



## Survey Reports and Legal Privilege – A Reminder of the Position under Australian Law

Owners' claim for privilege in a survey report obtained by it in relation to alleged product cargo contamination has been challenged in a recent matter conducted by Norton White. We take this opportunity to revisit the requirements that must be satisfied before a survey report may attract privilege in Australia and provide our recommendations for the benefit and protection of our clients.

Generally, surveyors are engaged to prepare reports in relation to incidents which may result in claims and for use in the defence (or pursuit) of such claims. If the survey report is not privileged, it is subject to discovery and production to opposing parties and its contents may be used to prejudice the defence (or pursuit) of the claim.

### General Statement of the Principle of Privilege:-

Confidential communications made or obtained for the dominant purpose of the provision of legal advice or for use in reasonably anticipated legal proceedings will attract privilege under Australian law.

The privilege belongs to the client and permits the client to object to the production of the confidential communication.

More specifically, client legal privilege is comprised of "legal advice privilege" and "litigation privilege":

- **Legal advice privilege** applies to confidential communications made between a client (or agent) and solicitor (or agent) for the dominant purpose of the giving or receiving of legal advice.
- **Litigation privilege** applies to confidential communications made between a client (or agent) and/or solicitor (or agent) and/or third party for the dominant purpose of use in or in relation to actual or reasonably anticipated legal proceedings.

### Circumstances in which Privilege may Attract:-

The following circumstances must be satisfied in order for a communication to attract privilege:

- **The communication must be confidential** – We recommend that confidentiality is expressly reserved in a surveyor's instructions and issued report.

- For legal advice privilege:
  - ***The communication must be between a client (or agent) and solicitor (or agent)*** – Legal advice privilege will not apply to communications made by a client or solicitor to independent third parties.<sup>1</sup>

It is debatable whether or not a marine surveyor is an agent of the client or solicitor for the purposes of giving or receiving legal advice and care should be taken not to communicate extraneous matters of legal advice to a surveyor for fear of waiving privilege in any such legal advice; and

- ***The communication must be made for the dominant purpose of giving or receiving legal advice*** - (see below as to the dominant purpose).
- For litigation privilege:

- ***The communication may be between a client (or agent) and/or solicitor (or agent) and/or third party*** – Litigation privilege extends to communications with third parties, such as surveyors. Survey reports are far more likely to attract litigation privilege than legal advice privilege.<sup>2</sup>

Being a client privilege, the instructions to engage a surveyor must come from the client and clients should specifically instruct their solicitors to engage a surveyor, rather than merely providing general instructions to act to serve the best interest of the client; and

- ***The communication must be made for the dominant purpose of use in or in relation to actual or reasonably anticipated legal proceedings*** – There must be litigation on foot or at least a real prospect of litigation.

General investigatory or information gathering surveys (such as general load or discharge surveys) may not attract privilege.<sup>3</sup> Where a (potential) claim incident arises during the course of such general survey, instructions to prepare a separate report should be given or another surveyor appointed for such purpose.

The Courts will look to the substance of the engagement and instructions of a surveyor in determining whether or not a survey report is made for the dominant purpose of actual or anticipated proceedings. In order to ensure the link between the report and any litigation is maintained we strongly recommend that solicitors formally instruct the surveyor on behalf of the client and that the report is communicated directly to the solicitors for forwarding to the client.

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<sup>1</sup> However, anticipated amendments to the Evidence Acts in each Australian jurisdiction are expected to extend “legal advice privilege” in certain circumstances to communications made to or by a third party.

<sup>2</sup> At least until the anticipated amendments referred to above are implemented and in force.

<sup>3</sup> In part because such surveys are usually conducted on the basis of a standing retainer in the ordinary course of shipping operations, regardless of any proceedings or claim and/or the surveyors are usually appointed before any problem has arisen that may give rise to litigation (and their presence at the time of any problem arising is usually merely fortuitous).

It is not enough to pay mere lip-service to this principle. Where survey reports are requested by the client with solicitors asked to “confirm the instructions” at some later time or where reports are obtained by the client and forwarded to the solicitor along with instructions to act the reports may not attract privilege and may be subject to discovery and production to opposing parties.

## Summary

- Where a (potential) claim incident arises, a surveyor should specifically and separately be engaged to report on the incident.
- The client should engage solicitors and provide them with express instructions to engage a surveyor to provide a confidential report in relation to the (potential) litigation.
- The solicitors should issue the client’s instructions to the surveyor and direct the surveyor to communicate the report directly to the solicitors for forwarding to their client.
- All parties should ensure that appropriate statements as to the confidentiality and purpose of the survey report (generally, for use in relation to anticipated litigation)<sup>4</sup> are contained in the client’s instructions to the solicitors, solicitor’s instructions to the surveyor and survey report itself.

In accordance with the above considerations, we annex suggested formulations for use by clients in instructing solicitors to engage surveyors or other third party experts and for use by surveyors in their reports in order to create and maintain circumstances of privilege where possible.

We recommend that the above procedures for appointing surveyors in response to (potential) claims incidents and the annexed form of wording (or wording substantially to this effect) are adopted in all circumstances.

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<sup>4</sup> And/or for use in giving or receiving legal advice once the anticipated amendments to the Evidence Acts are passed.



## Norton White Recommended Formulation of Instructions to Solicitors to Appoint Surveyors and for use in Surveyor's Reports

- **Client's instruction to solicitor to appoint surveyor:**

We instruct you to appoint a surveyor to prepare a confidential report for use by *(us/the Member/Owners as appropriate)* in receiving legal advice and/or in relation to actual or anticipated litigation by *(us/Members/Owners or describe the likely claimant or class of claimants i.e. "XYZ Pty Ltd" or "Charterers" or "shippers, consignees and others interested in the cargo")* concerning *(describe the circumstances giving rise to the need for the survey i.e. "the suspected contamination of a consignment of..." or "the collision between..." or "the failure and repair of the steering gear of....")*.

- **To be included in surveyor's report:**

- **Introductory statement:**

In accordance with instructions received from *(solicitor's name)* on behalf of their client, the undersigned marine surveyor attended .... for the purpose of preparing a confidential report in relation to *(describe the circumstances giving rise to the need for the survey i.e. "the suspected contamination of a consignment of..." or "the collision between..." or "the failure and repair of the steering gear of....")*...

- **Concluding statement:**

This report is confidential and was prepared on instructions from *(solicitor's name)*, on behalf of their client for the purposes of the provision of legal advice and/or for use in actual or anticipated litigation by *(Club/Members/Owners or describe the likely claimant or class of claimants i.e. "XYZ Pty Ltd" or "Charterers" or "shippers, consignees and others interested in the cargo")* concerning *(describe the circumstances giving rise to the need for the survey i.e. "claims for loss or damage..." or "the suspected contamination of a consignment of..." or "the collision between..." or "the failure and repair of the steering gear of...")*.