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LAW

# Adducing Witness Evidence

Lessons from *Munkara v Santos*  
NA Barossa Pty Ltd. (No.3)



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This document is intended as a guide only. This does not constitute legal advice. There may be additional and important considerations that should be taken into account in your specific circumstances. If you or your organisation has a legal issue, you should obtain professional advice from a legal practitioner.

# Background

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The decision of *Munkara v Santos NA Barossa Pty Ltd. (No.3)*<sup>[1]</sup> sets clearer standards on the evidentiary burden to establish risks to tangible and intangible cultural heritage posed by a project. Working with Traditional Owner witnesses can often be complex and require a firm understanding of the cultural methods underpinning Traditional Owner information sharing, particularly when it concerns cultural heritage and where individual Traditional Owners may have divergent views. The decision highlights the responsibility of practitioners to engage with Traditional Owner witnesses in a way that complies with traditional process and upholds the integrity of lay and expert evidence.

The decision concerns Tiwi Islanders Mr Munkara, Ms Puruntatameri and Ms Purtaninga Tipuamantumirri (the Applicants)'s opposition to Santos NA Barossa Pty Ltd (Santos)'s construction of a 262km-long gas pipeline to supply gas from its Barossa offshore gas project. At its closest point, the pipeline would lie 7km west of the Tiwi Islands. The Applicants asserted that the pipeline's construction would constitute an offence under Regulation 8 of the Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009 (Cth) (the Regulations), on the basis that the proposed pipeline would risk significant impact to their cultural heritage, which constituted a 'new' environmental impact or risk that was not addressed in the pipeline's environment plan (EP). The Applicants sought a permanent injunction restraining the construction of the pipeline until Santos submitted a proposed revision of the EP in accordance with regulation 17(6) of the Regulations, and that revision was accepted by the regulator, the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA).

The Applicants referred in trial to risks to both tangible and intangible cultural heritage posed by the pipeline. The Applicants asserted that the pipeline would impact their intangible cultural heritage by passing two Dreaming stories which formed part of the Applicants' cultural life, concerning the ancestral beings the Ampiji (rainbow serpent(s)) and Jirakupai (Crocodile Man). The Applicants further referred to risks to tangible heritage, asserting that the seabed may contain artefacts which would form an archeological record of Tiwi Islanders' ancient occupation and activity before the sea levels rose tens of thousands of years ago. The Applicants asserted that these risks were 'new' as they had not previously been assessed by NOPSEMA in approving the EP.

[1] *Munkara v Santos NA Barossa Pty Ltd (No. 3)* [2024] FCA 5.

Charlesworth J dismissed the application, finding the Applicants' evidence 'qualitatively and quantitatively inadequate.'<sup>[2]</sup> The Applicants' evidence failed to prove the dreaming stories extended to the deeper seabed where the pipeline would cross, and her Honour further found that the risk of disturbing archeological artefacts was 'negligible.'<sup>[3]</sup> Her Honour was in any case not satisfied that the risks posed by the pipeline would have been 'new' for the purposes of the Regulations.<sup>[4]</sup>

Her Honour was deeply critical of the Applicants' evidence, remarking on conduct that amounted to a form of 'subtle coaching' of witnesses,<sup>[5]</sup> and a cultural mapping exercise that involved, at least in part, a 'confection'.<sup>[6]</sup> One can draw from the decision several practical lessons for practitioners in upholding the integrity of Traditional Owners' evidence and protecting the impartiality and credibility of expert witnesses.

[2] Munkara v Santos NA Barossa Pty Ltd (No. 3) [2024] FCA 5 at [957].

[3] Munkara v Santos NA Barossa Pty Ltd (No. 3) [2024] FCA 5 at [1302].

[4] Munkara v Santos NA Barossa Pty Ltd (No. 3) [2024] FCA 5 at [1311]-[1314].

[5] Munkara v Santos NA Barossa Pty Ltd (No. 3) [2024] FCA 5 at [994].

[6] Munkara v Santos NA Barossa Pty Ltd (No. 3) [2024] FCA 5 at [1027].

# Evidencing Community Held Beliefs

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The decision clarifies the evidential burden to prove intangible cultural heritage. Her Honour makes clear that evidence must show ‘a sufficient cogent or coherent belief’ that holds normative content for the relevant Traditional Owner group for the belief to amount to a cultural feature of an environment. [7] A singular perspective will not suffice, regardless of the individual’s cultural authority.[8] Rather, for beliefs to form a cultural feature, those beliefs must be shown to be ‘held by the relevant people as a people.’ [9]

Evidencing ‘a sufficient cogent or coherent belief’ proves difficult where there are inconsistent accounts of the content of those beliefs. [10] Divergent views within Traditional Owner groups and families are naturally unavoidable, and practitioners should consider how best to evidence beliefs held at a group-level, particularly for matters that may be controversial within a community. This should include evidence on what steps were taken so that divergent views were reconciled and consensus was reached in accordance with traditional law and custom. Evidence should also establish what cultural authority a witness has to speak for country and its cultural features, and the basis for that authority.[11]

Expert evidence will play an important role in supporting Traditional Owner evidence where there are divergent views, and should not shy away from those divergences. Expert witnesses should instead assist in explaining how conflicting accounts are customarily resolved within a family or group,[12] and how a group decides who has the cultural authority to speak for country.

[7] Munkara at [206].

[8] See Munkara v Santos NA Barossa Pty Ltd (No. 3) [2024] FCA 5 at [958].

[9] Munkara v Santos NA Barossa Pty Ltd (No. 3) [2024] FCA 5 at [208]

[10] For instance, her Honour commented that the conflicting evidence of reliable witnesses with equivalent cultural authority tends against a finding that a belief is broadly held; see Munkara at [906].

[11] See Munkara v Santos NA Barossa Pty Ltd (No. 3) [2024] FCA 5 at [900].

[12] See Munkara v Santos NA Barossa Pty Ltd (No. 3) [2024] FCA 5 at [197].

# Upholding Integrity of Traditional Owner Witness Evidence

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The decision exemplifies the role that Traditional Owner evidence plays in assisting the Court answer issues of fact. Her Honour generally commented that the Tiwi Islander witnesses were most compelling when examination questions were more open and explorative.<sup>[13]</sup> Her Honour further found their testimony most impactful when witnesses were invited to explain concepts in their own words and in their own time.<sup>[14]</sup>

While her Honour acknowledged the common involvement of practitioners in preparing witness' statements, she particularly scrutinised the conduct of the solicitor for the Applicant for 'synthesising' dreaming narratives,<sup>[15]</sup> and representing witness' evidence in language other than the witness' own words.<sup>[16]</sup> Such interference risks undermining the probative value of the evidence, and her Honour came to the view that the Applicants' witness statements should be approached with considerable caution.<sup>[17]</sup>

In preparing witness statements, practitioners should take care to maintain a witness' own language. Practitioners should avoid paraphrasing, and should not merely seek yes/no responses from witnesses to pre-prepared propositions. Where the witness is not proficient in English, a practitioner should consider whether an interpreter is appropriate to ensure the witness understands the questions and can have their answers accurately recorded. Practitioners should further take care to document source information from witnesses to ensure evidence is accurately recorded.

[13] Munkara at [247].

[14] Munkara at [258].

[15] Munkara v Santos NA Barossa Pty Ltd (No. 3) [2024] FCA 5 at [248].

[16] Munkara v Santos NA Barossa Pty Ltd (No. 3) [2024] FCA 5 at [246].

[17] Munkara v Santos NA Barossa Pty Ltd (No. 3) [2024] FCA 5 at [245].

# Managing Role of Expert Witness

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Her Honour was highly critical of the Applicant's expert evidence, and found that one expert had even lied to the Tiwi Islanders through the cultural mapping exercise at the June workshop in order to support the opposition to the construction of the pipeline. [18] Her Honour was not satisfied that the expert was sufficiently independent and credible to qualify as an expert witness in the proceedings, and discounted all their reports for all purposes.[19] Her Honour was further concerned that witnesses were 'coached' to present evidence that songlines extended to where the pipeline was intended to be constructed, in order to support the expert's account.[20]

Expert witnesses have obligations to the court, and their role is to assist the Court by providing objective and impartial assessment of an issue based on their specialised knowledge, training, study and/or experience.[21] Practitioners should be careful to ensure their witness experts uphold their independence and credibility. This includes managing how experts participate and engage in meetings with lay witnesses, so as to prevent conduct that may amount to coaching or influencing lay witnesses to support expert findings.[22]

[18] *Munkara v Santos NA Barossa Pty Ltd (No. 3)* [2024] FCA 5 at [1153].

[19] *Munkara v Santos NA Barossa Pty Ltd (No. 3)* [2024] FCA 5 at [1190] & [1198].

[20] *Munkara v Santos NA Barossa Pty Ltd (No. 3)* [2024] FCA 5 at [994].

[21] See Evidence Act 1995 (Cth), s 79.

[22] See her Honour's comments on the conduct of the expert at the May Lewis Meeting; *Munkara v Santos NA Barossa Pty Ltd (No. 3)* at [1134]

# Role of Charitable Organisations in Litigation

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While her Honour did not ultimately entertain any submission that the Applicant’s lawyer, the Environmental Defenders Office (EDO), was the principal proponent of the application and pursuing an ideological agenda, there has been considerable public scrutiny and reaction following the decision. This includes commitments from the opposition leader to defund the EDO if the Coalition wins government,[23] and tactics by Santos to pursue environmental groups who supported the Applicants, whether that support was material or moral.[24]

Third party support from charitable organisations plays an important role in pursuing public interest litigation. The material outcome and political consequences of this decision will likely impact how litigation of this kind will be pursued in future.

## Upholding Cultural Protocols

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Practitioners should generally consider how they adduce evidence from their witnesses in a way that complies with traditional law and custom, and should be particularly sensitive of matters of controversy within a community. Practitioners should maintain appropriate cultural protocols to ensure that they engage with witnesses in a way that respects tradition and custom, and minimises impacts on the social cohesion of the communities they work with.

For practical guidance on working with Traditional Owner witnesses, see the free resources on our website, including our checklist on preparing witness statements for native title claims.

[23] See <https://www.abc.net.au/news/2024-01-30/dutton-commits-to-defunding-environmental-defenders-office/103403866>

[24] Following the decision, Santos has received leave to issue subpoena to the EDO; *Munkara v Santos NA Barossa Pty Ltd (No 5)* [2024] FCA 717. Santos was further successful in applying for leave to issue subpoenas to non-party environmental organisations Jubilee Australia Research Centre Limited, the Sunrise Project Australia Limited and Environment Centre (N.T.) Inc. on the basis that they served to benefit from the litigation in ‘the form of the achievement of a political or ideological objective’; *Munkara v Santos NA Barossa Pty Ltd (No 4)* [2024] FCA 414 at [47].