

ACCESS TO ANTHROPOLOGICAL EVIDENCE AND DOCUMENTS CREATED IN NATIVE TITLE LITIGATION

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Documents are critical in native title litigation. This article explores the different methods of, and common problems encountered when, accessing such documents for the purposes of other litigation (whether native title or otherwise). By examining recent decisions dealing with the ‘Hearne v Street obligation’, non-party access requests and legal professional privilege, this article explores how courts have grappled with the translation of general principles of practice to the unique context of native title litigation. It observes that courts have refused to create special rules for native title, but rather have pragmatically applied general principles to native title matters on a case-by-case basis. Accordingly, close attention to these judicial developments is necessary, lest the interests of one’s clients, or of First Nations persons, be adversely affected by inappropriate document disclosure.

I INTRODUCTION

Native title litigation indisputably ranks amongst the most evidentially dense and complex forms of modern civil litigation in Australia. While lengthy days of oral evidence and on-country hearings in remote parts of Australia come to mind for many, documentary evidence has always played a critical role in native title litigation. Within the category of documentary evidence ‘invariably’¹ adduced in modern native title litigation, expert evidence — predominantly anthropological evidence, but also that of ‘historians, archaeologists, linguists’² and other similar experts — looms large.

With a particular emphasis on such expert evidence, this article is a consolidated exploration of the mechanisms through which persons may seek to access documentary evidence generated in native title proceedings for use in other litigation (whether native title litigation or otherwise) and considers some

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¹ Justice Graham Hiley, ‘Trial by Peers?’ (Speech, JCA Colloquium, 7–9 June 2019).

² *Sampi v Western Australia* [2005] FCA 777, [951] (French J) (‘*Sampi*’).

of the problems that may be encountered in doing so. While such a topic inevitably is skewed towards matters of practice and procedure, the application of fundamental legal principles in the unique context of native title raises complex and difficult questions of broader and deeper theoretical interest.

Part II of the article aims to contextualise these questions by exploring the nature and importance of documentary evidence in native title litigation. Parts III to V of the article then explore, in order of increasing ‘compulsion’, the chief legal mechanisms by which parties may seek access to native title evidentiary material: by consent; from the court; and by way of subpoena or notice to produce. While this legal architecture must be considered as a whole, each of the specific mechanisms discussed raises unique procedural and conceptual challenges, which this article explores.

Specifically, in Part III’s discussion of access by consent, difficulties arising from the operation of the obligation in *Hearne v Street* are explored.³ In Part IV, the judiciary’s response to the complex exercise of balancing the competing principles of privacy, ‘open justice’, First Nations self-determination, and public education and reconciliation, is explored. In Part V, the article encounters legal professional privilege and settlement/‘without prejudice’ privilege, and asks, ‘who is the client?’ and ‘when will I waive privilege by disclosing a document?’.

Finally, in Part VI, the article consolidates the preceding analysis by extracting some key lessons for those responsible for drafting the creation, management, control of and access to documents in native title litigation. While these observations are inevitably coloured by their context, the analysis in this part is likely to be of general interest to those involved in civil litigation, whatever its form.

II ANTHROPOLOGICAL EVIDENCE IN NATIVE TITLE LITIGATION

Expert evidence is of fundamental importance in native title litigation. As French J acknowledged in *Sampi v Western Australia*:

The historical reality of an indigenous society in occupation of land at the time of colonisation is the starting point for present day claims for recognition of native title rights and interests. The determination of its composition, the rules by which that composition is defined, the content of its traditional laws and customs in relation to rights and interest in land and waters, the continuity and existence of that society and those laws and customs since colonisation, are all matters which can be the subject of evidence in native title proceedings.⁴

³ (2008) 235 CLR 125.

⁴ *Sampi* (n 2) [951].

Second only to evidence of First Nations peoples themselves,⁵ expert evidence is therefore a key method of proving ‘the content of pre-sovereignty laws and customs and the continuous acknowledgment and observance of those laws and customs down to the present day’.⁶

Anthropological and related expert evidence thus plays both a direct and indirect role in resolving the facts in issue in native title proceedings, whether by consent⁷ or judicial determination. In addition to bearing directly upon the matters that native title claimants are required to establish, anthropological evidence is also often of great ‘indirect’ relevance and assistance. This ‘dual’ function of anthropological evidence was captured by Mansfield J in *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory*, where his Honour explained:

[A]nthropological evidence may provide a framework for understanding the primary evidence of Aboriginal witnesses in respect of the acknowledgment and observance of traditional laws, customs and practices ... Not only may anthropological evidence observe and record matters relevant to informing the court as to the social organization of an applicant claim group, and as to the nature and content of their traditional laws and traditional customs, but by reference to other material including historical literature and anthropological material, the anthropologists may compare that social organization with the nature and content of the traditional laws and traditional customs of their ancestors and to interpret the similarities or differences. And there may also be circumstances in which an anthropological expert may give evidence about the meaning and significance of what Aboriginal witnesses say and do, so as to explain or render coherent matters which, on their face, may be incomplete or unclear.⁸

Concomitantly, access to expert evidence prepared for, and adduced in, native title proceedings is of obvious importance for those parties who are, or are likely to be, engaged in native title litigation: claim groups, named applicants, state/Commonwealth government respondents and other respondent parties, as well as their legal representatives (be they lawyers, representative bodies, and/or Registered Native Title Bodies Corporate (‘RNTBC’)). Anthropological and other evidence generated in the course of native title litigation may also be of strategic significance to parties in other litigation — native title or otherwise.

⁵ See, eg, *ibid* [48] (French J), cited in *Sampi v Western Australia* (2010) 266 ALR 537, 556 [57] (North and Mansfield JJ) (Federal Court of Australia — Full Court); *Graham v Western Australia* [2012] FCA 1455, [46] (Marshall J).

⁶ Vance Hughston and Tina Jowett, ‘In the Native Title “Hot Tub”: Expert Conferences and Concurrent Expert Evidence in Native Title’ (2014) 6(1) *Land, Rights, Laws: Issues of Native Title* 1, 1, citing *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539, 562 [89] (Federal Court of Australia) (‘*Alyawarr*’). See also *Jango v Northern Territory* (2006) 152 FCR 150, 279–80 [462] (Sackville J) (Federal Court of Australia).

⁷ See, eg, *Brooks v Queensland* [No 3] [2013] FCA 741, [46] (Dowsett J).

⁸ *Alyawarr* (n 6) 562 [89]. See also *Rrumburriya Borroloola Claim Group v Northern Territory* (2016) 255 FCR 228, 240–1 [68]–[71] (Mansfield J) (Federal Court of Australia) and the cases cited therein.

However, this far from exhausts the list of parties potentially interested in accessing native title evidentiary materials. The volume and nature of the evidentiary material required in native title proceedings means that the Federal Court has accumulated ‘an enormous number of records that contain information about many thousands of Aboriginal and Torres Strait Islander persons, both living and deceased’.⁹ Estimates suggest that even the Federal Court’s collection is likely dwarfed by the collections of evidence held by state/Commonwealth government respondents, whose roles in negotiating consent determinations mean they will undoubtedly hold a vast volume of evidentiary material never ultimately put before the court.¹⁰

As McGrath explains, ‘the onerous evidentiary requirements of the *Native Title Act* have resulted in, albeit unintentionally, one of the most substantial government-sponsored research efforts ever undertaken with Indigenous Australians’.¹¹ It is difficult to over-emphasise the size, or the importance, of these evidentiary collections, or the attendant information management difficulties which they present.¹² In terms which justify quotation at length, McGrath continues:

As legal records, they are an account of the administration of justice, but they also have broader historical and cultural importance. Collectively, they tell the story of the implementation of one the most significant political interventions in colonial relations since 1788, when Arthur Phillip planted a British flag on the land of the Eora Nation at the place now known as Sydney Cove. Perhaps more importantly, they contain extensive documentation of Aboriginal and Torres Strait Islander peoples’ families, histories and cultural practices in relation to land, tendered as proof of asserted rights and interests, and constitute a unique body of research that is not available elsewhere.

...

Far from being neutral documents, the collective knowledge they contain about country, culture, kin and the impact of colonial settlement affords them a degree of emotional and political power that resonates well beyond their original purpose. Their contents have the potential to confirm or deeply disturb an individual’s fundamental sense of self and where they belong in the world, generating joy, grief, shame, anger and argument in turn and altering both an individual and shared sense of social reality.¹³

⁹ Pamela McGrath, ‘Providing Public Access to Native Title Records: Balancing the Risks Against the Benefits’ in Ann Genovese, Trish Luker and Kim Rubenstein (eds), *The Court as Archive* (ANU Press, 2019) 213.

¹⁰ Ibid 213 n 2.

¹¹ Ibid 214.

¹² As to the latter, see generally Pamela Faye McGrath, Ludger Dinkler and Alexandra Andriolo, *Managing Information in Native Title (MINT): Survey and Workshop Report* (Report, 1 November 2015); Grace Koch, *The Future of Connection Material held by Native Title Representative Bodies* (Final Report, 11 March 2008) <<https://aiatsis.gov.au/sites/default/files/2020-09/future-connection-material-final-report.pdf>>.

¹³ McGrath (n 9) 214, 221.

Understood in that light, access to native title evidentiary materials is clearly a matter of public importance. The richness and wealth of the information contained in those records means that they are a resource of great importance for a wide range of academic, social, cultural, historical, and political purposes, in addition to the deeply personal significance attached to much of their contents. It is undoubtedly for these reasons that the Federal Court of Australia has established a records authority, providing that all native title files held by it are to be retained as 'national archives', subject to the operation of the *Archives Act 1983* (Cth).¹⁴ Similar provisions apply to certain records held by RNTBCs,¹⁵ and under state and territory records legislation.¹⁶

Even more fundamentally, the establishment, maintenance of and access to native title records and archives is also a direct expression of First Nations peoples' rights to self-determination. Article 13 of the *United Nations Declaration on the Rights of Indigenous Peoples*,¹⁷ endorsed in 2009 by Australia after initial opposition,¹⁸ provides: 'Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.' Further, art 31 provides:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

States are obliged to take 'effective measures' to ensure each of these rights is protected.¹⁹

Based upon these provisions, a rich jurisprudence championing the concept of 'Indigenous data sovereignty' has begun to emerge in Australia.²⁰ Domestically, such notions emerge from official sources as early as 1997, with the

¹⁴ See especially ss 19–20, 24. See also Federal Court of Australia, *Records Authority 2010/00315821* (19 October 2011).

¹⁵ Koch (n 12) 1–2.

¹⁶ See generally, eg, *Territory Records Act 2002* (ACT); *State Records Act 1998* (NSW); *Information Act 2002* (NT); *Libraries Act 1988* (Qld); *State Records Act 1997* (SA); *Archives Act 1983* (Tas); *Public Records Act 1973* (Vic); *State Records Act 2000* (WA).

¹⁷ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) ('DRIP').

¹⁸ See, eg, 'Experts Hail Australia's Backing of UN Declaration of Indigenous Peoples' Rights', *United Nations* (Web Page, 3 April 2009) <<https://news.un.org/en/story/2009/04/295902-experts-hail-australias-backing-un-declaration-indigenous-peoples-rights>>.

¹⁹ DRIP (n 17) arts 13(2), 31(2).

²⁰ See generally Tahu Kukutai and John Taylor (eds), *Indigenous Data Sovereignty: Towards an Agenda* (ANU Press, 2016).

landmark ‘Bringing Them Home’ Report recommending government agencies record, preserve, index and administer access to personal, family and community records of, or concerning, First Nations peoples.²¹ Article 32 of the 1999 *Burra Charter*, adopted by Australia International Council on Monuments and Sites (‘ICOMOS’) as guidelines for the conservation and management of cultural heritage, similarly recommends that records associated with the conservation or history of places ‘should be protected and made publicly available, subject to requirements of security and privacy, and where this is culturally appropriate’.²²

More recently, the Maïam nayri Wingara Indigenous Data Sovereignty Collective developed an Australian set of ‘Indigenous Data Governance protocols and principles’, following the inaugural ‘Indigenous Data Sovereignty Summit’ in 2018. These principles, which provide for First Nations peoples to ‘[e]xercise control of the data ecosystem including creation, development, stewardship, analysis, dissemination and infrastructure’, recognise the need for data and data management that is ‘relevant’, ‘empowers sustainable self-determination and effective self-governance’, that is ‘accountable to Indigenous peoples and First Nations’ and which ‘is protective and respects [their] individual and collective interest’.²³

Commitment to careful and sensitive management of data and information about indigenous people thus is not merely a hortatory statement or theoretical matter of aspiration; it is also of significant, enduring, and tangible importance for First Nations peoples. As McGrath explains:

Breaches of traditional law and custom in relation to cultural information may result in pain, anxiety, illness and, potentially, death, and the people deemed responsible for a breach may be punished by their community. The loss of information and authority in relation to both culture and country, in turn, undermines an individual’s cultural status and impedes their ability to reproduce their traditions and, therefore, themselves in very fundamental ways.²⁴

It is in this context, and towards these goals, that the procedural provisions raised in the remainder of this article ought properly to be understood.

²¹ See Human Rights and Equal Opportunities Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report, 2 August 1995) recommendations 1, 21, 22a, 22b, 23.

²² See Australia ICOMOS, *The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance 1999* (Charter, 2000), art 32 <https://australia.icomos.org/wp-content/uploads/BURRA_CHARTER.pdf>.

²³ ‘Indigenous Data Sovereignty Principles’, *Mayi Kuwayu: The National Study of Aboriginal & Torres Strait Islander Wellbeing* (Web Page, 2022) <<https://mkstudy.com.au/indigenousdata-sovereigntyprinciples/>>.

²⁴ McGrath (n 9) 230.

III ACCESS BY CONSENT

When considering how native title documents may be accessed, the simplest and least compulsive method is often overlooked: access by consent. As Blackstone observed, it is a deeply-rooted principle of the common law that persons who have rights or interests in an object (ie proprietary rights) may use, enjoy or dispose of that object as they wish, ‘without any control or diminution, save only by the laws of the land’.²⁵ So it is in relation to documents: subject to an existing rule of law or practice providing otherwise, the default position is that it is open to a person to grant access to a document in their possession, and to distribute, publish or disseminate it, as they wish. As a result, and subject to a contrary rule of law or practice, the easiest and most straightforward way — at least in theory — of accessing documents held by another person is to reach agreement with them in relation to that access.

Such agreements are in keeping with both the *Native Title Act 1993* (Cth) (‘NTA’) and the rules of the Federal Court. The Preamble to the NTA explicitly provides that the Act creates a ‘special procedure ... for the just and proper ascertainment of native title rights and interests which ... if possible ... is done by conciliation’. It is ‘designed to encourage parties to take responsibility for resolving proceedings without the need for litigation’.²⁶ Similarly, the ‘overarching purpose’ of civil procedure in the Federal Court includes the just resolution of disputes ‘as quickly, inexpensively and efficiently as possible’, and with the ‘efficient use of the judicial and administrative resources available for the purposes of the Court’ and ‘at a cost that is proportionate to the importance and complexity of the matters in dispute’.²⁷ Plainly, resolving document access issues by consent, between the parties, and without the need for curial intervention promotes all of these objectives. It is surely for these reasons that consensual resolution of document access disputes is also the option preferred by the court.²⁸ Furthermore, from the perspective of Indigenous data sovereignty, consensual dispute resolution enables First Nations peoples to have the greatest role in managing the dissemination of their information, and most fully manifests the principles of self-determination that underpin this notion.

However, to state that consensual resolution is the preferred and ‘easiest’ model in theory is not to deny the significant number, and the complex nature, of the rules of law and practice that may prohibit such agreements from being reached. Without seeking to be exhaustive, such rules might include:

²⁵ William Blackstone, *Commentaries on the Laws of England* (The Legal Classics Library, 1765) vol 1.134.

²⁶ *Lovett v Victoria* [2007] FCA 474, [36] (North J).

²⁷ *Federal Court of Australia Act 1976* (Cth) ss 37M(1)(b), (2)(b), (2)(e).

²⁸ See Federal Court of Australia, *Central Practice Note: National Court Framework and Case Management*, 20 December 2019, para 10.3.

1. extant suppression or non-publication orders under Part VAA of the *Federal Court of Australia Act 1976* (Cth);²⁹
2. orders restricting disclosure of or access to documents under s 92 (prohibition of disclosure of evidence given to an assessor) or s 155 (prohibition of disclosure of evidence given to the Tribunal) of the NTA, or r 34.120 of the *Federal Court Rules 2011* (Cth) ('*Federal Court Rules*');
3. restrictions on the access to, or publication of, gender- or other culturally-restricted evidence under s 17(4) under Part VAA of the *Federal Court of Australia Act 1976* (Cth);³⁰
4. contractual restrictions on disclosure or dissemination of documents (eg in an expert's retainer);
5. equitable obligations of confidentiality that attach to particular documents;
6. principles of customary law that apply to, and govern, the actions of First Nations peoples; and
7. the *Hearne v Street* obligation.³¹

To such a list may also be added the myriad individual factors of morality, prudence, and strategic concern (eg cultural respect, privacy, risks of harm, risk of intra-mural disputes, and likelihood of adverse consequences if disclosed). Although these matters are not directly enforceable at law, they may nevertheless weigh just as heavily, if not more so, in the consideration of whether to disclose particular documents by agreement. This is because, as Mortimer J explained in *Booth v Victoria* [No 3] ('*Booth*'):³²

It is a feature of native title proceedings that a great deal of highly personal information is relevant to the determination of claims for native title. Peoples' family histories, which can sometimes involve traumatic events such as acts of sexual violence and removal, become part of the narrative presented to the Court. Genealogies play a large role in such proceedings.

Producing genealogies for Aboriginal and Torres Strait Islander people may mean, because of the history of oppression, violence and dislocation experienced by them after European arrival, that some of this genealogical information reveals matters about people's families that they would otherwise never share, and would certainly not share with strangers, or with those with whom they may have disputes. On any view, and even if they do not concern this kind of very private information, all genealogical information is personal to the families and individuals concerned; and is

²⁹ See, eg, *Booth v Victoria* [No 3] [2020] FCA 1143 ('*Booth*').

³⁰ See generally *Western Australia v Ward* (1997) 76 FCR 492 (Full Court).

³¹ *Hearne v Street* (n 3).

³² *Booth* (n 29).

not usually the kind of information which would be readily distributed to all and sundry, to be used for whatever purposes anyone wished.

... [I]t is also a fact of native title proceedings that people must share their traditional law and custom and their stories of connection to country, again doing so with a much wider audience than would usually be the case under those traditional laws and customs.³³

In circumstances where — as will be seen — these matters are neither decisive, nor necessarily relevant to, the questions of access that the court has been called on to determine, the importance of these matters to First Nations peoples, and the relationship of these matters to the principles of Indigenous self-determination and data sovereignty, further stress the importance of resolution of disputes by agreement.

A *The Hearne v Street Obligation*

The final legal rule outlined in the previous section — the *Hearne v Street* obligation (also known as the ‘*Harman* undertaking’³⁴) — requires further analysis. As explained by Hayne, Heydon and Crennan JJ, in the eponymous case:

Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence. The types of material disclosed to which this principle applies include documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for the purposes of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an *Anton Piller* order, witness statements served pursuant to a judicial direction and affidavits.³⁵

The obligation also applies to third parties who receive documents in the course of litigation, including documents received by both lay and expert witnesses.³⁶ Therefore, the *Hearne v Street* obligation *prima facie* applies to the vast majority of documents, and the information contained therein, exchanged in the course of a native title proceeding, including most expert reports.³⁷ It does not, however, apply to documents that exist and are exchanged independently from the coercive process of the court. Such documents may be used and disclosed freely, subject to any supervening legal obligations governing such use (such as those listed above).

³³ Ibid [35]–[37].

³⁴ But see *Treasury Wine Estates Ltd v Maurice Blackburn Pty Ltd* (2020) 282 FCR 95, 108 [39] (Jagot, Markovic and Thawley JJ) (‘*Treasury Wine*’).

³⁵ *Hearne v Street* (n 3), 154–5 [96] (citations omitted).

³⁶ *Gall v Domino's Pizza Enterprises Ltd* [2019] FCA 1799, [17] (Murphy J).

³⁷ *Booth* (n 29) [35]–[37] (Mortimer J).

In the Federal Court, where it applies, the *Hearne v Street* obligation no longer operates in two scenarios:

1. if the document ‘is read or referred to in open court in a way that discloses its contents’, rule 20.03 of the *Federal Court Rules* provides that the obligation no longer applies to the document, unless the Court orders otherwise;³⁸ or
2. if the Court exercises its discretion to release a party from the obligation with respect to one or more documents.

When seeking a release from the *Hearne v Street* obligation, a party must demonstrate that ‘special circumstances’ exist.³⁹ While it is ‘neither possible nor desirable to propound an exhaustive list’ of the factors that may constitute “‘special circumstances’”,⁴⁰ ‘good reason must be shown why’ the obligation needs to be lifted, recalling that the court’s ‘discretion is a broad one and all the circumstances of the case must be examined’.⁴¹

Recently, these matters came before the Federal Court for determination in a dispute that gives some guidance as to the application of the ‘exceptional circumstances’ test in the native title context. In *Glencore Coal Pty Ltd v Franks*,⁴² the Full Court (Reeves, Perry and Abraham JJ) dismissed an appeal against the decision of Katzmann J,⁴³ refusing to release Glencore from the *Hearne v Street* obligation in respect of an expert report produced in native title proceedings. Glencore sought relief from the *Hearne v Street* obligation attaching to an anthropologist’s report, filed pursuant to court order (but not tendered into evidence) in native title proceedings brought by the Plains Clans of the Wonnarua People, so as to enable Glencore to use that document in the making of representations to the Minister in relation to an application for an order protecting or preserving a specified area from injury or desecration under s 10 of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).⁴⁴

At first instance, Katzmann J accepted (and it was not disputed) that the *Hearne v Street* obligation would restrain Glencore’s proposed use of the report.⁴⁵ However, her Honour was not satisfied that ‘special circumstances’ justifying the release of the obligation existed. Katzmann J acknowledged three features that supported Glencore’s case. First, her Honour accepted that there was ‘at least a

³⁸ See also *Treasury Wine* (n 35) 118–23 [79]–[92] (Jagot, Markovic and Thawley JJ) and the authorities referred to therein.

³⁹ See generally *ibid* 124–5 [96]–[100] and the authorities cited therein.

⁴⁰ *Springfield Nominees Pty Ltd v Bridgelands* (1992) 38 FCR 217, 225 (Wilcox J) (Federal Court of Australia).

⁴¹ *Liberty Funding Pty Ltd v Phoenix Capital Ltd* (2005) 218 ALR 283, 289–90 [31] (Branson, Sundberg and Allsop JJ) (Federal Court of Australia — Full Court) (citations omitted).

⁴² (2021) 284 FCR 622 (‘*Franks Full Court*’).

⁴³ *Glencore Coal Pty Ltd v Franks* [2020] FCA 1801 (‘*Franks First Instance*’).

⁴⁴ *Ibid* [4]–[5], [9]–[31]; *Franks Full Court* (n 43) 624 [1].

⁴⁵ *Franks Full Court* (n 43) 627 [16].

real prospect' that the anthropologist's report might have been admitted into evidence. Second, her Honour observed that there was no 'commercially sensitive material or personal data' in the report. Third, her Honour accepted there were 'some common features' between the native title proceeding and the proposed use of the report.⁴⁶

However, weighing against those matters, her Honour observed that the report was prepared for (although not restricted for use in) a native title mediation. In her Honour's view, the court ought to be 'cautious' in releasing the *Hearne v Street* obligation in this context, as to do so 'could conceivably affect the willingness of First Nation peoples to cooperate with, or participate in, the court's processes'.⁴⁷ Secondly, her Honour noted that the contents of the report were 'sensitive and controversial', addressing questions including 'whether certain people were "Wonnarua people"',⁴⁸ and identified that the authors of the report appeared to be 'uncomfortable' with disclosure, such that it might risk embarrassment and prejudice to the authors if the report was to be put to Glencore's proposed use.⁴⁹

Noting that the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) did not require proof of connection in the sense required under the NTA, her Honour concluded that the evidentiary value of the report would be low in the context of its proposed use by Glencore, as it appeared to 'have little, if any, relevance to any of the matters the reporter is required to consider'.⁵⁰ Finally, her Honour noted that Glencore's 'largely unexplained' delay of 12 months in bringing its application for relief raised potential for unfairness, inhibited the ability of third parties to make representations, and weighed against the grant of relief sought.⁵¹ Accordingly, her Honour refused to release Glencore from the *Hearne v Street* obligation.

On appeal, the Full Court rejected Glencore's challenge to Katzmann J's decision in almost its entirety.⁵² Notably, the Court placed weight on the fact that the decision-making process in which Glencore sought to use the anthropological report was not 'judicial' but 'an exercise of executive power ... of such breadth and nature as to have an essentially political character'.⁵³ In the Full Court's view, the weight afforded to 'the relevance of the [expert] report to the discharge of the s 10 function' was tempered by the various other considerations identified by the Court.⁵⁴

⁴⁶ *Franks First Instance* (n 44) [38].

⁴⁷ *Ibid* [39].

⁴⁸ *Ibid* [16], [40].

⁴⁹ *Ibid* [41]–[42].

⁵⁰ *Ibid* [43]–[44].

⁵¹ *Ibid* [40].

⁵² See *Franks Full Court* (n 43) 634–5 [37]–[41] (Reeves, Perry and Abraham JJ).

⁵³ *Ibid* 629 [23].

⁵⁴ *Ibid* 629 [23]–[25].

Indeed, the Full Court went further than the primary judge in some respects, departing from Katzmann J's finding that the report could have been expected to enter the 'public domain' at some point in the future. In that respect, the Court observed that the report 'contained information of a personal kind such as family histories, places and dates of birth, the names of deceased members of the native title group, and the like', and reasoned that this information likely 'would have been subject to confidentiality orders in whole or in part' were it tendered in the native title proceedings.⁵⁵ In support of this conclusion, regard was had to the Court's broad powers to take account of cultural and customary concerns under s 82(2) of the NTA. The Full Court also had regard to the statutory scheme pursuant to which the mediation was conducted, and concluded that 'there is a strong public interest in ensuring that Aboriginal peoples are not deterred in the future from agreeing to the use of court processes, ... to assist in resolving their claims because of the potential for any resulting report to be used for ulterior purposes by non-indigenous parties'.⁵⁶

Although the proceeding has passed largely unnoticed by commentators, it provides a clear indication of the court's approach to the *Hearne v Street* obligation in a native title context. Chiefly, the decisions (both at first instance and on appeal) demonstrate the strictures of the obligation and emphasise that applications for release from that obligation face a substantial hurdle — after all, 'special circumstances' are required. The Full Court's recourse to the unique procedures and statutory context of the NTA emphasise that these matters are not irrelevant to the exercise of the court's discretion but must be expressly grappled with. This is particularly the case where, as is likely to be common, the documents in issue were created for the purpose of mediation, negotiation, or preparation for a consent determination under the guidance of the court and pursuant to the various provisions of the NTA.

As a result, and consistently with the comments of Mortimer J in *Booth*, the impacts of release of the obligation on affected First Nations peoples and communities are likely to be a key concern for the court. In this regard, while the Court did not expressly have recourse to the term, the principles of data sovereignty referred to in Part I above may provide a useful prism through which to approach such applications. As a result, persons seeking release from the *Hearne v Street* obligation for native title documents may need to identify and provide evidence to the court of procedures for document management and confidentiality (for example, by way of contractual or other undertakings of confidentiality and non-publication), which will minimise or obviate such harms occurring.⁵⁷ By incorporating these factors into its 'exceptional circumstances' analysis, the *Franks* judgments also provide a glimpse of the ways in which

⁵⁵ Ibid 634 [38].

⁵⁶ Ibid 636 [45].

⁵⁷ See, eg, *Burrugubba v Queensland* [No 2] [2018] FCA 1031, [57] (Robertson J) ('*Burrugubba*').

Indigenous data sovereignty principles may be promoted through the court's analysis.

IV ACCESS FROM THE COURT

The next least-compulsive method of accessing documents of interest is to obtain those documents from the Court. Under r 2.31(a) of the *Federal Court Rules*, all documents filed in proceedings in the Court are held in the custody of, and subject to the control of, the relevant District Registrar. From there, and in addition to the formal procedure for producing documents held in the custody of the Court,⁵⁸ r 2.32 of the *Federal Court Rules* provides a series of rules, which govern the rights of both parties to proceedings, and non-parties, to access documents filed in the Court's proceedings.

A Documents Entitled to be Accessed

For any access applicant who is not a party to the proceedings in which the documents were filed (a question that itself has raised some concern in the Court),⁵⁹ and assuming that the litigation is not one of the few especially high-profile matters where the Court creates a public case file,⁶⁰ access to court documents depends upon the nature of the material sought and the way in which it was used in the litigation.

Rule 2.32(2) of the *Federal Court Rules* provides that, subject to extant confidentiality orders, non-publication orders, or orders restricting the use of evidence,⁶¹ non-parties may access copies of pleadings, orders, transcripts, judgments, notices relating to representation and addresses for service, and — uniquely to native title matters — Forms 1–4 (as applicable) and accompanying affidavit material,⁶² or the extract from the Register of Native Title Claims received by the Court from the Native Title Registrar. Leave of the Court is not required to access the documents, and persons are entitled to be given copies of documents upon payment of the authorised fee (excepting transcripts, which must generally be purchased separately from the Court's official transcript provider, Auscript).⁶³ Additionally, many of these materials are made freely

⁵⁸ See Rules (n 30) rr 24.12(2)(b), 24.24.

⁵⁹ *Hughes v Western Australia* [No 3] [2019] FCA 2127, [16] (Mortimer J) ('*Hughes*').

⁶⁰ See generally 'Public Interest Cases (Online Files)', *Federal Court of Australia* (Web page, 2021) <<https://www.fedcourt.gov.au/services/access-to-files-and-transcripts/online-files>>.

⁶¹ Rules (n 30) r 2.32(3). But see Jagot J's discussion of the first limb of this rule in *Porter v Australian Broadcasting Corporation* [2021] FCA 863, [87]–[97].

⁶² *Hughes* (n 60) [19] (Mortimer J).

⁶³ Rules (n 30) r 2.32(5); *Hughes* (n 60) [20] (Mortimer J).

available via the Court-administered Commonwealth Courts Portal and Federal Law Search databases.⁶⁴

The justification for this right is that the public is broadly entitled to know and to access documents that record the nature of the dispute, the stage of its progress, 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 by the public. Importantly, as this is an entitlement vested by the *Federal Court Rules*, it does not matter why a person is seeking access to the materials, nor what they propose to do with them afterwards, and they need not give any such information when requesting access.

B Documents For Which Leave Is Required

Rule 2.32(4) of the *Federal Court Rules* provides that, for all other documents (ie ‘document[s] that the person is not otherwise entitled to inspect’ under r 2.32(2)), persons may apply to the Court for leave to inspect those documents. Ordinarily, the Court will seek the views of the parties as to disclosure prior to deciding whether or not to grant an access request, often with a preliminary view on the request.⁶⁵ However, the ultimate decision is one for the Court alone, with the grant or refusal of leave a discretionary decision to be made in the context of the particular access request,⁶⁶ and in accordance with the Court’s establishing statute, the *Federal Court Rules*,⁶⁷ and the *Access to Documents and Transcripts Practice Note* (GPN-ACCS), the latter of which provides that all such requests must be construed in the context of a general, but qualified, commitment to ‘open justice’.⁶⁸

There is a burgeoning collection of jurisprudence relating to the circumstances in which non-parties may (or may not) be granted access to a ‘restricted’ document, and the factors that will bear upon the Court’s discretion.⁶⁹ However, in a number of recent decisions, the Court has considered these matters in the context of gaining access to evidence and expert reports filed in native title matters and made a number of observations of note.

⁶⁴ Federal Court of Australia, *Access to Documents and Transcripts Practice Note* (GPN-ACCS), 25 October 2016, paras 3.1–3.4.

⁶⁵ See, eg, *Hughes* (n 60) [4] (Mortimer J); *Dallas Buyers Club, LLC v iiNet Limited* [No 1] [2014] FCA 1232, [16] (Perram J).

⁶⁶ *Hasna v Crown Melbourne Limited* [2021] FCA 1066, [25] (Mortimer J).

⁶⁷ See *Oldham v Capgemini Australia Pty Ltd* (2015) 241 FCR 397, 401 [24] (Mortimer J) (Federal Court of Australia) (‘Oldham’).

⁶⁸ Federal Court of Australia, *Access to Documents and Transcripts Practice Note* (GPN-ACCS), 25 October 2016, paras 2.1–2.4.

⁶⁹ See generally *Oldham* (n 68); *Deputy Commissioner of Taxation v Hawkins* (2016) 341 ALR 255; *Dallas Buyers Club, LLC v iiNet Limited* [No 1] [2014] FCA 1232; *Baptist Union of Queensland – Carinity v Roberts* (2015) 241 FCR 135; *Deputy Commissioner of Taxation v Shi* [No 2] [2019] FCA 503.

First, according to these authorities, the beginning of the inquiry into granting access is whether the documents were ‘read’ or otherwise admitted into evidence. Evidence that has been so used and not otherwise restricted is ‘in no different position to oral evidence-in-chief given by a witness’ (ie recited in open court, before the public) and is thus ‘consistent with inspection of transcript being available without leave’.⁷⁰ In those circumstances, ‘open justice’ principles weigh heavily in favour of the grant of leave to inspect.⁷¹ Where documents are not formally admitted into evidence (eg reports ‘marked for identification’ but not ultimately tendered), ‘open justice’ principles do not have the same weight.⁷²

Importantly, this applies equally to the often voluminous and deeply personal evidence put before the Court in support of a consent determination under ss 87 or 87A of the NTA.⁷³ Access to such documents is justified on the basis that their contents provided the basis on which the Court was satisfied that the making of an *in rem* determination was appropriate.⁷⁴

Second, provided the document has been admitted into evidence, it is generally no answer to an inspection request that material may be exposed to a broader number or range of individuals than initially envisioned, nor that the viewers of the document may misunderstand or misinterpret its contents. This is because, as Robertson J stated in *Nicholls*, ‘[t]he exchange of information and ideas is not limited to those who may be thought to adequately or best understand them, and access to the courts and what occurs in the course of court proceedings is not to be so limited.’⁷⁵

Importantly, in *Champion v Western Australia* (‘*Champion*’),⁷⁶ Bromberg J emphasised that such principles applied to expert anthropological reports notwithstanding that they were ‘replete with private or personal information about the native title claimants, their families and their ancestors’ and contained ‘highly sensitive spiritual information of a private nature’.⁷⁷ While acknowledging that any ‘harmful disclosure’ ought to be avoided if possible, his Honour observed that once the material was admitted into evidence, discussed in open court and analysed in a judgment (without any confidentiality or non-publication orders having been made), ‘open justice’ considerations outweighed any discomfort or objection that First Nations people may have to the subsequent

⁷⁰ *Burragebba* (n 58) [46] (Robertson J), citing *Oldham* (n 68) 401 [26]–[27] (Mortimer J); *Nicholls v A-G (NSW)* [No 2] [2019] FCA 1797, [16] (Robertson J) (‘*Nicholls*’); *Champion v Western Australia* [2020] FCA 1175, [19] (Bromberg J) (‘*Champion*’).

⁷¹ *Nicholls* (n 71) [8], [11]–[14] (Robertson J).

⁷² *Champion* (n 71) [17] (Bromberg J).

⁷³ *Nicholls* (n 71) [6], [17]–[18] (Robertson J).

⁷⁴ *Anderson v Queensland* [No 3] [2015] FCA 821, [153] (Collier J); Justice J A Dowsett, ‘Beyond Mabo: Understanding Native Title Litigation through the Decisions of the Federal Court’ (Speech, LexisNexis National Native Title Law Summit, Brisbane, 15 July 2009).

⁷⁵ *Nicholls* (n 71) [7].

⁷⁶ *Champion* (n 71).

⁷⁷ *Ibid* [25].

distribution of those documents.⁷⁸ Principles of Indigenous data sovereignty no longer necessary weigh against disclosure, as the (informed) act of filing, relying upon, and admitting documents into evidence is construed by the Court as a release of those documents ‘to the world’, as it were.

Champion provides a useful example. In that case, it was not to the point that the proposed use of the anthropological report went beyond the use ‘expected’ by First Nations persons.⁷⁹ This is because, once admitted into evidence, ‘the prospect of the information being made accessible to persons unassociated with the proceeding in which it was tendered or being used in a different proceeding is real even though it may not be substantial’.⁸⁰ As his Honour emphasised, it is incumbent upon lawyers and advisors to ‘be clear about the potential for disclosure of that information including the risk that the information may be used for purposes beyond the instant litigation’.⁸¹ The Court’s power to make orders on conditions⁸² may be a valuable way through which cultural and customary concerns of indigenous groups may be managed by the Court.

Third, unlike the entitlement to inspect materials under r 2.32 of the *Federal Court Rules*, the motive, reasons or purpose for inspecting restricted documents ‘may provide a powerful discretionary consideration’ either for or against the grant of leave.⁸³ Similarly, ‘the identity of the non-party, and the use to which the material may be put, might be highly relevant to the Court’s exercise of power’.⁸⁴ For example, in *Hughes v Western Australia [No 3]* (‘*Hughes*’), Mortimer J proposed to grant an access request lodged by a common law native title holder and director of an Aboriginal Corporation holding native title on trust only once evidence was filed demonstrating that existing gender-restriction orders could be complied with.⁸⁵ Notably, her Honour also indicated that principles of indigenous data sovereignty, like those outlined above, were relevant to the exercise of the Court’s discretion, stating:

It is important that, going forward, the Court not place undue restrictions on claim groups, who secure a determination of native title, ultimately being able to reclaim their own evidence, and evidence about them and their connection to their country, which was placed on the Court file. It is their knowledge, and their history. Therefore, provided the Court is satisfied of the consent of the common law holders as a group, through a mechanism such as the one used here of consulting the elders of the common law native title holding group, as well as the statutory entity charged to hold

⁷⁸ Ibid [27]–[30], [37].

⁷⁹ Ibid [38]–[39].

⁸⁰ Ibid [38]–[40].

⁸¹ Ibid [40].

⁸² *Rules* (n 30) r 1.33.

⁸³ *Burragubba* (n 58) [47] (Robertson J). See also *Champion* (n 71) [33]–[34] (Bromberg J).

⁸⁴ *Hughes* (n 60) [25] (Mortimer J).

⁸⁵ Ibid [28]–[30].

their native title in trust, in my opinion it is appropriate for the Court to give favourable consideration to access requests such as the one made [in *Hughes*].⁸⁶

Hughes therefore stands as a salutary example of the way in which the Court has been willing to construe and apply its 'ordinary' rules of procedure in the light of the unique nature and demands of native title matters. This flexibility ought to be encouraged, as it is through this means that principles of Indigenous data sovereignty can be balanced against the principles of 'open justice', and therefore given their fullest possible effect in the circumstances.

Finally, it ought to be noted that the often voluminous and aged nature of many native title files held by the Court mean that considerations of cost and time efficiency, and the overarching objective provisions of ss 37M–37N of the *Federal Court of Australia Act 1976* (Cth), may weigh against granting access to certain documents notionally held by the Court.⁸⁷ As Robertson J has recognised, this may involve an assessment of the request's 'proportionality', in the sense of the likely expenditure of time, money and effort, in the light of the asserted purpose and benefit to be gained from the request.⁸⁸ Such an enquiry bears some resemblance to the existence of a 'practical refusal reason' by reason of a substantial and unreasonable diversion of resources from an agency's operation in the *Freedom of Information Act 1982* (Cth) ss 24–24AB.

V ACCESS VIA COMPULSIVE PROCESS

Finally, it may also be possible to obtain access to documents of interest via some compulsive process, such as subpoenas, notices to produce and orders for discovery.⁸⁹ Due to their potential costs and their burdensome nature, such modes are considered 'last resorts' by the Court.⁹⁰ The general principles and operation of each of these methods of access are well-known and need not be repeated here.⁹¹ For present purposes, it suffices to observe that the existence of either legal professional privilege or 'without prejudice' (or settlement) privilege in a document provides a valid basis on which to resist the compulsory production of a document under a subpoena, notice to produce, or order for discovery.⁹² In this

⁸⁶ Ibid [27].

⁸⁷ Ibid [23].

⁸⁸ *Burragubba* (n 58) [53]–[55].

⁸⁹ See generally *Rules* (n 30) pts 20 (discovery and inspection of documents), 24 (subpoenas).

⁹⁰ See, eg, Federal Court of Australia, *Subpoenas and Notices to Produce Practice Note (GPN-SUBP)*, 25 October 2016, paras 2.3–2.4, 6.15.

⁹¹ See generally Bernard Cairns, *Australian Civil Procedure* (Lawbook, 10th ed, 2014) ch 10; Adrian Zuckerman et al, *Zuckerman on Australian Civil Procedure* (LexisNexis, 2018) ch 15.

⁹² See *Rules* (n 30) r 20.02; *Glencore International AG v Commissioner of Taxation* (2019) 265 CLR 646, 654–5 [5], 657–8 [16] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ) ('*Glencore*'); *Field v Commissioner for Railways (NSW)* (1957) 99 CLR 285, 291 (Dixon CJ, Webb, Kitto and Taylor JJ) ('*Field*').

regard, two unique issues regarding privilege have arisen in the native title context, warranting further examination.

A Legal Professional Privilege: Who Is The 'Client'?

Legal professional privilege may be understood as that species of privilege that ordinarily entitles a person 'to resist the giving of information or the production of documents which would reveal [confidential] communications *between a client and his or her lawyer* made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings'.⁹³ The privilege extends to protect communications with an independent expert, provided that they are undertaken for the dominant purpose of conducting legal proceedings or obtaining legal advice.⁹⁴

However, in the native title context, a foundational question has raised some difficulties: who is the lawyer's 'client'? The question is not an arid one. Legal professional privilege exists to protect the interests of the client⁹⁵ and belongs to that client.⁹⁶ Therefore, privilege may only be claimed, or waived, by that client or their successors in title.⁹⁷ As Mortimer J observed in *Tommy v Western Australia [No 2]* ('*Tommy*'),⁹⁸ '[i]dentifying 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.'⁹⁹

In *Tommy*, one of two competing claim groups was granted leave to issue a subpoena to the Yamatji Marlpa Aboriginal Corporation, seeking production of certain specified anthropological reports.¹⁰⁰ Despite considering themselves a mere 'custodian' of the documents, the Yamatji Marlpa Aboriginal Corporation nevertheless objected to production, arguing that the reports were the subject of legal professional privilege, settlement privilege or both.¹⁰¹ In overruling the Yamatji Marlpa Aboriginal Corporation's objections, Mortimer J held that the 'the holder of the relevant privileges' in the present case was not the Corporation, but rather 'the applicant in a proceeding for a determination of native title, or, post-determination, the prescribed body corporate holding the native title on trust (or

⁹³ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, 552 [9] (Gleeson CJ, Gaudron, Gummow and Hayne JJ) (emphasis added).

⁹⁴ *Wyman v Queensland* [2012] FCA 397, [26] (Reeves J) and the authorities cited therein.

⁹⁵ *Glencore* (n 93) 661 [27] (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

⁹⁶ *Eso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 81–2 [88] (Kirby J).

⁹⁷ *Baker v Campbell* (1983) 153 CLR 52, 85 (Murphy J).

⁹⁸ [2019] FCA 1551 ('*Tommy*').

⁹⁹ *Ibid* [37].

¹⁰⁰ *Ibid* [8]–[11].

¹⁰¹ *Ibid* [17]–[20].

acting as agent for the common law holders)',¹⁰² as a statutory 'concept' or 'vehicle'.¹⁰³ As a result, the Yamatji Marlpa Aboriginal Corporation was unable to make any claim for privilege in the subpoenaed documents.

To reach this conclusion, her Honour began by affirming comments of Reeves J in *QGC Pty Ltd v Bygrave*,¹⁰⁴ which emphasised the unique role and importance of identifying the 'solicitor on the record' in native title matters, noting that availability of costs sanctions as a means of controlling solicitors had been 'significantly reduced' by s 85A of the NTA.¹⁰⁵ For Mortimer J, these comments 'emphasise that, in examining how a solicitor "on the record" in a proceeding for a party must behave, the focus is on the precise relationship which arises between that solicitor and her or his "client"'.¹⁰⁶ From that starting point, her Honour then observed that the NTA creates a method through which a representative 'entity' — the 'named applicant' — comes into existence and serves an 'applicant' for the purposes of the various types of applications possible under the NTA.¹⁰⁷ Noting that those persons hold 'ongoing, collective responsibility' for the prosecution of an application under the Act,¹⁰⁸ and that it is those persons from whom 'the legal representatives will take their instructions',¹⁰⁹ her Honour held that — absent contrary evidence and for the limited purpose of determining where legal professional privilege lies¹¹⁰ — 'it is the applicant, as an entity (and therefore those individuals who constitute the applicant, jointly) which is the "party" and the "client", and holds any privilege'.¹¹¹ Instructions about the maintenance of privilege can thus be given 'jointly and in accordance with their authorisation by the claim group (but also taking into account the terms of s 62A about the extent of their authority) ... in the same way they give any other instructions to their legal representatives about the conduct of a proceeding under s 61'.¹¹²

Where a RNTBC is created under ss 56–7 of the NTA following a determination of native title, to hold that title on trust for a claim group, her Honour held that the 'same reasoning' applied even more strongly, 'since such a body is a legal person and the intention of the Act is that the native title recognised in the common law holders will be held by a legal person, either on trust or as agent for the common law holders'.¹¹³ As her Honour explained, the privilege

¹⁰² Ibid [39], [81].

¹⁰³ As to the latter, see *CITIC Pacific Mining Management Pty Ltd v Yaburara and Coastal Mardudhunera Aboriginal Corporation* [2020] WASC 332, [53] (Master Sanderson).
¹⁰⁴ (2010) 186 FCR 376 (Federal Court of Australia).

¹⁰⁵ *Tommy* (n 99) [39]–[48].

¹⁰⁶ Ibid [48].

¹⁰⁷ Ibid [50]–[57].

¹⁰⁸ Ibid [55]–[56], citing *Lennon v South Australia* (2010) 217 FCR 438, 447–8 [34] (Mansfield J).

¹⁰⁹ *Tommy* (n 99) [58].

¹¹⁰ Cf *ibid* [84].

¹¹¹ Ibid [56].

¹¹² Ibid [81].

¹¹³ Ibid [60].

‘pass[es] from the relevant applicant to the relevant prescribed body corporate, subject to any arguments about loss or waiver’.¹¹⁴ Decisions about claiming or waiving privilege then become ‘subject to the usual decision-making processes of that prescribed body corporate, in accordance with its constitution and rule book’.¹¹⁵ Some practical difficulties may be experienced in this situation, because the instructions and documents held by a solicitor prior to a determination, ‘do not automatically transfer to the resulting PBC post-determination, as the PBC is a new legal entity, different to the claim group and the applicant that represents it’.¹¹⁶

Mortimer J’s decision in *Tommy* is notable because it fundamentally rejected a submission that ‘a representative body, rather than any individual solicitor as the legal representative for a native title applicant or a prescribed body corporate, had some unilateral role, and some unilateral control, over expert reports which it had commissioned and funded’.¹¹⁷ The importance of this decision, and the fact that it marked only the start of litigation as to the interaction between the rules of civil procedure and the principles of the NTA was not lost on her Honour, who made the following additional comments of note:

What is important is not to assume that in the unique and various circumstances arising in the making of claims under s 61 of the Native Title Act, there is some ongoing, automatic attachment of any particular privilege to documents such as anthropological reports. This case is a good illustration of the dangers of making too many assumptions about that matter, and a good illustration of the law’s focus on the circumstances in which a particular report was created, and on the particular circumstances in which such a report might have, or might not have, formed part of a confidential communication for the purposes of parties to a proceeding resolving their dispute. It is also a good illustration of the need for those who assert a privilege to be able to prove it. On that count, there are no special rules for native title proceedings.¹¹⁸

Consequently, for an anthropological report to be the subject of legal professional privilege, the party resisting production must establish on the balance of probabilities that the report represents a confidential communication between solicitor and client (or agents thereof) for the purpose of legal advice or litigation.¹¹⁹ All the same elements are applicable in the native title context as in other forms of litigation.

It is this tension between recognising the ‘unique nature’ of native title litigation, balanced against the ordinary principles of civil procedure, and taking shape in the light of the unique set of facts presented in any given case, that is

¹¹⁴ Ibid [83].

¹¹⁵ Ibid.

¹¹⁶ Angus Frith, ‘Later Use and Control of Evidence Given in Native Title Hearings’ in Pamela Faye McGrath, Ludger Dinkler and Alexandra Andriolo, *Managing Information in Native Title (MINT): Survey and Workshop Report* (Report, 1 November 2015) 51, 52.

¹¹⁷ *Tommy* (n 99) [215].

¹¹⁸ Ibid [68].

¹¹⁹ Ibid [28]–[29].

likely to continue producing litigation for some time to come. In this regard, it is noteworthy that *Tommy* has been referred to with approval by the Court,¹²⁰ and was applied by Griffiths J in the context of alleged misuse of confidential information against the background of discontinued and revived claims in *Mumbin v Northern Territory [No 1]*.¹²¹ However, as the Court has repeatedly emphasised, *Tommy* does not present any blanket rule of automatic application. Rather, claims must be worked out on a ‘case by case basis’.¹²² Indeed, Griffiths J’s decision in *Pappin v Attorney-General (NSW)* (*‘Pappin’*)¹²³ was identified by Mortimer J as a case where the specific contractual provisions in issue produced an alternative result, finding that the terms of an expert’s retainer meant that NTSCorp Ltd was itself the holder of legal professional privilege in an anthropological report in respect of which production was sought.¹²⁴

B *Loss of Privilege*

The second key question which has been the subject of recent analysis is the question of loss of privilege. Given the definition of legal professional privilege offered above, it is relatively straightforward to observe that legal professional privilege:

1. 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);¹²⁵ and/or
2. will not arise, or will be ‘waived’ (or ‘destroyed’), if and when the communication is no longer ‘confidential’ (save for some small exceptions).¹²⁶

In this respect, legal professional privilege may be waived by the client (to whom the benefit of legal professional privilege accrues) either expressly or impliedly by conduct inconsistent with the maintenance of the confidentiality that grounds the privilege.¹²⁷ As Gleeson CJ, Gaudron, Gummow, and Callinan JJ held in *Mann v Carnell*, ‘considerations of fairness may be relevant to a determination of whether

¹²⁰ *Alvoen v Queensland [No 3]* [2021] FCA 785, [72]–[74] (Collier J).

¹²¹ [2020] FCA 475, [41], [69].

¹²² *Ibid*, [41]; *Tommy* (n 99) [67] (Mortimer J).

¹²³ [2017] FCA 817.

¹²⁴ See *Tommy* (n 99) [80].

¹²⁵ *Commissioner of Taxation (Cth) v Australia and New Zealand Banking Group Ltd* (1979) 143 CLR 499, 521–2 (Gibbs ACJ).

¹²⁶ See, eg, *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* [2020] FCA 1232, [45]–[46] (Wigney J).

¹²⁷ See *Mann v Carnell* (1999) 201 CLR 1, 13 [28]–[29], 15 [34] (Gleeson CJ, Gaudron, Gummow and Callinan JJ) (*‘Mann’*). See also *Evidence Act 1995* (Cth) s 122.

there is such inconsistency'.¹²⁸ Extensive attention has been given to the operation of legal professional privilege with respect to experts and expert reports,¹²⁹ and much of this discussion applies equally in the native title context.

Two further, and closely related, types of privilege also require discussion at this juncture: settlement privilege and 'without prejudice' privilege. At common law, 'without prejudice' privilege protects from disclosure those documents evidencing admissions made in an effort to settle a dispute.¹³⁰ Under this rule, correspondence containing admissions, and passing between the parties during discussions conducted with a view to reaching an agreed resolution of their dispute, are generally inadmissible in evidence, and are privileged from disclosure by compulsive process.¹³¹ 'Without prejudice' privilege will not arise 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.¹³² The Uniform Evidence Law gives statutory form to this privilege, in the form of settlement privilege, providing in s 131(1) that — subject to an extensive list of exemptions — evidence of communications between disputing parties 'in connection with an attempt to negotiate a settlement of the dispute' or documents 'prepared in connection with an attempt to negotiate a settlement of a dispute' are not admissible.¹³³ However, as the Uniform Evidence Law applies only to the adduction of evidence, the common law privilege continues to govern pre-trial processes, such as the 'discovery, production and inspection of documents'.¹³⁴

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 decision of Mansfield J in the *Lake Torrens Overlap Proceedings*,¹³⁵ which it followed, is that many anthropological 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 unlikely to attract either legal professional privilege or 'without prejudice' privilege or will lose any such privilege when provided to any other party, notwithstanding that such production is, in effect, mandatory under the various

¹²⁸ *Mann* (n 129) 15 [34].

¹²⁹ See generally *Australian Securities & Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438 (Lindgren J) (Federal Court of Australia).

¹³⁰ *Field* (n 93) 291–2 (Dixon CJ, Webb, Kitto and Taylor JJ).

¹³¹ *Ibid*; *Trade Practices Commission v Arnotts Ltd* (1989) 88 ALR 69 (Beaumont J) (Federal Court of Australia); *Bailey v Beagle Management Pty Ltd* [2001] FCA 185, [18] (Goldberg J).

¹³² See, eg, *Kong v Kang* [2014] VSC 28, [61] (Derham AsJ).

¹³³ *Evidence Act 1995* (Cth) s 131.

¹³⁴ *Eso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 100–1 [149] (Callinan J). See also *Mann* (n 129), 9–12 [17]–[27] (Gleeson CJ, Gaudron, Gummow and Callinan JJ).

¹³⁵ *Re Lake Torrens Overlap Proceedings* [2015] FCA 519.

State and Territory consent determination guidelines. While it may be arguable that submission pursuant to such guidelines constitutes disclosure under compulsion of law (and therefore the disclosing party is ‘not taken to have acted in a manner inconsistent with’ the maintenance of legal professional privilege),¹³⁶ any such argument is yet to be clearly tested by the court.

There are indications that such an argument is unlikely to succeed. In the *Lake Torrens Overlap Proceedings*, Mansfield J was called on to resolve various claims for both legal professional and settlement privilege and other objections to disclosure of ‘pre-existing historical, anthropological and other expert reports’ by competing claim groups and South Australian Native Title Services.¹³⁷ His Honour rejected the submission that a general obligation of confidentiality attached to the documents, holding that ‘whatever the circumstances in which they came to be created, they were provided to the opposing parties to the litigation’.¹³⁸

Similarly, his Honour found that any legal professional privilege in the reports had been waived upon provision of the reports to the State and Commonwealth in an effort to negotiate a ‘joint claim’ to resolve the overlap.¹³⁹ Finally, his Honour rejected any claim of settlement privilege in the reports, critically finding that the reports were ‘not shown to have come into existence, nor to have been provided under any express or tacit arrangement that — at the conclusion of negotiations — they should not be available for use to the benefit (or detriment) of one or other parties if the matter were not resolved by negotiation’.¹⁴⁰ As his Honour observed, it would be difficult for material provided to the State to meet its consent determination policy to be protected by settlement privilege, as ‘[i]f the matter proceeded to a consent determination ... that material would be part of the evidentiary material relied on by the State to adopt [its] position’ on the consent determination itself.¹⁴¹

Mortimer J in *Tommy* expressly approved this analysis,¹⁴² and indicated that her Honour would have reached the same conclusions independently in any case.¹⁴³ Her Honour concluded that any legal professional privilege that may have subsisted in the anthropological reports either never arose because there was no evidence that the report was prepared for the dominant purpose of providing legal advice to any client,¹⁴⁴ was lost upon submission of the report to the State for the purposes of negotiating a consent determination, or both. Her Honour also noted that the Western Australian Determination Guidelines expressly contemplated

¹³⁶ See *Evidence Act 1995* (Cth) s 122(5)(a)(iii).

¹³⁷ See *Tommy* (n 99) [130] (Mortimer J), discussing *Re Lake Torrens Overlap Proceedings* (n 137).

¹³⁸ *Re Lake Torrens Overlap Proceedings* (n 137) [46].

¹³⁹ *Ibid* [47].

¹⁴⁰ *Ibid* [59].

¹⁴¹ *Ibid* [65].

¹⁴² *Tommy* (n 99) [130]–[140].

¹⁴³ *Ibid* [145].

¹⁴⁴ *Ibid* [203]–[205].

the submission of documents to the court if a consent determination was agreed.¹⁴⁵ The anthropological reports were ‘not created so that it could be kept from the State, and used in an adversarial way in a contested claim for native title’.¹⁴⁶ Once that foundational proposition is accepted, even if there is *some* possibility that the material may later be used in a contested hearing, any legal professional privilege that might have otherwise vested in the document never arose, or was defeated when it was voluntarily provided to the State.

Similarly, no settlement privilege arose as the material provided to the State ‘did not contain anything in the nature of an admission or offer of compromise, ... [and] could well have been put to adversarial use’,¹⁴⁷ and was not subject to any restrictions as to the possible uses to which it could be put¹⁴⁸ (or, in respect of one particular report, had been impliedly waived).¹⁴⁹ Great weight was placed, in both *Tommy* and the *Lake Torrens Overlap Proceedings*, on the fact 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. Indeed, in both cases, the relevant expert retainers and State consent determination guidelines contemplated such future uses. The fact that such use was within the ‘reasonable contemplation’¹⁵⁰ of the parties was considered inconsistent with the existence of settlement privilege in the documents.

VI SOME LESSONS

Multiple lessons may be drawn from the previous sections of the article for those involved in native title litigation.

First, and most saliently, it must be recalled that there are no ‘free passes’ in native title litigation. Whether it is the requirement to establish ‘special circumstances’ to be released from the *Hearne v Street* obligation, applications for leave to access restricted documents, or objections to production on the grounds of privilege, the court will apply the same tests as in traditional civil litigation. As Mortimer J stated in *Tommy* at [68] (cited in Part IV.A above), ‘there are no special rules for native title proceedings’. While the application of these usual principles may be shaped in the light of the unique nature of native title litigation, and the court has been willing to do so where necessary, it should be assumed that the court’s expectation and default position will be to apply the same legal tests as it would in any other litigation. Indeed, such a message — emphasising that the general obligations on lawyers and parties litigating in the court are equally

¹⁴⁵ Ibid [148]–[149], [166]–[167], [244]–[249].

¹⁴⁶ Ibid [125].

¹⁴⁷ Ibid [157], [218].

¹⁴⁸ Ibid [158]–[163], [218].

¹⁴⁹ Ibid [219]–[221].

¹⁵⁰ Ibid [95], [160], [162].

applicable to native title matters — has been a notable feature of the court's recent jurisprudence.¹⁵¹

Secondly, no special rules apply to the management of documents in native title litigation. As a starting point, principles of open justice — which weigh heavily in the balance of any subsequent discretion — mean that parties should 'be mindful that, upon a request, any document that they have filed in the Court may potentially be made available to any member of the public'.¹⁵² The difficulty facing both parties and the court is to integrate the operation of these open justice principles with the need to respect First Nations people, and principles of Indigenous data sovereignty. In respect of First Nations people, the comments of Mortimer J in *Booth* and *Hughes* (see Parts III and IVB above, respectively) demonstrate the seriousness of the principles in issue. The cases discussed in this article have demonstrated that legal advisors, anthropologists and assistants must be alert to the possibility of disclosure or use beyond the instant litigation, and must advise First Nations people as to those risks and possibilities (noting, however, that this may adversely impact upon the quality of the evidence ultimately received, or the willingness of First Nations people to participate in the litigation process).

Thirdly, the tenor of the cases discussed above demonstrates that disputes as to document production and access must be addressed on a specific, case-by-case basis, with careful attention to the existing legal frameworks that apply to their disclosure. This is especially the case when dealing with anthropological reports, where an (unsustainable) presumption of secrecy appears to have taken place. Such an approach must be tempered in light of the decisions discussed herein, and careful attention must be given to the use and disclosure of anthropological reports. As Mortimer J stated in *Booth*:

The full and frank participation of experts is often encouraged by the knowledge that what they say is to be used only for the purposes of the proceeding and may, at least initially, be undertaken in a confidential setting, so that they may truly speak their minds. Ultimately, some of their reports, or their discussions, may by the choice or conduct of the parties, or a ruling of the Court, become more freely available. But those decisions are very much made in the specific context of a specific proceeding.¹⁵³

Fourthly, and relatedly, parties must not assume that all material or correspondence gathered by an anthropologist from First Nations people is automatically privileged from production. Specific attention must be given to the

¹⁵¹ See, eg, *Sandy v Queensland* (2017) 254 FCR 107, 122 [47] (Reeves, Barker and White JJ); *Western Bundjalung People v A-G (NSW)* [2017] FCA 992, [3]–[24], [66] (Jagot J); *Barkandji Traditional Owners #8 v A-G (NSW)* [2015] FCA 604, [12] (Jagot J); *Phyball v A-G (NSW)* [2014] FCA 851, [1], [9] (Jagot J); *Yaegl People #1 v A-G (NSW)* [2015] FCA 647, [9]–[10] (Jagot J); *Yaegl People #2 v A-G (NSW)* [2017] FCA 993, [12]–[16] (Jagot J); *Malone v Queensland* [2020] FCA 1188, [67] (O'Bryan J); *Agius v South Australia [No 6]* [2018] FCA 358, [66] (Mortimer J); *Akiba v Queensland* [2017] FCA 1336, [135]–[137] (Mortimer J); *Tommy (n 99)* [68] (Mortimer J).

¹⁵² *Nicholls (n 71)* [11] (Robertson J).

¹⁵³ *Booth (n 29)* [39].

nature and purpose for which documents are produced, and subsequently used, for privilege claims to be maintainable. As Reeves J stated in *Wyman v Queensland*,¹⁵⁴ neither privilege nor confidentiality can ‘throw a protective cover over every communication that has occurred between members of the Bidjara People and [an expert] during his professional life as an anthropologist’.¹⁵⁵

In this respect, those commissioning expert reports ought to give specific attention to, and be very clear of, the purpose for which the report is commissioned, and the potential uses to which the report might be put. Ideally, these matters ought to be explicitly recorded in the retainer agreement (alongside appropriate obligations of confidentiality), and document control mechanisms established to maintain confidentiality. Furthermore, those involved in native title litigation ought to create and invest in protocols for document management and controls upon access, use and distribution of material. It is important that any decisions to share or disclose documents are made with full appreciation of the potential consequences of doing so on any existing legal rights.

Fifthly, where parties are concerned about the risk of documents being used for adverse or collateral purposes, it will be prudent for express agreements to be made to govern the terms on which any disclosure occurs. Such arrangements should be established prior to that disclosure occurring. In both *Tommy* and the *Lake Torrens Overlap Proceeding*, the absence of contractual restrictions on disclosure weighed heavily against the existence or maintenance of any privilege. If suitable terms cannot be agreed, alternative arrangements — such as separate expert reports — may need to be commissioned. While the cost of implementing such measures may be high, such costs are almost certainly going to be lower than the costs of litigation relating to document access later.

Sixthly, representative bodies ought to review their terms of engagement with experts in light of the decisions in *Tommy* and *Pappin*. Those decisions make clear that the ‘default’ position — that the relevant client to whom privilege accrues, and from whom instructions may be sought is the named applicant(s) for the native title determination — may be varied by clear contractual terms to the contrary. If representative bodies wish to maintain control over documents, rather than merely acting as a custodian thereof, clear terms of engagement listing the representative body as the commissioning party and client will be required.

Seventhly, where evidence which may be especially sensitive is filed in proceedings, parties ought to promptly seek confidentiality or non-publication orders under Part VAA of the *Federal Court of Australia Act 1976* (Cth), as they would in any other Federal Court proceeding in which such an issue arises. Although the threshold for obtaining orders of this sort is high, they are the most effective mechanism for preserving and protecting the interests of persons and parties

¹⁵⁴ *Wyman v Queensland* (n 95).

¹⁵⁵ *Ibid* [28].

whose interests may otherwise be jeopardised by publication or disclosure of documents.

Finally, parties and legal advisors ought to be conscious of, and promote, principles of Indigenous data sovereignty wherever they are able. Increasing litigation surrounding access to documents in native title litigation is generally a poor, alien solution to issues that intimately affect the rights, interests, and status of First Nations peoples. Those First Nations peoples should be centred in all efforts to resolve documentary disputes, as the burgeoning jurisprudence has recognised. While some judicial decisions have demonstrated a willingness to promote principles of Indigenous data sovereignty, the jurisprudence has not yet reached a stage whereby those principles have any direct operative effect. Accordingly, and in some tension with the first conclusion expressed above, principles of self-determination must be expected to be construed in light of — and subject to — the ordinary rules of practice and procedure applying to all civil litigation in the court.

VII CONCLUSION

A recent trend in native title litigation has emerged of disputes surrounding access to documents taking up an increasing amount of judicial time and attention. As this article has discussed, recent cases have required the court to translate, adapt, and apply ‘ordinary’ principles of civil procedure to the unique context of native title litigation. While having due regard to the special features of native title litigation, and recalling the principles of Indigenous data sovereignty, the cases demonstrate that the court has generally applied the same tests, with the same level of stringency, as it would do in ordinary *inter partes* litigation.

However, this has required the court to confront several unique issues arising from the ‘mapping’ of these principles onto the native title context. Whether documents are sought by consent, from the court, or via compulsive means, recent cases have demonstrated the difficulty of the potential issues surrounding access. For consensual resolution, persons possessing documents must be mindful of the *Hearne v Street* obligation, and conscious that release from that obligation requires the court to be persuaded that some ‘special circumstances’ exist. Where documents are sought from the court, particular attention must be given to principles of ‘open justice’ and how they apply to the specific document sought. In the context of subpoenas and notices to produce, questions of legal professional privilege and ‘without prejudice’ (or settlement) privilege are likely to loom large.

While each of these issues are not unique to native title matters, the court has consistently demonstrated that resolution of these issues will occur on a case-by-case basis, applying well-established general principles to the unique factual context of a given matter while being cognisant of the demands of the native title

context. Judicial decisions have generally favoured the disclosure of documents, emphasising that there are no special rules protecting documents in native title litigation. In doing so, the need for careful attention to, and management of, documents, has become particularly acute. For those engaged in native title litigation, such issues ought to be given careful attention, lest the interests of First Nations peoples be adversely impacted by careless or unexpected disclosure of sensitive material.