The Future of Connection Material held by Native Title Representative Bodies: Final Report
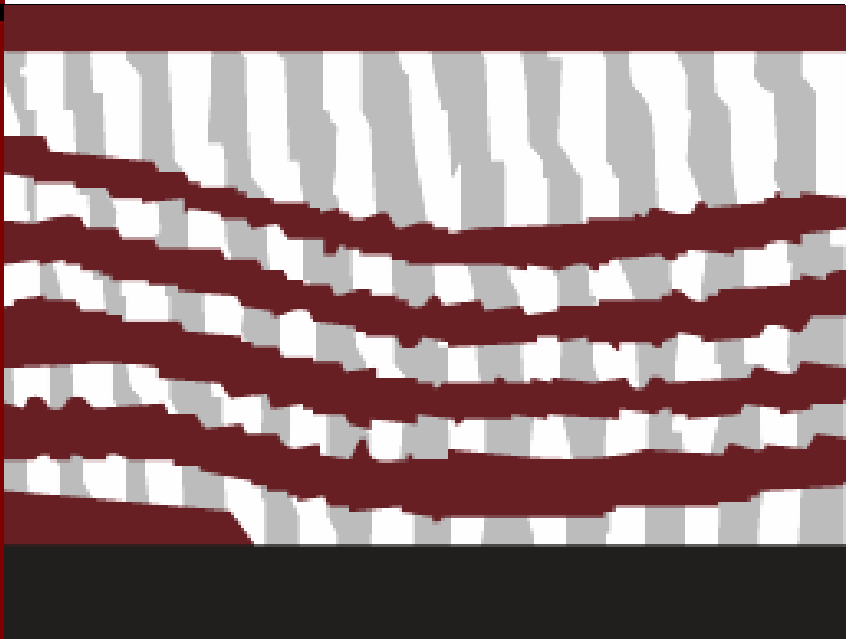
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The future of connection material held by native title representative bodies: final report

Grace Koch

The views expressed in this publication are those of the authors and not necessarily those of the Australian Institute of Aboriginal and Torres Strait Islander Studies.

Abbreviations

AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
Archives Act	*Archives Act 1983* (Cth)
CLC	Central Land Council
FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs
IFaMP	Indigenous Facilitation and Mediation Project
KLC	Kimberley Land Council
NLC	Northern Land Council
NTRBs	Native Title Representative Bodies
NTRAO	Native Title Research and Access Officer
NTRU	Native Title Research Unit
NTS NSW	Native Title Service New South Wales
OIPC	Office of Indigenous Policy Coordination
TSRA	Torres Strait Regional Authority

Acknowledgements

Executive summary

Many valuable and irreplaceable documents have been created during research for native title claims. Some Native Title Representative Bodies (NTRBs) have dedicated staff to manage these documents, but others are not able to care for them properly.

Early in 2005, the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), through the Native Title Research Unit (NTRU), sponsored a project to focus upon issues of arrangement, preservation, and access to connection material. A series of workshops, surveys, and web resources have resulted from directions provided by NTRB staff who have set the goals for the project.

The AIATSIS Native Title Research and Access Officer (NTRAO) has been working through the recommendations arising from meetings and sessions held at the last three annual Native Title conferences; however further implementation of the recommendations will require staffing and funding. Four recommendations are proposed in this report, which was workshopped at a Senior Professional Officers' seminar (3-4 March 2008), sponsored by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA). A resolution in support of the project was formulated at the seminar and circulated to attendees at the seminar and to senior FaHCSIA staff. It can be found as appendix 8.

The following key recommendations emerged from the Future of Connection Project:

Recommendation 1: Identification, arrangement and description
An assessment needs to be made urgently of which NTRBs are successful in organising their material and which ones need help, after which a plan should be implemented to get the material into proper order.

Recommendation 2: Preservation/conservation measures
Each NTRB needs to develop and implement a plan to ensure secure storage facilities to assess the condition of its records and to develop procedures for digitising the holdings.

Recommendation 3: Access and use protocols
Each NTRB needs a plan for access and use of native title material.

Recommendation 4: Location of an external repository
Each NTRB needs to select a separate and secure repository for their holdings to ensure their preservation for posterity.

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1. Introduction

The native title process has created valuable research resources assembled during the claim research. Although some of this material has come from other sources, the arrangement of the documents coupled with original field research gives a unique description of Indigenous societies and their connections with the land. Also, much of the field material is irreplaceable because the elders who gave the information may have passed away. This connection material is of great value, not only to claimants, but to the wider community because it offers a valuable contribution to Australian history, anthropology, sociology, land management and other disciplines; however, because it was created as part of a legal process, it deserves special recognition and respect.

When NTRBs were established, funding went to claim research and there was very little, if any, provision for documentation and storage of research reports, connection material, and other print and audiovisual documents generated by the native title process. NTRBs now hold significant collections which require extra funding for their care if they are to be available for future generations. This funding should be in addition to the normal allocation of money for each NTRB.

The documents held must be easy to access. Contract researchers who prepare connection reports are employed for fixed time periods and depend upon efficient and accurate retrieval mechanisms for locating relevant information on local groups, historical documents, and neighbouring claims. Unfortunately, databases for documentation and internal storage provisions vary widely amongst Native Title Representative Bodies with some material being in danger of dispersion or decay.

It became obvious that action was needed to ensure that the holdings of NTRBs be catalogued and that secure storage and preservation issues be addressed. These became the aims and objectives of a project sponsored by the NTRU of AIATSIS entitled 'The Future of Connection Material'.

2. Description of the project

The Future of Connection Material project aims to formulate a plan for NTRBs nationwide to establish standards and to develop skills towards proper documentation and secure storage for connection material and other original documents generated by the native title process. The project has been conducted within the NTRU, which exists as part of the Research Program of AIATSIS.

NTRB materials can be divided into two categories: those that fall under the *Archives Act 1983* (Cth) (Archives Act) and those that exist separately. The Northern Land Council (NLC), the Central Land Council (CLC) and the Torres Strait Regional Authority (TSRA) are authorities of the Commonwealth that are subject to the Commonwealth's Archives Act, which regulates the disposal, access, custody and storage of Commonwealth records. The Federal Court is also a party to the Archives Act. This means that these organisations need to coordinate their work in gathering information on their records with the National Archives so that their documentation and evaluation processes are compatible. Some records have been transferred to the

Darwin office of the National Archives.[1] NTRBs that do not fall under the *Archives Act 1983* (Cth) have more freedom in organising their documentation; however, all NTRBs can benefit from the recommendations shown below.

The recommendations cover two broad areas- *arrangement, access and use* and *preservation and external storage*. The first recommendation is dealt with in the most detail because the other three cannot be achieved without it.

3. The Recommendations

Recommendation 1- Identification, arrangement and description

An assessment needs to be made urgently of which NTRBs are successful in organising their material and which ones need help, after which a plan should be implemented to get the material into proper order.

Immediate action needs to be taken on this recommendation, especially with the consolidation of the four Queensland NTRBs.

Land Councils formed before the passage of the *Native Title Act 1993* (Cth), such as the NLC, CLC and Kimberley Land Council (KLC), have cataloguing and internal management systems for their documents; they also have collection managers and/or librarians. Their expertise would be most valuable to newer or consolidating NTRBs, and some of them already have provided information to others at the annual Native title conferences.

Priority should be given to the four Queensland NTRBs that are in the process of consolidation, and the following steps could be actioned as a pilot project between them and the remaining Queensland NTRBs who will be holding some of their material. This pilot could contribute towards forming a template for action for other NTRBs.

- A team needs to work with Queensland NTRB staff to determine the extent of their holdings and the status of their collection organisation. The Senior Professional Officer seminar held by FaHCSIA on 4 March described an ideal team as having an expert in collection management, an anthropologist and/or someone familiar with the workings of NTRBs and an ethnographic research officer. A Queensland-based academic could also be included. The collections themselves should be assessed for duplication, uniqueness of material, and general value of each document.[2] Duplication may occur, for example, if some documents are held both by the legal section and the anthropology unit.

- Hopefully NTRBs should hold all records, both print and audiovisual, relevant to the claims they have documented. Some material held by consultants, though, may not have been deposited (see point below). Also, the Federal Court may hold

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[1] H Rowell, National Archives, email, 20 February 2008.

2 See Koch, G. *Report on survey of NTRBs April-May 2005*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, viewed 30 March 2008, <http://ntru.aiatsis.gov.au/collections/pdfs/ntrbsurvey_report05.pdf>

digital diaries created at the time of hearings, the archiving of which need to be negotiated.

- The following typology of materials created by Nick Smith of primary and secondary sources held at Pilbara/Yamatji Native Title Service could help to identify gaps in the collections:[3]

Claim generated materials/ primary sources:

- Field notebooks
- Genealogical notebooks
- Genealogical databases
- Various archival/ethno-historical databases e.g. Bates and Radcliffe Brown, Tindale nominal indices (need to have the resources to produce more)
- Mapping software (huge scope to integrate most other data formats)
- Audio – analog recordings
- Video – digital
- Images – transparencies; digital
- Restricted materials (male and female)
- Connection Reports
- Meeting records

Secondary sources:

- Library (published works)
- Archival materials e.g. Native Affairs; Colonial Sec; Police Occurrence Books; Police files; Supreme Court documents; Registrar General's Death Index; Cemetery records; Lock Hospital records; Station Diaries; Station 'home movies'.
- Ethno-historical data in various forms audio, images, genealogies, notebooks e.g. Radcliffe Brown; Daisy Bates; Norman Tindale.
- Reports e.g. Heritage surveys, Paul Seaman inquiry,
- Other materials donated or discovered not directly relevant to NT (claimants' photo albums)
- Maps (including digital maps)
- Publications

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[3] See also Appendix 2.

- Consultants who have prepared connection reports may not have lodged copies of some of their supporting documentation with the NTRB who engaged them (see list above). A project team could examine the holdings of the NTRBs and contact the researchers for missing documents, some of which would appear as references in the connection reports. This does not mean that all books and articles referenced should be purchased, but there should be information on where to locate them. This point came through strongly at the 2005 Native Title Conference workshop on project objectives.

- Once an assessment has been made and missing documents have been traced, then a catalogue of the holdings should be made or updated. Some of the four Queensland NTRBs have in-house databases using FileMakerPro software. No matter what software is used, the data should be exportable. A workshop on databases held at AIATSIS in 2006 listed the following ideal fields of information for an NTRB database:

  - Register of Consultants, qualifications and contact details;
  - Claim group lists;
  - Claimants (Community) list and their contact details;
  - Applicants list and their contact details;
  - Working group list and their contact details;
  - Personal history information;
  - Claimants testimonies (evidence);
  - Claim area boundaries;
  - Geospatial site information;
  - Genealogies;
  - Minutes of meetings (one for Anthropology and one for Legal);
  - Records of reports;
  - Report number
  - Author
  - Title and Date of Report
  - Borrowed by (in/out)

  - Correspondence with the State regarding connection material (including State's Peer Review);
  - Federal Court Orders;
  - Land tenure information;
  - Researchers' note books;
  - Consultants' agreements/Contracts and correspondence with Consultants;
  - Report may be inputted directly;
  - Research related material; Audiovisual research material; and NNTT research bricks.
  - General correspondence (one for Anthropology and another for Legal)
  - Future Acts Notices (FAN), recipients, address, etc.
  - Respondent Parties, their interests and contact details
  - Calendar of events so as to keep track of the history, present status and important future dates of a claim.

- At least one of the four Queensland NTRBs has begun to create digital surrogates of the documents, linking them to the database record. Ideally this should be done for all print and audiovisual material. This can be done during the implementation of Recommendation 1 or later, as time and funds allow.

Assessment and arrangement and description for NTRBs require extra staffing for up to a year. Some funding bodies, such as the National Library, offer grants to cover archival assessment of a collection, but there would not be time to apply before the consolidation of the Queensland NTRBs. FaHCSIA, perhaps in conjunction with the Department of Environment, Heritage and the Arts, should consider funding this part of the project. It is vital that any task-forces work closely with current NTRB staff to achieve the best results and to agree upon procedures. Costs could be minimised by exploring the following options.

1. Arranging internships with information management students from neighbouring universities.
2. Approaching professional organisations such as the Australian Society of Archivists, Australian Library and Information Association, or Records Management Association to explore possibilities of help.
3. Exchange programs/ secondments for NTRB information management staff with AIATSIS staff or with another collecting institution.

Ideally, listings of materials held by NTRBs should be standardised. AIATSIS (and many other collecting institutions) produces detailed indexes, or Finding Aids for personal collections and other manuscript material acquired by the Library. NTRBs may consider making such indexes for each claim. The Australian Society of Archivists could offer assistance here in providing standards. NTRBs falling under the Archives Act should try to follow procedures used by National Archives as much as possible in order to avoid duplication of cataloguing when their material is transferred.

Recommendation 1 is the most expensive and detailed of the four. When its objectives are achieved, the others will fall in place because an identifiable critical mass will be created upon which to base further action.

Firm and knowledgeable project management is necessary for such a major task.

Recommendation 2 - Preservation/conservation measures
Each NTRB needs to develop and implement a plan to ensure secure storage facilities to assess the condition of its records and to develop procedures for digitising the holdings.

This section deals with how NTRBs store material on the premises rather than externally. Recommendation 1 in this report examines in-house arrangement and description; this one focuses upon the storage conditions and the physical state of the material and the creation of digital surrogates.

It is imperative that the holdings of NTRBs be held within secure storage conditions, yet some NTRBs have not been funded to provide adequate housing. NTRBs have explored various options, such as fireproof safes, lockable filing cabinets, and, in the case of the Kimberley Land Council, an air-conditioned shipping container located at the Derby repository.

Because there are time limitations upon funding for NTRBs, decisions need to be made about how much should be spent upon storage conditions when financial support will only be assured for the next two to six years. Recommendation 2 should be examined along with Recommendation 4, which looks to external security storage.

As part of the Future of Connection Material project, all NTRBs were sent a set of preservation/conservation notes developed by two peak government agencies—the Australian Society of Archivists and the National Film and Sound Archive. AIATSIS has produced a set of useful documents and manuals as well, some of which can be found on-line, such as the Preservation Information Sheets prepared by the AIATSIS Library. A copy of the Keeping History Alive Information Handbook, with advice on the care and handling of audiovisual materials, can be requested through the Audiovisual Archives section of the AIATSIS website.

Recommendations 1 (arrangement and description) and 3 (access conditions) will provide the parameters for scoping the extent and costing for conservation/preservation work. Attention should be focussed upon the original documents and their preservation, and a detailed plan developed for both conservation and digitization. Once the materials are in good shape, they should be scanned with software offering good optical character recognition capability and should be easily discoverable on a computerised catalogue with special access provisions by password or by some other secure administrative control. Consideration could be given to aggregation of materials between claims for searching, as some claims either border or overlap with others.

The National Library, through their Heritage grants, funds professional conservators to do assessments of collections and to offer advice. The grants, though limited to $10,000 each, could work well for a small cluster of NTRBs. Alternatively, an approach could be made to professional information management associations or organisations to see if they could offer help. It is vital that external technical advice be sought for the best way to digitise material and to ensure that it links directly to a catalogue record. AIATSIS has been digitising both print and audiovisual materials for many years and can be contacted for advice.

The Collections Council of Australia, through its CollectionsCare project, is looking into work with Indigenous collections and knowledge centres. It would be most worthwhile to explore how they could assist with Recommendations 1 and 2.

A number of low-cost digitisation solutions are being used for small organisations. For example, Gavan McCarthy, Director of the Australian Science and Technology Heritage Center at the University of Melbourne, has created an inexpensive digitisation suite comprised of a computer, special software, and a digital camera and stand that will make low-resolution .pdfs that are fully text searchable. The suite costs

$10,000. Other initiatives such as mobile scanning bureaus exist, but research needs to be done to locate them and to assess their suitability.

Some NTRBs, such as Central Queensland Land Council Aboriginal Corporation and New South Wales Native Title Services Ltd., have already begun to digitise their holdings. Their experience would be most valuable for other NTRBs.

This recommendation can only be achieved by discovering what information exists, enlisting expert help to evaluate the findings, then to develop a plan. As for Recommendation 1, extra staff (probably short-term) will be necessary to get the job done.

Recommendation 3 - Access and use protocols
Each NTRB needs a plan for access and use of native title material.

Material held by NTRBs is sensitive because it includes much personal data, such as genealogies, as well as information on traditional knowledge and beliefs.[4] Allowing access to these records requires a delicate balancing act between respecting the rights of the traditional owners and complying with legitimate requests for information. A set of protocols drawn up by NTRBs will standardise basic principles and procedures as well as giving guidance to NTRBs when clients ask for access to native title documents.

Those NTRBs falling under the *Archives Act 1983* (Cth) (NLC, CLC and TSRA) would need to ensure that their access arrangements are consistent with access provisions of the Act.

The 2005 survey conducted by AIATSIS with NTRBs raised questions about access and use, including how the Privacy Act relates to native title material, what should be kept by the courts and by NTRBs, and how Indigenous control can be established and maintained. (See appendices 1-3) The first two issues were discussed at the 2006 Native Title Conference in Darwin;[5] more detailed questions and proposals arose during the second part of a workshop with 13 NTRBs at AIATSIS in June 2006. (appendix 5)

All agreed that proper consultation mechanisms need to be set between owners of the knowledge and people requesting access to that knowledge. Once these are finalized, they must be rigorously followed by NTRB staff. Traditional owners must be included in the formation of the protocols, preferably after a draft is produced. The procedures should include how to give access to isolated bits of information as well as full reports, and should specify how to handle all types of requests, both internal and

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[4] See Twomey J, 'Legal and practical considerations in managing access to materials held by NTRBs and Land Councils' paper presented at the National Native Title Conference 2007, Carins 6-8 June 2007, viewed 30 March 2008,
<http://ntru.aiatsis.gov.au/collections/pdfs/AIATSIS%20Native%20Title%20Conference%20Materials%20Access%20Policy%20J%20Twomey.pdf>.

[5] See Irving, I, 'Information held on Federal Court files' paper presented at the National Native Title Conference 2007, Carins 6-8 June 2007, viewed 30 March 2008,
http://ntru.aiatsis.gov.au/conf2006/download_docs/Papers/Ian_Irving.pdf.

external. A local Indigenous advisory group could be constituted for ongoing advice and could also deal with changes in procedures in the future.

Some NTRBs already have developed documents and policies on access and use; however, a template that will cover all contingencies needs to be drawn up urgently. The workshop on access at the 2007 Native Title Conference in Cairns brought up many issues seen from the viewpoints of three participants from the same NTRB- a collection manager, a lawyer and a traditional owner. The legal perspectives from this workshop in drawing up a set of protocols are available on the NTRU website and can be seen in this report as Appendix 6.

There is clearly a need for a workshop that will draft a template for access and use of native title materials held by NTRBs. AIATSIS has long experience in creating access and use protocols for its Library and Audiovisual archival material.

Ownership and access issues can be very emotive. With this in mind, a workshop on access issues should also cover mediation skills. The Indigenous Facilitation and Mediation Project (IFaMP), sponsored by AIATSIS, proposed that such a workshop be held,[6] and expertise exists within AIATSIS to conduct one.[7]

A successful workshop with the aim of creating a useful template for access requires at least three days because of the many issues that need to be addressed. A minimum of three representatives from each NTRB- a collection manager, a claimant and an anthropologist and/or lawyer- would ensure a breadth of viewpoints. One possibility would be to conduct a pilot meeting with the Queensland NTRBs to create a document that would serve their purposes. Later, another meeting with all NTRBs could develop the template further. Attendees from NTRBs who have effective policies could offer some case studies and helpful practical examples to this larger group.

If given adequate funding, AIATSIS would be well placed to hold such a workshop which would address some of the following points:

- legal limitations on and implications of the distribution of materials;
- categories of materials which might attract legal privilege;
- categories of materials which are publicly available to other stakeholders;
- legal status of connection reports;
- issues around distribution of the whole or part of a report;
- legal requirements of anthropologists in writing connection reports;
- ownership of connection reports;

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[6] Bauman, T, *Final Report of the Indigenous Facilitation and Mediation Project July 2003-June 2006: research findings, recommendations and implementation*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra 2006, p 71, viewed 30 March 2008, <http://ntru.aiatsis.gov.au/ifamp/research/pdfs/ifamp_final.pdf>.

[7] Toni Bauman, presently a researcher within the AIATSIS Native Title Unit, led the IFaMP project from July 2003 to July 2006.

- conditions of access to particular materials provided by individuals or groups and reasons for any restrictions;

- how materials can and/or will be used;

- how contradictory information will be managed;

- how state governments and policies and connection guidelines are to be taken into account;

- how Commonwealth government legislation and policies relate to the information, especially in the case of the three NTRBs falling under the Archives Act;

- processes for handling of disputes around connection materials amongst parties and misuse by state agencies; and

- approaches to cultural heritage issues.[8]

Recommendation 4: Location of an external repository

Each NTRB needs to select a separate and secure repository for their holdings to ensure their preservation for posterity.

Several NTRBs are in areas where storms, flooding and other natural disasters often occur. Once lost, many of these documents can never be replaced. Their unique nature means special care should be taken to ensure that they are available for future generations.

All NTRBs are in agreement that backups, either the originals or copies, of their documents should be held in a secure environment, but various opinions arise as to where they should go. The question is settled for the NLC, CLC and TSRA, who fall under the Archives Act because National Archives will provide repository storage for their records. The question of a repository remains, though, for the other NTRBs as to what place would be suitable and where should it be? For example, the Library Subcommittee of the KLC Executive firmly insists that all originals and backups be held in the Kimberley but other NTRBs have seen AIATSIS as a suitable storage venue. The chosen venue, though, would need to assess its own storage capacity and the condition of materials proposed for lodgement.

Even though the material will have been adequately arranged and described, and will have clear access conditions, the vast amount of material held by NTRBs can put a considerable workload upon staff of the external repository/repositories. Some questions to consider are:

- Can the repository ensure adequate protection and security to the material?

- What will be stored- originals or digital surrogates or other sorts of copies?

- What type of retrieval mechanisms will be provided for the material? A computer catalogue, cards, lists?

- Will there be large quantities of audiovisual material?

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[8] Toni Bauman, AIATSIS, personal communication, 20 September 2006.

- Will the charter of the repository allow for the access conditions set by the NTRB (*Recommendation 3*)?

- Will the repository grant access to anyone, and if not, how long must the material be closed?

- What will be the impact of storage upon the staff of the repository?

- Will external funding be provided for the maintenance and upkeep of the material?

- How will the information be ingested?

- What plans will be in place for the material if the NTRB ceases to exist?

Once the storage venue is chosen, a decision should be made when the material can be stored offsite.

It would be ideal if the originals and digital surrogates were lodged in an external, secure repository after a determination is made, but this is not always feasible because they may continue to be working documents.

It may be that more than one agency may be the proper place for some parts of the material. For example, the Federal Court holds the application and documents filed in support or opposition to the case. Each court registry has different arrangements with various local suppliers for archiving.[9] (appendix 4)

If documents are held in several places, catalogues of the repositories should indicate where the rest of the holdings of that NTRB can be found. It is vital that all of the stored records of each claim be retrievable under the name of the claim.

The National Archives, who is the designated repository for three NTRBs, has experience in handling Indigenous materials. They also have State offices and Memorandums of Understanding (MOUs) with various Indigenous organisations. Other suitable storage venues need to be researched also, such as State libraries.

There is value in considering the benefits of public archives rather than private storage:

- Public archives receive ongoing funding and can ensure long-term security for collections.

- It is the job of public archives and libraries to maintain up-to-date information technology standards so that documents will be available in perpetuity.

- Archives and library staff members have experience with a wide range of access issues.

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[9] See above n 5, for a discussion of what the Court keeps.

- Public archives and libraries are employing increasing numbers of Indigenous staff.

An example from AIATSIS shows the wide-ranging value of a collection with mostly open access conditions. The audio tapes and transcriptions made with Queensland people by Gavan Breen in the 1960's and 1970's have proved to be priceless both in documenting native title claims and in preparation of teaching materials for endangered languages. The narratives gathered during his fieldwork include important oral historical and ecological knowledge. Photographs held by AIATSIS may be the only ones ever taken of family members, which is especially important for people of the Stolen Generation. These examples alone, and there are many others, present a strong case for making as much material accessible as possible for future generations.

4.   Conclusion

The Future of Connection Materials project has operated for three years and much has been accomplished, however if connection material generated by the native title process is to be preserved for future generations, a plan needs to be set in train urgently, especially as NTRBs are reorganising and, in some cases, consolidating. This report gives a set of directions and suggestions for such a plan. During the three years of the project, most NTRBs have participated enthusiastically and willingly. It is now time for the findings to be incorporated into an effective plan.

Native title holders should consider factoring in costs for preservation, conservation and collection management when they negotiate the terms of a successful native title claim. Costs for the above plus training for Indigenous collection management staff would provide jobs and would ensure the successful flow of communication between the owners of the material and others who wish to access it.

The NTRU will be happy to participate in discussions relating to the implementation of this report. Please contact Lisa Strelein, Director, Research Programs and Native Title Unit (lisa.strelein@aiatsis.gov.au) and/or Grace Koch, Native Title Research and Access Officer (grace.koch@aiatsis.gov.au) for further information.

5.   Supplementary material referred to in this report

APPENDIX 1
Koch, Grace 2007, History of the "Future of Connection Material Project."

APPENDIX 1a
Koch, Grace 2005, *Report on survey of NTRBs April-May 2005* (presented to Native Title Conference, Coff's Harbour 1-3 June 2005)

APPENDIX 2
Smith, Nick 2005, '*The Future of Connection Material'* (presented to Native Title Conference, Coff's Harbour 1-3 June 2005)

APPENDIX 3
Koch, Grace 2005, *Report on breakout session* [Native Title Conference, Coff's Harbour 1-3 June 2005]

APPENDIX 4
Irving, Ian 2006, '*Information held on Federal Court native title files'* (presented to Native Title Conference, Darwin, 24-26 May 2006)

APPENDIX 5
Koch, Grace 2006, *Report on workshop for NTRBs on databases and access and use issues held at AIATSIS 29-30 June 2006*

APPENDIX 6
Twomey, Justine 2007, '*Legal and practical considerations in managing access to materials held by NTRBs and Land Councils*' (presented to Native Title Conference, Cairns, 6-8 June 2007)

APPENDIX 7
Bennett, Michael and Grace Koch 2007 '*History and Native Title: the making of a community asset 2007*' (presented to the Australian Historical Association 2007 Regional Conference, University of New England, Armidale, NSW 25 September 2007)

APPENDIX 8
Resolution drafted at the Senior Professional Officers' Forum held in Coogee, NSW on 4 March 2008.

APPENDIX 9
List of Native Title Representative Bodies as of 25 February 2008.

APPENDIX 1: History of project and activities

Survey

The first step of the project consisted of a survey by the NTRAO in order to find out current storage practices and plans for the future for documents that have been either collected or generated by the native title process. Telephone contact was made with each of the 17 NTRBs and interviewees were records managers, anthropologists and lawyers. Participants were also asked for ideas as to how AIATSIS could be of help to NTRBs.

The issues raised by the survey set the directions for the duration of the project. In summary, re storage and management, they were:

- Status of copying material held

- Implications of the Privacy Act

- Retention of materials by the court

- Access to materials for traditional owners

- Need for assessment of collections

- Firm control of collections according to cultural requirements

NTRBs requested AIATSIS' help in the following ways:

- Possible long-term storage facility

- Question of when to archive materials

- Help in records management, information management, IT, and digitisation practice.

- Possibility of mentoring staff and giving work experience with AIATSIS collections

- Adaptation of AIATSIS' system of access and copying procedures to their own purposes.

- Designing protocols for legal representatives of non-Indigenous respondents to help make the process less onerous for indigenous people.

- Location of relevant materials held by consultants

The report on the survey can be seen as APPENDIX 1a.

NTRU conference activity

The annual Native Title Conferences have offered an excellent chance for NTRB staff to discuss the project and to shape future directions. A breakout session concentrating upon the project has been held for three conferences during the first day, which is reserved for NTRB staff. Even though several parallel sessions are held at the same time, there has been good attendance each year and lively discussion.

Coff's Harbour Conference 2005
This conference offered the first session on the Future of Connection Material Project. Four presentations were made:

- Grace Koch gave the results of the telephone survey.

- Michael Bennett from NSW NTS talked on the historical resources available for native title research, concentrating on NSW.

- Bill Cruse from Ngaanyatjarra Council raised a number of questions that NTRBs should consider with their collections.

- Nick Smith from Yamatji presented a typology of materials held by NTRBs. This typology can be seen as APPENDIX 2.

There was such interest in the content that another informal session was held to draw up a number of recommendations. It was impossible to address all of them, but the following outcomes were achieved during the latter part of 2005:

- The typology by Nick Smith was put on the AIATSIS website.

- A toolkit on preservation strategies were sent in the form of a booklet to all NTRBs at Christmas.

- Grace Koch disseminated a list of possible funding agencies for collection management.

APPENDIX 3 contains a report on the recommendations arising from the breakout session at this conference.

Darwin Conference 2006

A breakout session was held offering three presentations.

- Grace Koch reported on two case studies she had conducted with the Kimberley Land Council and Native Title Services NSW. This will be dealt with in the next section.

- Matthew Moharich from the NLC presented a paper on behalf of Ian Irving (Federal Court) on how the Court treats native title material. This report can be seen as APPENDIX 4.

- He also gave a paper on ownership of material generated by the native title process.

Both Ian Irving's paper and Grace Koch's report were put on the NTRU website.

Delegates requested that a workshop be conducted on databases and on issues of access. This was convened on 29-30 of June 2006 and will be described in a later section. There was great interest in geospatial interfaces, especially the one being used by the National Native Title Tribunal.

Cairns Conference 2007
NTRBs at the Darwin conference had raised many questions about access to native title materials. As a response, a session was held with three speakers from the

Kimberley Land Council presenting their perspectives on the topic. Jenny Bolton spoke from a collection manager's view, Linda Dean gave her views as a traditional owner, and Justine Twomey presented legal issues as raised by experience in preparing access documents for the Kimberley Land Council. Grace Koch gave a brief overview of project development during the previous year. The overview and the paper by Justine Twomey appear on the NTRU website. Twomey's paper can be seen as APPENDIX 6.

Case studies

Two case studies were conducted during 2006 in order to identify needs of the collections. The Kimberley Land Council (KLC) was chosen because it is representative of the three land councils constituted before the Native Title Act[10] and its collections include items collected before the native title process. Also, it holds a large amount of connection material, has had at least eight determinations, has a substantial library and is making plans for preservation of the material it holds. Native Title Services NSW (NTS NSW) was chosen because it is a relatively new agency containing solely native title material, has an active policy to return copies of holdings to traditional owners, and no determinations had been made after the agency was established.

Because the two organizations were so different, it was difficult to do valid comparisons, but the following points emerged:

- KLC insisted that its holdings never leave the Kimberleys, whereas NTS NSW staff felt that AIATSIS would be an ideal security storage venue.

- In both cases, there were geospatial interfaces available, but NTS NSW had created one in-house.

- The KLC had a full-time librarian whereas NTS NSW had records managers for its organizational documents only.

- Both organizations had created their own in-house databases for locating documents based upon FileMakerPro.

- Both organizations recognise the importance of digitization of their collections, and NTS NSW has begun the process.

Workshop

On 29-30 June, AIATSIS held a workshop on databases and access issues for NTRBs. All NTRBs were contacted by the NTRAO and funding was provided by the then Officer of Indigenous Policy Coordination (OIPC) for travels costs for delegates; 13 of 17 NTRBs sent a total of 23 people, including legal, information management and anthropology staff.

The workshop arose from the second working session of NTRB representatives at the Darwin conference, which focussed on two demonstrations of databases that had been shown- one from Native Title Services NSW and the other by the National Native

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[10] Central Land Council, Northern Land Council, and Kimberley Land Council.

Title Tribunal. Because time was limited for discussion, participants requested that a workshop be held at AIATSIS in Canberra before the end of the financial year in order to construct a best practice document addressing database structure and content, and ethics and protocols for access and use of connection materials. This document would result in savings for NTRBs who need to update or establish databases by seeing what is already available within NTRBs and learning from their experiences rather than investing in database design all on their own.

Each NTRB described their databases, then small groups formulated lists of necessary and ideal fields of information. After that, the groups came up with ethical standards and access procedures for native title material. A record of the proceedings and the lists compiled at the workshop were disseminated to all participants. Although exact templates were not formulated, enough information was available for NTRBs to use the bits that would be pertinent to their organization.

The National Native Title Tribunal had been invited to demonstrate and to discuss their geospatial database, but did not attend due to time constraints.

The full report of the workshop can be seen as APPENDIX 5.

Website publications

The NTRU website contains a section on Collections Access and Development and a subsection on the Future of Connection Material Project. All of the attachments to this report plus selected articles and listings about information management can be downloaded from the site. At present it contains:

- [Legal and practical considerations in managing access to materials held by NTRBs and Land Councils](#) by Justine Twomey AIATSIS Native Title Conference 2007

- [Report on workshop for NTRBs on databases and access and use issues](#) held at AIATSIS 29-30 June 2006

- Hudson, Emily and Andrew T. Kenyon 'Copyright and Cultural Institutions: Guidelines for digitisation'. (Available in both [short](#) and [long](#) forms)

- [Information held on Federal Court Native Title files](#), presented by Ian Irving at the Native Title Conference 2006

- [Report on survey of NTRBs (April-May 2005)](#)

- [Report on Breakout Session: The Future of Connection Material (Native Title Conference 2005)](#)

- ['The Future of Connection Material'](#), presented by Nick Smith (Native Title Conference 2005)

- [Brief list of on-line resources for preservation and information on Indigenous studies](#), compiled by Grace Koch, Native Title Research and Access Manager, AIATSIS

APPENDIX 1a: Report on survey of NTRBs

April-May 2005
Grace Koch
Native Title Research and Access Officer

The survey was conducted in order to find out current storage practices and plans for the future for documents that have been either collected or generated by the Native Title process. The second part of the survey asked for ideas as to how AIATSIS could be of help to NTRBs. Telephone contact was made with each NTRB, and interviewees consisted of records managers, anthropologists, and lawyers.

General points:

All NTRBs are at different stages in the Native Title process with some having reached a number of determinations and others still in process. Also, there are varying levels of storage facilities ranging from secure fireproof areas to material being held in offices.

Issues for storage:

Status of material held for Native Title:
- With the DIMIA funding contract for the NTRB can copies be made within the provisions of that contract?
- What are the implications of the Privacy Act for Native Title materials?
- What does the court keep and what may the NTRB keep, especially in litigation?

Provisions for external storage:
- All NTRB's want materials to be readily available to traditional owners.
- Some have approached other organisations for storage but have not finalised anything yet.
- Before collections could be copied or transferred for storage, they would need to be assessed for duplication, uniqueness of material, and general value of each document.

Costs:
- All require help with funding generally, and security storage is just one need amongst many.

Access:
- If material is stored externally, there is a concern that access conditions be maintained.
- Materials need to be accessible for claimants and firm conditions set respecting Indigenous control.

Issues as to how AIATSIS could help NTRB's

Long-term storage:

- All were happy to consider AIATSIS as a security storage venue and want to know about access conditions/restrictions as used by AIATSIS.

- Some mentioned the issue of short-term vs. long-term storage and have approached possible archives. One NTRB thought it would be great to have a team come from AIATSIS and make scans of all relevant documents!

- Any storage would have to have the consent of the claimants and have explicit access conditions that would be strictly maintained.

- There was a question of when to store- during the process of native title or afterwards when a determination or agreement has been reached.

Managing arrangement, description, and conservation/preservation:

- Most organisations mentioned that they would like some help in records management, information management, IT, and digitisation practice.

- One NTRB proposed a 'mentoring' or training program where NTRB staff could come to AIATSIS and learn from staff here in the above areas of info.

DVDs of claim materials:

- One NTRB mentioned that they would like all claim material to be available digitally. They targeted DVDs because they have videos and other audiovisual material as well as reports. They want to submit a grant proposal to get someone qualified to do this for them.

- Other NTRBs hinted at this as well once items are digitised.

Protocols:

- There was much interest in the AIATSIS system of access and copying procedures, and they would like to adapt some of these to their own purposes.

- It was suggested that protocols be drawn up for legal representatives of non-Indigenous respondents to help make the process less onerous for indigenous people.

Locating material that should have been deposited with NTRBs:

- Consultants do not always lodge their reports with NTRBs. They would like some help in tracking down this sort of material.

APPENDIX 2: The future of connection material

Nick Smith
Pilbara Native Title Service

The range of materials PNTS /Yamatji researchers collate:

Claim generated materials/ primary sources:

- Field notebooks

- Genealogical notebooks

- Genealogical databases (FTM)

- Various archival/ethno-historical databases e.g. Bates and Radcliffe Brown, Tindale nominal indices (need to have the resources to produce more)

- Mapping software (huge scope to integrate most other data formats)

- Audio – analog recordings

- Video – digital (inc. CR video, follow content of report)

- Images – transparencies; digital

- Restricted materials (male and female)

- Connection Report

Secondary sources:

- Library (published works)

- Archival materials e.g. Native Affairs; Colonial Sec; Police Occurrence Books; Police files; Supreme Court documents; Registrar General's Death Index; Cemetery records; Lock Hospital records; Station Diaries; Station 'home movies'. Etc. etc.

- Ethno-historical data in various forms audio, images, genealogies, notebooks e.g. Radcliffe Brown; Daisy Bates; Norman Tindale. (Curr's responses to survey questions)

- Reports e.g. Heritage surveys, Paul Seaman inquiry,

- Other materials donated or discovered not directly relevant to NT (claimants photo albums; Max Brown original 6 x 8s B&W 1950s – 1960s the halcyon days of Pilbara pastoral workers movement.)

- Maps (including digital maps)

MC has nearly completed assembling most of the archival and ethno-historical materials however we will be generating large amount of primary data for the 15 remaining claims. Will continue to expand our electronic databases.

Points for discussion:

Present

- We currently have no staff with training in archival management.

- What staff we do have, that have knowledge of the materials especially of items of particular significance, may not be there in the future.

- Storage dilemma – researchers need access to materials in the regions, the sub-tropical climate of the Pilbara is not kind to various forms of data. (Ever-present threat of cyclone/flood) Necessity of duplicating (at least) and storing off-site.

- Does this breach conditions of the provision of this data?

- Require expertise in management of.

- Urgent need to build e-databases now to expedite the claim research process.

Future

- It is my understanding all materials will be returned to the claim group post-determination.

- In such an ethnographically sparse domain as the Pilbara (1 PhD in Anthropology to date) vital to ensure these materials are maintained and accessible to claimants post- determination. It is ultimately the claimants' decision as to how this material will be managed and accessed and they will need assistance to do this.

- Access protocols / ethics – sensitive genealogical information; medical records that could cause distress to descendants. Require expertise / assistance in how to manage.

- A connection report can be a cumbersome document for claimants. Archival materials may be inaccessible to many claimants. Need to think of creative means to make available to claimants the wealth of information contained therein. E.g. Geospatial programs that use map of the claim area as link to all other forms of data. Cost can be prohibitive. How many computers will there be in communities that can run such a program?

APPENDIX 3: Report on Breakout Session: The Future of Connection Material

Grace Koch, Native Title Research and Access Officer
6 June 2005

The session, which considered current practice for the treatment of connection material and other documents collected in the claim process, was held on 1 June from 1:30-3:00PM. Approximately 45-50 people attended the session.
Chair: Grace Koch
Speakers: Michael Bennett, NSWNTS
Bill Kruse, Ngaanyatjarra Council
Nick Smith, YMBB MAC

Questions raised by speakers included:

- When NTRB staff create their own databases of information, who owns it?

- What do the courts intend in relation to the native title reports that they hold?

- Is the advice that all material should be kept closed for 7 years correct?

- What material should Rep Bodies keep?

- How does the Privacy Act work with native title information?

- Need to explore intellectual property issues.

- How should material be disseminated to claimants?

- Dilemmas of where to lodge materials, generally what to use during the claims process

It was agreed that we have another session the following day in order to formulate a list of suggestions for further action. Ten people attended a meeting from 3:30-5:00 on 2 June and made these recommendations:

1. The Indigenous Facilitation and Mediation Project had issued a *Report on Native Title Representative Body Workshops: Directions, Priorities and Challenges*. Report No. 2 in this series had made two recommendations under "Managing Connection Materials" (p.24) **Recommendation 5**: There is a need to review the processes by which NTRBs collect, exchange and allow access to connections materials in order to develop best practice guidelines and policies**. Recommendation 6**: As part of this review process, IFaMP should identify strategies to coordinate a workshop to review and agree upon joint approaches between lawyers and researchers and the range of agencies involved for the use of connection materials. The conference group wanted to see the words "responsibility to claimants" appended to Recommendation 6. They also would like to see such a workshop convened in the near future.

2. Nick Smith and Mark Chambers agreed to provide GK with a listing of the types of materials generated by the Native Title process.

3. The group requested that preservation information for both print and audiovisual materials be distributed to each NTRB. GK can arrange this. In addition, it was suggested that a team of experts in records management, archival procedures, preservation and computer technology be sent to each NTRB to make recommendations for better management of materials.

4. The need for an ethics forum was discussed and suggestions need to be made for how such a body would function and would be constituted. GK agreed to do a listing of web sites on ethics documents.

5. Clarification was needed about Government ownership of material in regard to moral rights and privacy issues.

6. A list of funding agencies needs to be drawn up for projects dealing with improving arrangement and description of materials held by NTRBs. GK offered to help with this.

7. Participants would like to see an approach made to AIATSIS for funding help to establish storage facilities *in situ*.

8. The NLC believes that there is a real possibility of deregistration in the near future and would like to see AIATSIS or some other archive or storage facility approach them in order to make contingency plans as soon as possible.

9. The group would like to see AIATSIS approach consultants who had worked on native title claims, NTRBs in general and the Federal Court and governmental agencies for copies of reports and other material that they may hold on native title.

All participants want to explore what is sensible and what is feasible for ensuring the safety and preservation of records that they hold.

An interesting development in relation to Point 5 above arose. The funding agreements between DIMIA and NTRBs include a clause stating that all material generated were required to be passed on to DIMIA. NSWNTS had been successful in striking out that clause. NTSV will be seeking to do the same.

It was agreed that GK would discuss the above recommendations with relevant AIATSIS staff and would inform NTRB contacts about further developments.

Attendees at the second meeting:

- Michael Bennett (NSWNTS)

- Mark Chambers (Consultant Historian)

- Gerard Finnigan (NTSVictoria)

- Belinda Guest (NTSVictoria)

- Grace Koch (AIATSIS)

- Bill Kruse (Ngaanytjarra Council)
- Pam McGrath (NTSV)
- Michael Meegan (GoldfieldsLSC)
- Jodi Neale (PilbaraNTS)
- Nick Smith (PilbaraNTS)

APPENDIX 4: Information held on Federal Court native title files

Ian Irving, Federal Court of Australia

The nature of the law of native title and the matters which are required to be proved in order to be successful in a native title determination or compensation applications, means that Federal Court native title files are often a rich repository of historical and contemporary cultural and other information.

It is not uncommon for Court files in matters in active litigation to contain claimant genealogies, expert anthropology, history and/or linguistic reports, witness statements, photographs and other material.

In order to gain a better understanding of the issues (and potential issues) involved in relation to material held on Federal Court files in native title matters, it is a useful starting point to examine the current rules and practices within the Federal Court of Australia regarding access to materials on Court files and what happens to materials held by the Court once matters are concluded.

While the Federal Court Rules provide guidance in a number of issues, practices may vary from Registry to Registry and from case to case. Different judges manage matters in different ways and parties to litigation often request that judges make orders using a particular form of words. For these reasons it is not always possible to provide a definitive position on particular issues that will be followed in all cases.

The views expressed are primarily based on the author's own experience of the native title litigation process (as a solicitor for applicants) and an examination of the Federal Court Rules.

The views expressed in this paper are those of the author and do not necessarily reflect the views of the Federal Court of Australia. Any references to Federal Court Rules or practices of the Federal Court refer to the author's understanding of those Rules and practices as at the date of this paper. The information presented in this paper is not intended to constitute legal advice or to substitute for examination of the Rules.

What is the Court file?

There is no clear definition of what documents make up the Court file in Federal Court native title matters although the wording of Order 46 rule 6 of the Federal Court Rules does provide some guidance. The application and any documents filed in support or opposition to the application do generally form part of the file. Significantly, correspondence and any digital diary of on-country hearings (digital photographs of witnesses and locations) do not form part of the Court file. Transcript of the proceedings also does not form part of the Court file unless it is specifically ordered by the judge to be part of the file.

Who can access material held on the Court file?

The Federal Court Rules make provision for access to material on Court files. It is important to note that the Rules do not distinguish between Court files that are 'active' and those that have been closed and archived.

Order 46 rule 6 of the Federal Court Rules (reproduced below) provides for the inspection of documents. The Rule distinguishes between parties and non-parties and the processes each must follow to access certain documents. The Rule also sets out different processes that must be followed to access different classes of documents. Order 46 rule 6 provides for classes of documents on the Court file which may be inspected without the leave of the Court and those that can only be inspected by a non-party with the leave of the Court or a Judge. The Court must grant leave for a party or non-party to inspect the transcript of a matter.

Parties to a proceeding may inspect documents on the Court file unless the document is subject to restricted access (confidentiality) orders.

It is clear from the terms of the Order that a non-party would need leave of the Court or a Judge or permission of the Registrar in order to inspect expert reports (including genealogies), affidavits (other than those filed as part of native title determination applications), witness statements or transcript. The Rules do not provide guidance about the matters to be taken into account by the Court, Judge or Registrar in deciding whether to grant leave to access a document.

Order 46

Rule 6 Inspection of documents

(1) A person may search in the Registry for, and inspect, a document in a proceeding that is specified in subrule (2), unless the Court, or a Judge, has ordered that the document is confidential.

(2) For the purposes of subrule (1), the documents are:

(a) an application or other originating process;

(b) a notice of appearance;

(c) a pleading or particulars of a pleading;

(d) a notice of motion or other application;

(e) a judgment;

(f) an order;

(g) a written submission;

(h) a notice of appeal;

(i) a notice of discontinuance;

(j) a notice of change of solicitors;

(k) a notice of ceasing to act;

(l) in a proceeding to which Order 78 applies:

(i) an affidavit accompanying an application, or an amended application, under section 61 of the *Native Title Act 1993*;

(ii) an extract from the Register of Native Title Claims received by the Court from the Native Title Registrar;

(m) reasons for judgment.

(3) Except with the leave of the Court or a Judge, a person who is not a party to a proceeding must not inspect any of the following documents in the proceeding:

(a) an affidavit (other than an affidavit mentioned in subparagraph (2) (l) (i));

(b) an unsworn statement of evidence filed in accordance with a direction given by the Court or a Judge;

(c) interrogatories or answers to interrogatories;

(d) a list of documents given on discovery;

(e) an admission;

(f) evidence taken on deposition;

(h) a subpoena or document lodged with the Registrar in answer to a subpoena for production of a document;

(i) a judgment, order, or other document that the Court has ordered is confidential.

(4) Except with the leave of the Court or a Judge, or with the permission of the Registrar, a person who is not a party to a proceeding must not inspect any document in the proceeding that is not referred to in subrule (2) or (3).

(5) Except with the leave of the Court or a Judge, a party to a proceeding or other person must not search in the Registry for, or inspect:

(a) a transcript of the proceeding; or

(b) a document filed in the proceeding to support an application for an order that a document, evidence or thing be privileged from production.

(6) A party to a proceeding or other person may copy a document in the proceeding if:

(a) the document is produced by the Court, a Judge or the Registrar for inspection by the party or other person; and

(b) the Registrar gives the party or other person permission to copy the document; and

(c) the party or other person has paid the prescribed fee.

(7) In this Rule:

> *Native Title Registrar* has the same meaning as in Order 78.
>
> *Register of Native Title Claims* has the same meaning as in the *Native Title Act 1993*.

Confidential material

In native title matters a party may wish to ensure that there is limited access to certain documents that are to be filed with the Court or to the hearing and transcript of certain evidence given during the proceeding. Order 78 rules 31 to 33 (copied below) deal with this issue.

In the event that the Court makes an order restricting access it is usual for that order to set out the actual or class of persons who are allowed to access the document or transcript of evidence. An order may also limit the number of copies of the

document/transcript that may be made and state what must happen to all copies made after the case is concluded, e.g. all copies to be returned to the applicant or destroyed.

Court orders restricting access to documents or transcript can specify that following the conclusion of a matter (and the lapsing of any appeal period), all copies of the restricted document or restricted transcript must be returned to the party who provided the document or evidence. Unless the particular order specifies otherwise, any direction about what should happen to confidential documents following the conclusion of the matter would also apply to any copy made and held by the Court.

So for example, if during the course of giving restricted evidence an applicant witness drew a map, the transcript of that evidence and the map may be subject of orders restricting access. Such orders would normally be made on the application of a party and the specific terms of the orders would be decided following submissions from the parties. The order could specify who could access or receive copies of the transcript and what should happen to those copies following the conclusion of the matter. The order could also specify that no copies of the map are to be made and that the map is to be returned to the applicants following the conclusion of the matter and the lapse of any appeal period. In this case the Court file would contain information indicating that the document had been returned pursuant to the order made.

Order 78

Rule 31 Evidentiary matters generally

(1) The Rules generally and the Rules of evidence apply, subject to this Order, to a proceeding under this Order.

(2) The Court may, at any time in a proceeding, make any order it considers appropriate relating to evidentiary matters.

(3) Without limiting subrule (2), the Court may make orders:

(a) restricting access to the transcript of a proceeding; or

(b) restricting access to the content of any pleading or any other document on the Court file; or

(c) relating to the manner in which evidence may be presented to the Court; or

(d) relating to the time when and the place where certain evidence is to be taken; or

(e) relating to the manner of identifying and referring to evidence about specified subject matters; or

(f) relating to the presentation of evidence about a cultural or customary subject.

Rule 32 Evidence of a cultural or customary subject

If evidence of a cultural or customary subject is to be given by way of singing, dancing, storytelling or in any other way other than in the normal course of giving evidence, the party intending to adduce the evidence must tell the Court, within a reasonable time before the evidence is proposed to be given:

(a) where, when and in what form it is proposed to give the evidence; and

(b) of any issues of secrecy or confidentiality relating to the evidence or part of the evidence.

Rule 33 Documents referring to certain material

(1) A document used in a proceeding that refers to material relating to a cultural or customary subject that a party claims is of a confidential or secret nature must contain a notice of the claim.

(2) The notice must:

(a) appear on the front page of the document; and

(b) include a short description of the material and the reason for its confidential or secret nature.

(3) The material must be contained in a sealed envelope attached to the document.

(4) The sealed envelope must not be opened except by leave of the Court.

(5) Leave may be conditional on non-disclosure of the material or part of the material.

Return of exhibits

There is a general practice in the Federal Court that exhibits are returned to the party that tendered the exhibit. This practice is consistent with the terms of Order 52 rule 23 of the Federal Court Rules (copied below).

Exhibits tend to fall within three classes:

> 1. material produced on subpoena or a notice to produce – this material is normally returned to the individual or organization who originally produced it to the Court;
> 2. exhibits that were originally annexures to an affidavit – this material is normally returned to the Court file; and
> 3. other tendered exhibits – these are usually returned to the party that tendered the exhibit.

In native title matters it is common for more than one copy of expert reports (including genealogies) to be filed in advance of the hearing. During the hearing the report may be tendered (through the witness who authored the report) and assigned an exhibit number. In this case the copy of the report that has become the exhibit would, at the conclusion of the matter (including any appeal), be returned to the Court file. If however, a party tendered a document (that had not previously been filed) during the course of a witness's evidence, that document would be returned to the tendering party at the conclusion of the matter. A notation would be made on the file to indicate that the document was returned and no longer on the Court file.

Order 52

Rule 23 Retention of exhibits

(1) Where an appeal from a judgment lies, by leave or without leave, to the Court, the officer of the court below who has custody of the exhibits in the proceeding, shall, unless the court below otherwise orders, retain the exhibits:

(a) for 21 days after the date when the judgment is pronounced; or

(b) if within the period of 21 days leave to appeal to the Court from the judgment is granted, for a period of 21 days after leave is granted.

(2) Upon an appeal to the Court being instituted:

(a) the proper officer of the court below or the associate to the judge below, shall make out and certify a list of exhibits; and

(b) the exhibits, the list, and any other document before the court below, shall be delivered or transmitted to the Registry at the proper place.

(3) Where an exhibit cannot be so delivered or transmitted, the associate or officer shall, in his certificate, state the circumstances and give such information as he can to enable the Registrar to cause the exhibit to be available to the Court.

(4) The Registrar shall retain the documents obtained under subrules (2) and (3) until the disposal of the appeal and shall thereupon return them to the officer or persons from whom he obtained them.

Transcript

The Federal Court does not produce transcript of proceedings and as noted above, transcript does not usually form part of the Court file.

Transcript is not traditionally archived by the Court. However, in 2005 the Federal Court commenced a project to archive native title transcript. Under the project the Court purchases the original transcript tapes for archiving. Electronic copies of the tapes are currently kept in the relevant Registry until the matter is finalized. It is intended that the transcript will be archived with National Archives Australia (NAA) once a number of issues in relation to storage and access to the transcript have been resolved.

The Court is exploring the possibility of "archiving" native title transcript on the Court's website for access by parties and others. This would not be possible under the current Rules which require leave of the Court to access transcript. There are also a number of contractural and other issues which would need to be resolved before transcript could be placed on the Court's website. Obviously, restricted material would not be posted.

Digital diaries

During on-country hearings digital diaries are sometimes produced containing photographs of witnesses and locations. Currently, a digital diary is not a document that forms part of the Court file.

Currently, all digital photographic material is captured electronically and stored at the relevant Registry. The court is considering how best to store this material centrally for possible archiving.

Archiving

Once a native title matter is concluded and all confidential material has been dealt with in accordance with any order made and the exhibits have been returned, the Court file will be closed and archived. The Federal Court Rules for accessing documents on archived files are the same as those for accessing documents on current

'active' files. It is important to remember that the agency that is storing the archived files may have additional rules that must be followed to access material.

The Federal Court generally keeps closed files within the relevant Registry for a set period (a number of years but this varies from Registry to Registry) before sending them for archiving off-site. Until about 5 years ago Court files were stored with National Archives Australia (NAA) in Canberra. Discussions are continuing between the Court and NAA with a view to resumption of storage of files with NAA. In the meantime each Registry has different archiving arrangements with local providers.

The Federal Court as a superior court of record does not destroy documents on the Court files prior to archiving. Additionally in September 2000 National Archives placed a freeze on the destruction of any records that could be of use to Indigenous Australians separated from their families as a result of past government policy, who are trying to re-establish kinship and community links.

Applications to access archived files are generally made to the Court.

Ian Irving
22 May 2006

APPENDIX 5: Report on workshop for NTRBs on databases and access and use issues held at AIATSIS 29-30 June 2006

Grace Koch
Native Title Research and Access Officer

Executive Summary:

A workshop for Native Title Representative Bodies on databases, access and use was held at AIATSIS 29-30 June 2006. It grew out of a session at the 2006 Native Title conference in Darwin where two databases were demonstrated - one from Native Title Services NSW and the other by the National Native Title Tribunal. Because time was limited for discussion, they requested that a workshop be held at AIATSIS in Canberra before the end of the financial year in order to construct a best practice document addressing database structure and content, and ethics and protocols for access and use of connection materials. The OIPC provided a grant to cover airfares for one delegate from each NTRB and accommodation costs for all. Twenty-three representatives from thirteen NTRBs attended the meeting.

Aims of the workshop:

- To establish a network of NTRB staff who have designed databases, are looking to improve what they already have or create new databases
- To compile lists of software used for administrative and research databases
- To compile a list of recommendations for fields to be included on a generic database that will be useful for all NTRBs
- To make general recommendations on best practice for database structure and maintenance

The program

AIATSIS staff presented information on the Agreements, Treaties and Negotiated Settlements database (ATNS), the AIATSIS Aboriginal Biographical Index, and issues arising from state requirements for reporting . These were followed by powerpoint demonstrations of the new Ngaanytyara database, concentrating upon sites, and the relational database used by NSW Native Title Services. Originally, the National Native Title Tribunal had planned to be present to demonstrate their geospatial program, but they decided to organise a workshop in August to concentrate on their findings and to provide training for their system.

Delegates then described the databases in use in their own organisations, referring to descriptive files sent to AIATSIS before the workshop. Four working groups then formed to draft best practice guidelines. These were presented the second day and recorded. After a brief presentation on issues for copyright and the ethics of access and use of connection material, three discussion groups assembled findings and presented them to the entire group. Finally, the group completed evaluation forms and expressed opinions for further steps to be taken as a result of the workshop.

Delegates were able to attend the launch of the AIATSIS Digitisation program and the Wentworth Lecture given by Bob Tonkinson. Also, they were given copies of a compilation of all fields of information used by all NTRBs, a description of the Aboriginal Biographical Index and the AIATSIS Research Service in Native Title, and a booklet on legal issues for digitisation.

The findings:

Delegates stated the importance of having the strong support of their management for database functions so that there will be adequate and ongoing funding. A useful list of fields of information for Research and Administrative databases was compiled and circulated for comment, with several delegates offering additions/corrections. (ATTACHMENT A). There were 18 recommendations for best practice for database structure, with security, user-friendliness, standardisation of file formats, and proper authority structure for amending the database heading the list. (See ATTACHMENT B). All aspects of the database must be documented properly. It was agreed that there needs to be a set of protocols, both for entering data and how to use the database.

A set of recommendations was drafted also in the area of ethics and access issues.

They centred around the importance of access to the proper owners of the intellectual property, keeping material accessible 'on country', and proper consultation mechanisms. See ATTACHMENT C.

Further steps:

All delegates agreed that the workshop was worthwhile because, in the past, they have felt isolated and now they have established an effective working group. The timing was especially good for the Goldfields representative as they are just beginning to establish a database and for the NLC, who are planning to change from a paper-based system.

There was interest in having a follow-up to this workshop towards the end of the year. Delegates would like more meetings/workshops to explore the following issues:

- Testing of the generic database format proposed by this workshop

- Preservation and storage of materials

- Assessment of software and examination of options

- Practical training in designing and using databases and in data input

- Training in digitising materials, including audiovisual holdings

- Exploration of protocols and policy amongst NTRBs for sharing material

- An investigation of duplicate systems within NTRBs

- Workshops focussed on discipline-based research issues, such as linguistics, genealogy, etc.

- Policy and legislative regime for the protection of materials

- Creation of a central database (NTRBs) of public documents (eg. library catalogues) and the sharing of public electronic documents

- Information on effective funding strategies for database creation and maintenance
- Workshop on access, copyright and moral rights

ATTACHMENT A

Fields of information for an ideal research database for NTRBs

- Register of Consultants, qualifications and contact details;
- Claim group lists;
- Claimants (Community) list and their contact details;
- Applicants list and their contact details;
- Working group list and their contact details;
- Personal history information;
- Claimants testimonies (evidence);
- Claim area boundaries;
- Geospatial site information;
- Genealogies;
- Minutes of meetings (one for Anthropology and one for Legal);
- Records of reports;
    - Report number
    - Author
    - Title of Report
    - Date of Report
    - Borrowed by (in/out)
- Correspondence with the State regarding connection material
- (including State's Peer Review);
- Federal Court Orders;
- Land tenure information;
- Researchers' note books;
- Consultants' agreements/Contracts and correspondence with Consultants;
- Report may be inputted directly;
- Research related material;
- Audiovisual research material; and
- NNTT research bricks.

Form 1

- General correspondence (one for Anthropology and another for Legal)
- Future Acts Notices (FAN), recipients, address, etc.
- Respondent Parties, their interests and contact details
- Calendar of events so as to keep track of the history, present stasis and important future dates of a claim.

It was suggested that the above be listed under claim groups with each claim having separate fields of information, and that Anthropological, Legal and FAN sections exist under each claim group.

Elements for an Administrative database:
- File tracking and management- research and legal files
- Mailing lists, also to be accessible from the Research database
- Membership lists
- Governing Committee and contact details

ATTACHMENT B
General recommendations for database structure:

1. Security of information and various levels needed. There is a dilemma with "knowledge being power." All information should be on the database but not all information should be accessible to everyone. Security of format—that the database will always remain functional and that there be clear directions for access.

2. All NTRBs need IT specialists-experts to make the database user-friendly, and to ensure that it continues to work. Adequate funding must be set aside for such a position within the NTRBs.

3. Single point of entry for all data

4. Variable and easily-manipulated series of front ends. There is a need for 3 types of databases- research, library and administration. These could exist as front ends for the underlying database with all information.

5. There needs to be a single person to monitor changes at a thesaurus level with proper authorisation and verification procedures.

6. Standardisation of file formats

7. Ensure multiple relationships within genealogical lists- a "point and click" mechanism to allow information at various levels. (Mention of ISIS Knowledge Warehouse, or the facility offered by Acrobat). Genealogical software such as The Master Genealogist, Flow-Charter and I_Graphics—all of which must be able to speak to other databases.

8. Necessity of separating basic data from analysis

9. Ability to store and to link to multimedia

10. A note field for evaluation of data or classification

11. Standardisation of how data is entered and to have standards for connection reports.

12. A field or fields should be included that show who has the intellectual property rights to information.

13. Deceased people should be identified in some way.

14. Executives at NTRBs must be committed to supporting the database and be informed about issues arising with them. Database working groups should have input into Board activities and priorities.

15. The greatest danger is atomization. NTRBs need to be connected and to have a common sense of purpose so that there can be coherent action amongst them.

16. A good spatial front end. Any database should be able to map spatial patterns and to include audio and other material within that can link to spatial data. Would like to see a 3_D image of country.

17. The database should be well-documented, fool-proof and simplified. Drop-down boxes are very helpful for categorization. Helpful software could be TriMagic, TRIMS, Oracle and Oracle Spatial. Whatever is used should have fields of information that allow for ease in creation of a connection report.

18. Proper administration of the collection- file tracking, etc. The database must be able to track draft copies as well as the final reports so that no information is lost. Protocols should govern how to document what happened to the originals and to track the changes.

ATTACHMENT C

Ethics and access issues

1. Information sharing amongst research units of NTRBs. Possibly a central server to which all NTRB-digitised documents (publicly available) could be indexed and located. Would allow swapping of digitised files. Suggestion that AIATSIS hold and manage materials from NTRBs in this way. Material would be restricted only to NTRBs. The major hurdle would be copyright because the status of the documents would change from internal to external.

2. In contrast, many NTRBs insist that original material generated by the claim process remain "on country."

3. Needs to be more connection between legal and research staff sharing of documents.

4. Protocols must be set for access and use, including procedures for dealing with Indigenous people who want isolated bits of reports.

5. Proper consultation mechanisms need to be set between owners of the knowledge and people requesting access to that knowledge.

6. Ensure that all staff observe protocols. When new staff members come, they must know the proper procedures.

7. Ensure a plan to establish procedures for safety of material if deregistration of an NTRB occurs. If insurance policies drafted, suggestion to include AIATSIS as a keeping place.

ATTACHMENT D

List of participants

- James Rose, NSW Native Title Services
- Louise Allwood, North Qld. Land Council NTRBAC
- Tony Jefferies, Fiona Campbell and Camilla Blackburn-Smith Gurang Land Council
- Carol Volker, Goldfields Land & Sea Council Aboriginal Corporation
- Lorna Gregory, Carpentaria Land Council Aboriginal Corporation
- Carly Talbot, Ngaanyatjarra Council
- Amy O'Donoghue, Loyola Gray and Olaf Geerkin Central Land Council
- Kim deRijke and Simon Davies, Central Qld. Land Council

- Kim Barber, Belinda Oliver and Julie Stokes, Northern Land Council
- Belinda Guest, Luke Miller, Native Title Services Victoria, Ltd.
- Joeleen Bettesworth, Olivia Norris Yamatji Barna Baaba Marlpa Land & Sea Council
- Phil Roberts, Lyn Coad Aboriginal Legal Rights Movement
- Henry Cox South West Aboriginal Land and Sea Council

APPENDIX 6: AIATSIS Native Title Conference 2007

Legal and practical considerations in managing access to materials held by NTRBs and Land Councils

Justine Twomey[11]

What is a "materials access policy" and why have one?

1.   By its nature, native title litigation involves the accumulation of significant amounts of information about native title claimants. This information is often of a highly personal nature and may include historical community records, family trees / genealogies, personal records and recollections, and information on traditional practices and beliefs subject to specific cultural constraints, as well as the various expert documents and reports which are prepared in support of a claim. Native title representative bodies and land councils, as community or representative organisations for Aboriginal people, may also find themselves in possession of personal records which have been placed in their care but remain the property of the relevant depositors. Land and sea country management projects, often carried out concurrently with native title claims, also have the capacity to generate significant quantities of material of a personal nature and / or historical significance.

2.   Native title representative bodies and land councils (hereafter referred to as "**NTRBs / LCs**") are therefore in a unique position of being responsible for significant quantities of material, some of which is of a highly personal nature to individuals, families or communities as a whole. Appropriate preservation and protection of that material, balanced with equitable access for depositors, owners and other interested parties, raises a number of practical and legal issues. The purpose of this paper is to identify some of those issues and suggest ways in which appropriate responses might be "ordered" to assist in the formulation of policies for protection, preservation and access. No single policy or procedure is suggested or advocated, as the final form of any such policy or procedure will necessarily depend on the particular circumstances experienced by the holders of the subject material. However, it is hoped that the following consideration of some of the relevant issues will assist in the development of appropriate policies and procedures.

Consent for use

3.   A fundamental issue in the development of any policy for access to and use of material held by NTRBs / LCs is the consent of the owners of that material to the proposed use. Given the resource constraints experienced by many NTRBs / LCs, and the remote and diverse location of those persons whose consent may need to be obtained, any policy relating to access and use of material should also take into account efficient implementation procedures.

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[11] I would like to acknowledge the assistance of Jenny Bolton and Linda Dean of the Kimberley Land Council in the preparation of this paper. However, all views expressed herein are those of the author alone.

What types of material are subject of requests for access?

4   The categories of material held by NTRBs / LCs will vary from organisation to organisation and will depend on factors such as the type of activities engaged in, the structure of the organisation, and the length of time that the organisation has been in operation. By way of example only and for the purposes of the present discussion, the following categories of material have been identified as likely to be held by NTRBs / LCs and the subject of requests for access.

   (a)   Corporate information

   This type of material broadly includes documents relevant to the corporate history and operation of NTRBs / LCs, such as minutes, newsletters, press releases, policy documents, and general administration files. Access to this type of material may, depending on the history and activities of the NTRBs / LCs involved, be of general historical significance[12].

   (b)   Native title claims materials

   This category of materials would generally encompass materials created for the purposes of native title litigation. This might include materials such as genealogies, expert reports, affidavits, witness statements and proofs, and general legal files.

   Particular constraints and protections apply to documents produced for the purposes of providing legal advice, including documents categorised here as "native title claim materials". These constraints generally, and absent the consent of the client concerned, limit use of that material for purposes other than the purpose for which they were created. In the case of native title claim materials discussed here, these constraints will apply to any use other than the native title proceedings for which they were created. These 'constraints' include privilege and confidentiality, ownership of legal files, and use of documents produced by parties in Court proceedings.

      (i)   Ownership of legal files

      Property in legal files, including documents produced for the purposes of providing legal advice and representation such as expert reports, genealogies, and records of personal histories, belong to the client[13]. Therefore, any use of that material outside the scope of the original instructions requires the consent of the client.

      In the case of native title litigation, the 'client' is likely to be the native title claim group as a whole. Therefore, consent for use of documents produced for the purposes of native title litigation and

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[12] This type of material may also be capable of evidencing the ongoing connection of native title claimants to their traditional land and waters through activities such as political lobbying and social justice advocacy for recognition of traditional rights and interests in land and waters in the period prior to the lodgement of a native title claim.

[13] See generally *Wentworth v De Montfort* (1988) 15 NSWLR 348 which identifies the source of this principle in the agency relationship. The principle provides generally that documents brought into existence for the benefit of the client belong to the client. Specific requirements for dealing with client files may also be found in the professional regulatory regimes in each jurisdiction, e.g. *The Law Society of New South Wales Professional Conduct and Practice Rules* rule 8.

which form part of the "legal files" for a claim should be obtained from the claimant group as a whole. The authority of named applicants to act in relation to the native title litigation would, arguably, not extend to use of materials for extraneous or unrelated purposes[14].

(ii)   Privilege and confidentiality

Client legal privilege applies to discussions, instructions, documents, reports, and any other type of information produced for the dominant purpose of providing legal advice[15]. Documents and other information subject to client legal privilege may not be adduced into evidence in Court proceedings without the consent of the client[16]. The privileged status of documents may be lost if they are disclosed to third parties with the consent of the client and for a purpose unrelated to the purpose for which they were created – in the case of native title materials discussed here, for a purpose other than the native title proceedings[17].

Information will not be privileged or confidential once it is made public, for example if a document is filed in open Court. However, the Court may make orders restricting use of a document, for example so that it can only be used in the native title claim proceedings.

(iii)   Documents produced by respondents

Documents produced (that is, provided to other parties) in litigation are subject to an implied undertaking to the Court that they will not be used for any purpose other than the purpose for which they were produced (the relevant Court proceedings)[18]. This means that documents produced by respondents in native title litigation, such as State parties, pastoralists, and mining companies, cannot be used for any purpose other than that native title claim. A similar protection applies to documents produced by or on behalf of native title claimants.

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[14] Section 62A *Native Title Act 1993* (Cth) provides that applicants 'may deal with all matters arising under the [Native Title] Act in relation to the [native title] application.' This would not appear to provided named applicants with the authority to deal with matters not associated with native title proceedings, such as use of client / claim group material for extraneous purposes.

[15] *Evidence Act 1995* (Cth) s117.

[16] *Evidence Act 1995* (Cth) ss 118, 119.

[17] Common law legal professional privilege provides a similar protection to confidential communications made for the dominant purpose of obtaining legal advice. Legal professional privilege may be lost or waived if the privileged information is used in a manner not consistent with the maintenance of that privilege: *Mann v Carnell* (1999) 201 CLR 1 at 13 per Gleeson CJ, Gaudron, Gummow and Callinan JJ.

[18] *Harman v Secretary of State for the Home Department* [1983] 1 AC 280.

Breach of this implied undertaking may constitute contempt of Court[19].

(c)   Land and sea country management project material

Land and sea country management projects are often funded through project-specific grants. Therefore, consideration may need to be given to whether any particular grant includes conditions on the allocation of intellectual property in documents or reports produced for the purposes of or as a result of the project. Any such allocation of property in that material would necessarily be relevant to the process for obtaining consent to subsequent uses.

Additional considerations in relation to this type of material include:

- ownership and control of documents procured or generated for the purposes of the project other than reports to the funding body, such as minutes, program planning documents, and primary data from traditional owners;

- recognition of the interests of traditional owners in the material gathered and reported on, notwithstanding a lack of formal property rights in that material; and

- cultural constraints on the use of material, and implied or express undertakings given by researchers at the time that material was gathered in relation to such constraints.

(d)   Deposited materials

NTRBs / LCs, as peak regional or representative bodies, may also provide a repository service for constituents and other indigenous people within their relevant region. These types of 'repository services' are often informal and may occur by default of any other secure and trusted location for community members to store personal or historic records.

Examples of deposited materials may include personal and family histories, and property of functioning or non-functioning family corporations.

Even if informal, this type of 'repository service' imposes on NTRBs / LCs an obligation to secure the deposited records and deal with them only in a manner approved by the relevant depositors.

(e)   General resources

This category of materials may include government reports, books, journals, and other publicly available information. While not subject to specific confidentiality constraints, these types of resources may need to be appropriately managed in the interests of the owners of that material i.e. the relevant NTRB / LC.

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[19] *Harman v Secretary of State for the Home Department* [1983] 1 AC 280; *Biltoft Holdings Pty Ltd v Casselan Pty Ltd* (1991) 4 WAR 14 per Nicholson J.

Who wants access to these materials?

5   Requests for access to material held by NTRBs / LCs may come from any number of sources, for any number of reasons. Typical applicants for access may include the following.

      (a)   NTRB / LC staff and consultants

            These requests for access and use may be related to the purpose for which the material is held, for example, to brief an expert for the purposes of a native title claim. Alternatively, requests may be made for purposes not related to the purpose for which the material was created or is held, for example requests for access to land management project material for the purposes of demonstrating ongoing connection to land and waters the subject of a native title claim.

      (b)   Traditional owners

            Requests may be made for purposes associated with a native title claim, for example to determine issues in relation to interests in particular areas within a claim. Requests for access may also be made for purposes unrelated to the purpose for which the material is held, such as recording personal or family histories.

      (c)   Government departments and agencies.

            As representative organisations and repositories of significant community information, NTRBs / LCs may be in a position to provide information or advice to government agencies in relation to the development of programs for members of the local or regional indigenous community, for example in relation to the assessment of health care services to outstation communities. In such cases, granting of access to relevant material may be in the interests of members of the local community. However, appropriate consent for use of the material would still need to be obtained from the owners or other interested parties.

      (d)   Private researchers.

            This includes academic, government and private researchers with an interest in areas in which NTRBs / LCs are likely to have operated.

      (e)   Members of the general public.

            Requests for access to materials from members of the public may arise most often in relation to the "general" category of material identified above, particularly if that material is held in a library facility.

6   This brief consideration of parties who may request access to material held by NTRBs / LCs demonstrates that the circumstances in which requests for access are made are almost unlimited and may involve a mixture of:

      (a)   parties with an interest in the requested material, who require access for purposes associated with the reason for which it was created or is held by the NTRBs / LCs;

(b)   parties with an interest in the requested material, which require access for purposes unrelated to the reason for which it was created or is held;

(c)   parties with no interest in the requested material, who require access for purposes which may be beneficial to the owners of that material or the NTRBs / LCs constituents generally; or

(d)   parties with no interest in the requested material, who require access for purposes unrelated to the purpose for which is was created or held, and unrelated to the interests of NTRBs / LCs constituents.

Managing access

7   Having regard to the various issues identified above, the interaction between factors relevant to a request for access to material held by NTRBs / LCs could be categorised by reference to whether consent for access and use needs to be obtained from external parties; that is, where a party other than the NTRB / LC has an interest in the requested material which necessitates either consultation with or consent from that other party for the proposed use.

Consent from external parties not required	Consent from external parties required
• NTRB / LC corporate information • General resources • Native title claim materials } Where access is required for the purpose for which the material is held • Land and sea country project management materials	• Deposited material • Native title claim materials • Land and sea country project management materials } Where access is requested for a purpose other than the purpose for which the material is held

8   In addition to the need for consent from external parties, practical matters which may impact on the process for dealing with requests for access include:

(a)   appropriate constraints on internal use of and external access to NTRB / LC corporate information;

(b)   appropriate management and preservation of "general materials" which are the property of the NTRB / LC; and

(c)   depending on the number of requests for access to material which an individual NTRB / LC may receive and the resources available to deal with those requests, procedures for bringing such requests before the appropriate persons ('external parties' referred to above) in a way which is both timely and not overly burdensome to those persons.

Concluding remarks

9   The purpose of this paper is to highlight some of the practical and legal considerations which may affect the manner in which native title representative

bodies and land councils manage requests for access to materials held on behalf of constituents and clients in native title proceedings. This is not intended to be an exhaustive list of all matters which should be taken into account in managing such requests. Rather, it should ideally provide a starting point for those who are considering how best to manage such requests in a fair and timely manner.

APPENDIX 7: History and Native Title: the making of a community asset

Michael Bennett, Native Title Services NSW

Grace Koch, Native Title Research and Access Officer, AIATSIS

 (presented to Engaging Histories Australian Historical Association 2007 Regional Conference, University of New England, Armidale, NSW 25 September 2007)

History and Native Title: The Making of a Community Asset

Since the *Native Title Act 1993 (Cth)* came into being, historical and anthropological research has been conducted in order to provide evidence of Indigenous land ownership. One of the most important aspects of the native title process involves tracing descent from the traditional owners of the land who could be identified at the time of sovereignty. This requirement plus others has resulted in the assemblage of vast and varied amounts of historical material. In this paper we will give a brief description of what type of documentation is needed for a native title claim, what happens to the materials both during and after the claim process and how the research creates a valuable community asset. Finally, there will be consideration of various options for the management of the historical material to give greater access and control to the indigenous communities in NSW.

The very nature of the process depends upon accurate historical documentation. The applicants must provide the following information when they submit an application for a native title claim (SLIDE 1):

> ➢ Identification of the group claiming the area

> ➢ Evidence of descent from the group holding native title in the area at the time of sovereignty

> ➢ Existence of a system of traditional laws and customs and how these connect the people with the lands and waters claimed

> ➢ Establishment of the nature of the rights and interests claimed and evidence that these rights derive from the traditional laws and customs shown earlier[20]

The first two requirements, identification of the group and evidence of descent, depend heavily upon historical documentation. In the past two years, researchers at NSW Native Title Services have collected 2680 death certificates and 1387 marriage certificates. Other documents include numerous records of the Aborigines Protection Board, pastoral station ledgers and diaries and hundreds of newspaper articles, etc. Some of the material contains specific information about individuals. Aside from its usefulness in producing genealogies and determining the nature of indigenous

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[20] Finlayson, 2001

connection to land, the material is naturally of great interest to the descendents of the people mentioned.

Both the Federal Court and NSW NTS hold claimant genealogies, expert anthropology, history and/or linguistic reports, witness statements, photographs and other material. Not all evidence collected for a claim is filed with the court. The Court files on any one case hold documents filed both in support of and in opposition to a claim, and they do not distinguish between active files (while the case is proceeding) and archived files. All parties to a claim may inspect the files unless they are subject to confidentiality orders or other restricted access[21]. When the claim is concluded, the files are sent to the appropriate Court Registry for 5 years, then to Australian Archives or another organisation. Researchers can then apply to the Court for access to all records that have no restrictions. Unfortunately, the Court does not hold transcripts of native title claims, but is exploring options for making these available electronically. Another valuable set of documents are the digital diaries which are produced during hearings on traditional lands; these contain photographs of claimants and of places and are held at Court Registries. Again the Court is considering best how to store this material for archiving centrally[22]

The material held by NSW NTS and other rep bodies, even if it is not submitted to the court, is subject to legal privilege and cannot be used without the consent of the community. At NSW NTS we have established a process for the management and storage of material. When material is received, it is logged and scanned into a relational database using Filemaker Pro software. Hard copies are filed according to material type. The storage area is not accessible to the public. Community members often make requests for material about their ancestors. Those requests are logged into the database and answered at the first opportunity. We provide copies of documents that relate to the direct ancestors of the person making the request.

The advantage of this system is that the material is centrally stored at no cost to the community. A disadvantage is that staffing restrictions mean that it can take several months for a request to be answered. There is also concern from communities that if funding for native title ceased the material would no longer be available. To overcome this difficulty, copies of the research material could eventually be placed, following community approval, at enduring institutions such as AIATSIS, State Library of NSW or the Koori Heritage Trust of Victoria. AIATSIS has several staff- the Native Title Research and Access Officer, the Family History Unit, and the Access Unit of the AIATSIS Audiovisual Archive- all of whom specialise in helping indigenous clients to locate and obtain copies of relevant material held in the AIATSIS Library and the Audiovisual Archives. The State Library of NSW employs two indigenous service librarians and part of their role is to assist indigenous clients with their research. Such officers and librarians assist clients to access native title research material placed in their institutions. But the obstacle remains that these institutions are remote from most communities in NSW and the material is still out of their control.

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[21] Irving 2006: 2

[22] Irving 2006:8

For the past two years, Grace Koch of the AIATSIS Native Title Unit has managed a project entitled the Future of Connection Materials which aims to establish protocols for the storage, management and accessibility of the historical material collected for native title claims.

Formal workshops and discussions have been held at three of the annual Native Title conferences and have dealt with classification of materials held by NTRBs, historical documents and their use in Native Title claims, legal aspects of ownership of material and how the courts deal with the Native Title documents that they hold, and copyright and access issues to Native Title material held in NTRBs.

Two case studies, one at the Kimberley Land Council in Broome and Derby, WA and another at NSW NTS, were conducted in order to view storage of materials and to discuss databases and access issues.

In 2006, a two-day workshop was held with representatives of 13 of the 17 NTRBs to formulate an ideal set of fields for databases used by NTRBs and to look at the handling of intellectual property. Also, a toolkit on conservation/preservation of collections was sent to each NTRB. Most reports and some of the papers given at the Native Title conference on the project can be accessed on-line at: (SLIDE 2)

The project funding model, where money is given for a specific time, does not ensure that material generated by Native Title will be available for future generations. These precious collections need, at best, backup copies to be stored in environments with ongoing and secure funding, such as libraries and archives, whose job is to maintain collections in perpetuity. With this in mind, the final report for the Future of Connection Materials project, which will be completed late this year, will produce a set of recommendations based upon the differing situations for NTRBs in each state about how the collections can be best described, preserved, and made available to both indigenous users and others.

There are, however, clear indications from communities that they wish to control and manage the material themselves. There are various options for communities wishing to do just this.
A possible model for community control and ownership is suggested by the Dhiiyaan Indigenous Centre at the Northern Regional Library in Moree. Established in 1995 by Noeline Briggs-Smith, a Gamilaroi woman, the unit holds numerous genealogies, photographs and historical records about Gamilaroi people. All material is professionally and securely stored and there are plans to digitise the collection in the near future. The unit fields enquiries from Aboriginal people wishing to research their family history. The aim of the unit is to "document, preserve and protect Aboriginal information and objects of significant importance to Aboriginal people for our people of today, and for future generations"[23]. To this end, the unit has published three books about Moree Aboriginal History using material held in the library.

A community-driven model is suggested by the efforts of Joey Flick, Roy Barker and June Barker to see the return of copies of photographs and genealogies from the Tindale collection at the South Australian Museum to community control. They

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[23] www.indigenousunit.com.au/index.php?option=com_content&task=blogcategory&id=0&Itemid=46

organised a "Back to Brewarrina" weekend in 1994 which featured a display of photographs from the Tindale collection of Aboriginal people along the Darling River and its tributaries from Boggabilla to Menindee. The South Australia Museum usually only provides copies to the direct descendents of the people pictured. Joey Flick, Roy Barker and June Barker, with assistance from Jumbunna (the indigenous unit of the University of Technology, Sydney) negotiated with the Museum to have copies of the photographs returned en-masse to the Brewarrina Cultural Centre with provision made "to protect the privacy of individuals who may be affected by the unreliable genealogies". Displayed on boards in family groups (most of the originals were of individuals), the photographs stimulated much discussion and reminiscing about family and community connections. The photographs were published in a book titled "Karroo: Mates." As Heather Goodall has recently written, "Karroo", a term derived from a kin relationship, is now used as a synonym for "mates" and reflects the peoples "sense of bond across and beyond families". The Barkers continue to display some of the photographs and other family information at community events, allowing people to find out more about their ancestors. They also operate a small cultural museum at Lightning Ridge. The Brewarrina Cultural Centre has since closed but is due to reopen soon.

An alternative, electronic model is suggested by the Bundjalung Mapping Project, a joint venture between the Bundjalung Aboriginal community, Southern Cross University, Northern Rivers Catchment Management Authority and NSW National Parks and Wildlife Service. The aim of the project, which is in the early stages of development, is to create a "highly secured, user-friendly computer-based record keeping system through which Aboriginal communities can record and own their cultural knowledge". Sensitive information will only be able to be accessed by those persons delegated by the local community. Individuals will be able to add photographs, film, oral stories and written histories, etc, to the database, which will be web-based[24]. Preservation of existing knowledge is an important function of the database. At the project's launch in December 2006, Bill Walker, a Bundjalung man, commented that "It's very important to the Aboriginal community because over time, we've lost a lot"[25].

Further afield, the Ara Irititja electronic archive, established in 1994 for the Anangu people of South Australia by the Pitjantjatjara Council, is at the forefront of the development of computer technology for the benefit of Aboriginal people in remote locations. The archive contains over 35,000 records including digitised copies of manuscripts, photographs, film footage and oral recordings. The Pitjantjatjara language is used in the database where possible. The software "protects and/or restricts access to private, sensitive and offensive materials". The Anangu can also add material or correct mistakes. One of the most innovative aspects of the archive is the "Niri Niri[26]" or the mobile workstations made up of a computer, data projector, printer and self-contained power supply. The workstations, of which there are ten, are housed in a sturdy, dust-proof casing that is hardy enough to be taken into the harsh

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[24] http://www.wetlandlink.com.au/content/the-bundjalung-mapping-project

[25] *Northern Star* 16 December 2006: 9

[26] Niri niri is the Pitjantjatjara word for 'scarab beetle.'

environmental conditions of many remote communities[27]. The Anangu don't have to travel to access their archive – it comes to them.

The Koori Heritage Trust of Victoria is building a collection of genealogies, photographs, oral recordings and written material as a resource for the indigenous community[28]. The material is gradually being transferred to a modified form of the Ara Irititja database. Established in 1985, the Trust moved to its own cultural centre in Melbourne in 2003. It assists members of the Victorian community to create genealogies and obtain copies of personal records held by government institutions. The main objective of the Trust is to help rebuild community knowledge about families and ancestors to foster a greater sense of wellbeing among the Aboriginal people of Victoria.

An obvious problem for community owned and controlled collections is funding. At the beginning of the Ara Irititja project, the Pitjantjatjara Council solved the money problem by seeking funding from a variety of government and commercial sources including (SLIDE 3)[29]:

- South Australian Museum
- Telstra Foundation
- Visions of Australia
- Anangu Education Services
- Dept of Further Education, Employment, Science & Training
- ATSIC
- Dept of Communications, Information Technology & The Arts
- Networking the Nation
- Museum Victoria
- AIATSIS
- State Library of South Australia
- National Library of Australia – Community Heritage Grants
- Australia Foundation for Culture and the Humanities
- Yaitya Warra Wodli Language Centre
- Green Hills Foundation
- Australian Indigenous Cultural Network

The Koori Heritage Trust of Victoria is funded by a similar range of private and government sources. The Bill and Melinda Gates Foundation recently donated $1.46 million to the Northern Territory Library "to extend a program that provides computers for (indigenous) communities and helps them to build skills and preserve their culture"[30]. Some of the money will be used to continue the development of the "Our Story" database, using the Ara Irititja software, which is currently accessible by 10 communities across the NT[31]. The success of both Ara Irititja and the Koori

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[27] http://www.irititja.com

[28] http://www.koorieheritagetrust.com

[29] http://www.irititja.com

[30] *Sydney Morning Herald* 19 September 2007

[31] http://www.ntl.nt.gov.au/about_us/knowledgecentres

Heritage Trust demonstrate that funding for community control can be raised through initiative, persistence and extensive knowledge of financial sources. The donation by the Gates Foundation demonstrates that private and philanthropic funding is also available. The situation, however, as the managers of Ara Irititja acknowledge, is precarious.

The funding situation is particularly stark in the realm of native title. When the Federal Court makes a determination that native title exists, the holders are required by the *Native Title Act 1993* to establish a Prescribed Body Corporate (PBC) to manage their rights and interest in land[32]. Theoretically, a PBC could also manage the storage and access of the collection of research material used in the claim. But PBCs receive minimal funding from the Federal government and outside sources would have to be sought.

The Future Acts regime of the *Native Title Act 1993* offers an alternative means to source funding for the management of research material. Future Acts refer to proposed developments such as coal mining that may affect native title rights and interests. A registered claim over the area of a proposed development triggers the "right to negotiate" which means that the claimants have the opportunity to sit down with the developer to have a say. An outcome of the negotiations might be employment for claimants or the payment of compensation. Notionally, the claimants could also negotiate to establish a community centre that holds research material and is funded for the life of the development. Training could be provided in database and archival management for some members of the community

Discussion

The Bundjalung Mapping Project and the Ara Irititja Archive show that technology has an important role to play in preserving indigenous knowledge and historical sources, particularly if the creators collaborate with the community. Increasingly, libraries and archives are digitising material and placing it on the web (SLIDE 4). The AtMitchell website of the State Library of New South Wales contains several digitised manuscripts with indigenous content including the Bathurst blanket returns. Ron Briggs, SLNSW Indigenous Service Librarian, recently commented that his institution is increasingly relying on directions from the community to determine what they will digitise and place on AtMitchell. (Ron is a member of the Indigenous Library Services and Collections Group which recently published a policy to guide the management of indigenous material that emphasises collaboration with communities.) The AIATSIS website includes numerous digital exhibitions including the *Dawn* magazines and the annual reports of the NSW Aborigines Protection Board. *Dawn* is also available on CD-ROM and is proving popular with community organisations such as Local Aboriginal Land Councils. The website of NSW State Records, although not displaying digitised material, includes some indexes to collections such as the Register of Aboriginal Reserves.

Technological developments on the internet offer encouraging opportunities for community control of connection material. Most of the innovation is coming from

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[32] http://www.nntt.gov.au/publications/1021859460_4854.html

business applications, but conceivably they can be adapted to the non-profit sphere. Developments in internet programming mean that it is possible for a business to manage accounts and keep track of inventory using tools on the web. All the business data is stored on the web rather than on their own computers, making traditional computer-based software unnecessary[33]. The Bundjalung Mapping Project is exploring some of these developments. Conceivably, the Ara Irititja Archive could be transferred to the web using similar technology, meaning that individuals could access historical information whenever they liked instead of waiting for the mobile computer to come to them.

Further developments are suggested by websites such as Wikipedia where users are able to add and modify content. The internet is no longer a passive source of information but a system where individuals can collaborate and create remotely. For example, Patrick McConvell, Linguistic Research Officer at AIATSIS, has been funded by DCITA, in conjunction with the Max Planck Institute DOBES (documentation of endangered languages) program based in Nijmegen to conduct the On-Line Community Access Pilot project for language documentation (OLCAP), which will provide on-line access to tapes and videos to Indigenous regional language centres and community knowledge centres. When this pilot is completed (and contingent upon further funding), a second phase will examine interactive aspects of enhancement of documentation. Technology is developing at such a rapid rate that interactivity is becoming a key factor in knowledge exchange. With proper password controls and access protocols, it will soon be possible for members of a community to create a web genealogy that individuals can add to or change as more information from documentary and oral sources is discovered.

It is important that safeguards are built into any new web applications to protect sensitive information. Goodall has written recently about the community benefits that can be derived from sharing historical material. For example, wider kinship bonds can be shown to exist when families share genealogical information. But the process of community re-building can take time, particularly when long standing rifts endure. At least initially, protective measures may be required. Precise controls can be determined on a case-by-case system according to the wishes of each community.

Alternatives to technological solutions also need to be considered. Access to computers and the internet is not even across communities and many people find technology bewildering. Technology is not always culturally appropriate. The Anganu, for example, have major concerns about the security of information stored on the web[34]. Further, it is our experience that most people prefer "paper" copies of certificates and other historical material rather than digital files. This is especially the case for photographs. Any technological system that is installed must be easily able to print copies on demand.

Conclusion

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[33] Friedman 2006: 86-87

[34] Hughes and Dallwitz 2007: 155

The review of the various models presented here suggests that there is no single answer for the preservation of connection material and the process of making it accessible to members of the Aboriginal community. Organisations such as NSW NTS are funded to conduct NT research, store the material in a safe and secure manner and use it according to the directions of the claiming community. The clear disadvantage is that such organisations may only have a limited lifespan; an alternative are the enduring institutions such as AIATSIS, the State Library of NSW and the Koori Heritage Trust of Victoria. They are consistently funded and experienced in the management of archival materials. The three institutions mentioned here have clear protocols and systems for interacting with the indigenous community. The disadvantage is that the materials are stored remotely from most Aboriginal people.

The community models benefit from closer community control but funding can be difficult to find. Technology has an important role to play, but not all communities are equipped for the digital age and there is a strong preference among many Aboriginal people for "hard" copies of photographs and certificates. What is clear is that the solutions must come from close collaboration with the people themselves.

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National Native Title Tribunal
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APPENDIX 8: Resolution

RESOLUTION (drafted 4 March 2008 at the SPO Forum sponsored by FaHCSIA)

> *Noting:*
>
> 1. *the growing importance of collection management for NTRBs/SPs; and*
>
> 2. *NTRBs/SPs may not have current access to expertise required to progress collection management issues;*
>
> *the SPO workshop requests that the following recommendation be put to the next CEO forum for endorsement:*
>
> > *That FAHSCIA, as an urgent priority:*
> >
> > 1. *find funding for a national project to:*
> >
> > a) *assess existing collection management practice in NTRBs/SPs(including access and use protocols);*
> >
> > b) *develop a native title sector-wide flexible and responsive plan for best practice collection management (including access and use protocols); and*
> >
> > c) *in due course, implement options developed in the plan on a local basis.*
> >
> > 2. *ensure that funding for the above national project be quarantined from NTRB/SP funding; and*
> >
> > 3. *report on progress to the next SPO meeting.*

APPENDIX 9: List of Native Title Representative Bodies

Aboriginal Legal Rights Movement, Inc.	SA
Cape York Land Council	Qld.
Carpentaria Land Council Aboriginal Corporation	Qld.
Central Desert Native Title Services Ltd.	WA
Central Land Council	NT
Central Queensland Land Council Aboriginal Corporation	Qld
Goldfields Land and Sea Council Aboriginal Corporation	WA
Gurang Land Council Aboriginal Corporation	Qld.
Kimberley Land Council	WA
Native Title Services Victoria	Vic.
New South Wales Native Title Services Ltd.	NSW
Northern Land Council	NT
North Queensland Land Council Aboriginal Native Title Representative Body Aboriginal Corporation	Qld.
Queensland South Native Title Services Ltd.	Qld
South West Aboriginal Land and Sea Council	WA
Torres Strait Regional Authority	Qld
Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation	WA

Source: http://www.ntrb.net/?p=13 accessed 25 February 2008.