

Privilege – Overview and Recent Developments Relevant to Anthropologists Working on Native Title Claims¹

Tig Pocock, Senior Associate, Corrs Chambers Westgarth

I'm going to be talking mainly about "legal professional privilege", or "client legal privilege". This relates to communications made between claimants and their lawyers and may extend to communications with anthropologists. Privilege is an issue which is very important for expert witnesses involved with native title claims, such as anthropologists, to understand or have some grasp of. It is unfortunately also a very complex and technical area of the law.

In this paper I will attempt to give an overview of:

- what legal professional privilege is;
- what documents it protects and when; and
- how the protection of privilege can be lost.

In doing so, I will consider some recent Federal Court cases where the issue has been considered in the context of native title claims. I also hope to be able to provide a couple of practical pointers at the end.

I will also talk briefly about "without prejudice" privilege. This is quite a different issue, and relates to communications made, or documents provided, to *another party* to the claim as part of negotiations to settle the claim by agreement. This would include, for example, "connection reports" provided to the State.

I will start with legal professional privilege, by introducing the court process.

BACKGROUND – THE COURT PROCESS

In order to understand what "privilege" is, it is necessary to first have an understanding of the court process and how it works.

In very crude terms, two parties come to court to put their opposing cases before an impartial judge, who hears the arguments, considers the evidence, and makes a decision based on both the law and the judge's findings on the evidence.

The nature of evidence that will be led by parties in a case is of course determined by the legal issues to be addressed. Those legal issues are in general settled between the parties in Court at the outset of a case, through a process called pleadings – although it is possible that other issues may arise during the course of the hearing.²

¹ In response to a question from the floor, this paper has been expanded to incorporate a new section dealing specifically with the issue of "without prejudice" privilege and "connection reports" provided to other parties in the course of National Native Title Tribunal mediation of claims.

² Cremean, D.J. (et al), 2001, *Practice and Procedure - High Court and Federal Court*, Federal Court Principal Legislation, Butterworths Australia, electronic full text compact disk, [32,585.15].

Importantly, both parties generally also get to test the evidence of the opposing party. This is what cross-examination is about – the testing of a witness about facts in issue, or testing the credit of the witness. While there is no actual right of cross examination, it is a discretion which is generally permitted by a judge in order to ensure a fair trial.³

In order to ensure each party has the opportunity to put any relevant evidence before the court, and that both sides are able to properly test the evidence of the opposing side, there are certain processes by which parties can, through the Court, require all relevant documents to be provided to them for inspection.

There are essentially two processes by which a party or a person can be compelled to provide documents. These are :

- by a process called “discovery”; and
- by subpoenas requiring production of documents.

Discovery

Discovery is a process where a party to litigation is able to compel another party to provide them with a list of *all* documents in that other party’s power, possession or custody, which are relevant to any issues before the court.⁴ This list is usually accompanied by an affidavit attesting to its compliance.⁵

This is potentially very broad – the list must even include all documents which have been in the party’s power or possession, but are no longer in their power or possession.⁶

“Documents” are defined very broadly, and would include sound and video recordings, maps, computer files, and anything on which there is writing or symbols which have a meaning.⁷

In addition, the test for whether a document is relevant to the proceedings is very broad – it will include anything which tends to advance either party’s case, or will lead to a chain of inquiry which has that consequence.⁸

Because the scope of discovery is potentially so wide, the Chief Justice of the Federal Court has issued a Practice Note to try to limit it.⁹ Therefore, the Court may limit discovery to particular issues, or may decide to give discovery only in stages. Nonetheless, the potential scope of discovery remains extremely broad.

³ Heydon, J.D. (et al), 2001, *Halsbury’s Laws of Australia*, Evidence, Butterworths Australia, electronic full text compact disk, [195-7885].

⁴ Federal Court Rules 1979 (Cth) O 15 r 2 and O 15 r 6

⁵ Federal Court Rules 1979 (Cth) O 15 r 2(2)(b)

⁶ Federal Court Rules 1979 (Cth) O 15 r 6(2) and O 15 r 6(5)

⁷ Federal Court Rules 1979 (Cth) O 1 r 4 and the *Evidence Act* 1995 (Cth) Dictionary

⁸ Federal Court Rules 1979 (Cth) O 15 r 2

⁹ Federal Court Practice Note No. 14, 3 December 1999, Chief Justice Black

Production and Inspection

Following the preparation of the list of relevant documents, the list is provided to the other party. The documents in the list must then be produced and made available for inspection by the other party. That other party may then make copies of the documents,¹⁰ and may potentially use them in evidence or in cross-examining the first parties' witnesses (for example if there are inconsistencies between their evidence and anything in any of the documents).

There is an important exception to this. That is where the documents are privileged.

If documents are subject to privilege, they must be listed with all the other documents, but they do not have to be produced for inspection.

However, the list of documents must still include all privileged documents. It must also note which documents are privileged, and state the basis on which it attracts privilege.¹¹ The other party then has the option of challenging the claim of privilege in the Court.

It should be noted that just because a document is produced for inspection does not mean that the document itself is necessarily admissible as evidence in the subsequent trial.¹²¹³ To be admissible in Court, the document would have to comply with other rules of evidence set out in the *Evidence Act*, such as relevance or the rule against hearsay.¹⁴

Before I go on to explain the concept of privilege and how it works, I'll just briefly mention the other way that production of documents may be required – on subpoena.

Subpoena to Produce Documents

A subpoena is an order of the court, issued at the request of a party, which can command any person who can give relevant evidence (and not just a party to the proceedings) to give evidence in person or to produce documents.¹⁵ Subpoenas to produce can be issued for different purposes – both to put evidence in court, and to get access to materials to consider whether to try to put it in court.

The subpoena will specify the nature of the documents which must be produced. Again, the scope of the term “document” is very broad.¹⁶

¹⁰ Federal Court Rules 1979 (Cth) O 15 r 2

¹¹ Federal Court Rules 1979 (Cth) O 15 r 6(5)

¹² See *Rush & Tomkins Ltd v Greater London Council* [1989] AC 1280 at 742 for a statement of the general rule that a party is entitled to discovery of all documents that relate to the matters in issue, irrespective of admissibility.

¹³ One aspect which is touched upon later in this paper is that it is conceivable that a document which is discoverable under the common law test of legal professional privilege during a pre-trial process, may not then be admissible as evidence in Court under the *Evidence Act* 1995 (Cth) formulation of the same privilege. See footnote 22 below.

¹⁴ There may nonetheless be advantages to the opposing party to having access to those documents, even if they cannot be used in Court. For example, they may be used to inform the basis of cross-examination of witnesses, to independently establish the facts in the documents; or they might lead to a chain of inquiry which exposes other documents which could be used as evidence, but would otherwise have been privileged.

¹⁵ Byrne D. (et al), 2001, *Halsbury's Laws of Australia*, Practice and Procedure, Butterworths Australia, electronic full text compact disk, [325-7250].

¹⁶ The definition of “document” in the Federal Court Rules 1979 (Cth) is derived from the Dictionary contained in the *Evidence Act* 1995 (Cth).

And again, an exception to the requirement to produce documents required by a subpoena is where the documents are privileged.

Just to give you an idea, here are some examples of how broad the requests for production of documents can be. I have taken these from three relatively recent native title cases, which I will come back to again later in my talk:

- In *Daniel v Western Australia*¹⁷, (“**Daniel**”) a subpoena for production directed to an anthropologist, Michael Robinson, required production of:

All notes, books, video tapes, audio tapes and other documents which are in your possession, custody or control and which contain or record interviews, conversations, or correspondence with, or your observations of, members of the first, second and third applicant native title claim groups.¹⁸

- In *Clarrie Smith v Western Australia*¹⁹ (“**Clarrie Smith**”), subpoenas for production were directed at the anthropologist, Dr Mana Waite, and his research assistants Sally Babidge and Stuart Fisher. That subpoena sought production of two categories of documents:

First, it sought

all records made of all information and data gathered for the purpose of compiling the applicants’ anthropology report [“the report”], including any handwritten or electronically recorded notes, sound recordings, video recordings or any like records made of any observations made by the applicants’ researchers and/or interviews or other communications made with any persons, including the applicants, who provided information for the purpose of and incidental to the compilation of the anthropologist’s report, whether or not that information was ultimately included in the report.²⁰

Second, it sought production of a series of ethnographic site surveys from the claim area prepared between 1996 and 1998. These included restricted reports relating to sites.

- In another matter, *Sampi v Western Australia*²¹ (“**Sampi**”), a similar subpoena for production directed at Geoffrey Bagshaw and Katie Glaskin, the anthropologists for the claimants and authors of an anthropological report in that case.²² The subpoena is even longer and more comprehensive than the previous two.

LEGAL PROFESSIONAL PRIVILEGE

So, what is this exception of “legal professional privilege”, and how does it work?

This is where we hit the first hurdle – there are two sets of rules for privilege: the *Evidence Act* and the common law.

¹⁷ [1999] FCA 1541

¹⁸ *Daniel v Western Australia* [1999] FCA 1541 at paragraph 2

¹⁹ [2000] FCA 526

²⁰ *Daniel v Western Australia* [1999] FCA 1541 at paragraph 1

²¹ [2000] FCA 1862

²² *Daniel v Western Australia* [1999] FCA 1541 at paragraph 1

In broad terms, legal professional privilege protects the confidentiality of certain communications made or documents passing between a lawyer and his/her client for the **dominant purpose** of legal advice, or use in litigation.²³

Importantly, privilege can also extend beyond the lawyer and client, to a third party such as an expert witness, where the communications or documents are prepared by that third party for the **dominant purpose** of use in litigation.²⁴ The rationale behind this is that extending the privilege to third party communications will encourage the production by parties of information relevant to litigation, thereby assisting the functioning of the Court system.²⁵

The rules of privilege relating to evidence in the Federal Court are set out in the *Commonwealth Evidence Act 1995*. However, that only applies where a subpoena seeks to adduce material *as evidence in Court*.

In the case of *pre-trial* proceedings (for example discovery, or subpoenas which only seek access to information for consideration by parties with a view to subsequently adducing it at trial), the common law applies.²⁶

The rules under the common law and the *Evidence Act* are slightly different - so you could have different rules applying at different times in a proceeding.²⁷

Nonetheless, the common law and *Evidence Act* are broadly similar, and the greatest difference between them was resolved by the High Court in *Esso Australian Resources Limited v the Commissioner of Taxation*²⁸ ("**Esso**"), which was handed down only about a month after the decision in *Daniel*. Prior to *Esso*, the common law adopted what was known as the "*Sole Purpose Test*", whereas the *Evidence Act 1995 (Cth)* used the broader "*Dominant Purpose*" test. In this respect at least, the common law and *Evidence Act* are now aligned.

Despite this, some of the details of the common law position are still unsettled and in a state of flux. As mentioned above, there have been three recent cases in the Federal Court dealing with privilege as it applies to material on which anthropologists' reports (prepared for native title purposes) have been based:

²³ *Esso Australia Resources Limited v The Commissioner of Taxation* [1999] HCA 67 and the *Evidence Act 1995 (Cth)* ss 118, 119

²⁴ *Evidence Act 1995 (Cth)* s 119. Note that the privilege in section 119 does not extend to communications with experts which are purely for advice and not in contemplation of litigation. See also the discussion of the general rule relating to legal professional privilege in the context of expert witnesses by Mansfield J in *Tirango Nominees Pty Ltd v Dairy Vale Foods Ltd* (1998) 156 ALR 364

²⁵ Odgers S. 1994, *Uniform Evidence Law*, 4th ed, LBC Information Services, Pymont NSW, p 292

²⁶ *Evidence Act 1995 (Cth)* ss 118, 119 and *Esso Australia Resources Limited v The Commissioner of Taxation* [1999] HCA 67

²⁷ In *Esso Australia Resources Limited v The Commissioner of Taxation* [1999] HCA 67, Gleeson CJ, Gaudron and Gummow JJ at paragraphs 18-28, expressly rejected the argument (set out in paragraph 13) that "even if the provisions the *Evidence Act* did not directly apply to claims for privilege made in relation to discovery and inspection of documents (and in other circumstances not involving the adducing of evidence), the common law, by analogy or derivation, should be treated as modified to accord with the statutory test".

²⁸ [1999] HCA 67

- *Daniel v Western Australia*²⁹;
- *Clarrie Smith v Western Australia*³⁰; and
- *Sampi v Western Australia*³¹

Each of these cases was decided by a different single judge of the Federal Court, and the approaches to privilege taken in each of these cases is somewhat different. Some of these differences start to emerge when we consider the scope of privilege.

I will focus the rest of my paper on the common law, which applies to “pre-trial proceedings” as outlined earlier. This is largely because the three native title cases all dealt with pre-trial proceedings under the common law. (References to equivalent provisions of the *Evidence Act* are included in footnotes. On the whole, the practical effect of both the common law and the *Evidence Act* is likely to be the same.)

Scope of Privilege – What does it cover?

There are a couple of elements to the common law test for privilege as it relates to communications with experts.

1. Communications

In *Daniel*, the Court held that anything that was not a record of a “communication” between a claimant and the anthropologist was not able to attract privilege.³² Mere “observations” were not privileged.

Therefore, for example, a video which simply recorded an occurrence during a visit to a site was not privileged.³³

However, a second video, in which applicants explained the significance of a site, was privileged.³⁴

2. Confidential Communications

The communications must also be confidential.³⁵ Again in *Daniel*, the Judge left open the possibility that the second video to which I have just referred was simply recording events

²⁹ [1999] FCA 1541

³⁰ [2000] FCA 526

³¹ [2000] FCA 1862

³² *Daniel v Western Australia* [1999] FCA 1541 The *Evidence Act* 1995 (Cth) does not define “communication”.

³³ *Daniel v Western Australia* [1999] FCA 1541 at paragraph 43

³⁴ *Daniel v Western Australia* [1999] FCA 1541 at paragraph 43

³⁵ See for example *Australian Competition and Consumer Commission v Safeway Stores Pty Ltd* (1998) 153 ALR 393. This common law requirement is mirrored in section 118 and 119 of the *Evidence Act* 1995 (Cth). Section 117 of the *Evidence Act* (1995) (Cth) defines the terms “confidential communication” and “confidential document” by reference to the circumstances in which it was made/prepared, and whether the person making/receiving it was under an express or implied obligation not to disclose its contents.

that occurred in public, and therefore were not confidential.³⁶ If that was the case, it would not attract privilege.

3. *Made for the dominant purpose of litigation*

As noted above, the communications or documents must have been made for the “dominant purpose” of obtaining legal advice or for litigation.³⁷

Therefore, in *Daniel* notes in field books recording discussions between the anthropologist and the instructing lawyers about the litigation were held to have been privileged.

However, reports and books (including confidential site surveys), prepared previously as heritage surveys for the purposes of compliance with heritage legislation were held *not* to attract privilege - in both *Daniel* and *Clarrie Smith*.

4. *Documents on which experts witnesses base their opinions*

As a general rule, documents which experts create or rely on in forming their expert opinions are *not* privileged.³⁸ This is because such information remains in the expert’s possession and is not the subject of a communication with the lawyers.

This might include drafts of the expert’s report, working papers prepared by the expert, copies of other documents selectively collated and copied by the expert for use in preparation of their report. It potentially extends to all field notes as well. Unfortunately the law in this area is not settled.

- In *Daniel*, the Court held that the general rule, from a case called *Interchase v Grosvenor Hall*³⁹ (“**Interchase**”), did not apply. This was on the basis that in *Interchase*, the expert was basing their opinion on pre-existing documents which themselves were not privileged.⁴⁰ However, in *Daniel*, the documents were records of communications made directly from the applicants to the expert for the dominant purpose of litigation.
- However, in *Sampi*, the Court quoted *Interchase* in a way that indicates that it preferred *Interchase* to the approach adopted in *Daniel*, although no concluded decision was made on the point.⁴¹ That case was dealing primarily with a slightly different matter – whether the experts had complied with the *Guidelines to Expert Witnesses* adopted as a Practice Direction by the Federal Court (which I will also return to later).

³⁶ *Daniel v Western Australia* [1999] FCA 1541 at paragraphs 49 - 53

³⁷ The High Court did not define a specific test for “dominant purpose” in *Esso*. The term is also not defined in the *Evidence Act 1995* (Cth).

³⁸ *R v King* [1983] 1 All ER 929, *Interchase Corporation (In Liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1)* [1999] 1 Qd R 141

³⁹ *Interchase v Grosvenor Hall* [1999] 1 QdR 141

⁴⁰ *Daniel v Western Australia* [1999] FCA 1541 at paragraph 38

⁴¹ *Sampi v Western Australia* [2000] FCA 1862 at paragraphs 12 - 14

- The matter is further complicated by a recent decision of the Victorian Supreme Court, *Linter Group Ltd v Price Waterhouse (A Firm)*⁴², which was not cited in any of the three native title cases. That case held that drafts of expert reports *should* retain privilege – unless it can be shown that changes between the draft and final were for an improper purpose, for example if “motivated by a desire simply to improve the [party’s] case”.⁴³ This would include where directed to make such changes by the instructing solicitor.
- In *Clarrie Smith*, the Court decided it did not need to consider the issue, because in the Court’s view, and I quote “even if such a privilege existed it should be regarded as having been waived by the applicants.”⁴⁴

That gets us onto the next heading.

Loss of Privilege – Waiver

Privilege can be lost where it is waived by the person who holds the privilege. It can be expressly waived by consent, or inadvertently waived. The way privilege is lost inadvertently is typically where the privileged information is disclosed to a third party.

Examples of where waiver might occur might include the following:

- The tendering into evidence of an expert’s report prepared for litigation;
- Reference to materials by an expert when called as a witness;
- Disclosure of the contents of a privileged document in a letter or e-mail to a third party; or
- The publication of an article which is based on or discloses the content of privileged communications.

There are some differences in the way the common law and the *Evidence Act* deal with waiver of privilege. Again, I will focus on the common law.

The common law test for waiver has also changed since the decision in *Daniels case*. At the time of the decision in *Daniel*, the test was based on considerations of “fairness” – whether it would be unfair or misleading to maintain the privilege in the circumstances. (This was from a Northern Territory land rights case called *Attorney General for the Northern Territory v Maurice*.⁴⁵)

The test was changed by a case called *Mann v Carnell*⁴⁶ which was handed down by the High Court on the same day as *Esso*. Following *Mann v Carnell*, the test is that privilege will be found to have been waived where there is inconsistency between the conduct of the client (to whom the privilege

⁴² [1999] VSC 245 (25 June 1999)

⁴³ *ibid* at 21

⁴⁴ *Clarrie Smith v Western Australia* [2000] FCA 526 at paragraph 9

⁴⁵ (1986) 161 CLR 475

⁴⁶ [1999] HCA 66

“belongs”) and maintenance of the confidentiality.⁴⁷ It remains to be seen what difference this will in fact make in practice.⁴⁸

Flow-on effects of waiver

Importantly, if a document which is not privileged, or in relation to which privilege has been waived, refers to other documents which are privileged, those other documents may lose their privilege as well. The test is whether access to that privileged material is reasonably necessary for a proper understanding of the first document.⁴⁹

This is a broad test with potentially serious implications. It can create a chain of links from one document to the next, if a document which loses privilege in this way refers to further privileged documents which are reasonably necessary for a proper understanding of that document, and so on.

As noted above, when an anthropologist’s report is tendered as evidence, privilege will be lost. Other documents or communications referred to in the report will also lose their privilege if needed to fully understand the report, and can then be accessed and potentially used by opposing parties.

Federal Court Guidelines

It should be noted that expert witnesses are subject to the Federal Court’s Practice Direction *Guidelines to Expert Witnesses*⁵⁰, which I referred to earlier. This requires the following:

There should be attached to the report, or summarised in it, the following: (i) all instructions (original and supplementary and whether in writing or oral) given to the expert which define the scope of the report; (ii) the facts, matters and assumptions on which the report proceeds; and (iii) the documents and other materials the expert has been instructed to consider.

and also:

Where an expert’s report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports.

These requirements will invariably result in a waiver of privilege in relation to those instructions, documents and extrinsic materials. This will probably include all field notes, even if they manage to get over the barrier to privilege posed by *Interchase*, discussed earlier.⁵¹

⁴⁷ However, the Court noted that considerations of fairness may inform the court in considering whether there is an inconsistency (at 384). The test for waiver in the *Evidence Act 1995* (Cth) is simply where “the substance of the evidence has been disclosed” (*Evidence Act 1995* (Cth) s 122(4)). It also remains to be seen whether there is any real practical difference between this test and the test in *Mann v Carnell*.

⁴⁸ While *Maurice* was cited in *Daniel’s case*, *Mann v Carnell* was not cited in either *Clarrie Smith* or *Sampi*. And although *Maurice* was distinguished in *Clarrie Smith*, it was on a slightly different issue. The change in the common law test for waiver therefore does not appear to be the basis for the different outcomes in these cases.

⁴⁹ This test is applied at both the common law and under section 126 of the *Evidence Act 1995* (Cth)

⁵⁰ *Federal Court Practice Direction* “Guidelines for Expert Witnesses in proceedings in the Federal Court of Australia”, M E J Black, Chief Justice

⁵¹ In this regard, see *Sampi v State of Western Australia* [2001] FCA 110 at 20-21 per Beaumont J, *Daniel v Western Australia* [2001] FCA 223 at paragraphs 4-6

Why bother?

So, you may ask, if privilege in field notes is ultimately going to be waived anyway, why bother with trying to maintain privilege in the first place? Well, there may be a couple of reasons.

The most obvious one is that it is possible that not everything will be exposed. There may be confidential communications in the field notes which, although made in contemplation of litigation, are not in the end relevant for the purposes of the case. The Indigenous clients may well wish to keep such information confidential.

The other, less obvious, reason to try to maintain privilege over source materials such as field notes is the stage in the proceedings at which privilege is waived over source documents.

The significance of the issue of the timing of waiver in native title cases is that the expert's field notes could be made available to the other parties for use in cross-examining claimants who give evidence, *before* the expert is able to give evidence explaining the field notes and their context.⁵²

It is on this issue where *Daniel* and *Clarrie Smith* take different very approaches. *Daniel* allowed privilege to be maintained until the report was formally tendered and the expert called to give evidence.⁵³ In *Clarrie Smith* however, it was held that privilege was in effect waived from the start, when the report was filed with the Court.⁵⁴

This leaves a degree of uncertainty in the law as it stands. It may be that the issue is simply the result of the timings of the hearings in the two cases, and the different judge's perceptions of the "fairness" of the respective approaches (to apply the pre-*Mann v Carnell* test) and the degree of potential cost and disruption to parties if Aboriginal witnesses had to be recalled for cross-examination on issues raised by the expert's evidence, or the materials on which it was based.

NATIVE TITLE MEDIATION AND "WITHOUT PREJUDICE" PRIVILEGE

A further issue of concern to many involved in native title mediation negotiations is the status of communications made to other parties in the course of negotiations. This takes us into a different area of the law, which I will touch on only briefly.

Where a confidential document is provided to another (opposing) party, any legal professional privilege will clearly be waived.⁵⁵ An example of this would be where a claimant group provides

⁵² Blowes R. & Trigger D. 2000, 'Experts, Documents and Lawyers in Native Title Claims', *Indigenous Law Bulletin*, vol. 4, issue 28, pp. 4-9

⁵³ *Daniel v State of Western Australia* [1999] FCA 1541 at paragraphs 54-59

⁵⁴ *Clarrie Smith v Western Australia* [2000] FCA 526 at paragraphs 11-14

⁵⁵ This can be taken a step further. The recent case of *Bailey v Beagle Management Pty Ltd* [2001] FCA 185 is authority for the proposition that an expert report prepared for provision to an opposing party for settlement purposes (such as a "connection report") is not properly the subject of legal professional privilege in the first place. Per Goldberg J at paragraph 11:

"Properly characterised, it is not correct to say that a document is brought into existence for the purpose of the conduct of litigation, and so privileged from production, if it is brought into existence, albeit to try and settle the litigation, but for the purpose of being shown to the other side."

an anthropological “connection report”⁵⁶ to a State government during the course of mediation for a consent determination.

However, other privileges may apply to protect the material from use by that other party in Court. Clearly, there are public policy reasons for this – it is in the public interest to ensure parties can undertake full and frank discussions in order to facilitate the settlement of matters without the need for a contested hearing. The relevant privileges arise from specific provisions in the *Native Title Act 1993* (Cth) (“**the Native Title Act**”), and “without prejudice privilege” at common law and under the *Evidence Act*.

Native Title Act

There are several sections of the *Native Title Act* which may protect communications made in the course of mediation from being used in Court.

Section 136A(4) of the *Native Title Act* provides:

Statements at conference are without prejudice

- (4) In a proceeding before the Court, unless the parties otherwise agree, evidence may not be given, and statements may not be made, concerning any word spoken or act done at a conference.

There are a couple of points to note about this:

- For the protection to apply, the conference *must* be presided over by a Member of the National Native Title Tribunal⁵⁷ (“**the Tribunal**”) or a Presidential Consultant.⁵⁸ It will therefore not apply where parties are just meeting between themselves, or (for example) are meeting with only a Tribunal case manager present.
- The protection only extends to “words spoken or acts done”. It does *not* appear to extend to documents provided or exchanged.⁵⁹

Further, under section 136F, the presiding Member at a mediation conference has power make a direction prohibiting disclosure of:

- (a) Any information given, or statements made, at a conference; or
 (b) The contents of any document produced at a conference.

A person breaching such a direction is guilty of an offence with a maximum penalty of \$4,400.⁶⁰ However, unlike section 136A(4), section 136F does not *expressly* prohibit the giving of evidence

⁵⁶ “Connection reports” should be distinguished from an expert’s report prepared for trial purposes. “Connection reports” are prepared in response to certain State government requirements for an outline of evidence to be provided to them, as a precondition to negotiation of a consent determination of native title. Both Queensland and Western Australia currently have formal requirements for connection reports and detailed guides to their preparation.

⁵⁷ *Native Title Act 1993* (Cth) s 136A(2). Members of the Tribunal are a special class of officers of the Tribunal appointed by the Governor General (*Native Title Act 1993* (Cth) s 111). In making the appointment, the Governor General must be of the opinion that the person has special knowledge of certain relevant subjects (*Native Title Act 1993* (Cth) s110). Tribunal “case managers” and other employees are not Members.

⁵⁸ *Native Title Act 1993* (Cth) s 136A(7). Presidential consultants are appointed under section 131A(1) of the *Native Title Act 1993* (Cth)

⁵⁹ However, its purpose may instead be to fill a gap in “without prejudice” privilege. This is discussed further below.

in Court in relation to the information or documents subject of a direction. (The only persons expressly prohibited from giving evidence in relation to such information or documents are Tribunal members, officers or consultants.⁶¹) The interaction of these directions and court proceedings is therefore not entirely clear.

It should also be noted that the non-disclosure directions are not automatically made, and generally require application from a party, although they may be made at the member's own initiative.⁶² Again, such directions (obviously) can only be made at a mediation conference presided over by a Tribunal member or Presidential consultant.

There are therefore clearly limitations on the protection afforded by the relevant provisions of the *Native Title Act*. However, these apparent shortcomings are arguably not in fact limitations in the law. Instead, the *Native Title Act* provisions could just be seen to be supplementing the protection provided to settlement negotiations by "without prejudice" privilege under the common law and the *Evidence Act*.

"Without Prejudice" Privilege

"Without prejudice" privilege protects communications or documents relating to settlement negotiations. As noted before, the purpose is to encourage free and open discussions aimed at settlement, without fear of the discussions being used against a party in any subsequent trial.⁶³

Unfortunately, as with "legal professional privilege" there is a split between the common law and the *Evidence Act*, with former applying to pre-trial applications, and the latter only applying in court. Again, however, the practical implications of both regimes are likely to be effectively the same in most situations.

As no native title matters have dealt with the issue of "without prejudice" privilege, either under the common law or the *Evidence Act*, I will focus on the *Evidence Act* provisions, for convenience.

Section 131 of the Evidence Act

Section 131(1) of the *Evidence Act* states that:

- (1) Evidence is not to be adduced of:
 - (a) a communication that is made between persons in dispute, or between one or more persons in dispute and a third party, in connection with an attempt to negotiate a settlement of the dispute; or
 - (b) a document (whether delivered or not) that has been prepared in connection with an attempt to negotiate a settlement of a dispute.

There are a couple of elements to sub-section 131(1):

1 "Evidence not to be adduced"

⁶⁰ *Native Title Act* 1993 (Cth) s 176

⁶¹ *Native Title Act* 1993 (Cth) s 181

⁶² *Native Title Act* 1993 (Cth) s 136F(2)

⁶³ See, for example, *Field v Commissioner for Railways for NSW* (1957) 99 CLR 285, per Dixon CJ, Webb, Kitto and Taylor JJ at 291-292.

As noted above, the Evidence Act only applies in court. For discovery and pre-trial processes, the common law applies. As noted above, the practical effect of the law is likely to be the same.

Further, there is also now also a line of authority for the proposition that communications which are not admissible because of “without prejudice” privilege are also not discoverable.⁶⁴

2 “communication” or “document”

The protection under section 131(1) only extends to communications or documents. It probably does not extend to physical matters observed on a privileged occasion.⁶⁵ Physical facts observed could include, for example, ceremony performed by claimants at or as part of settlement negotiations. This is where section 136A(4) of the *Native Title Act* would extend the protection to “any word spoken or act done” at a formal Tribunal mediation.

3 “dispute”

There must be a dispute at the time the communication or document is made for the protection to apply.⁶⁶ Because native title claims are made in the Federal Court, they should easily satisfy the meaning of a “dispute” as defined in the *Evidence Act*.⁶⁷ However, the issue would not be so clear-cut if a native title claim had not yet been made at the time of the communication.

4 “made in connection with an attempt to negotiate settlement of a dispute”

The protection only applies where there are genuine negotiations to reach settlement of the dispute. This is a question of fact. Just because there is a dispute does not mean that the communication or document is made in connection with an attempt to settle the dispute.⁶⁸

The provision of a “connection report” to the State to meet the State’s negotiation requirements, and correspondence between parties relating to the terms of a proposed consent determination or associated indigenous land use agreement, would almost certainly be protected.

However, not all statements made at mediation conferences (for example statements by claimants) would necessarily attract the protection of s131 - for example if they are not directed to settling the matter. Again, section 136A(4) of the *Native Title Act* should act to “fill the gap” by extending the protection to “any word spoken or act done” at any formal Tribunal mediation.

Section 131(2) sets out a number of exceptions to the rule in 131(1). Relevantly, these include:

⁶⁴ *Bailey v Beagle Management Pty Ltd* [2001] FCA 185; *Austotel Management Pty Ltd v Jameison* (1995) 57 FCR 411; *Rush & Tompkins Ltd v Greater London Council* [1989] 1 AC 1280, *Rabin v Mendoza & Co* [1954] 1 All ER 247

⁶⁵ see *Lock v Lock* [1966] SASR 246 (FC); *AWA Ltd v Daniels* (1992) 7 ACSR 463 (SC NSW)

⁶⁶ see *Brown v Commissioner of Taxation* [2001] FCA 240 (13 March 2001)

⁶⁷ “Dispute” is defined very broadly in section 131(5)(a) of the *Evidence Act* 1995 (Cth).

⁶⁸ see *GPI Leisure Corp Ltd v Yuill* (1997) 42 NSWLR 225

- Where the parties consent (it is conceivable that parties might consent to the use of a connection report as evidence in Court);
- Where the substance of the evidence has been partly disclosed with the consent of all parties, and full disclosure is reasonably necessary to understand the disclosed part;
- Where evidence already adduced before the Court would be misleading unless evidence of the privileged communication or document is adduced to contradict or qualify it.

An example of the last point might be if claimants were to lead evidence in Court which contradicts evidence contained in a “connection report” previously provided to the State on a “without prejudice” basis for mediation purposes. In such cases another party, such as the State, could argue that the connection report should *not* remain privileged.

PRACTICAL STEPS

There are a number of practical implications in all this for anthropologists involved with native title claims and also for their instructing lawyers. I set out a few of these below.

Legal Professional Privilege

1. Probably most obvious point to make is that the anthropologist should presume that at some point in the proceedings, everything that they produce, from field notes to final reports including anything relevant kept on their computer, is likely to eventually lose legal professional privilege and therefore to be available for cross examination of both the anthropologist and Aboriginal claimants. They should therefore be prudent about the way they record and express their observations. It may be that some communications are best made orally and not reduced to writing.

When writing their expert reports, the anthropologist should also keep in mind that any materials such as field notes referred to in the report may also then be used in cross examination of themselves or Aboriginal witnesses.⁶⁹

2. A very simple practical step, is that the anthropologist should as a matter of course mark any written communications relating to a claim, such as letters or reports to claimants or their lawyers, as being “confidential and privileged in contemplation of litigation”. This will not necessarily mean that the communication will automatically be privileged, but it should help to protect against accidental waiver of privilege on otherwise privileged communications.
3. A matter for the lawyer engaging the anthropologist is to ensure that the terms of reference are appropriate, and make it clear that the materials produced by the anthropologist are for the sole or dominant purpose of use in litigation. And wherever possible, the anthropologist should ensure that the documents they prepare are only for that purpose. Further, the contract, including the terms of reference and confidentiality provisions, should be entered *prior* to any significant communications between the lawyer and the

⁶⁹ *Daniel v State of Western Australia* [1999] FCA 1541 and Blowes R. & Trigger D. 2000, ‘Experts, Documents and Lawyers in Native Title Claims’, *Indigenous Law Bulletin*, vol. 4, issue 28, p 8.

anthropologist.⁷⁰ Finally, any report produced in accordance with the contract should only be provided to the lawyer.

4. When drafting the Report, the anthropologist should attempt, where possible, to try to limit any references to or use of privileged materials.⁷¹
5. One area for anthropologists involved with native title claims to be particularly careful about is their communications with third parties, such as other anthropologists. Such communications, including e-mails, letters, and comments on draft reports will **not** be subject to legal professional privilege, and could be used in court. There is also the risk that such communications might refer to other documents or communications which would then also be exposed, if necessary to properly understand the first.

This clearly has implications for:

- peer review;
- supervised anthropologists (communications between junior and senior anthropologists); and
- collaboration between anthropologists.

If you are interested in some further consideration of these particular issues, there is an excellent article in the March 2000 edition of the Indigenous Law Bulletin (volume 4, issue 28) by Robert Blowes and David Trigger, called “*Experts, Documents and Lawyers in Native Title Claims*”. Although written before the *Clarrie Smith* and *Sampi* decisions, the general points it makes in these areas are still applicable and very relevant.

6. A final area to be very wary about is the publication of academic articles based on matters which are the subject of a claim. Your contract with the retaining lawyers would normally include a confidentiality clause which would effectively prevent you from doing this while the source information remains confidential. The obvious risk is that any article could potentially expose everything it refers to, to loss of privilege. While this concept of not publishing may be an anathema to an academic, it may just be a question of waiting to publish until after a final determination of native title has been made.

Without Prejudice Privilege

5. Communications with opposing parties to a claim aimed at obtaining a consent determination (including connection reports) should clearly be marked “confidential and without prejudice – for mediation purposes only”. As with legal professional privilege, this will not be determinative of whether the privilege applies (which is a question of fact), but it will be indicative of an intent that the communication be privileged.
6. Where settlement negotiation meetings take place without a Tribunal Member present, the parties should agree on some express (preferably written) rules for the negotiations. These would include terms protecting the confidentiality of, and acknowledging the “without prejudice” nature of, all communications made, documents provided and actions done at the meeting and in any subsequent or related meetings and correspondence between the

⁷⁰ As to the last point, see Mendelow, P. 2001 ‘Expert Evidence: Legal Professional Privilege and Experts’ Reports’, *The Australian Law Journal*, vol. 75, April, p.273

⁷¹ Although this should not be done in a way so as to mislead the Court. See also the discussion of the Federal Court Guidelines, above.

parties. Again, this will help to ensure the application of section 131(1) of the *Evidence Act*, but will not be determinative of the issue.

- 7 If negotiations are to take place at which securing “without prejudice privilege” is likely to be a serious consideration, it would be advisable to ensure that a Tribunal Member is present. This is particularly the case where the applicants may want to secure privilege over “acts done” as well as communications and documents. If “without prejudice” documents are to be provided to an opposing party, a confidentiality direction should be sought from the presiding Tribunal Member (needless to say, the document should also be marked as suggested in point 5 above). It is recommended that these steps be taken *in addition to* entering an agreement along the lines suggested in the previous point, prior to the meeting(s) or communication(s).
- 8 Finally, the anthropologist should ensure that any connection report provided for mediation purposes is as accurate as possible. This probably goes without saying. However, if the connection report is inconsistent with evidence subsequently led by or for claimants at trial, the “without prejudice” privilege could be lost, and the inconsistencies be used in cross examination of both the anthropologist and the Indigenous witnesses. If, in the course of preparing subsequent evidence for litigation purposes, such inconsistencies become apparent and are unavoidable, the anthropologist should be prepared to explain them in Court.