought to light despite the existence of the relevant code of conduct?

Is the fact of an expert misconceiving some of the facts in a draft report,[684] or feeling constrained in an ability to change his or her mind after having submitted one, despite the relevant codes recognising and being highly prescriptive in terms of what should be done in such cases,[685] a sufficient rationale for maintaining the cloak of privilege over draft reports and communications in relation thereto which are not in the nature of 'instructions'? It is contended that, unlike the posited judge in *Linter Group* who may change his or her mind part-way through writing a judgment, the circumstances of the expert's change of mind may (and are quite likely to be) material to an understanding of the basis of the final opinion expressed by that expert and the weight to be given to each aspect of that opinion and should be amenable to exploration by way of cross-examination, particularly where there are competing evidentiary scenarios proffered by the parties. By contrast, the judge is

682 See the discussion of the codes in Chapter 2.

683 *Interchase Corporation Limited (in liq) v Grosvenor Hill (Qld) Pty Limited (No 1)* (1999) 1 Qd. R 141, 164.

684 Lord Woolf, above n 9, 145.

685 *Linter Group Limited v Price Waterhouse (a firm)* [1999] VSC 245, [16]. For example, Section 4(1) of the Expert Witness Code of Conduct appearing in Schedule 7 to the *Uniform Civil Procedure Rules 2005* (NSW) states: 'Where an expert witness has provided to a party (or that party's legal representative) a report for use in court, and the expert thereafter changes his or her opinion on a material matter, the expert must forthwith provide to the party (or that party's legal representative) a supplementary report…'.

merely required to ensure that his or her reasons adopted are adequately exposed in the judgment delivered by reference to the evidence finally adopted.

Evidence law already contains a basis for the rejection of evidence that is not relevant to a fact in issue in proceedings.[686] Indeed, the 'relevance rule' is the touchstone and gateway through which all other evidence must pass.[687] The primacy of the rule is exhibited by the terms of section 56 of the *Uniform Evidence Law*, which simply states:

> 56 Relevant evidence to be admissible
>
> (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding.
>
> (2) Evidence that is not relevant in the proceeding is not admissible.

In *Festa v The Queen*[688] Gleeson CJ stated:

> If evidence is of some, albeit slight, probative value, then it is admissible unless some principle of exclusion comes into play to justify withholding it from [the Court's] consideration.[689]

The relevance rule could constitute a far sounder basis for excluding from evidence the draft expert report that proceeds upon a factual misconception or which represents a thought that the expert has since renounced where the misconception or renounced opinion is of no relevance to the final conclusion reached. And to the extent that such issues could not be brought within the exclusionary rule regarding relevance suggests, to the contrary, that the misconception or change of mind *was* necessarily relevant to the fact in issue and hence an improper subject for concealment. Unless a draft report were amenable to disclosure by removal of the privilege, the circumstances under which these types of evaluation could take place would not arise.

686 See, for example, Part 3.1 of the *Uniform Evidence Law*.
687 The relevance rule is referred to as the 'general inclusionary rule' in the introduction to Part 3.1 of the *Uniform Evidence Law*. The balance of Chapter 3 of the *Uniform Evidence Law* concerns exceptions to that inclusionary rule.
688 *Festa v The Queen* (2001) 208 CLR 593.
689 Ibid 599.

For these reasons, the abolition altogether of legal professional privilege in communications with, or documents created by, experts warrants consideration and, it is contended, should not be so lightly treated as to be considered 'unrealistic'.[690]

Like the *Lord Woolf Final Report*, the *NSWLRC 2005 Report* considered but dismissed approaches to the problems of expert evidence that rely upon disclosure of all communications with experts. It did so in less than two pages.[691] Although confirming that 'submissions were divided on whether it is desirable for the law to require disclosure of all communications between the party and the expert', the report does not in fact identify any submissions in favour of such disclosure. It identifies the arguments against disclosure in the following terms:

> A number of submissions argued that the privilege serves important policy purposes and should be retained: it is important, and useful both to the administration of justice and to the parties, that the parties should be able to obtain confidential expert advice as they prepare their cases.[692]

The *NSWLRC 2005 Report* quotes a submission from the Institute of Chartered Accountants to the effect that 'to create a regime which requires the production of all iterations of instruction may discourage legal advisors or their clients from seeking appropriate advice in a timely manner'.[693] It also quotes a submission from law firm Freehills, that the result of requiring such disclosure 'is an unnecessary cutting-down of privilege and likely to increase the discovery burden on parties with little real benefit'.[694] Evidentiary support in respect of these submissions (if any) is not identified in the report. Likewise, the *NSWLRC 2005 Report* relies upon a generalised assertion that the introduction of a compulsory disclosure requirement 'would be easily circumvented, for example, by using oral rather than written communications'.[695]

690 Compare Lord Woolf, above n 9, 144.
691 NSW Law Reform Commission, above n 9, 89–90.
692 Ibid.
693 Ibid.
694 Ibid 90.
695 Ibid.

Ultimately the *NSWLRC 2005 Report* adopts and identifies with the conclusion adopted by the earlier Australian Law Reform Commission report into the federal justice system,[696] namely:

> The view is widely held that narrowing the scope of legal professional privilege adds to the documentary burden of litigation without any necessary improvement in the quality of the evidence before the court. The Commission considers that, in most circumstances, it would be unfair to expose experts to cross-examination on the contents of draft reports (which may be no more than 'preliminary musings' of the expert). Experts often modify their views as they carry out more work.[697]

Respectfully, it is difficult to countenance the possibility of an increase in the administrative burdens of litigation as being a fundamental argument against law reform directed to ensuring that courts and other triers of fact are able properly to evaluate expert evidence by accessing all documents relevant to the formation of the expert's opinion. This is especially the case having regard to the fact that the *NSWLRC 2005 Report* elsewhere concluded that:

> Although it is not possible to quantify the extent of the problem, in the Commission's view it is safe to conclude that adversarial bias is a significant problem, at least in some types of litigation. Measures that would reduce or eliminate adversarial bias, therefore, are likely to have potential benefits, even if the extent of those benefits cannot accurately be determined.[698]

However, any argument in favour of the abrogation of the privilege, even if limited to the context of expert evidence, needs to contend with public policy reasons for the existence of the privilege.

In chapter 1 of this thesis, the Benthamite approach to privilege (namely, the complete abolition thereof) is considered and rejected as being unsound.[699] To deny completely a person the opportunity confidentially to communicate with an expert in circumstances in which the opinion of such expert is relevant to that person's prospects of success, for fear of having such communication later revealed and potentially used against the person, appears at least as inimical to the justice system

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696 Australian Law Reform Commission, 'Managing Justice: A Review of the Federal Civil Justice System' (89, Australian Law Reform Commission, 2000).
697 Ibid [6.84].
698 NSW Law Reform Commission, above n 9, 74.
699 See page 44 above.

as it does where a solicitor is posited in the place of such expert. To quote again Lord Chancellor Brougham in *Greenough v Gaskell*:

> …if the privilege did not exist at all, every one would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skilled person, or would only dare to tell his counsellor half his case. If the privilege were confined to communications connected with suits begun, or intended, or expected, or apprehended, no one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous.[700]

Once it is accepted that a lawyer may be unable to advise a client adequately in the absence of expert assistance in relation to factual issues upon which the client's position depends, it is difficult to see the involvement of such an expert as an eventuality that should sit outside the fabric of the privilege that would otherwise arise. Indeed, there is no inherent vice in the expert's involvement at this stage because the opinion of the expert informs the advice to the client and not the decision of a third party trier of fact. It is, rather, when the expert is engaged for the purpose or potential purpose of giving evidence in proceedings or anticipated proceedings that the problem arises.

The complete abrogation of client legal privilege in the context of experts does not appear capable of being reasonably justifiable for the reasons set out above and the legitimate purpose of consulting an expert other than in the context of anticipated litigation is now recognised both at common law[701] and in the amended section 118(c) of the *Uniform Evidence Law*.

B Partial Abrogation

If its complete abrogation in the context of experts cannot be justified, the issue then becomes what, if any, limitation of the privilege should be considered. If all communications are not to be made available, should service of an expert report require the disclosure of all drafts of that report or any other expert reports within the possession of the party?

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700 See n 144 above.

701 See n 207 to n 209 above regarding the effect of the decision in *Pratt Holdings*.

The *NSWLRC 2005 Report* gives consideration to, but ultimately rejects, the mandatory disclosure of all expert reports obtained by a party. After canvassing similar provisions adopted in Queensland and South Australia, the proposal is rejected on two bases, namely: that it could readily be circumvented by parties avoiding written communications until they have ascertained the approach likely to be taken by the expert; and that it could encourage parties only to approach witnesses 'at the extreme ends of the spectrum'.

The first of these two conclusions, although possibly a truism, does not seem to have probative value. If a party wishes to conduct discussions with an expert and not to make a record of those discussions, it is free to do so and would also need to prevail upon the expert to do the same. That is a matter for the party. The fact that some parties or experts may choose to act in this way should not affect an approach to reform that would require disclosure of draft reports.

The second consideration appears based upon one submission to the New South Wales Law Reform Commission by a Queensland based 'organisation that provides expert witnesses'. The submission was that the Queensland experience, in light of its disclosure rules, 'tends to encourage the parties to obtain reports only from experts where they are absolutely sure of the opinion the expert will provide'.[702] No evidentiary basis for the submission is identified. The submission is also at odds with the observations of the Honourable Geoffrey Davies, formerly a judge of the Supreme Court of Queensland (as opposed to a representative of an organisation that advocates for expert witnesses). Geoffrey Davies' submissions are discussed below in the context of a proposed 'hybrid model'.

But even if disclosure of expert reports obtained by parties (including drafts thereof) were to be mandated, triers of fact and opposing parties would still be unable to reach any conclusions that might otherwise be available regarding the number of witnesses approached and the extremity of the position adopted by the witnesses who had actually prepared reports for use in the proceedings. That is, whilst the

[702] NSW Law Reform Commission, above n 9, 92.

disclosure of draft reports of experts that had prepared reports for the purpose of proceedings might assist in the identification of bias on the part of such experts, the solution would not address the paradigm of expert exceptionalism.

IV A Hybrid Model

A The South Australian Approach

The conclusions expressed in the *NSWLRC 2005 Report*, rejecting wider disclosure rules, were reached despite the following counterveiling argument raised (extra-judicially) by Justice Geoffrey Davies, quoted in the *NSWLRC 2005 Report* in the following terms:

> In some jurisdictions reports obtained from experts, intended for use in litigation, have been made disclosable. This has resulted in greater frankness between parties though, if the existing system of party appointed experts were to be retained, it would be vastly improved if parties were obliged to disclose not only the reports of experts whom they proposed to call but also those of other experts whom they had engaged but did not intend to call and the names and addresses of those other experts whom they had approached for an opinion but did not intend to call.[703]

The approach advocated by Justice Davies approximates, to an extent, the current system in place in South Australia.

Rule 160(1) of the South Australian *Supreme Court Civil Rules 2006* ('*SASC Rules*') requires parties to serve on every other party to the action a copy of each expert report in the party's possession relevant to the subject matter of an action (whether the party intends to rely on it at the trial or not) ('*SA Disclosure Rule*').[704] The first iteration of the *SA Disclosure Rule* was introduced in 1987.[705]

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703 G Davies, 'Expert Evidence: Court Appointed Experts' (2004) 23 *Civil Justice Quarterly* 367 quoted in NSW Law Reform Commission, above n 9, 92.

704 *SASC Rules*, rule 160(1) 'A party must, before the relevant time limit–(a) obtain all expert reports that the party intends to obtain for the purposes of the trial of the action; and (b) serve on every other party to the action a copy of each expert report in the party's possession relevant to the subject matter of an action (whether the party intends to rely on it at trial or not) not previously served on that party. Exception–This rule does not apply to reports obtained, or to be obtained from a shadow expert (see rule 161(1))'.

705 *Kenneally v Pouras* [2003] SASC 394, [11] (Gray J).

The rationale for the *SA Disclosure Rule* was discussed in *Piber Pty Limited v AW Baulderstone Pty Limited* by Mullighan J in the following terms:

> No longer may a party withhold from the other party or parties a report of an expert even though he does not intend to call that expert or to rely on the report in some other way. The policy of the rule is for full disclosure so that all matters relating to expert evidence are known to all parties and their experts well before the trial … A consequence is that disclosure of an expert's report which in some respect is unfavourable to a party, may advance the case of the other party. Tactical withholding of reports is no longer permissible. Such a policy may be clearly discerned from the rule and is consistent with the purpose of expert evidence, namely to assist the court with respect to matters which are not within the knowledge or experience of ordinary people.[706]

The initial version of the rule also required disclosure of, amongst other things, 'notes made by another person of an expert's opinion'. That more expansive definition was removed in 1994. However, the balance of the rule remained intact.[707]

The clear intent of the *SA Disclosure Rule* to abrogate, to the extent of the rule, legal professional privilege otherwise inhering in reports required to be served, is stated in rule 160(10):

> For the avoidance of doubt, an expert report (including a summary expert report) served under this rule is not subject to legal professional privilege and may be the subject of questions at trial and, if otherwise admissible, may be tendered in evidence at trial.

Importantly, a further feature of the *SASC Rules* not only serves to protect an appropriate class of communications between parties and experts, but also assists the court and other parties to make an assessment of the extent to which the paradigm of expert exceptionalism may be in operation in any given set of proceedings. This is the concept of the 'shadow expert' referred to in rule 161 of the *SASC Rules*.

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706 *Piber Pty Ltd v AW Baulderstone Pty Ltd* (1992) 163 LSJS 380, 382.

707 *Kenneally v Pouras* [2003] SASC 394, [11]. The rule was also accompanied by a practice direction (Practice Direction 46, which required, amongst other things, upon request by a party on whom an expert report had been served, 'a list of all conversations in which the expert has taken part with any party, any legal representative of a party or any other expert consulted in relation to the matter relevant to the opinions expressed in the report …and copies of all notes made by or on behalf of the party or by or on behalf of the expert concerning any of the conversations referred to in such a list)'. This requirement was removed in the current practice direction (Practice Direction 5.4).

A party is still entitled to communicate confidentially with an expert for the purposes of obtaining legal advice and such communications will not be amenable to the operation of the *SA Disclosure Rule*, provided that the party engages that expert as a 'shadow expert' in accordance with the rules.

Rule 161(1) defines a shadow expert as an expert who:

> (a) is engaged to assist with the preparation or presentation of a party's case but not on the basis that the expert will, or may, give evidence at the trial; and
>
> (b) has not previously been engaged in some other capacity to give advice or an opinion in relation to the party's case or any aspect of it.

The issue of the expert initially obtained to give advice, being converted into a witness, as discussed above, is circumvented by the operation of rule 161(2) which makes clear that a shadow expert will not be regarded as such unless 'at or before the time the expert is engaged', the expert gives a certificate to the effect that:

> (a) the expert understands that it is not his or her role to provide evidence at the trial; and
>
> (b) the expert has not been previously engaged in any other capacity to give advice or an opinion in relation to the party's case or any aspect of it.

Rule 161(4) requires that a party who engages a shadow expert must serve on the other parties a copy of the certificate procured pursuant to rule 161(2) and also notify them of the engagement, date of engagement and name, address and qualifications of the shadow expert. This requirement, whilst preserving privilege inhering in communications between the party and the shadow expert, addresses to some extent the paradigm of expert exceptionalism by giving visibility to the other litigants of the number and nature of expert witnesses engaged by a party.

Additionally, this process also thereby militates against the 'Croesus litigant' possibility referred to in Chapter 2, namely, the possibility of a litigant engaging and thereby conflicting out all potentially damaging experts in a field — a situation made possible by the 'no property in an expert' rule also finding an exception in the

case of an expert witness who has been privy to confidential information.[708] Whilst not preventing expert witness shopping or the 'rich litigant' possibility entirely, it permits at least visibility over the number of witnesses engaged to give evidence or as 'shadow witnesses' and for other parties to make appropriate submissions to the court in this regard.

A lacuna in the *SASC Rules* lies in the possibility of informally obtaining the view of the expert without a report coming into existence, in which case the expert would arguably not be a shadow expert and the party would not be obliged to give disclosure of the engagement unless an unsolicited report were to be received (which scenario appears to have had some precedent).[709] The *SASC Rules* do not permit the transitioning of a shadow expert to an expert entitled to give evidence in the proceedings.

As to whether the rules capture, and require production of, draft reports prepared by an expert other than a shadow expert, some guidance was provided by the Supreme Court of South Australia in connection with an earlier formulation of the rules in *Harris Scarfe Limited (Receivers and Managers Appointed) (In liq) & Ors v Ernst & Young & Ors (No 6)*, in which Bleby J drew the following distinction:

> The definition of 'expert report' in r 38.01 has, as its primary meaning, a 'written report'. To be a report it must be something other than what the expert has written for his own edification or as part of the process of forming his opinion. Any professional accustomed to writing opinions will often prepare or amend or discard drafts before being satisfied with the version to be produced for the client's consumption. Drafts of that nature are not reports. They report to no-one. In the sense in which 'report' is used in r 38.01, it means an account prepared for the benefit of others, not merely for the benefit of the author.
>
> However, where a report is prepared for discussion as representing the author's then present or even tentative view, and is made available to the client for discussion, even though it may not necessarily be intended as the final report, it is still a report. If it is in writing it is a written report. If it contains or includes the opinion of the expert it is required to be delivered to other parties in accordance with the requirements of r 38.01.[710]

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708 See pages 102-105 and 165 above.

709 *Turner v Eastern Sydney Area Health Services* [1999] SASC 1, [23] and [25] (Wicks J); *Kenneally v Pouras* [2003] SASC 394, [16]-[25] (Gray J).

710 *Harris Scarfe Ltd (Receivers and Managers Appointed) (in liq) & Ors v Ernst & Young & Ors (No 6)* [2006] SASC 148, [26]-[27] (Bleby J).

Accordingly, draft expert reports prepared for the purpose of communicating with a party or solicitor will generally fall within the scope of the *SA Disclosure Rule*. An interesting corollary is that draft expert reports not being prepared for the purpose of being communicated to the party or solicitor would in any event, fail at least the common law test for the establishment of legal professional privilege and thereby be susceptible to disclosure upon the application of a party.[711]

The South Australian approach, as reflected in the *SA Disclosure Rule* and the shadow expert regime, at least, represents something of a comprehensive solution for the problem of expert evidence and legal professional privilege because it has the potential to address both the issue of expert bias and the paradigm of expert exceptionalism.

In *Naylor v Preston Area Health Authority*,[712] Donaldson MR stated:

> …whilst a party is entitled to privacy in seeking out the 'cards' for his hand, once he has put his hand together, the litigation is to be conducted with all the cards face up on the table…[713]

This statement does not even represent the current orthodoxy with respect to expert evidence because, as discussed in Chapter 3, privilege can be maintained over draft expert reports and communications passing between solicitors, parties and experts, absent some lacuna in the expert report relied upon that suggests regard has been had to other material. The basis of the attractiveness of the adoption of a hybrid model based upon the *SA Disclosure Rule*, is that it would not only reflect the 'cards face up' ideal espoused in *Naylor*, but would also, in the context of expert evidence only, allow other parties and hence the court to see the 'discard pile' and draw any relevant inferences therefrom.

B A Proposal for reform

If the *SA Disclosure Rule* were to be modified to create a hybrid model that required the production not only of draft expert reports but all communications with experts

711 Ibid [28] (Bleby J). See also pages 133-137 above.
712 *Naylor v Preston Area Health Authority* [1987] 2 All ER 353.
713 Ibid 360.

other than shadow experts but containing other important safeguards ('*Proposed Disclosure Rule*'), it would provide a solution to the problem of expert evidence and legal professional privilege that satisfies the criteria discussed at the conclusion of Chapter 4 of this thesis.

That is, it would provide a means of disclosing expert bias and also a means of exposing the presence of the paradigm of expert exceptionalism. It would be capable of resolving the differential application of the tests for the existence of privilege currently adopted under the *Uniform Evidence Law* and the common law because it would abrogate such privilege in the context of experts other than 'shadow experts', a term perhaps better restated as 'advisory experts'. Also, by that same distinction, it would represent a departure from a test of waiver based upon the adoption of the principles set out in *Maurice*, which are contended, for the reasons set out in Chapter 4, to be unsound.

Further, unlike solutions involving reliance upon a court appointed expert, or a jointly engaged expert, it is a solution that is capable of applying to *all* circumstances in which expert witnesses are deployed and it strikes a balance between maintaining the privilege (in the case of the advisory expert procedure) and providing a level of disclosure that can be utilised by other parties in the context of the adversarial system, to hold experts and parties engaging them to account.

The implementation within New South Wales and the federal jurisdiction of an approach to expert evidence based upon the adoption of the *Proposed Disclosure Rule* discussed above could be effected by the creation of a succinct statement of rules encompassing the *Proposed Disclosure Rule* that courts, tribunals and other triers of fact could adopt.

One such statement, which is by no means conclusive or exhaustive of the possibilities, is as follows:

> (1) Subject to rule (2), a party must, upon service of each expert report that the party intends to rely upon for the purposes of

the proceedings, make available for inspection by each other party:

(a) a copy of each expert report and each draft expert report in the party's or the expert's possession relevant to the subject matter of the proceedings (whether the party intends to rely on it at the trial or not) and not previously served on each other party or made available for inspection; and

(b) a copy of all documents and communications in connection with the proceedings exchanged with the expert upon whose report the party proposes to rely, as are in the party's or the expert's possession and not previously served on each other party or made available for inspection.

(2) A party is not required to comply with rule (1) in connection with reports prepared by or documents or communications exchanged with, an advisory expert.

(3) A party who wishes to adduce evidence in proceedings from an expert engaged as an advisory expert must:

(a) notify each other party of the party's intention to do so within 14 days of the date on which the expert is engaged to prepare evidence; and

(b) comply with rule (1) in connection with that expert, as though the expert had never been engaged as an advisory expert.

(4) For the purposes of rules (2) and (3), an advisory expert is an expert:

> (a) who is engaged to assist with the preparation or presentation of a party's case but not on the basis that the expert will, or may, give evidence at the trial;
>
> (b) who has not previously been engaged in some other capacity to give advice or an opinion in relation to the party's case or any aspect of it; and
>
> (c) the existence and identity of whom has been notified in writing to all other parties within 21 days of the date on which the expert was first engaged or the proceedings commenced (whichever is the later).

A number of likely criticisms of such a rule may be inferred from the foregoing discussion in relation to the other options for reform. In particular, the adoption of such a rule is likely to be considered as giving rise to an increased administrative and documentary burden, increasing the costs of litigation. Similarly, it is likely to be viewed as encouraging parties to adopt two sets of experts for the purpose of proceedings, also increasing litigation costs.

It is contended that such criticisms do not appropriately militate against the adoption of the rule. Any perceived increased 'documentary burden of litigation' arising from adoption of a *Proposed Disclosure Rule*,[714] is ameliorated to an extent by the obligation consisting only of making available for inspection the documents required to be disclosed, not in providing each other party with copies of such documents. It would be up to each party to decide whether to avail itself of the opportunity and whether to make copies of any or all of the documents disclosed in the process. Presumably it would only do so where it considered a disclosed document to be of potential benefit in the litigation.

The adoption of the *Proposed Disclosure Rule* would also remove from court processes applications for disclosure, such as notices to produce or subpeonas,

[714] See discussion at page 187 above.

engendering costs savings for the parties and the ability of courts to deploy resources to other disputes and overcome the problematic practice, currently adopted, of judges who may be the ultimate triers of fact, inspecting documents over which a claim for privilege is made in order to determine their status.[715]

The nature of the 'additional' burden posed by such a requirement is also somewhat illusory given that experts are required by codes of conduct to identify all information upon which their conclusions are reached.[716] The expert (and the solicitors engaging the expert) should already be collating such communications as may be relevant to the opinion ultimately reached for disclosure pursuant to these requirements. It would be difficult to assert that the extension of the obligation to communications that may ultimately not be considered, at least by the expert, to be material to the conclusions reached, is such a substantial additional burden as negate the benefits of the rule. Indeed, it could be contended that the adoption of the *Proposed Disclosure Rule* would prompt parties to be more thoughtful about their communications with an engaged expert and potentially reduce parties' 'unthinking reliance on expert evidence'.[717]

It could also be said that adoption of such a model would increase the cost of litigation by making it desirable for parties to engage both an advisory expert and an expert witness. Although it would be more costly to obtain both an advisory expert and a conventional expert, as is consistent with the features of the adversarial system in which the case is run, such forensic decisions lie with the party and the manner in which it wishes to run its case. Further, as proposed in the formulation set out above (and unlike the provisions in South Australia), there is provision in the *Proposed Disclosure Rule* for an advisory expert to transition into an expert witness, the price being susceptibility of all communications to disclosure. It would be open to a party to engage an expert initially as an advisory expert and convert the expert into a witness once the party has greater certainty about the likely opinion

715 See pages 128-129 above.
716 For example, in the Expert Witness Code of Conduct which form Schedule 7 to the *UCPR* clauses (d), (e), (f), (g) and (h).
717 *Seven Network Ltd v News Ltd* (2009) 182 FCR 160, [23] (Sackville J).

to be given by the expert. The advantage that such a process would have over the current system, apart from the disclosure of communications and draft reports in the case of a transition, is that the initial engagement would still be required to be disclosed, thereby enabling other parties to make appropriate submissions regarding the operation of the 'paradigm of expert exceptionalism', possible instances of expert shopping and the practice of 'conflicting out' expert witnesses.

Finally, it could be said that adoption of the *Proposed Disclosure Rule* would constitute an unjustifiable inroad into the public policy rationale behind the doctrine of legal professional privilege. As set out above, this should not be the case given the ability of parties to take advantage of the 'safe harbour' provisions regarding advisory experts.

Taking into account its satisfaction of the criteria for reform identified in Chapter 4, the responses to the criticisms referred to above and recognition by law reform bodies that 'measures that would reduce or eliminate adversarial bias … are likely to have potential benefits, even if the extent of those benefits cannot accurately be determined',[718] it is contended that the opportunity for courts, tribunals and other triers of fact in the New South Wales and federal jurisdictions to adopt the *Proposed Disclosure Rule* would be an appropriate response to the problems that lie at the intersection of the law relating to expert evidence and legal professional privilege.

[718] NSW Law Reform Commission, above n 9, 74.

CONCLUSION

Legal professional privilege operates as an important exception to the principle that any evidence which is relevant to a fact in issue in proceedings, is admissible. Likewise, expert evidence is an exception to the rule that opinion evidence is inadmissible as a basis for proving the truth of the proposition about which the opinion is expressed and requires, as one of its guiding principles, that the expert owe a paramount duty to the court.

The current orthodoxy which lies at the intersection between the doctrine of legal professional privilege and the law with respect to expert evidence, creates a tendency to work injustice that cannot readily be resolved or alleviated by the strict application of the law with respect to each of these concepts as it has independently developed. For example, to continue, as courts have, to apply principles derived from cases such as *Attorney General (NT) v Maurice* to the waiver of legal professional privilege in the context of the party-engaged expert has engendered lines of authority which, it is contended, are not apt to expose contraventions of guidelines and codes of conduct by expert witnesses, a number of which have come to light only in extraordinary circumstances.[719]

The inherent tension between the doctrine of legal professional privilege and the role of the party-engaged expert witness — the first institutionalising the concealment of communications and documents and the second, mandating that the output of the expert transcend the partisan circumstances of its creation — tends to generate something of an irreconcilable dynamic, perhaps exacerbated by the conditions in which trials are run in this era of 'mega-litigation'. This unsatisfactory state is further confused by the uncertainties attendant upon the status of the 'basis rule' at common law and under the *Uniform Evidence Law*, the disharmonies of application between the common law and *Uniform Evidence Law* tests for the existence and waiver of legal professional privilege in the context of expert

[719] See for example the discussion of the cases of *Wood*, *Sharman* and *Hudspeth* in Chapter 4.

evidence and the differential operation of the relevant tests at various stages of proceedings in New South Wales and federal courts, as discussed in Chapter 3.

There must be at least a grain of truth in the pronouncement of Judge Learned Hand back at the turn of the 20th Century that:

> [t]here can be, in my opinion, no legal anomaly which does not work evil, because, forging an illogical precedent, it becomes the mother of other anomalies and breeds chaos in theory and finally litigation.[720]

It is also true that the adoption of the *Proposed Disclosure Rule* identified in Chapter 5 would, in effect, require the creation of a further anomaly, departing as it does from the current orthodoxy discussed in Chapter 3. Nevertheless, it is contended that the *Proposed Disclosure Rule* may address the criteria for reform identified at the conclusion of Chapter 4 and overcome the fundamental problem posed by the application of legal professional privilege to expert evidence.

By requiring the disclosure of communications with, and draft reports prepared by, an expert engaged for the purpose of giving evidence in proceedings — material that may otherwise be the subject of a claim for legal professional privilege — competing litigants are permitted the opportunity to form a view as to the role (if any) such material had in shaping opinions finally expressed by the expert. The timely disclosure of such material may militate against the recurrence of such conduct as was exposed in *Wood*, *Sharman* and *Hudspeth* as constituting partisan behaviour on the part of the expert.

Further, by mandating the disclosure of each expert engaged by a party (whether in the capacity of an advisory expert or not), the *Proposed Disclosure Rule* also allows other litigants some transparency as to the identity and number of experts engaged. This would provide some opportunity, currently lacking, to seek appropriate redress through the court or tribunal in respect of attempts at ‘expert shopping’ or engagement in the ‘Croesus litigant’ practice of attempting to ‘knock out’ by way of conflicting all or key experts within a field.

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720 Hand, above n 239, 52.

Importantly, the *Proposed Disclosure Rule* would not rely upon an extension of existing expert witness codes of conduct or guidelines, or other self-executing and self-regulating means of promoting transparency on the part of party-engaged expert witnesses — including the expert witness declaration, favoured by the authors of *Judicial Perspectives* — the efficacy of which has been questioned.[721] The sanction for non-compliance with an expert code of conduct is the potential inadmissibility of the evidence given by the defaulting expert,[722] whereas the sanction for non-compliance with a disclosure requirement that has the force of a court order lies in the realm of contempt.[723]

The *Proposed Disclosure Rule* would also, by reason of its capacity for consistent application irrespective of whether the relevant law of the forum in which disclosure would be made is the *Uniform Evidence Law* or the common law, overcome the remaining differences associated with the two regimes and negate the existing inconsistencies between the test to be applied during ancillary processes and at hearing.[724] Further, by providing other parties with the means critically to evaluate all material provided to an expert witness, the *Proposed Disclosure Rule* may assist in overcoming the practical consequences of any lingering uncertainty over the scope of the 'basis rule' in the context of admissibility of expert evidence.[725]

In Chapter 5, a number of potential counter-arguments to the efficacy of the adoption of the *Proposed Disclosure Rule* are considered. On the whole, it is contended that such adoption would not fall foul of the overriding principles of case management for the reasons there stated, but also because it would remove a tier of intelocutory process from administration by the courts (namely the issue of subpoenas and notices to produce to experts and parties). The adoption of the *Proposed Disclosure Rule* would also overcome the unsatisfactory practice of requiring those who may be the ultimate triers of fact in proceedings to review the

721 See for example, the discussion at pages 84-86 and 160.
722 See for example, rule 31.23(3) and (4) of the *Uniform Civil Procedure Rules 2005* (NSW).
723 See for example *Trade Practices Commission v Arnotts Limited (No 2) (*1989) 21 FCR 306, 312-313 (Beaumont J).
724 See the discussion in Chapter 3.
725 See the discussion at pages 91-94.

very documents over which a claim for privilege is made in order to make a ruling in the case of a disclosure application.[726]

Overall, the *Proposed Disclosure Rule* is contended in this thesis to be one means by which the worst tendencies of the combined operation of the doctrine of legal professional privilege and the role of the party-engaged expert witness are ameliorated and the genuine policy rationales for each, to a reasonably practicable extent, retained. There are undoubtably others.

Finally, lest it be thought that the irony of a lawyer impugning experts for holding divergent opinions has escaped notice, it is appropriate to conclude with some further words from Judge William Foster, spoken at the conclusion of the 19th century:

> It is certainly true that there are and always will be differences of opinion among experts of the highest character … [b]ut concerning this alleged misfortune, it seems hardly becoming for the legal profession to indulge in severe criticism, since there is no profession so strongly characterised by differences of opinion on any subject, – lawyers as well as judges constantly disagreeing, and the latter not infrequently overruling one another's decisions.
>
> Yes, it is a visible truth that doctors, as well as lawyers and ministers of the Gospel do disagree. It would be marvellous and deplorable if they did not. If there were no disagreement investigation and experiment would cease; and science, literature and art would sink to a dead level of stupidity and laziness.[727]

[726] See the discussion at pages 128-130 above.
[727] Foster, above n 1, 186.

BIBLIOGRAPHY

A *Articles/Books/Reports*

Australian Law Reform Commission, 'Evidence (Interim)' (26, Australian Law Reform Commission, 21 August 1985)

Australian Law Reform Commission, 'Evidence' (38, Australian Law Reform Commission, 5 June 1987)

Australian Law Reform Commission, 'Managing Justice: A Review of the Federal Civil Justice System' (89, Australian Law Reform Commission, 2000)

Australian Law Reform Commission, 'Final Report "Uniform Evidence Law"' (ALRC Report 102, Australian Law Reform Commission, December 2005)

Ballow, Henry and John Fonblanque, *A Treatise of Equity* (Messrs. P. Byrne, J. Moore, W Jones, and H Watts) vol 2

Basten, John, 'The Court Expert in Civil Trials - A Comparative Appraisal' (1977) 40 *Modern Law Review* 174

Bathurst, TF, 'Three Contemporary Issues in Civil Litigation: Expert Evidence, Discovery and Alternative Dispute Resolution' (at the Annual Civil Litigation Seminar, 5 March 2015) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2016%20Speeches/Bathurst%20CJ/Bathurst_20150305.pdf>

Bentham, Jeremy, 'Rationale of Judicial Evidence' in *The Works of Jeremy Bentham* (William Tait, 1843) vol 7

Bergin, Patricia, 'Case Management' (at the National Judicial Orientation Program, Broadbeach, 3 August 2008) <http://www.austlii.edu.au/au/journals/NSWJSchol/2008/15.pdf>

Brereton, Paul, 'Legal Professional Privilege' in *Historical Foundations of Australian Law* (Federation Press, 2013) vol 2, 127

Cicero, *The Verrine Orations* (Harvard University Press, 1928) vol 1

Cooper, RE, 'Federal Court Expert Usage Guidelines' (1997) 16 *Australian Bar Review* 203

Council of Australian Law Deans, 'Council of Australian Law Deans Statement on the Nature of Legal Research' (October 2005) <https://cald.asn.au/wp-content/uploads/2017/11/cald-statement-on-the-nature-of-legal-research-20051.pdf>

Davies, G, 'Expert Evidence: Court Appointed Experts' (2004) 23 *Civil Justice Quarterly* 367

Dixon, Owen, *Jesting Pilate* (The Law Book Company, 1965)

Dwyer, DM, 'Expert Evidence in the English Civil Courts, 1550 - 1800' (2007) 28 *Journal of Legal History* 93

Edmond, Gary, 'Judging Surveys: Experts, Empirical Evidence and Law Reform' (2005) 33 *Federal Law Review* 95

Foster, William, 'Expert Testimony - Prevalent Complaints and Proposed Remedies' (1897) 11(3) *Harvard Law Review* 169

Freckelton, Ian and Hugh Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (Lawbook, 5th ed, 2013)

Freckleton, Ian, Prusana Reddy and Hugh Selby, *Australian Judicial Perspectives on Expert Evidence: An Empirical Study* (The Australian Institute of Judicial Administration Incorporated, 1999)

Freckleton, Ian, Hugh Selby and Prusana Reddy, *Australian Magistrates' Perspectives on Expert Evidence: A Comparative Study* (The Australian Institute of Judicial Administration, 2001)

Gleeson, Murray, 'Valuing Courts' <http://www.hcourt.gov.au/assets/publications/speeches/former-justices/gleesoncj/cj_family.htm>

'Guide to Professional Conduct of Solicitors' (1944) 41 *LS Gaz* 8

'Guide to Professional Conduct of Solicitors' (1963) 60 *LS Gaz* 108

Hammelmann, HA, 'Expert Evidence' (1947) 10 *Modern Law Review* 82

Hampel, George, 'A Case Against Single Experts' November/December 2013(119) *Precedent* 15

Hand, Learned, 'Historical and Practical Considerations Regarding Expert Testimony' (1901) 15(1) *Harvard Law Review* 40

Howell, TB, *A Complete Collection of State Trials and Proceedings for High Treason and Other Crimes and Misdemeanors from the Earliest Period to the Year 1783* (T. C Hansard, 1816)

Huber, Peter, *Galileo's Revenge: Junk Science in the Courtroom* (Basic Books, 1991)

Hutchinson, Terry, *Research and Writing in Law* (Lawbook Co, Second, 2006)

Hutchinson, Terry and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) *Deakin Law Review* 83

Hutchinson, Terry, 'The Doctrinal Method: Incorporating Interdisciplinary Methods in Reforming the Law' (2015) 3 *Erasmus Law Review* 130

Kirby, Michael, 'The Judicial Review of Expert Evidence: Causation, Proof and Presentation' (at the Law in the World of Science and Technology) <http://www.hcourt.gov.au/assets/publications/speeches/formerjustices/kirbyj/kirbyj_expert.htm#_ftn9>

Kumar, Miiko, 'Admissibility of Expert Evidence: Proving the Basis for an Expert's Opinion' (2011) 33 *Sydney Law Review* 427

LexisNexis Australia, *Cross on Evidence* ((loose-leaf), 2018) vol 1

Lord Woolf, 'Access to Justice Interim Report to the Lord Chancellor on the Civil Justice System in England and Wales' (June 1995)

Lord Woolf, 'Access to Justice Final Report to the Lord Chancellor on the Civil Justice System in England and Wales' (July 1996)

Macnair, Michael, *The Law of Proof in Early Modern Equity, Comparative Studies in Continental and Anglo-American Legal History* (Duncker & Humblot, 1999)

McClellan, Peter, 'Contemporary Challenges For the Justice System - Expert Evidence' (at the Australian Lawyers' Alliance Medical Law Conference 2007, 20 July 2007) <http://www.austlii.edu.au/au/journals/NSWJSchol/2007/10.pdf>

McClellan, Peter, 'Civil Justice Reform - What Has It Achieved?' [2010] *NSWJSchol* 5

McDougall, Robert, 'The Debatable Privilege' (2007) 27(335) *Lawyers Weekly* 14

Meagher, Gummow and Lehane, *Equity Doctrine and Remedies* (Butterworths LexisNexis, 4th ed, 2002)

Mendelow, Paul, 'Expert Evidence: Legal Professional Privilege and Experts' Reports' (2001) 75 *The Australian Law Journal* 258

NSW Law Reform Commission, 'Expert Witnesses' (109, NSW Law Reform Commission, 2005)

NSW Law Reform Commission, 'Final Report "Uniform Evidence Law"' (NSWLRC Report 112, NSW Law Reform Commission, December 2005)

Nuée, Alain, 'Civil-Law Expert Reports in the EU: National Rules and Practices' (European Union, 2015) <http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519211/IPOL_ID(2015)519211_EN.pdf>

Pearce, Dennis, Enid Campbell and Don Harding, 'Australian Law Schools: A Discipline Assessment for the Commonwealth Territory Education Commission' (AGPS, 1987)

Spencer, David, 'The Phenomenon of the Vanishing Civil Trial' (2005) 8(2) *ADR Bulletin* 2

Stowe, Hugh, 'Expert Reports and Waiver of Privilege' Summer 2006/2007 *Journal of the NSW Bar Association* 71

Strange, Sir John, *A Collection of Select Cases Relating to Evidence* (Henry Lintot, 1754)

Supreme Court of New South Wales, '2015 Annual Review' (Supreme Court of New South Wales, 2015) <http://www.supremecourt.justice.nsw.,gov.au/Documents/Publications/Annual%20Reviews%20Stats/Annual_Review_2015.pdf>

Victorian Law Reform Commission, 'Final Report "Uniform Evidence Law"' (VLRC Report 186, Victorian Law Reform Commission, December 2005)

Victorian Law Reform Commission, 'Civil Justice Review Report' (14, Victorian Law Reform Commission, March 2008)

Voet, Johannes and Johannes Van Der Linden, *The Selective Voet Being the Commentary on the Pandects by Johannes Voet [1647 - 1713] and the Supplement to That Work by Johannes Van Der Linden [1756 - 1835] Translated with Explanatory Notes and Notes of All South African Cases by Percival Gane* (Butterworth & Co (Africa) Limited, 1956) vol 3

Wigmore, John Henry, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Little Brown and Company, 1940)

B *Cases*

Adelaide Steamship Co Ltd v Spalvins & Ors (1998) 152 ALR 418

AG Australia Holdings Ltd v Burton (2002) 58 NSWLR 464

Air Jamaica Limited v Charlton [1999] 1 WLR 1399

Andrews v Australia and New Zealand Banking Group Limited (2012) 247 CLR 205

Aon Risk Services Australia Limited v Australian National University (2009) 239 CLR 175

Armstrong Strategic Management and Marketing Pty Limited & Ors v Expense Reduction Analysts Group Pty Ltd & Ors (2012) 295 ALR 348

Attorney General (NT) v Maurice (1986) 161 CLR 475

Austen v Vesey [1577] Cary 63

Australian Competition and Consumer Commission v Lux Pty Ltd [2003] FCA 89

Australian Leisure Hospitality Group Pty Ltd & Anor v Dr Judith Stubbs & Anor [2012] NSWSC 215

Australian Securities and Investment Commission v Adler [2001] NSWSC 1103

Australian Securities and Investment Commission v Rich (2005) 218 ALR 764

Australian Securities and Investment Commission v Southcorp Limited [2003] FCA 804

Australian Securities and Investments Commission v Rich (2005) 53 ACSR 110

Australian Securities and Investments Commission v Rich [2009] NSWSC 1229

Baker v Campbell (1983) 153 CLR 52

Baker v London and South Western Railway Co 3 Q. B. 93

Beck v Ministry of Defence [2005] 1 WLR 2206

Berd v Lovelace [1576-1577] Cary 62

Bevillesta Pty Ltd v Sovereign Motor Inns Pty Ltd [2002] NSWCA 279

Birmingham and Midland Motor Omnibus Company Limited v London and North Western Railway Company (1913) 3 KB 850

Brown v Gugy [1863] II Moore N. S. 341

Brown v Harding [2008] NSWCA 51

BT Australasia Pty Ltd v The State of New South Wales & Ors (1996) 140 ALR 268

Buckley v Rice-Thomas (1554) 1 Pl. 118

Bullivant & Ors v The Attorney-General for Victoria [1901] AC 196

Bulstod v Letchmere (1676) 2 Freeman 6

Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 7) [2008] FCA 323

Cala Homes (South) Limited v Alfred McAlpine Homes East Limited [1995] EWHC Ch 7

Carbotech-Australia Pty Ltd v Yates [2008] NSWSC 1151

Cary v Pitt Peake Ev. Appendix 84

Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd (2011) 192 FCR 445

Chaulk v Volkswagen of America & Anor (1986) P11 CCH Prod. Liab. Rep. 248

Clark v Ryan (1960) 103 CLR 486

Coco v A N Clark (Engineers) Ltd [1969] RPC 41

Commissioner of Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501

Commonwealth Development Bank of Australia Pty Ltd v Cassegrain [2002] NSWSC 980

Commonwealth v John Fairfax and Sons Ltd (1980) 147 CLR 39

Co-operative Insurance Society Limited v Argyll Stores (Holdings) Limited [1998] AC 1

Corrs Pavey Whiting & Byrne v Collector of Customs (Vic) (1987) 14 FCR 434

Cossey and Wife v London, Brighton and South Coast Railway Company (1870) 5 CP 146

Creed v Trapp (1578) 121 Choyce Cases

Curling v Perring (1835) 2 MY & K 380

Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543

Dasreef v Hawchar (2011) 243 CLR 588

Dennis v Codrington 1579–1580 Cary 100

Dingle v Commonwealth Development Bank of Australia (1989) 23 FCR 63

Du Barre v Livette [1791] Peake 107

Esso Australia Resources Limited v Commissioner of Taxation (1998) 83 FCR 511

Esso Australia Resources Limited v Federal Commissioner of Taxation (1997) 150 ALR 117

Esso Australia Resources v Commissioner of Taxation of the Commonwealth of Australia (1999) 201 CLR 49

Fagenblat v Feingold Partners Pty Ltd [2001] VSC 454

Farrell v The Queen (1988) 194 CLR 286

Festa v The Queen (2001) 208 CLR 593

FGT Custodians Pty Ltd v Fagenblat [2003] VSCA 33

Filipowski v Island Marine Limited [2002] NSWLEC 177

Folkes v Chad (1782) 3 Doug. 157

Friend v The London, Chatham and Dover Railway Company [1875] 3 ExD 437

Galway v Constable (2002) 2 Qd R 146

Goldberg v Ng (1995) 185 CLR 83

Gourmet Gate Australia Pty Ltd (in liq) v Gate Gourmet Holding AG [2004] NSWSC 768

Grant v Downs (1976) 135 CLR 674

Grant v Downs 135 CLR 674

Greenough v Gaskell (1833) 1 MY & K 98

Gurney v Langlands 5 B & A 330

Half Court Tennis Pty Limited v Seymour (1980) 53 FLR 240

Harmony Shipping SA v Davis [1979] 3 All ER 177

Harrington-Smith (on behalf of the Wongatha People) v Western Australia (No 7) (2003) 130 FCR 424

Harris Scarfe Ltd (Receivers and Managers Appointed) (in liq) & Ors v Ernst & Young & Ors (No 6) [2006] SASC 148

Hartford v Lee [1577-1578] Cary 63

Health & Life Care Limited v Price Waterhouse (1997) 69 SASR 362

Herring v Clobery (1842) 1 Ph. 89

HG v The Queen (1999) 197 CLR 414

Hudspeth v Scholastic Cleaning and Consultancy Services Pty Ltd & Ors (No 8) [2014] VSC 567

Hughes v Biddulph (1827) 38 ER 777

Idoport Pty Ltd v National Australia Bank Ltd [2001] NSWSC 995

Idoport Pty Ltd v National Australia Bank Ltd [No 37] [2001] NSWSC 838

In the matter of Bauhaus Pyrmont Pty Ltd (in liquidation) [2006] NSWSC 543

In the matter of Optimisation Australia Pty Ltd [2015] NSWSC 2072

Instant Colour Pty Ltd v Canon Australia Pty Ltd [2003] FCA 89

Integral Energy Australia v Eds (Australia) Pty Ltd [2006] NSWSC 971

Interchase Corporation Limited (in liq) v Grosvenor Hill (Qld) Pty Limited (No 1) (1999) 1 Qd. R 141

James v Keogh [2008] SASC 156

Julian Ronald Moti v R (2011) 245 CLR 456

Kenneally v Pouras [2003] SASC 394

Kimbers Pty Ltd v Harley (1998) BC9807400 Unreported

Knight v Stocken [2002] NSWSC 1161

Lafone v The Falklands Island Company (No 1) (1857) 4 K & J. 32

Lampson & Ors v McKendry [2001] NSWSC 373

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520

Legione v Hateley (1983) 152 CLR 406

Lewis v Rucker (1761) 2 Burr 1167

Lindsay v Talbot Bull. N. P. 284

Linter Group Limited v Price Waterhouse (a firm) [1999] VSC 245

Lloyd d Fiennes & Mignon v Lord Saye & Sele (1712) 10 Mod 40

Lord Abinger v Ashton (1873) 17 LR Eq 358

Lovegrove Turf Services Pty Ltd v Minister for Education [2003] WASC 213

Makita (Australia) Pty Limited v Sprowles (2001) 52 NSWLR 705

Mann v Carnell (1999) 201 CLR 1

Marsden v Amalgamated Television Services Pty Ltd [2000] NSWSC 384

Marshall v Prescott (No 3) [2013] NSWSC 1949

Mary A Keegan v Minneapolis & St Louis Railroad Company (1899) 76 Minn. 90

Matthews v SPI Electricity Pty Ltd [2013] VSC 33

McDonald t/as BE McDonald Transport v Girkaid Pty Ltd [2004] Aust Torts Reports 81

Meadow v General Medical Council [2007] 1 All ER 1

Miller Steamship Company Pty Limited v Overseas Tankship (UK) Limited; R W Miller & Co Pty Limited v Same [1963] 1 Lloyd's List Reports 402

Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority (2002) 4 VR 332

ML Ubase Holdings Co Ltd v Trigem Computer Inc (2007) 69 NSWLR 577

Murphy v The Queen 167 CLR 94

National Justice Campania Naviera S A v Prudential Assurance Co Limited [1993] 2 Lloyd's Law Reports 68

Naylor v Preston Area Health Authority [1987] 2 All ER 353

New Cap Reinsurance Limited (in liquidation) v Renaissance Reinsurance Ltd [2007] NSWSC 258

North Shore Real Estate Pty Ltd v Real Estate Property Management Services Pty Ltd (No 2) [2017] NSWDC 77

Northern Territory v GPAO (1999) 196 CLR 553

O'Brien v Komesaroff (1982) 150 CLR 310

Osland v The Queen (1998) 197 CLR 316

Pacey v London Tramways Company [1875] 2 ExD 440

Palmer and Another v Durnford Ford (a firm) and Another [1992] 2 All ER 122

Parry-Jones v Law Soc (1969) 1 Ch 1

Pearse v Pearse (1846) 1 DE G & SM 12

Piber Pty Ltd v AW Baulderstone Pty Ltd (1992) 163 LSJS 380

Polivitte Limited v Commercial Union Assurance Co PLC [1987] 1 Lloyd's Law Reports 379

Pratt Holdings Pty Ltd v Commissioner of Taxation (2004) 136 FCR 357

Protec Pacific Pty Ltd v Brian Cherry [2008] VSC 76

R v Bonython (1984) 38 SASR 45

R v Gary Allan Ryan [2002] VSCA 176

R v Traino (1987) 45 SASR 473

Rapid Metal Developments (Australia) Pty Limited v Anderson Formrite Pty Limited [2005] WASC 255

Re Bell; Ex parte Lees (1980) 146 CLR 141

Richard Williams & Anor v Chief Executive, Department of Environment and Resource Management [2014] QLAC 10

Ricky-Edwards-Tubb v JD Wetherspoon PLC [2011] EWCA Civ 136

Russell v Jackson (1851) 9 Hare 387

Ryder v Frohlich [2005] NSWSC 1342

Sendy v Commonwealth of Australia [2002] NSWSC 546

Seven Network Limited v News Limited [2007] FCA 1062

Seven Network Limited v News Limited [2005] FCA 142

Seven Network Limited v News Limited (No 15) [2006] FCA 515

Seven Network Ltd v News Ltd (2009) 182 FCR 160

Singapore Airlines v Sydney Airports Corporation [2004] NSWSC 380

Singtel Optus Pty Ltd v Weston (2011) 81 NSWLR 526

Smith Kline & French Laboratories (Aust) Ltd v Department of Community Services and Health (1990) 22 FCR 73

Somerton's Case [1433] Seipp Number 1433.010

Somerville v Australian Securities Commission (1995) 60 FCR 319

Sparnon v Apand Pty Ltd (1996) 68 FCR 322

Spassked Pty Ltd v Commissioner of Taxation (No 4) (2002) 50 ATR 70

State of New South Wales v Jackson [2007] NSWCA 279

State of Queensland v J L Holdings Pty Ltd (1997) 189 CLR 146

Steele v Stewart (1843) 13 Sim 533

Steele v Stewart (1844) 1 Ph. 471

Streetscape Projects (Aust) Pty Ltd v City of Sydney (No 2) [2013] NSWCA 240

Succar v Bankstown City Council [2012] NSWLEC 157

Taub v R [2017] NSWCCA 198

Tavcol Pty Ltd v Valbeet Pty Ltd [2016] NSWSC 1002

Telebooth Pty Ltd v Telstra Corporation [1994] 1 VR 337

Telstra Corporation Limited v Minister for Communications, Information Technology and the Arts (No 2) [2007] FCA 1445

Telstra Corporation v Australis Media Holdings & Ors [No 1] (1997) 41 NSWLR 277

Temwell Pty Ltd v DKGR Holdings Pty Ltd [2003] FCA 948

The Tracy Peerage (1843) 10 Clark & Finnelly 154

Thorne v Worthing Skating Rink Company (1877) 6 Ch D 415

Towney v Minister for Land and Water Conservation for New South Wales (1997) 147 ALR 402

Trade Practices Commission v Arnotts Limited (No 2) (1989) 21 FCR 306

Trade Practices Commission v Port Adelaide Wool (1995) 60 FCR 366

Trade Practices Commission v Sterling (1979) 36 FLR 244

Traderight (NSW) Pty Ltd & Ors v Bank of Queensland Ltd (No 13) [2013] NSWSC 90

Traderight (NSW) Pty Ltd v Bank of Queensland Ltd (No 14) [2013] NSWSC 211

Turner v Eastern Sydney Area Health Services [1999] SASC 1

Tyler v Thomas (2006) 150 FCR 357

United Rural Enterprises Pty Limited v Lopmand Pty Limited [2003] NSWSC 870

Universal Music v Sharman (2005) 220 ALR 1

Waldron v Ward [1658] Sty 449

Walsham v Stainton (1863) 2 H & M. 1

Watkins as litigation guardian for Watkins v State of Queensland [2007] QCA 430

Waugh v British Railways Board [1980] AC 346

Westpac Banking Corporation v 789Ten Pty Limited [2005] NSWCA 321

Wheeler v Le Marchant (1881) 17 Ch D 675

Whitehouse v Jordan [1980] 1 All ER 650

Wimmera Industrial Minerals Pty Ltd v Iluka Midwest Ltd [2002] FCA 653

Wood v R (2012) 84 NSWLR 581

C *Legislation*

Administrative Appeals Tribunal Act 1975 (Commonwealth)

Civil and Administrative Tribunal Act 2013 (NSW)

Civil Procedure Act 2005 (NSW)

Civil Procedure Rules 1998 (England and Wales)

Civil Procedure Rules 2005 (NSW)

Commercial Arbitration Act 2010 (NSW)

Competition and Consumer Act 2010 (Commonwealth)

Coroners Act 2009 (NSW)

Drug Court Act 1998 (NSW)

Industrial Relations Act 1996 (NSW)

International Arbitration Act 1974 (Commonwealth)

Evidence Act 1995 (Commonwealth)

Evidence Act 1995 (NSW)

Evidence Amendment Act 2007 (NSW)

Evidence Amendment Act 2008 (Commonwealth)

Federal Court Rules 2001 (Commonwealth)

Federal Court Rules of Evidence 1975 (Commonwealth)

Independent Commission Against Corruption Act 1988 (NSW)

Local Court Act 2007 (NSW)

Native Title Act 1993 (Commonwealth)

Supreme Court Civil Rules 2006 (South Australia)

Supreme Court (General Civil Procedure) Rules 2015 (Victoria)

*Supreme Court Rules 200*0 (Tasmania)

D *Other*

Expert Evidence Practice Note (GPN-EXPT) 2016 Federal Court of Australia

Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia 1998

Seipp, David, J, *An Index and Paraphrase of Printed Year Book Reports, 1268 - 1535* <http://www.bu.edu/law/seipp>