Returning Native Title Materials

YMAC WORKSHOP SUMMARY

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Yamatji Marlpa Aboriginal Corporation Workshop

This report presents a summary of a two-day workshop on 14-15 May 2019 at the Yamatji Marlpa Aboriginal Corporation (YMAC) office in Perth.

The workshop was part of a wider body of case study research with Native Title Representative Bodies and Service Providers (NTRBs), Prescribed Bodies Corporate (PBCs) and communities, intended to inform the outcomes of the Returning Native Title Materials project (the project), spearheaded by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS).

Background

The Returning Native Title Materials project began in July 2018 and is expected to run until June 2021. It investigates existing efforts by NTRBs to manage and return materials collected and created in the process of native title claim research and cultural heritage work. A gap analysis and research into best practice principles will further support the optimisation of any remaining governance, archival, infrastructure and legal issues regarding the return of materials.

The research methodology includes desktop research, a nationwide survey of NTRBs, and case study research with NTRBs, PBCs and communities.

Results will be shared with the sector via publications and conference presentations. In addition, expert advice on common questions and challenges will be shared to minimise duplication of effort.

This workshop forms part of the case study research being conducted with project partner, YMAC.

People involved

YMAC: The Principal Legal Officer; a Lawyer; Amy Usher, the Research Manager; three Senior Anthropologists; two Anthropologists; and the Information Management Officer.

AIATSIS: Stacey Little, Senior Research Officer; Christiane Keller, Consultant.

Main workshop topics

- YMAC Return of Material (ROM) policies and procedures

- YMAC ROM governance framework

- YMAC archives and records management

- Legal obligations and issues

- Resourcing, including staff, funding and infrastructure

- Access to materials and transfer of materials, databases

- Research aims for YMAC

Evolving issues

Some of the main issues that were discussed and arose throughout the two-day workshop included:

YMAC ROM policy development

- Policy has evolved since 2013 from single (and redacted) connection report return (Nyangumarta) and a redacted report plus selected audio and images (Ngarla), to a now more holistic approach (Robe River Kuruma Aboriginal Corporation (RRKAC, formerly KMAC).

- YMAC has established two categories of returns:

  o Return to common law holders, which in most cases establishes a PBC as repository;

  o Personal returns, these are easier to do (requiring up to 4 months), but are highly sensitive due to the nature of some of the materials returned (genealogies, welfare materials). They also raise questions of access restrictions (e.g. PBC staff); also included are next of kin returns, which are often problematic since next of kin can be difficult to establish and there can be uncertainty about their motivation for requesting materials.

YMAC has an established policy for each of the two categories.

YMAC ROM process

- The ROM process has been established through a collaborative approach. In community workshops the YMAC staff (research manager + claim anthropologist + research assistant (currently not staffed) are utilising a template to draw out community expectations and aspirations, discuss the format of return (soft-/hardcopy/database), strategies to care for material and access policies. The workshops also establish a returns working group (cultural advisory committee nominated by PBC of people from the board), and inform the community about the materials available for return. The final results are presented to the common law holders and ideally culminate in a resolution to go ahead.

- For the process to be satisfactory to all, good documentation of the process is considered essential.

Legal obligations and issues

- Native title materials other than materials for personal returns are only returned post-determination and once the PBC is established.

- It is often difficult to determine who has rights to request materials. In YMAC's view, there must be a clear mandate for a request, either by a request from the community, through the agreed and adopted decision making processes for the group (which can be consensus amongst common law holders) or failing that, a request comes through the Board. NTRBs also receive requests from non-common law holders (e.g. RNTBC legal representatives) to control membership, for future acts determinations, or to support neighbouring claims. Of particular interest are often sensitive connection materials and genealogies.

- There are differing opinions in the community on who is the client for ROM. YMAC sees the common law holders as the authorising entity.

- Claim membership is a highly contested area and connection reports and genealogies are seen as key to solving membership issues. PBC and traditional owners (TOs) often have a differing and sometimes limited understanding of the native title research process and the complexities of the information collected within a confidential context, requiring careful management of expectations regarding ROM.

- Court demands for subpoenas and notices often put NTRBs in a difficult position when trying to produce the documents while adhering to required cultural protocols.

- Connection reports constitute expert advice. They are not written with the group's future purpose and needs in mind. As a result, the language used and the at times blunt statement of facts can be perceived as offensive. One potential solution might be to write two separate reports: one for the legal process and one for the community or modifying the style of writing.

- Litigation can lead to sensitive materials becoming available to the parties involved and sometimes, via judgment, also to the broader public. This creates issues for witness credibility in later compensation or neighbouring claims.

- YMAC is seeking advice regarding who has the legal privilege and who can waive it.

- YMAC is seeking advice on what are the NTRBs' obligations under the Privacy Act.

- Issues arise with materials obtained from third parties or collecting institutions: materials that were obtained for native title use only cannot be handed back due to the access and use conditions. Some materials fall within a grey area of

copyright. YMACs' experience is that institutions are not responsive to issues around ROM and don't have adequate access and use policies. YMAC requires assistance for institutions to recognise issues and decolonise collecting practices and access policies.

- Discussions around the legal and ethical responsibility of NTRBs during the ROM process and into the future handling of materials. YMAC staff are uncomfortable in the gatekeeper role. Do NTRBs need to ensure that transfer agreements and access protocols are honoured, and are or should there be any powers of control for the NTRBs? The misuse of materials by PBCs or TOs raises ethical question for NTRBs. The way forward may be the development of a cultural policy template and strategies for policy enforcement that can be amended by PBCs respectively.

- YMAC developed consent forms for personal returns of materials. For wider consultation YMAC relies on good documentation of process.

- Discussion around the protection of YMAC staff throughout the ROM process.

Archives and records management

- Discussions about information management raised questions around paper vs digital ROM, hard drive vs database ROM, and if the physical archive should follow the digital archive.

- YMAC is seeking advice for archiving best practice and Australian standards.

- YMAC has indexing categories and policies in place. These are followed for new materials but there are no resources for indexing of older materials which created a large backlog. The index allows for identification of ROM and restricted materials.

- Digitisation is urgent for deteriorating audio-visual materials.

- Plans for the final location for originals, in particular audio-visual materials.

- YMAC has file naming conventions established but these evolved over time with the result that some files have incomplete provenance.

- Discussion if YMAC internal materials are included or excluded from ROM. Such internal materials can help interpret ROM materials.

- Currently YMAC does not add metadata to materials but is rethinking this approach since metadata would help with searchability and provenance, especially for audio-visual materials.

Resourcing needs

- Two ROM levels have been established:
  1. Basic ROM: consisting of workshops, consultation, policy development and finally ROM, currently not funded.
  2. Additional supported ROM: database development and ongoing support, in addition to the basic level. This level requires grant funding or PBC financial contribution.

- Database development for community use is highly valued but currently there is no consistent suitable platform. Developing such a platform is very costly.

- YMAC identified a need for additional equipment and funding for material digitisation.

- One additional information management staff member is needed to keep up and address backlog.

- One return takes 12-18 months minimum, if both sides are engaged and workshop times can be arranged quickly. At this stage, YMAC considers no more than one to two returns per year is feasible (this is dependent on funding and staffing).

- YMAC is currently not funded for ROM. Cost for a basic ROM is estimated at $60 - 80 000 per return and requires two full-time staff members. YMAC has represented 23 claim groups. To enable returns for each group YMAC requires additional staff.

- PBCs need capacity to seek funding for ROM. This raises questions of equity especially for 'small' or low income PBCs.

Future directions for ROM

- The generation of sensitive but invaluable material is a by-product of the native title process. The suggestion is to incorporate ROM process as integral part of the native title claim process, especially regarding ROM cost and resourcing.

- NTRBs should hold strategic planning sessions for ROM pre-determination.

- Long-term strategies are needed for a time when NTRBs cease to exist.

- There is a need for a national repository for native title materials which could be AIATSIS or the National Archives.

- NTRBs are equipped to offer PBC capacity building to care for materials but they are currently not funded for these services.

- Community knowledge about the ROM process and experience of looking after native title materials needs to be passed on.

Summary of YMAC's need for assistance

- advice regarding who has the privilege and who can waive it

- advice regarding who is the client for ROM

- advice on what are the NTRBs' obligations under Privacy Act

- assistance for institutions to recognise issues and decolonise collecting practices and access and use policies

- advice for archiving best practice and Australian standards

- assistance with additional equipment and funding for material digitisation

- funding (either through NIAA or other grant) for ROM projects

Going forward

For YMAC, envisaged research outcomes would be an increased understanding by government of the need to address these issues, development of funding avenues and an adaptable best practice model applicable across country and states.

The AIATSIS research team is waiting for fieldwork dates with RRKAC to conduct further case study research. This will provide opportunities to gather data directly from a PBC and community members about the process.