

SPIRITUAL SECRETS VERSUS FAIR ACCESS TO INFORMATION

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The rights and beliefs of Aborigines should be accorded a special degree of protection and respect in Australian Courts, but not to the extent that they may impede fairness in the proper operation of justice, according to a recent Federal Court decision. In an outcome which may have implications for native title actions, the Federal Court has taken a practical approach to the application of privilege and access to documents.

The Court considered a number of issues, including whether notes created in the production of an expert's report were relevant, and whether privilege attaching to notes used to produce the expert's report was waived because the report was filed as part of the Court proceeding.

The Court also considered whether public interest immunity - the right to restrict disclosure of information, in the public interest - applied to Aboriginal beliefs. Madgwick J determined that both the interests of the Court doing justice, and the public interest in the protection of confidential material concerning Aboriginal spiritual beliefs, could be reasonably accommodated.

FACTS

Clarrie Smith & Ors v State of Western Australia & Ors [2000] FCA 526 (20 April 2000) dealt with privilege in materials used in the preparation of an expert anthropological report prepared in connection with a native title claim.

An anthropologist and his research assistants had been engaged by native title claimants to investigate their claim and to produce an expert anthropological report and genealogies to be tendered as evidence in the claim proceedings.

The State of Western Australia issued a subpoena, directed to the anthropologist and his research assistants, to produce ethnographic site surveys which had been conducted in and around the claim area.

The subpoenas also sought production of all information and data, including any handwritten or electronically recorded notes, sound or video recordings or any like records made of any observations made by the researchers and/or interviews or other communications made with any persons, including the applicants, who provided information for the purpose of compiling the report, *whether or not that information was ultimately included in the report* (emphasis added).

The claimants opposed the subpoena on the grounds that the material produced was not relevant; was subject to client legal professional privilege; and was subject to public interest immunity.

In response, the State of Western Australia and other respondents argued that no privilege or immunity attached to the materials and, even if a restriction did apply, it had been waived by the claimants.

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RELEVANCE

In rejecting the claimants' arguments about the irrelevance of the anthropologist's research materials, Madgwick J concluded that the bulk of the material did appear to be relevant for a number of reasons, including that the material which the anthropologist decided not to include in his final report may have been of equal, or greater, forensic relevance than what he actually did choose to use.

With respect to the site surveys, the claimants argued that they were not relevant because their purpose had been limited to determining whether a proposed land development would interfere with culturally sensitive places in and around the claim area. Furthermore, the anthropologist did not refer to or rely upon them in preparing his expert report.

Madgwick J disagreed and said that surveys regarding the ethnographic make-up on or near the claim area were, in themselves, of great relevance to the proceedings; and they were also the subject of oral evidence by Clarrie Smith, the claimant.

PRIVILEGE

In considering the claim of client legal privilege, the Court applied the recent High Court decision in *Esso v Commissioner of Taxation* (1999) 168 ALR 123.

There, the High Court concluded that the general test to determine whether legal professional privilege applied was whether the communications or documents in question were brought into existence for the dominant purpose of being submitted to legal advisers for advice or use in legal proceedings.

With respect to the ethnographic site surveys in the *Clarrie Smith* matter, they were produced in accordance with the provisions of the *Aboriginal Heritage Act 1972* (WA), to assist the Department of Aboriginal Sites to make assessments of Aboriginal heritage.

Accordingly, the Court determined that legal professional privilege did not attach to the surveys because the dominant purpose for their production was to comply with the *Aboriginal Heritage Act*, not to provide legal advice.

WAIVER

While the claimants conceded that any privilege that may exist over the research notes and other source materials used in the preparation of the anthropologist's final report would be waived when the anthropologist was called to give oral evidence in the Court, they argued that privilege was not waived by merely filing the report.

Madgwick J determined that to draw such a "technical distinction" could cause inconvenience and increased costs to the parties and the Court.

He said it would be unfair to allow the report to stand without disclosing the documents upon which it was based, as this would amount to a partial disclosure of the available material.

The Court concluded that any client legal privilege had been waived by the filing of the report.

This decision is authority for the argument that any client legal privilege attaching to an expert report may be waived by the filing of that report. This differs from the conclusion reached by the Full Federal Court in *Daniel v Western Australia* [1999] FCA 1541.

It should be noted that the decision of Madgwick J is that of a single Judge and remains less persuasive than that of the Full Court.

PUBLIC INTEREST IMMUNITY

The claimants sought public interest immunity because, they maintained, the anthropologist's research materials were protected from disclosure by a public interest in protecting Aboriginal rights and beliefs.

The test for public interest immunity is "...whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence".

The Court recognised that the proper protection of Aboriginal rights and spiritual beliefs should be accorded a special degree of protection and respect in Australian courts, and that such an approach would extend to cover Aboriginal guardians of "the secret" and other persons to whom they extended their confidence.

And while the Court recognised that the protection of and respect for Aboriginal rights and beliefs was manifestly in the public interest, it also noted that the concept of public interest immunity did not exist merely to enable tactical advantages or disadvantages in litigation.

Madgwick J determined that where the interests of the Court doing justice and the public interest in protecting confidential material concerning Aboriginal spiritual beliefs could both be reasonably accommodated by an appropriately framed order, this should be done.

In this case, Madgwick J considered that any competing interests could be reconciled by restricting access to the materials collected or prepared by the anthropologist to counsel, instructing solicitors and the expert anthropologist engaged by the State of Western Australia.

He ordered that the materials be made available on the condition that there should be only one copy of the documents, that they not be reproduced, and that upon conclusion of the trial they be returned to the Court and destroyed. No extraneous use of these materials could be made and there would be compliance with any necessary gender restrictions.

While the Court rejected the claim for public interest immunity based on the fact that the research materials were about Aboriginal rights and beliefs, it was still prepared to restrict access to, and use of, the materials.

In doing so, Madgwick J affirmed that the proper protection of Aboriginal rights and spiritual beliefs should be accorded a special degree of protection and respect in Australian courts.

However, this must be balanced against the prevention of public interest immunity being employed to enable tactical advantages or disadvantages in litigation, and the increased costs which this involves for both parties and the Court.