

ACCESSING DOCUMENTS IN NATIVE TITLE LITIGATION

**Federal Court of Australia:
NSW Native Title Forum**

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OVERVIEW

- Access by consent
- Court access requests
- Subpoenas
- Takeaways for drafting evidence

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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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ACCESS BY CONSENT

- ▶ However, many significant barriers to such agreement exist, including (but, by no means, limited to):

Court Orders	Confidentiality Obligations	Principles of Law & Custom	Morality and Prudence
Non-publication orders	Contractual provisions	Harman Undertaking	Cultural respect
Suppression orders	Confidentiality in equity	Cultural or customary restrictions	Privacy
Gender-restricted evidence			Risk of harm
Access regimes			Intra-mural disputes

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INSPECTION OF COURT DOCUMENTS

Parties	Non-Parties
General right of access to all documents except as below	Right of access to pleadings, orders, judgments, motions, representation documents, transcripts of open court
No access to documents subject to confidentiality orders or privilege claims	May seek leave to inspect other documents (including evidence and affidavit material)
	No access to documents subject to confidentiality orders or other restrictions

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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 Marinyu Ghoorle Claim Group v State of Western Australia* [2020] FCA 1175 (Bromberg J)
- ▶ *Nicholls on behalf of the Bundjalung People of Byron Bay and Attorney General of New South Wales (No 2)* [2019] FCA 1797 (Robertson J)
- ▶ *Burragubba 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

- ▶ Legal professional privilege and 'settlement' privilege operate in narrow sets of facts and circumstances.
- ▶ Applying these principles to native title litigation raises some novel problems.
- ▶ For example: *Who is the 'client'?*
 - › Inevitably fact-specific, but contrast:
 - › Mortimer J in *Tommy*: Privilege vested in Applicant as "statutory concept" (thus in named individuals jointly) pre-determination, and RNTBC as agent or trustee afterwards.
 - › Griffiths J in *Pappin*: Privilege vested in RNTBC itself.

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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

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

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Selected Publications:

"Reconciling Current Issues in the Law & Practice of Consent Determinations Under The Native Title Act 1993 (Cth)" [2018] 114 University of New South Wales Law Journal 1197

Aaron Moss and William Jelle, "Where To Next? Native Title Compensation Following 'Tommy Creek'", *ANZTLJ* [link]

Aaron Moss, "Looking Back, Looking Back: Native Title in 2017 and 2018 (Pt 2)", *February 2018 ANZTLJ* [link]

Nick Thomas, Mark Gertz, Tuan An and Aaron Moss, "New Proposed Provisions to protect in Indigenous Cultural Heritage", *Clayton Utz*, 1 March 2018 [link]

- ▶ Aaron advises and appears on behalf of government agencies in the full spectrum of administrative and public law issues at both Federal and State levels including judicial review, access to information, and public interest disclosures.
- ▶ Aaron is also passionate about native title, aboriginal land rights, and indigenous cultural heritage law, and frequently advises and assists a range of clients in matters involving these issues.
- ▶ Beyond public law, Aaron maintains a diverse litigation and advice practice in areas including customs law, corporations, equity and trusts, admiralty, insolvency, native title, planning, environmental and indigenous cultural heritage law.
- ▶ In 2016, Aaron served as Associate to the Honourable Justice J M Jagot in the Federal Court of Australia.
- ▶ In 2019/20, Aaron completed a Masters of Law (LLM) with Class 1 Honours at the University of Cambridge, where he was supported by the W M Tapp Studentship in Law (Gonville & Caius College).
- ▶ Aaron was awarded the 2020 Emyrn Waste Prize for Law by Gonville & Caius College, in recognition of his performance as the best performing Master of Laws student at the College.
- ▶ Aaron is also an Adjunct Researcher at the University of Tasmania, where he assists in the Faculty's administrative law, public law, torts, advocacy and public international law programs.

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