Access to Documents in Native Title Litigation
Aaron Moss, 17 March 2021
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Introduction

I too would like to begin by acknowledging the Gadigal people, of the Eora Nation, the Traditional Custodians of the land on which we are gathered today, and I pay my respects and give my thanks to their Elders past and present and emerging. I specifically wish to extend that respect and thanks to Aboriginal and Torres Strait Islander peoples here today.

I would also like to thank Registrar Stride for inviting me to speak with you today.

My name is Aaron Moss. I am a solicitor at Clayton Utz. My practice is somewhat unusual but can best be described a broad litigation practice with focuses on public law, statutory interpretation and government disputes. Of greater present importance, I also have a deep and enduring interest in native title, Aboriginal land rights and cultural heritage law and have worked on these matters across my professional, academic and personal spheres.

Outline

I'm going to speak with you today about access to documents in native title litigation, with a specific focus on access to anthropological reports.

As I am sure you can all appreciate, this is a topic which is incredibly important, but it is also quite complex and gives rise to significant tensions and sensitivities, as well as a number of issues of legal significance. It is also a matter which has been increasing in interest of late.

I'm going to look today at a few of the key methods available to parties to seek access to documents used in native title proceedings, and explore some of the issues of significance which have cropped up in recent times. Specifically, I propose to discuss the use of subpoenas and non-party access requests, and consider some of the difficulties arising from the application of the principles of legal professional privilege and the species of privilege claims known as 'without prejudice' or 'settlement' privilege to the unique native title context.

I then propose to close by briefly extracting some lessons about drafting evidence which may be taken from these cases.

In that light, I wish to emphasise at the outset that nothing I'm likely to say today is intended to be revolutionary or brand new. Much of the law and practice which I'm going to step through is likely to be familiar to many of you. However, I hope that you may take something of value from this presentation - even if that's just a new case reference or two.

Accessing Documents By Consent

At the outset, I want to briefly emphasise one often-overlooked aspect of the quest for access to documents. Subject to:

- any extant orders of the Court restricting access to, publication or use of a particular document;
- any obligations of confidentiality, exclusivity or privacy assumed voluntarily or otherwise inferred by operation of law; and
- any other rule of law or custom - and, I pause to expressly include in that, indigenous custom,

The default position is that it is generally open to a person to grant access to a document in their position, and to distribute, publish or disseminate it, as they wish.

The corollary of this principle is that in the absence of one or more of those 'barriers' which I have referred to, the easiest and most straightforward way - at least in theory - of accessing documents of interest held by another party is to reach agreement in relation to that access.

Consensual resolution of disputes is embedded at the heart of the *Native Title Act 1993* (Cth) and is reflected in the overarching purpose provisions in ss 37M to 37P of the *Federal Court of Australia Act 1976* (Cth) and cl 10.3 of the Court's *Central Practice Note (CPN-1)*.

There is no reason why these provisions do not or should not, apply equally to encourage parties to agree mutually-satisfactory solutions to disputes about access to documents without needing to have recourse to the Court.

That is not, however, to deny the significant number and the complex nature of the barriers which often exist to reaching such agreements. Some, but by no means all, of those barriers are collected on the screen behind me.

Many of these are likely to be familiar to you, but I just want to draw out one point of note:

- In the third column, you'll see a reference to the *Harman* undertaking. This undertaking reflects the general principle of law that a party who obtains or receives documents or information obtained pursuant to some compulsory process of the Court – whether that's in discovery, subpoena, or court order – is subject to an implied undertaking prohibiting them from using those documents or that information for any purpose other than that for which it was received: *Hearne v Street* (2008) 235 CLR 125 at [109].

  As independent expert reports prepared for the purposes of the litigation and served accordingly, it is into this category that many anthropological materials are likely to fall. The *Harman* undertaking is strictly applied, and a person can generally only be relieved of it:

  - once the material is adduced in evidence in court proceedings, subject to contrary order of the Court: r 20.03(1) of the *Federal Court Rules 2011* (Cth); or

  - if the relevant Court makes orders releasing a person from the undertaking. Generally, this requires demonstrating that "special circumstances" exist and Courts are cautious to do so.

  I note in passing that there is a recent decision of Justice Katzmann in *Glencore Coal Pty Ltd v Franks* [2020] FCA 1801 which deals with precisely this question in relation to an independent expert report. However, as this decision is subject to an appeal which remains on foot, I don't propose to discuss it any further.

- You'll note in the right-hand column I've listed a number of moral and prudential considerations which may inhibit a person's willingness to grant access to materials. Although many of these matters are not generally directly enforceable by law, they are incredibly powerful and demonstrate why these matters are often quite tense, and reference has been repeatedly made in judgments as to the significant emotional, social, psychological and cultural consequences - both good and bad - that may come from wider distribution of the material contained in anthropological reports.

Inspection of Court Documents

It is against that context that I turn to one of the chief, and increasingly common, methods used to seek access to Court documents - lodgement of an inspection request with the Court.

Under the *Federal Court Rules,* all documents filed in proceedings in the Court are held in the custody and subject to the control of the relevant District Registrar: r 2.13.

Rule 2.32 of the *Federal Court Rules* sets out a series of rules which govern the rights of both parties, and non-parties, to access documents filed in the Court's proceedings. The operation of those principles is summarised on the slide.

For any access applicant who is not a party to the proceedings in which the documents were filed, access to those documents depends upon the nature of the material sought.

- Rule 2.32(2) provides that non-parties are entitled, as of right, to access certain material including the pleadings, interlocutory applications, judgments and orders, transcripts of open court proceedings upon payment of the specified fees, and any documents dealing with the parties' legal representation. As Justice Mortimer held in *Hughes,* this includes the Form 1 and any attached documents.

  The general justification for this right is that the general public is broadly entitled to know and to access documents which record the nature of the dispute, the stage which it is up to, how it is resolved, and how to formally contact the parties if required. Such rights are a necessary aspect of justice being conducted publicly and being seen to be done. Importantly, as this is an enforceable right, it does not matter *why* a person is seeking access to the materials, nor what they propose to do with them afterwards.

- Rule 2.32(3), somewhat self-evidently, provides that non-parties may not access any documents subject to confidentiality orders or other orders which restrict publication.

- Rule 2.32(4), however, deals with everything else - being material which non-parties are not *entitled* to, nor prohibited from, inspecting. In those cases, access applicants may apply to the Court, seeking leave to inspect the documents sought.

It is into this last category that most anthropological evidence is likely to fall.

Exercising The Discretion

For documents where leave is sought, the Court has a very wide discretion about whether or not to grant that leave - and, if so, on what terms it does so. The relevant question for the Court is what the "interests of justice" generally require.

The four cases set out at the bottom of that slide each provide an excellent summary of the relevant principles and demonstrate how the Court has applied those in the native title context.

A couple of principles can be gleaned generally from those cases:

- Where evidentiary material, including expert anthropological evidence, has been formally 'read' by the Court - i.e. filed, relied upon and admitted into evidence - principles of 'open justice' weigh *heavily* in favour of the grant of leave to inspect those documents. This is because once that evidence has been formally 'read', it is as though the evidence had been fully recited in Court, in the presence of the public. The usual practice is thus to release that material.

- This principle applies equally to material which was 'read' or relied upon by the parties in support of an application for a consent determination, even though the material is not usually 'read' in the ordinary sense. This is because the material is relied upon by the parties and otherwise used to satisfy the Court that the requirements in ss 87 and 87A have been met.

- Where material has not been 'read' in a formal sense before the Court - i.e. it's been filed, but not relied upon for whatever reason - the position is more complex.

    - It is here that the views of the parties become particularly salient. Judges will often seek the views of potentially affected parties in the event that they receive an access request, and will frequently provide a preliminary indication of their views.

      If an access applicant can provide evidence of consultation and proof that potentially affected parties either consent, or consent on specified terms, to the access request being granted - the Court is likely to give great weight to that consent. This is consistent with principles of information and data sovereignty, and indigenous self-determination.

      This is precisely what occurred in *Hughes,* where the Court substantively granted an access request brought by an individual who was a common law native title holder and director of the relevant prescribed body corporate, giving great weight to the evidence that the Applicant had obtained the consent of the Eastern Guruma elders, provided she could satisfy the Court that appropriate protocols were put in place to ensure gender restricted material and other cultural sensitivities were respected.

    - In Hughes, as well as in *Champion*, the Court noted that the likely purpose or utility of the access request is a relevant factor - here, the question of *why* a party is seeking access to such a document may become relevant. That's not to say that parties who have no demonstrable 'interest' in a document may not be entitled to access it, but merely that a recognised interest - such as one's status as a litigant in proceedings to which the document may also relate - may be a "important" factor weighing in favour of the grant of leave.

    - Questions of proportionality and the degree of burden which the Court might occur in reviewing and providing access to the number of documents requested may also legitimately bear upon the exercise of the discretion.

I want to particularly emphasise the *Champion* proceeding, as it provides an important example of the types of issues that may arise. In that case, his Honour Bromberg J granted access to certain anthropological evidence read in the Ngadju proceedings, notwithstanding a submission on behalf of the Ngadju NTAC that the claim group objected to disclosure on the basis that the material comprised special stories and histories and was given confidentially to the relevant anthropologist for the sole purpose of advancing the native title proceedings.

Whilst accepting the strength of those concerns, his Honour nevertheless observed that native title proceedings are not unique in requiring disclosure of private, personal or sensitive matters, and that whilst mechanisms do exist to protect against harm caused by disclosure, where those provisions have not been otherwise employed, principles of "open justice" must weigh so heavily in the exercise of the discretion that disclosure was appropriate in that case.

In that situation, his Honour observed that whilst "native title claimants may provide sensitive, private and confidential information because they are convinced that to do so is a necessary cost of obtaining a native title determination in their favour", once the material is "brought into the public

domain through a court proceeding", "the prospect of the information being made accessible to persons un-associated with the proceeding in which it was tendered or being used in a different proceeding is real even though it may not be substantial".

Subpoenas

This brings me to the final method of accessing documents that I propose to talk about today - subpoenas. Under part 24 of the *Federal Court Rules 2011* (NSW), a subpoena requiring another person to produce a copy of a document may be issued only with leave of the Court.

If that leave is obtained and documents are produced, parties to the proceedings may inspect the material produced under the subpoena with leave of the Court, such leave generally being granted unless the addressee objects to inspection.

Disputes about subpoenas therefore arise in three contexts:

- About whether leave ought to be granted to issue the subpoena;
- Leave having been granted, about whether the subpoena actually issued ought to be set aside or varied; and/or
- Production under the subpoena having occurred, whether leave ought to be granted to the parties to inspect the material produced under the subpoena.

Two types of 'privilege' are often relied upon by parties to resist or object to production of documents under a subpoena: Legal professional privilege and 'without prejudice' or 'settlement' privilege.

Whilst the basic principles in relation to each of these matters are well-understood, recent decisions have established that the application of these principles can give rise to some novel problems in native title proceedings.

Legal Professional Privilege: Who is the client?

As a matter of principle, at common law – legal professional privilege is the common law doctrine which provides that parties cannot - with some narrow and presently immaterial exemptions – be compelled to adduce evidence of confidential communications between solicitor and client, or agents of either of those parties, where the communication is made for the dominant purpose of the giving or receiving of advice, or for use in existing or anticipated litigation. The privilege exists to protect the interests of the 'client', and may generally only be waived by that client.

Similarly, 'without prejudice' or 'settlement' privilege enables a party to resist the admission of evidence in a dispute of confidential communications between the parties which are genuinely entered into for the purpose of trying to reach a compromise. The key question in for this purpose is whether the documents or information in issue were subject to an express or implied agreement between the parties that their communications will be kept confidential.

As Mortimer J observed in *Tommy*, privilege - of either kind is thus not an abstract concept, but one which arises in "particular facts and circumstances". As a result, "identifying the relationship, the parties to it, and the specific circumstances are all critical to resolving how any privilege is said to arise, whether in fact it does arise, who holds it, and indeed whether it attaches at all to the communications asserted to be protected by it".

It is in that context that her Honour was called on in *Tommy* to answer the fundamental question of who, relevantly, is the "client" in native title litigation for the purposes of legal professional privilege.

In that case, a native title representative body who considered itself a 'custodian' of a subpoenaed anthropological report objected to production on the basis of, amongst other things, 'legal professional privilege'.

Whilst acknowledging that, inevitably, any assessment must be made in light of the particular facts and circumstances in which a claim for privilege is made and thus no 'general principle' can necessarily be worked out, her Honour concluded in essence that:

- The holder of legal professional privilege in the circumstances was neither the claim group, as a whole, nor any specific legal representative, but the named applicant in a native title determination application as an entity, statutory 'concept' or statutory 'vehicle' (and thus, each person who comprises this group jointly) prior to determination.

- This conclusion was based predominantly upon an analysis of the structure of the Act and the privileged role played by the 'named applicants' - being persons who may be subject to orders, who may workably instruct counsel, who hold responsibilities to the claim group in the prosecution of their claim, and who are subject to control and removal from the claim group more generally.

- After determination, that privilege "passes" to and generally vests in the prescribed body corporate, either on trust or acting as agent for the common law native title holders. As her Honour found at [83], 'maintenance or waiver of any asserted privilege would then be subject to the usual decision-making processes of that [PBC]'.

This is important because - as her Honour noted at [68] - there is no "ongoing, automatic attachment of any particular privilege to documents such as anthropological reports". Rather, intense focus must be given to the facts of the particular case. Reports will generally only be protected from disclosure where they represent a **confidential communication between solicitor and client (or agents thereof) for the purpose of advice or litigation. Each of these elements must be established on the balance of probabilities by the party seeking to resist production.**

Before moving to the question of waiver, I pause to stress again that whilst *Tommy* is a decision of particular significance and likely to be of general application - and has already been followed in subsequent decisions (see Griffiths J in *Mumbin),* the question is inevitably fact-specific. The relevant factual context may lead to different outcomes.

In this regard, I simply refer to the decision of Griffiths J in *Pappin on behalf of the Muthi Muthi People v A-G (NSW)* [2017] NSW 817, in which the contractual terms made clear that a relevant expert report had been commissioned by NTSCorp not as agent, but in its own right. In that context, his Honour held that NTSCorp was the party in whom legal professional privilege relevantly vested.

Privilege: Has it been waived?

The second key question which has been the subject of recent analysis, and the last matter of substance which I propose to explore before I wrap up, is the question of *loss* of privilege.

Given the requirements that I referred to above, it is relatively straightforward to observe that legal professional privilege:

- will not arise where the communication is not made for the dominant purpose of the giving or receiving of advice, or for use in existing or anticipated litigation (regardless of whether it ultimately *came* to be used that way); and/or
- will not arise, or will be 'waived' (or 'destroyed') if and when the communication is no longer 'confidential' (save for some small exceptions).

Settlement privilege will also not be recognised in circumstances where the Court cannot be satisfied the correspondence passing between the parties was conducted on an understanding that the correspondence be 'confidential' or 'without prejudice' to their legal rights.

These seemingly simple tests have masked some significant difficulties in native title litigation - most commonly in the context of anthropologist reports that have passed between the parties in the process of negotiating a consent determination.

The message emerging clearly from *Tommy*, and from the earlier *Lake Torrens Overlap* decision of Mansfield J's which it followed, is that many anthropologists reports which are intended or used for - or commissioned with an eye to - submission to either the State or the Court for the purposes of satisfying the State's consent determination guidelines are *very unlikely* to attract either legal professional privilege or without prejudice privilege.

As Mortimer J found in *Tommy,* this is because these reports are not generally created "to be kept from other parties and used in an adversarial manner", but rather are generally produced for the dominant purpose of being provided to the State and other respondents for the purposes of trying to reach agreement on a consent determination.

Once that is accepted, even if there is *some* possibility that the material may later be used in a contested hearing, any legal professional privilege which might have otherwise vested in the document never arose, or was defeated when it was voluntarily provided to the State.

Similarly, without prejudice or 'settlement' privilege cannot attach to documents which are not treated as confidential. A classic example of that is the *Lake Torrens Overlap* proceeding, in which an expert report was circulated to both the State and the Commonwealth - in anticipation of the dispute arising - for the purpose of exploring whether the State and the Commonwealth would agree to the formulation of a joint claim (on behalf of a redefined claim group) over the then overlapping claim areas. In addition, in that case, the critical feature on which his Honour placed great weight - and which was subsequently followed by Mortimer J in *Tommy* - was that there was *no* evidence that the information or documents could **not** be available for use to the benefit (or detriment) of one or other parties if the matter were not resolved by negotiation. His Honour noted that the South Australian Government's consent determination policy expressly permitted documents provided to the State to be later used by it - as occurred in the *Starkey/Kokatha* determination. Mortimer J reached the same conclusion in relation to the WA Government's consent determination policy in *Tommy*, and placed weight in that case upon express statements in that policy which contemplated such use. Accordingly, her Honour considered it was (or ought to have been) within the 'reasonable contemplation' of the parties that the expert report could have been used in later proceedings.

Some Practical Lessons

By way of conclusion, I want to draw out a few key takeaways from these recent cases and make a number of suggestions about practical measures available to you to address the issues arising from these cases.

The first is to emphasise two key points, which I cannot stress enough:

- As Robertson J made clear in *Byron Bay Bundjalung* at [11], any document filed in Court proceedings becomes a matter of public record. Therefore, it may potentially be made available to any member of the public.
- Secondly, as Mortimer J made clear in *Tommy* at [68], there are no automatic privileges which attach to anthropological or other expert reports, and no free passes in native title. Careful attention must be given to all of the facts which we've talked about today to ensure that legal professional privilege and/or settlement privilege arises, is protected, and can be substantiated if it is to be claimed.

In terms of some practical lessons:

- It is incredibly important for those commissioning expert reports to be very clear of the *purpose* for which the report is commissioned, and the potential uses to which they envision the report might be put. Ideally, these matters ought to be explicitly recorded in the retainer agreement, and noted in various internal records.
- Anthropologists, lawyers and all those involved in seeking evidence from indigenous persons or other witnesses *must* appreciate and clearly explain the potential for disclosure of that evidence including the risk that the information may be used for purposes beyond the instant litigation.
- Where parties are concerned about the risk of material being used for adverse or collateral purposes, it will be prudent for express agreements to be put in place about the terms on which any disclosure occurs, *prior* to that disclosure occurring.
- If suitable terms cannot be agreed, alternative arrangements - such as separate reports - may need to be commissioned. Although I acknowledge the cost of doing so is likely to be high, it is almost certainly going to be less than the cost of a protracted privilege fight down the track.
- Create and invest in protocols for document management and controls upon access, use and distribution. It is important that any decisions to share material are made with full appreciation of the potential consequences of doing so and on instructions of the relevant owners.
- Where evidence is filed in proceedings which may be especially sensitive, seek confidentiality or suppression orders early. It will also be prudent to ensure that you have good records of those affidavits which have been read or otherwise relied upon in Court.
- In the course of doing so, or in the course of responding to a non-party access request forwarded to you or your clients for consultation, ensure that your views are expressed with precision, and ensure that identify any expected prejudice arising from disclosure clearly and with as much specificity as you are able.

Otherwise, it has been a pleasure and a privilege to speak with you today.

Thank you for your time and your attention, and I am happy to take any questions which you may have, now, later in the afternoon, or at a later time - my details are on the slide.