

However, many significant barriers to such agreement

Principles of Law & Custom Morality and

Prudence

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exist, including (but, by no means, limited to):

Confidentiality

Obligations

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ACCESS BY CONSENT

Court Orders

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### ACCESS BY CONSENT

- At law, parties are generally free to grant access to or publish documents and information in their possession, subject to:
  - » extant non-publication, confidentiality or other orders;
  - » any applicable obligations of confidentiality assumed voluntarily or otherwise inferred by operation of law; and
- » any other rule of law, principle or binding custom.
- Prima facie, documentary disputes thus ought to be resolved (or resolvable) by agreement between the parties.

## **Key Cases**

- Wyman on behalf of the Bidjara People v State of Queensland [2012] FCA 397 (Reeves J)
- Booth on behalf of the Gunaikurnai People Claim Group v State of Victoria (No 3) [2020] FCA 1143 (Mortimer J)

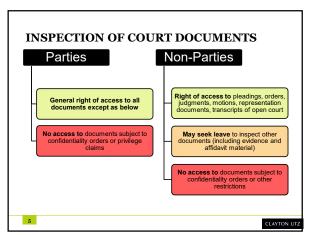
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# INSPECTION OF COURT DOCUMENTS

- Generally, open justice principles suggest inspection of material 'read' or relied upon will be permitted.
  - » Includes material used to support consent determinations
- If material not 'read', open justice principles weaker, but leave may still be granted if 'interests of justice' require.
- See generally: Access to Documents and Transcripts Practice Note (GPN-ACCS), 25 October 2016

## **Key Cases**

- Hughes on behalf of the Eastern Guruma People v State of Western Australia (No 3) [2019] FCA 2127 (Mortimer J)
- Champion on behalf of the Marlinyu Ghoorile Claim Group v State of Western Australia [2020] FCA 1175 (Bromberg J)
- Nichols on behalf of the Bundjalung People of Byron Bay and Attorney General of New South Wales (No 2) [2019] FCA 1797 (Robertson J)
- Burraguibba on behalf of the Wangan and Jagalingou Peoples v State of Queensland (No 2) [2018] FCA 1031 (Robertson J)

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### SUBPOENAS AND PRIVILEGE

- Subpoenas to produce may be issued, and material produced may only be inspected, with leave of Court.
- Legal professional privilege and/or 'without prejudice'/settlement privilege may provide bases to resist leave or have a subpoena set aside.

## Key Cases

- Tommy on behalf of the Yinhawangka Gobawarrah v State of Western Australia (No 2) [2019] FCA 1551 (Mortimer J)
- Mumbin v Northern Territory of Australia (No 1) [2020] FCA 475 (Griffiths J)
- Lake Torrens Overlap Proceedings [2015] FCA 519 (Mansfield J)
- Wyman on behalf of the Bidjara People v State of Queensland [2012] FCA 397 (Reeves J)
- Pappin on behalf of the Muthi Muthi People v Attorney-General of New South Wales [2017] FCA 817 (Griffiths J)

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**PRIVILEGES** 

some novel problems.

For example: Who is the 'client'?

### WAIVER OF PRIVILEGE

- Legal professional privilege:
  - » will not arise if communication not for advice or litigation
- » will not arise/be waived if no longer confidential
- Settlement privilege will not arise if no express or implied expectation of confidentiality/restraint
- Anthropological reports prepared in course of consent determination negotiations may not attract privilege:
  - "Dominant purpose' unlikely to be for advice or litigation, but rather persuasion/satisfaction of State
  - » Waiver of LPP likely where report provided to State/Respondents
  - Necessary expectation of confidentiality unlikely as parties likely to contemplate use in litigation if negotiations fail

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SOME PRACTICAL LESSONS Consider the purpose Anthropological Any filed document reports are not automatically 'privileged' of expert evidence and record this in your retainer may become publicly available Ensure witnesses and claim group embers are advised of possibility of Seek express agreement on terms of access prior to disclosure occurring Consider whether separate or additional reports required Clearly and specifically identify any prejudice expected from Establish protocols for document management, use and distribution Seek confidentiality or suppression orders early disclosure CLAYTON UTZ

Legal professional privilege and 'settlement' privilege

operate in narrow sets of facts and circumstances.

Inevitably fact-specific, but contrast:

Applying these principles to native title litigation raises

Mortimer J in Tommy: Privilege vested in Applicant as

» Griffiths J in Pappin: Privilege vested in RNTBC itself.

"statutory concept" (thus in named individuals jointly) predetermination, and RNTBC as agent or trustee afterwards.

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