

HIGH COURT OF AUSTRALIA

NETTLE J

D1/2018

NORTHERN TERRITORY OF AUSTRALIA

APPELLANT

AND

MR A. GRIFFITHS (DECEASED) AND LORRAINE
JONES ON BEHALF OF THE NGALIWURRU AND
NUNGALI PEOPLES & ANOR

RESPONDENTS

D2/2018

COMMONWEALTH OF AUSTRALIA

APPELLANT

AND

MR A. GRIFFITHS (DECEASED) AND LORRAINE
JONES ON BEHALF OF THE NGALIWURRU AND
NUNGALI PEOPLES & ANOR

RESPONDENTS

D3/2018

MR A. GRIFFITHS (DECEASED) AND LORRAINE
JONES ON BEHALF OF THE NGALIWURRU AND
NUNGALI PEOPLES

APPELLANT

AND

NORTHERN TERRITORY OF AUSTRALIA &
ANOR

RESPONDENTS

Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples [No 2]
Commonwealth of Australia v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples [No 2]
Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory [No 2]
 [2019] HCA 19
 19 June 2019
 D1/2018, D2/2018 & D3/2018

ORDER

1. Pursuant to s 77RE(1)(b)(i) and s 77RG(4) of the Judiciary Act 1903 (Cth), and on the ground in s 77RF(1)(a) that the orders are necessary to prevent prejudice to the proper administration of justice, publication and disclosure of the material contained in the volume titled "Commonwealth's Book of Further Materials Volume Three (Gender Restricted) (Pages 608-662)" (the **gender restricted volume**), copies of which were filed on 6 April 2018 in a sealed bag, be restricted with effect on and from 9 August 2019 in the following manner:
 - (a) the gender restricted volume and any copies shall be kept separate and sealed in an envelope or bag marked "Evidence Restricted by Orders of the Court made on 30 May 2018 in Appeal Proceedings D1 of 2018, D2 of 2018 and D3 of 2018";
 - (b) any copy of the gender restricted volume being kept in the office of Registry is not to be available for inspection without an order of a Justice of the Court, any such order to be made after giving written notice to the parties in Appeal Proceedings D1 of 2018, D2 of 2018 and D3 of 2018;
 - (c) the gender restricted volume may be accessed by, and its contents disclosed to:
 - (i) a Justice of the Court hearing any application in relation to access to the gender restricted volume, including the application for these orders and any application mentioned in Order 1(b) and Order 2;
 - (ii) any Associate or other Court staff as directed by a Justice mentioned at (i);

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- (iii) *any male counsel or legal representative of any party or intervener in the appeals in proceedings D1 of 2018, D2 of 2018 and D3 of 2018, or of any applicant or other party to an application mentioned in Order 1(b) and 3;*
 - (d) *any male counsel or legal representative mentioned in Order 1(c)(iii) may disclose the contents of the gender restricted volume to any male party or male officer of a party, other male counsel or legal practitioner, or male expert anthropological expert witness engaged by a party, for the purpose of any application mentioned in Order 1(b) and 3.*
- 2. *Subject to any further order, the period for which these orders will operate that is specified for the purposes of s 77RI of the Judiciary Act 1903 (Cth) is 10 years from 12 April 2019.*
- 3. *Liberty is reserved to any party or intervener to the appeal proceedings or any person listed in s 77RG(2) of the Judiciary Act 1903 (Cth) to apply by summons and supporting affidavit for an order varying Orders 1 and 2.*
- 4. *There be no order as to the costs of and incidental to the making of these orders.*

On appeal from the Federal Court of Australia

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples

Commonwealth of Australia v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples

Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory

Practice and procedure – High Court – Suppression and non-publication orders – Power to make – Where expert evidence and gender restricted evidence of senior males of Ngaliwurru and Nungali Peoples admitted in support of compensation claims in native title proceedings – Whether suppression or non-publication orders in respect of such evidence necessary to prevent prejudice to the proper administration of justice.

Words and phrases – "administration of justice", "gender restricted knowledge", "suppression order".

Judiciary Act 1903 (Cth), ss 77RD, 77RE, 77RF.

1 NETTLE J. This is an application made by summons filed 17 April 2019 for orders by consent pursuant to Pt XAA of the *Judiciary Act 1903* (Cth), to suppress publication and disclosure of material contained in the volume entitled "Commonwealth's Book of Further Materials Volume 3 (Gender Restricted) (pages 608-662)" ("the gender restricted volume").

2 The gender restricted volume comprises an expert report dated 9 February 2016, by Dr Kingsley Palmer, anthropologist, as exhibit A41 ("the 2016 restricted report") at trial in 2016 before Mansfield J ("the compensation proceedings")¹ and restricted men's evidence given by senior male members of the claim group on country in the compensation proceedings and the transcript of the evidence ("the 2016 restricted transcript"). The restricted men's evidence included: a drawing made in the course of the men's evidence tendered as exhibit A9 in the compensation proceedings; Appendix B to a supplementary report authored by Dr Palmer, dated 15 March 2005 and provided in earlier claim proceedings in 2005, tendered as exhibit A32 in the compensation proceedings ("the 2005 restricted report") and a copy of which was provided with the 2016 restricted report; restricted men's evidence given by senior male members of the claim group on country in the earlier claim proceedings in 2005 and restricted men's evidence given by Dr Palmer in those proceedings, the transcript of which was tendered as exhibit A35 in the compensation proceedings ("the 2005 restricted transcript").

3 The application is supported by uncontested affidavit evidence, including expert anthropological evidence, which, in brief substance, establishes that the restricted transcripts and reports relate to matters that are restricted in their transmission or communication to ritually qualified men according to customary Aboriginal practices. Such matters (gender restricted knowledge, which includes performance, song, narrative and objects) are a fundamental component of Aboriginal religious belief and practice. The integrity of their restricted domain is sustained through a structured system where knowledge is controlled by some and allocated to others according to customary rules for its dissemination. Failure to comply with those rules is believed to result in exposure to harmful and potentially fatal spirituality. Those who break the rules for transmission may be subjected to social opprobrium and spiritual reprisals that may be deadly. Those beliefs are strongly held and widely entertained in the Timber Creek area and other regions of Northern Australia, and the men who gave the restricted men's evidence, which is recorded on the 2005 restricted transcript and the 2016 restricted transcript and commented upon in the 2005 restricted report and the 2016 restricted report, would not have been prepared to give evidence had they known that it might later be read in transcript by a woman. If that were to

1 *Griffiths v Northern Territory [No 3]* (2016) 337 ALR 362.

occur, the men concerned would be vulnerable to the social opprobrium, spiritual reprisals and other deeply held fears of the kind mentioned.

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In order to ensure compliance with the requirements of s 77RG(2) of the *Judiciary Act*, each of the following entities and persons ("the potentially interested persons") has been given notice by email or post that, if they wish to be heard on the application, they are to notify the Court by letter or email addressed to the Deputy Registrar within seven days of being given notice:

	Entity or Person	Date	Email/Post
1.	News Corp Australia Pty Limited (formerly News Limited)	7 May 2019	Post
2.	Nine Publishing (formerly Fairfax Media)	6 May 2019	Email
3.	Nine Entertainment Co (Channel Nine)	6 May 2019	Email
4.	Australian Broadcasting Corporation	6 May 2019	Email
5.	Special Broadcasting Service	6 May 2019	Email
6.	Australian Associated Press	6 May 2019	Email
7.	The Guardian Australia	6 May 2019	Email
8.	Australian Community Media	6 May 2019	Email
9.	Seven Network (Channel Seven)	6 May 2019	Email
10.	Network Ten Pty Limited (Channel Ten)	7 May 2019	Post
11.	Fox Media (c/- Nine Entertainment Co)	7 May 2019	Email
12.	National Indigenous Times	6 May 2019	Email
13.	Australian Institute of Aboriginal and Torres Strait Islander Studies	6 May 2019	Email
14.	Kingsley Palmer	8 May 2019	Email
15.	Wendy Asche	8 May 2019	Email
16.	National Native Title Council	8 May 2019	Email

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	Entity or Person	Date	Email/Post
17.	Centre for Native Title Anthropology (Australian National University)	8 May 2019	Email
18.	Cape York Land Council	8 May 2019	Email

5 None of the potentially interested persons has expressed any wish to be heard.

6 I take into account, as is mentioned in s 77RD of the *Judiciary Act*, that a primary objective of the administration of justice is to safeguard the public interest in open justice. I also bear in mind, as is required by s 77RI of the *Judiciary Act*, that, in deciding the period for which an order is to operate, the Court is to ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which it is made. Other things being equal, I should be disinclined therefore to make the orders sought or at least to make orders of the duration of ten years that is proposed.

7 As against that, however, one requires no knowledge of the gender restricted volume in order fully to comprehend the Court's reasons² for judgment in this matter, or why or how the Court formulated the amount of compensation that was determined to be payable. Nor is it apparent that there is any other legitimate interest which the public might have in gaining access to the gender restricted volume. I am fortified in that conclusion by the consent of all parties and the manifest absence of opposition from the potentially interested persons. And on the available evidence, failure to make orders of the kind sought would risk subjecting the men who gave evidence to serious fears and other substantial adverse psychological consequences, and, I infer, would have the potential to inhibit other Aboriginal men in giving evidence regarding gender restricted knowledge in future compensation proceedings.

8 I was for some time troubled that the length of the orders proposed goes well beyond the duration of the kinds of suppression orders customarily made under s 77RE of the *Judiciary Act*. But in the end, I am persuaded on the available evidence, and what I infer to be the likely life expectancies of the men involved, that the period of ten years proposed, or until further order, is no longer than is necessary to achieve the purpose of the orders. On that basis, I have concluded that it is necessary to make the orders proposed, in order to prevent

2 *Northern Territory v Griffiths* (2019) 93 ALJR 327; 364 ALR 208; [2019] HCA 7.

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prejudice to the proper administration of justice within the meaning of s 77RF(1)(a) of the *Judiciary Act*.

9 I shall make orders accordingly.

