FEDERAL COURT OF AUSTRALIA

Champion on behalf of the Marlinyu Ghoorlie Claim Group v State of Western Australia [2020] FCA 1175

File number:	WAD 647 of 2017
Judgment of:	**BROMBERG J**
Date of judgment:	14 August 2020
Catchwords:	**PRACTICE AND PROCEDURE** – application for determination of native title – interlocutory application to inspect anthropological reports from another native title proceeding – application opposed by litigants from that other proceeding on the basis that they provided information to anthropologist on the understanding that it would only be used in that proceeding and that the information is confidential – lapsing of restrictions on use of affidavits or reports read in open court in accordance with *Federal Court Rules 2011* r 20.03 – balancing exercise between principle of open justice and interest in preserving confidentiality of private or sensitive information – whether access required for legitimate forensic purpose – whether granting access would damage a person's interests – legitimate forensic purpose established – no particulars of confidentiality or potential damage provided – conditional access in respect of those documents which were received as evidence in other proceeding granted.
Legislation:	*Federal Court of Australia Act 1976* (Cth) *Federal Court Rules 2011* (Cth)
Cases cited:	*Australian Securities and Investments Commission v Cassimatis (No 4)* [2015] FCA 465 *Banjima People v Western Australia (No 2)* [2013] FCA 868 *Booth on behalf of the Gunaikurnai People Claim Group v State of Victoria (No 3)* [2020] FCA 1143 *Burragubba on behalf of the Wangan and Jagalingou Peoples v State of Queensland (No 2)* [2018] FCA 1031 *Deputy Commissioner of Taxation v Hawkins* [2016] FCA 164 *Graham v Colonial Mutual Life Assurance Society Ltd* (2013) 216 FCR 458 *Graham on behalf of the Ngadju People v State of Western Australia* [2012] FCA 1455

	Hogan v Hinch (2011) 243 CLR 506 *International Litigation Partners Pty Ltd v Commissioner of Taxation* [2014] FCA 671 *Nicholls on behalf of the Bundjalung People of Byron Bay and Attorney General of New South Wales (No 2)* [2019] FCA 1797 *Oldham v Capgemini Australia Pty Ltd* (2015) 241 FCR 397 *Plate Glass Holdings Pty Limited as trustee for the R Gregg Family Trust v Fraser Gordon Investments Pty Limited* [2012] FCA 1487 *Ranbal (atf The Vikas Rambal Family Trust) v Oswald (atf The Burrup Trust)* [2014] WASC 86 *Russell v Russell* (1976) 134 CLR 495 *Van Stokkum v The Finance Brokers Supervisory Board* [2002] WASC 192
Division:	General Division
Registry:	Western Australia
National Practice Area:	Native Title
Number of paragraphs:	44
Date of hearing:	Determined on the papers
Counsel for the Applicant:	Mr M Pudovskis
Solicitor for the Applicant:	Blackshield Lawyers
Representative for Ms S Dimer (Respondent):	Ms S Dimer
Representative of Ngadju Native Title Aboriginal Corporation RNTBC (NNTAC):	Ngadju Native Title Aboriginal Corporation

ORDERS

WAD 647 of 2017

BETWEEN:	**BRIAN CHAMPION & ORS ON BEHALF OF THE MARLINYU GHOORLIE CLAIM GROUP** Applicant
AND:	**STATE OF WESTERN AUSTRALIA & ORS** Respondent

ORDER MADE BY: **BROMBERG J**

DATE OF ORDER: **14 AUGUST 2020**

THE COURT ORDERS THAT:

1. The Applicant's legal representatives are given leave to inspect and copy each of the documents listed in Annexure A to this order, on the proviso that:

   (a) the contents of the document are not to be communicated to any person other than for the purpose of this proceeding;

   (b) the document is not copied or provided to any person except for the purposes of the proceeding and after 7 days' written notice of each copy to be made or provided is given to the Njadgu Native Title Aboriginal Corporation RNTBC (ICN 8297) ("**Ngadju NTAC**") (in the case of documents 1 and 2 of Annexure A) or the First Respondent (in the case of documents 3 and 4 of Annexure A) and after any person to be provided with a copy has been provided with a copy of these orders;

   (c) the document is not to be used for any purpose other than for the proceeding; and

   (d) insofar as the contents of documents 1 or 2 of Annexure A are referred to or reproduced in any report or other document prepared by an anthropologist or other potential witness in the proceeding, a copy of an extract or extracts referring to or reproducing that content must be provided to the Ngadju NTAC at least seven days prior to the distribution of that report or document to any person other than the applicant's legal representative.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ANNEXURE A

Documents filed by the Applicant in proceeding WAD 6020 of 1998 ("Ngadju proceeding")

1. 2009 Report of Dr Palmer
2. Anthropologist's Responsive Report filed March 2012

Documents filed by the State of Western Australia in the Ngadju proceeding

3. Prof Sansom's report of 2004
4. Prof Sansom's report of February 2012

REASONS FOR JUDGMENT

BROMBERG J:

1 In this proceeding, the applicant seeks a native title determination in relation to lands and waters in Western Australia claimed by the claimant group that the applicant represents.

2 By an interlocutory application, the applicant seeks an order that the applicant's legal representatives be given leave to inspect and copy certain documents filed in proceeding WAD 6020 of 1998, which is the "Ngadju" native title claim proceeding that was the subject of the judgment of Marshall J in ***Graham*** *on behalf of the Ngadju People v State of Western Australia* [2012] FCA 1455 published on 21 December 2012 ("**the Ngadju proceeding**"). The land the subject of the Ngadju native determination is adjacent to the land in respect of which a native title determination is sought in this proceeding.

3 The application is resisted by one respondent – Ms Sharon Dimer – and also by the Ngadju Native Title Aboriginal Corporation RNTBC (ICN 8297) ("**the Ngadju NTAC**").

4 Annexure A to the interlocutory application lists the documents for which leave to inspect is sought by the applicant. That annexure is in the following terms:

ANNEXURE A

Documents filed for the Applicant in the Ngadju proceeding

1. Applicant's Anthropologist's Report of Dr Kingsley Palmer and Appendices dated 2003
2. 2009 Report of Dr Palmer
3. Anthropologist's Responsive Report filed March 2012

Documents filed for the State of Western Australia in the Ngadju proceeding

4. Prof Sansom's report of 2004
5. Prof Sansom's report of February 2012

5 In the Ngadju proceeding and on 26 September 2000, Carr J made the following order, the scope of which covers the documents in relation to which leave to inspect is sought:

> 32. Unless otherwise ordered or agreed between the parties, expert reports and genealogies filed in the proceedings and materials referred to in paragraph 32 above, shall be subject to the following restrictions:
>
> (a) the contents of the document are not to be communicated to any person other than for the purpose of the proceedings;

(b) the document is not to be copied except for the purposes of the proceedings and after notice of each copy to be made having been given in writing to the solicitor for the party who filed or provided the relevant document; and

(c) the document is not to be used for any purpose other than for the proceedings.

6 By reason of the order made by Carr J and the preliminary indication given by me that, if leave to inspect is granted, any order I make should impose similar restrictions on the use of material to those imposed by the order of Carr J, the applicant accepts that leave to inspect be conditioned by the following restrictions:

(a) the contents of the document are not to be communicated to any person other than for the purpose of the proceedings;

(b) the document is not to be copied or provided to any person except for the purposes of the proceedings and after notice of each copy to be made or provided having been given in writing to the Njadgu Native Title Aboriginal Corporation RNTBC (ICN 8297) (in the case of a document filed for the Applicant in the Ngadju proceeding) or the First Respondent (in the case of a document filed for the State of Western Australia in the Ngadju proceeding), and after any person to be provided with a copy has been provided with a copy of these orders; and

(c) the document is not to be used for any purpose other than for the proceedings.

7 The applicant has appointed Ray Wood as the anthropologist engaged to prepare connection material in support of its application for a native title determination. The applicant intends that, when prepared, that material will be provided to the State of Western Australia ("**State**") on a confidential and without prejudice basis. In that context, the affidavit in support of the applicant's interlocutory application sets out the basis for the leave sought as follows:

3. In its *Amended Statement of Facts and Contentions* filed in this proceeding on 13 September 2019 at [10], the Applicant identified the society under whose laws and customs the members of the native title claim group claim to hold native title in the application area as the "Kalamaia Kalaako Kaburn society". In the *First Respondent's Statement of Facts and Contentions* filed in this proceeding on 11 October 2019, the State denied the existence of a Kalamaia Kalaako Kaburn society at [117(a)], and noted at [29(b)] and [117(d)] that in *Graham v Western Australia* [2012] FCA 1455 at [21]-[33], the Court found that the Kalaako people were now extinct, and that they had constituted a sub-group of the pre-sovereignty Ngadju society. Accordingly, the Applicant is seeking access to the expert anthropological reports filed in the proceeding to which that judgment relates, being the Ngadju native title proceeding WAD 6020 of 1998 ("the Ngadju proceeding"), to assist Mr Wood in addressing the proposition that the Kalaako people are now extinct, and to address the "society" issue.

4. Further, in their Form 5 filed in this proceeding on 3 September 2019, Sharon, Peter and Roseanne Dimer and James Murphy ("the Dimer respondents")

> assert that they hold rights in part of the Marlinyu Ghoorlie claim area as members of the "Kalaako People", whereas the Applicant asserts that they are persons who are descended from Ngadju people and from western desert people. The Applicant believes that the reports listed in the interlocutory application may help clarify this issue.

8 In its submission in support of the orders it seeks, the applicant stated that the reasons for seeking access to the documents in question are twofold, as follows:

> (a) To enable to applicant's expert anthropologist Mr Ray Wood to understand and address certain findings of Marshall J in the Ngadju decision said by the State to be relevant to the merits of the applicant's case in these proceedings; and
>
> (b) To enable the applicant to address claims made by the Dimer respondents.

9 Further, the affidavit in support states that the applicant has no wish to access any gender restricted material and that the understanding of the deponent (the applicant's solicitor) is that the relevant reports do not contain any such material. A search of the file does not reveal that any gender based restrictions were imposed.

10 The affidavit further informed the Court that attempts to obtain the consent of the Ngadju NTAC and the respondents were not fruitful other than that the State has consented to an order with respect to those reports which are sought and which the State filed in the Ngadju proceeding.

11 The only respondent who filed submissions opposing the orders the applicant seeks was Ms Sharon Dimer. Ms Dimer is self-represented and, with great respect to her, her submissions seem to misunderstand the matters in issue on this application. Ms Dimer's submissions set out the basis of her opposition to the applicant's application for a determination of native title in relation to the lands and waters claimed by the claim group the applicant represents. Those submissions will need to be carefully considered in due course, but on this application, I am not dealing with the merits of the applicant's application for a native title determination but simply dealing with the applicant's application for access to certain documents. Ms Dimer's submissions are not directed to that issue and are of no assistance.

12 The Ngadju NTAC is the prescribed body corporate which, in relation to the native title the subject of the native title determination in the Ngadju proceeding, holds native title on trust for the Ngadju People. On behalf of the Ngadju NTAC, its Chief Executive Officer made two written submissions in opposition, neither of which were supported by affidavit. The opposition of the Ngadju NTAC is limited to the three reports of Dr Kingsley Palmer to which

the applicant seeks access. The submissions of the Ngadju NTAC assert that those reports were commissioned by the Goldfields Land and Sea Council ("**GLSC**") on behalf of the Ngadju People to assist in their application for a native title determination. The submission asserts that the Ngadju native title holders were authorised to provide the evidence to Dr Palmer on behalf of the Ngadju People for the sole purpose of the Ngadju People applying for native title. It is submitted that if Dr Palmer's reports are now to be used for a different purpose, then it is only those same native title holders who can provide consent for the reports to be used for that purpose. The submission states that the Ngadju NTAC has sought the counsel of elders of the Ngadju People, including some of the same persons Dr Palmer interviewed. It is asserted that all the persons to whom the Ngadju NTAC had spoken do not wish for any information from Dr Palmer's reports to be shared in the manner requested by the applicant. Their reasons are that the stories and history communicated to Dr Palmer by those interviewed were given confidentially for the sole purpose of progressing the Ngadju native title claim. The stories and history are said to be special to the Ngadju and not for communication to other persons for different purposes.

13 The submissions of the Ngadju NTAC put in the alternative that it is the GLSC that owns Dr Palmer's reports and that it is only the GLSC who can provide consent for their use in a manner different from the use for which they were commissioned. Furthermore, those submissions assert that the reports contain confidential or culturally sensitive information (without identifying which parts of those reports are confidential or culturally sensitive and why) and submit that if the Court is minded to provide access to the reports, the Ngadju NTAC should be permitted to redact those parts of the reports that are confidential or culturally sensitive prior to any access to those reports being permitted.

14 The first submission filed by the Ngadju NTAC advised that a meeting had been convened for 2 and 3 July 2020 in Norseman, Western Australia in order to give the Ngadju native title holders an opportunity to deliberate on whether access to the reports should be provided in the manner requested. The submission asked the Court to await that meeting before making its determination. That was done.

15 By its second submission filed on 15 July 2020, the Ngadju NTAC informed the Court that a meeting of Ngadju native title holders was held as foreshadowed; that the native title holders present were addressed by the Ngadju NTAC Chief Executive Officer and its legal advisor and that the nature of the access that was being sought was explained including the suggested

safeguards around disclosure, and the purpose and identity of persons to whom the information would be disclosed. The submission states that following a lengthy discussion, a resolution was passed unanimously by the meeting to the effect that the Ngadju NTAC not consent "in any way" to the applicant's application for access to the three reports of Dr Kingsley Palmer.

CONSIDERATION

16 There are only three documents in contest. The State has consented to an order providing access to the documents it filed in the Ngadju proceeding and there is no reason why access to those documents – the reports of Professor Sansom – should not be permitted on the basis of the conditions accepted by the applicant and set out above at [6].

17 Of the three documents in contest – the three reports of Dr Palmer – the first report dated 2003 was not received into evidence in the Ngadju proceeding. It was merely marked for identification. Open justice principles, to which I will shortly refer, do not support access being granted to that document because it was never part of the evidence in the Ngadju proceeding: ***Oldham*** *v Capgemini Australia Pty Ltd* (2015) 241 FCR 397 at [27] (Mortimer J). That is not to say that in the exercise of the Court's discretion to provide access to a document filed but not "read" could never been given: *Oldham* [27]. However, neither of the reasons (referred to above at [8]) relied upon by the applicant support the grant of access to that document. A forensic purpose or some utility (see the discussion at [34] – [35] below) has not been established and what I consider to be an important requirement in favour of the grant of access is absent. I will not grant the leave sought by the applicant in relation to the 2003 Report of Dr Palmer.

18 Dr Palmer's 2009 Report and his Responsive Report filed in March 2012 ("**Dr Palmer's reports**") were each received into evidence and must be taken to have been "read" into the court record. Dr Palmer was called to give oral evidence and I would infer, including because of the extensive reference made to Dr Palmer's evidence (including to his 2009 Report) in the reasons for judgment of Marshall J, that the content of Dr Palmer's reports were the subject of open discussion in Court through the questioning of Dr Palmer and oral submissions made by the parties.

19 In any event, an announcement in Court that an affidavit or report is "read" is usually taken as deeming all of the words in the document to be treated as though they had been read aloud: *Australian Securities and Investments Commission v Cassimatis (No 4)* [2015] FCA 465 at [9] (Edelman J). As Robertson J said in ***Nicholls*** *on behalf of the Bundjalung People of Byron*

Bay and Attorney General of New South Wales (No 2) [2019] FCA 1797 at [16] "[an] affidavit which is read is thus in no different position to oral evidence in chief given by a witness, and to permit inspection of such an affidavit is consistent with inspection of a transcript being available without leave under r 2.32(2)(m) [of the *Federal Court Rules 2011*]". See further *Oldham* at [26].

20 Robertson J went onto say in *Nicholls* at [18]:

> Because of the principle of open justice, it is the Court's usual practice to release material which has been used in open court or otherwise used by a judge in equivalent circumstances: *Seven Network Ltd v News Ltd (No 9)* [2005] FCA 1394; 148 FCR 1 at [27]; *ABB Transmission and Distribution* at [4]; *Re Universal Music (Australia) Pty Ltd v Sharman Licence Holdings Ltd; Ex parte Merlin BV* [2008] FCA 783; 222 FCR 580 at [31]-[33]; *Rich v Harrington* [2007] FCA 1979; 99 ALD 297 at [23]; *Y v University of Western Australia (No 2)* [2006] FCA 466; 151 FCR 322 at [46]; *Re Richstar Enterprises Pty Ltd; Australian Securities and Investments Commission v Carey (No 2)* [2006] FCA 407; 232 ALR 398 at [18]; *Hartnell v Commissioner of Taxation (No 1)* [2009] FCA 230; 254 ALR 71 at [9]; *Dallas Buyers Club, LLC v iiNet Limited (No 1)* [2014] FCA 1232; *Baptist Union of Queensland – Carinity v Roberts* [2015] FCA 1068; 241 FCR 135 at [34]-[36]; *Deputy Commissioner of Taxation v Shi (No 2)* [2019] FCA 503 at [15]-[26].

21 There is one further consequence of Dr Palmer's reports having been "read" which needs to be understood. Rule 20.03 of the *Federal Court Rules 2011* provides:

> (1) If a document is read or referred to in open court in a way that discloses its contents, any express order or implied undertaking not to use the document except in relation to a particular proceeding no longer applies.
>
> (2) However, a party, or a person to whom the document belongs, may apply to the Court for an order that the order or undertaking continue to apply to the document.

22 The consequence of the operation of that rule (or its predecessor O 15 r 18 which was in relevantly the same terms) is that the order made by Carr J, or at least that aspect of the order which restrained use of material covered by the order to the Ngadju proceeding, no longer applied to a document read or referred to in open court. As Mortimer J said in ***Booth*** *on behalf of the Gunaikurnai People Claim Group v State of Victoria (No 3)* [2020] FCA 1143 at [47], referring to the judgment of Flick J in *Plate Glass Holdings Pty Limited as trustee for the R Gregg Family Trust v Fraser Gordon Investments Pty Limited* [2012] FCA 1487 at [26], the usual obligation to use a document obtained through a proceeding solely for the purpose of the proceeding "will generally cease once material is adduced into evidence – whether tendered as documents, or read in the form of affidavits". That is a shift which her Honour considered was expressly provided for by r 20.03. Her Honour relevantly continued at [47]:

> It is at this point that open justice principles take precedence, the operating assumption being that parties have either made forensic choices, or have had rulings made by the Court, which have led to reliance on certain material in the adversarial context in support of the position taken in public litigation.

23 There is nothing before me to suggest that, beyond the order of Carr J to which I have referred, the content of Dr Palmer's reports were the subject to any additional confidentiality or other restriction which would have precluded any member of the public in the Court during the hearing of the Ngadju proceeding from hearing or otherwise receiving information as to their content or any member of the public receiving that information by accessing the transcript of the Ngadju proceeding.

24 The submissions made by the Ngadju NTAC were not supported by evidence. Nevertheless, I am prepared to accept that the views and attitudes of the Ngadju native title holders are those which the submission of the Ngadju NTAC assert them to be. However, the submission that the native title holders were only authorised to provide evidence to Dr Palmer for the sole purpose of applying for native title, is an assertion which I do not accept. It is neither stated nor apparent who it is that gave such a restricted authorisation.

25 I accept that the views asserted are likely to be genuine and deeply held. The views of the Ngadju native title holders deserve great respect. By their very nature, anthropological reports filed in native title proceedings are replete with private or personal information about the native title claimants, their families and their ancestors. They also tend to contain highly sensitive spiritual information of a private nature. Genealogies which chart familial connections over many decades are usually a feature of such reports. As Mortimer J said in *Booth* at [35], "[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". With her usual insight and drawing upon her extensive experience with native title proceedings, Mortimer J went on to say at [36] and [37]:

> [36] 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 not usually the kind of information which would be readily distributed to all and sundry, to be used for whatever purposes anyone wished.
>
> [37] Although not as much of an issue in the current circumstance, it 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. That is the system of proof which the Native Title Act imposes on Aboriginal and Torres Strait Islander Peoples. Much of that evidence and information may be of a character which lends itself to disclosure under open justice principles, and is capable of having an educative effect on those people within the Australian community who know little or nothing about the rich and complex system of traditional law and custom that exists in this country. However, other aspects will require protection, in order to recognise and preserve their character as special knowledge, to which only a limited number of people are privy. These aspects of native title proceedings are well recognised: see for example the comments of Barker J in *Banjima People v State of Western Australia (No 2)* [2013] FCA 868 at [2033]-[2037] and of Sackville J in *Jango v Northern Territory of Australia* [2003] FCA 1230 at [56] and [59].

26 It is likely, although I cannot make any finding as no evidence to this effect has been presented, that Dr Palmer's reports contain information of the character described by Mortimer J.

27 However, and without seeking to diminish the sensitivity and personal or spiritual significance of the kind of evidence commonly given in native title proceedings, information that is private or personal or sensitive is required to be publicly aired in other kinds of court proceedings including family law and criminal law proceedings where, quite often, the highly personal and sensitive circumstances of a person and that person's family has to be examined and assessed despite the harm that will often be caused to entirely innocent people. Open justice principles which courts are bound to respect and apply may result in private, personal or sensitive information being made publicly available. To the extent that harmful disclosure can be avoided it should be. But as will become apparent, a balancing exercise is required which takes into account both the principle of open justice and the legitimate need to protect confidential information in order to avoid harm or damage by reason of its public disclosure.

28 It is often wisely said that justice must not only be done but must be seen to be done. In order that public confidence in our system of justice is not undermined, the workings of our courts must be open to public scrutiny. Scrutiny not only enhances accountability but, importantly, it is the foundation for public confidence in our system of justice. To facilitate public scrutiny of the administration of justice and enable ordinary members of the public to understand the workings of our courts and the decisions there made, it is necessary that court hearings are open and that evidence received by the courts is generally accessible to those members of the public who, for good reason, seek that access. In *Russell v Russell* (1976) 134 CLR 495 at 520, Gibbs J said:

> It is the ordinary rule of the Supreme Court, as of the other courts of the nation, that their proceedings shall be conducted "publicly and in open view" (*Scott v. Scott* [1913]

> A.C. 417, at p. 441). This rule has the virtue that the proceedings of every court are fully exposed to public and professional scrutiny and criticism, without which abuses may flourish undetected. Further, the public administration of justice tends to maintain confidence in the integrity and independence of the courts. The fact that courts of law are held openly and not in secret is an essential aspect of their character. It distinguishes their activities from those of administrative officials, for "publicity is the authentic hall-mark of judicial as distinct from administrative procedure" (*McPherson v. McPherson* [1936] A.C. 177, at p. 200).

Chief Justice French in *Hogan v Hinch* (2011) 243 CLR 506 at [20] and [22] made similar observations; see also *Nicholls* at [12].

29 Of course, what may be considered as the right of the general public to understand and scrutinise the administration of justice by our courts must, at times, be tempered by due consideration being given to competing interests. So much is recognised by the available grounds for the making of a suppression and non-publication order under s 37AG of the *Federal Court of Australia Act 1976* (Cth) ("**Federal Court Act**"). Section 37AE requires that in making a suppression or non-publication order the Court take into account that the primary objective of the administration of justice "is to safeguard the public interest in open justice". Section 37AF empowers the Court to make suppression or non-publication orders on limited grounds. Those grounds are specified in s 37AG(1) as follows:

> (1) The Court may make a suppression order or non-publication order on one or more of the following grounds:
>
> (a) the order is necessary to prevent prejudice to the proper administration of justice;
>
> (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;
>
> (c) the order is necessary to protect the safety of any person;
>
> (d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in a criminal proceeding involving an offence of a sexual nature (including an act of indecency).

30 The public's capacity to access evidence tendered in a proceeding before this Court is not regulated by s 37AE of the Federal Court Act. It is Rule 2.32 of the *Federal Court Rules 2011* which governs this application. Sub-rule 2.32(4) relevantly provides that a non-party may apply for leave to inspect a document (like those here sought) that a non-party (by reason of sub-rule 2.32(2)) is not otherwise entitled to inspect. The discretion is wide and not expressly confined. Nevertheless, s 37AE of the Federal Court Act is instructive as to the nature of the competing interests which the Court's discretion to permit access to such evidence should

accommodate. That the principle of open justice is an overarching principle which guides the Court in its judicial and procedural operations is recognised by the Court's General Practice Note (GPN-ACCS) *Access to Documents and Transcripts Practice Note* issued by the Chief Justice on 25 October 2016.

31 In relation to access to evidence tendered in a proceeding which has been "read", the position under Rule 2.32 was expressed in the following terms by Mortimer J in *Oldham* at [26]:

> The entitlement of the public to be present when evidence is given in a proceeding (read with the underlying principles apparent in ss 17 and 37AE of the Federal Court Act) would suggest, subject to any competing discretionary considerations, that an affidavit which is "read" in a proceeding, and thus treated as if that evidence had been given orally in open court, should be made available for inspection: see *Australian Securities and Investments Commission v Cassimatis* (No 4) [2015] FCA 465 at [6]-[10], per Edelman J. An affidavit which is read is thus in no different position to oral evidence-in-chief given by a witness. To permit inspection of such an affidavit is consistent with inspection of transcript being available without leave under r 2.32(2)(m).

32 Factors relevant to the exercise of a discretion reposed in a rule like Rule 2.32 were discussed by McLure in *Van Stokkum v The Finance Brokers Supervisory Board* [2002] WASC 192 at [27] and cited by Pagone J in *Deputy Commissioner of Taxation v Hawkins* [2016] FCA 164 at [8].

33 In my view, two of the factors there discussed are here most germane. They are, *first*, the purpose for which access is required, and *secondly*, the potential for the private or commercial interests of a party to be damaged should access be provided. In *International Litigation Partners Pty Ltd v Commissioner of Taxation* [2014] FCA 671, Jagot J at [14] said that the exercise of discretion involved the weighing of any real utility of disclosure as against the interest in preserving the confidential and personal nature of the documents (see further *Oldham* at [39]). Those factors, in my view, are to be assessed in the context of the overarching need to generally safeguard the public interest in open justice. A practical rather than a technical approach should be taken.

34 The first consideration, going to the purpose for which access is required, focuses attention on the specific utility the access would provide: *Graham v Colonial Mutual Life Assurance Society Ltd* (2013) 216 FCR 458 at [11(e)] (McKerracher J). In a case such as this, where access is sought by a non-party for the purpose of assisting that person in their own litigation, Robertson J in *Burragubba on behalf of the Wangan and Jagalingou Peoples v State of Queensland (No 2)* [2018] FCA 1031 asked (at [33]) whether the purpose of the request for access "is

forensically related to an issue that has arisen in the present proceedings". At [51] and citing *Ranbal (atf The Vikas Rambal Family Trust) v Oswald (atf The Burrup Trust)* [2014] WASC 86 at [9], Robertson J accepted that "a party engaged in litigation has a legitimate interest in inspecting documents which contain information relevant to the issues in that litigation which that party is involved".

35 I am satisfied that the applicant has a legitimate forensic purpose the pursuance of which is likely to be of utility both to and to the potential disposition of this proceeding. That forensic purpose is set out at [7] and [8] above. It primarily concerns a matter that appears to be in issue in this proceeding, namely, whether the Kalaako People are extinct and whether they constituted a sub-group of the pre-sovereignty Ngadju society. The applicant seeks access to Dr Palmer's reports to enable its expert anthropologist to understand and address findings made by Marshall J in *Graham* in relation to that issue.

36 Despite the open justice principle, a compelling case may be established in opposition to a request for access. As Barker J discussed in ***Banjima*** *People v Western Australia (No 2)* [2013] FCA 868 in relation to an application seeking the suppression of evidence given in a native title proceeding, native title determination proceedings may be put at risk if confidential information is not protected. His Honour said this at [2032]:

> [2032] In the circumstances of parties who are claimants in a native title determination proceeding, and who are, by the law which governs proof of native title, obliged to reveal customary knowledge in order to establish that they are members of a vital society which remains connected to its traditional country by its traditional laws and customs, there is every possibility that what is customarily secret to, or held confidentially by, certain elders (with the respect and understanding of other members of that society) will need to be revealed to the Court and other parties to the proceeding. There may be considered a public interest in continuing to protect such information nonetheless, as it is that very information that gives life and meaning to the society for whose advantage the Parliament has enacted the NTA. To violate the confidentiality of such information, or to render useless the customary processes by which such information or knowledge is held and controlled, would be calculated to undo the society and so the purpose of the proceeding to which it relates.

37 No case based upon the need to protect a native title determination proceeding is here asserted. As in *Banjima* (see at [2040], where reports provided by Dr Palmer were also at issue), Dr Palmer's reports must be treated as having been read in open court and were also likely to have been the subject of discussion in open court and were discussed in the judgment delivered by Marshall J in *Graham*. Those reports and the evidence in relation to them were not the subject of confidentiality restrictions beyond those contained in the order made by Carr J and,

as earlier indicated, Rule 20.03 (or its predecessor) operated to disable the restriction made in that order that the reports only be used for the purpose of the Ngadju proceeding. That non-publication or suppression orders or orders restricting the use or access to Dr Palmer's reports were not sought or granted in the Ngadju proceeding in order to protect the interests of the Ngadju People from being damaged, as appears to be the case, makes it more difficult to accept that those interests now require protection from the kind of access which the applicant seeks. That is especially so in circumstances where, despite the observations I have made about the usual content of anthropological reports in native title proceedings, the submissions made by the Ngadju NTAC are very general, do not identify any particular parts of the reports as containing confidential or personal information, do not specify any particular harm or the extent of any potential for harm and are not supported by any evidence.

38 Rather than specifying the damage or harm that may be caused by the Court providing the access sought, the submissions made by the Ngadju NTAC are focused upon an objection that the access sought is beyond the purpose for which the Ngadju native title holders were prepared to provide the information they gave to Dr Palmer.

39 I can well understand that, in pursuance of a native title determination, 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. The capacity for that information to be compromised through its dissemination in the claimant's application for native title may be understood but accepted as the prejudice that must be suffered for the proceeding in question to succeed. However, the prejudice or perceived prejudice that must be suffered is, in truth, potentially broader than that that may be occasioned directly through the native title proceeding for which the information is provided to support. Once brought into the public domain through a court proceeding and because of the open justice principle, 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.

40 It is unfortunate if that reality was not conveyed to the Ngadju native title holders with whom Dr Palmer spoke in order to compile his reports. I do not seek to criticise Dr Palmer. I do not know what he did or did not foreshadow to those persons about the possible use of the information they were asked to provide. I would, however, make the general observation that anthropologists, lawyers and others who seek information from native title claimants or other

potential witnesses in native title proceedings should 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.

41 The alternative submission made by the Ngadju NTAC, that leave should not be granted unless the consent of the GLSC is obtained, has no merit. Even if it is the case that the GLSC is the proprietor of Dr Palmer's reports, the filing of those reports with the Court effectively gave over control of their use and distribution to the Court to be exercised in accordance with its rules and processes. For the purpose here in question, the Court does not require the permission of GLSC to provide the access which the applicant seeks.

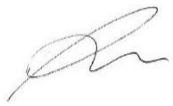
42 The Ngadju NTAC has not demonstrated, in the context of the open justice principle, that any need to protect the interests of the Ngadju People from harm or damage is outweighed by the legitimate forensic need of the applicant to access the documents in question for the limited purpose it seeks and in circumstances where I intend to impose the restrictions which the applicant accepts are appropriate to be imposed.

43 As earlier stated, the Ngadju NTAC contended that should its submissions not be accepted, an opportunity should be provided to it to identify and redact from Dr Palmer's reports information considered to be confidential. That submission must also be rejected. The time for identifying what information is asserted to be confidential and for substantiating those assertions has now long passed. I am, however, mindful that the Ngadju NTAC was not legally represented and may not have appreciated that it was incumbent upon it to fully make out its case in the opportunity which has already been afforded to it. I am therefore prepared to countenance one additional measure. I will order that, insofar as the report proposed to be made by the applicant's anthropologist Mr Wood (or any other potential witness) contains information which refers to or reproduces information from Dr Palmer's reports, an extract or extracts from such a report setting out that information be provided to the Ngadju NTAC seven days prior to the distribution of the report to any person other than the legal representative of the applicant. That condition upon the access that I will provide will give the Ngadju NTAC a short opportunity to approach the Court and seek relief should it be of the view that the wider distribution of the report in question will, by reason of its disclosure of particular confidential information, cause significant harm or damage to the Ngadju People. That opportunity, if needed, is not intended to provide for a re-run of this application. It may, however, enable sensible restrictions to be imposed on the distribution and use of the report in question.

44 For those reasons, I will make an order granting the leave sought by the applicant subject to the imposition of the conditions to which I have earlier referred.

I certify that the preceding forty-four (44) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromberg.

Associate:



Dated: 14 August 2020