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In partnership with



Yamatji Marlpa
ABORIGINAL CORPORATION

Return of Native Title Material Guide

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Disclaimer

This document has been compiled as part of the AIATSIS research project *Returning native title materials (2018–2021)*. It is intended to be a guide rather than a template or legal advice and Native Title Representative Bodies or Service Providers (NTRB/SPs), Land Councils or Prescribed Bodies Corporate (PBCs) will each have their own complexities and should seek independent legal advice.

What are native title materials?

Important aspects of the native title process involve identifying the group of native title holders, tracing their descent from the traditional owners of the land at the time of sovereignty, and demonstrating their continuing connection to country. These requirements have resulted in the collection of vast and varied amounts of historical, ethnographic and cultural material, which are called native title materials in this guide.

These native title materials can include:

- anthropological, linguistic, historical, archaeological and legal research documents
- field notes
- photographs
- audio-visual recordings
- genealogies
- maps
- spatial data
- digital files.

Some of these materials may be vulnerable due to their age, their general condition or because they are stored on magnetic tape carriers such as audio and video tapes. UNESCO has established Deadline 2025 as the date when materials stored on magnetic tape carriers will no longer be playable due to deterioration of the tapes themselves and because the technology to playback such materials may no longer be available. There also exists a vulnerability with respect to general paper documents which may be stored off site and in uncontrolled environments. This means there is an urgent need to digitise such vulnerable materials before they are irretrievably lost.

Who holds and owns native title materials?¹

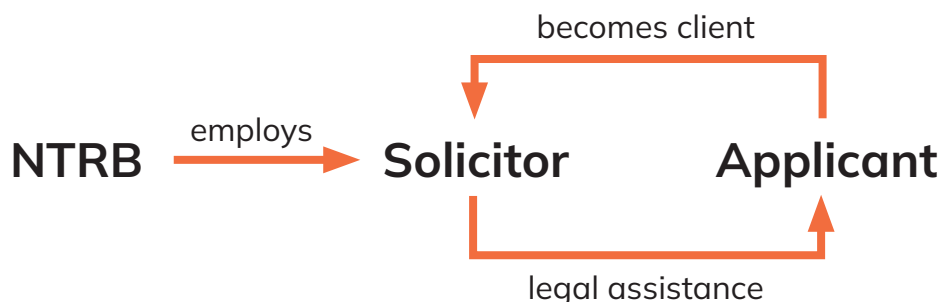
Under the *Native Title Act 1993 (Cth) (NTA) s203BB*, NTRB/SPs functions include facilitating and assisting with:

- researching and preparing native title applications; and
- assisting persons who may hold native title (including by representing them or facilitating their representation) in proceedings relating to native title determination applications to the Federal Court; future acts; Indigenous land use agreements and any other matter relating to native title.

NTRB/SPs can research native title applications themselves or engage experts to conduct the research on their behalf. In either situation, the research can be done prior to any application being lodged, or it can be carried out on the instructions of a native title applicant. In the former case, the NTRB/SP most likely owns the research material. The latter situation is more complex.

Where a NTRB/SP assists an applicant for a native title determination, it may do so by directing its employed solicitors to provide legal assistance to the applicant. That legal assistance may also involve the solicitor requesting that the NTRB/SP conduct research for the applicant, who is their client. Consequently, the NTRB/SP and the employed solicitor may separately hold research material on behalf of the native title applicant.

In that case, the solicitor, not the NTRB/SP, technically holds the native title material on behalf of the applicant and is personally responsible to the applicant for the native title material held in their file, even though the native title material is physically in the office of the NTRB/SP.



In general terms:

- most documents on a solicitor's file are owned by the client (the applicant), e.g. research materials;
- some documents on the file are owned by the solicitor, e.g. records of money held on trust for the client;
- some documents are owned jointly by the client and the solicitor, e.g. solicitor's notes of conversations with other parties.

¹ See, generally, A Frith, 'Legal issues in transferring research materials from NTRB/SPs to RNTBCs', paper presented at AIATSIS Summit 2021, Adelaide, AIATSIS, 3 June 2021, viewed 30 June 2021, <https://aiatsis.gov.au/presentation/legal-issues-transferring-research-materials-ntrb/sps-rntbcs-angus-frith>

Some documents are subject to an additional obligation of confidentiality regarding sensitive family information or restricted cultural information. In addition, there are obligations due to privacy considerations and the existence of legal professional privilege.

Once the native title determination is finalised and the applicant is replaced by a PBC:

- research material held by the NTRB/SP that is not on a solicitor's file belongs to the NTRB/SP, arguably to be held on trust for the benefit of the native title holders;
- most of the documents on the solicitor's file are not owned by the solicitor or by the NTRB/SP, but by the solicitor's client (the native title applicant).

Certain rights and responsibilities in relation to the documents in the solicitor's file pass to the Prescribed Body Corporate (PBC) on the determination of native title.²

The NTRB solicitor must obey the client's instructions, about what is to be done with the originals of client owned documents.

Depending on the instructions of the applicant/PBC, the documents could be:

- given to the PBC, to be held on behalf of the native title holders, to be used to manage and protect native title;
- retained by the NTRB, potentially to be used for the ongoing benefit of the PBC and the native title holders, including the making of additional native title claims or compensation claims;
- destroyed, although in terms of maintaining a historical record and archiving principles this is the least favourable option.

In addition, NTRB/SPs often seek to retain a copy of documents that are returned to the PBC, to act as an archive, to assist them to continue to fulfil their NTRB functions and to support future claims, including compensation claims.

² See *Tommy on behalf of the Yinhawangka Gobawarrak v State of Western Australia (No 2)* [2019] FCA 1551 [2019], [83].

Why do native title holders want native title materials returned to their families and communities?

Native title materials contain essential cultural information and knowledge often provided over many decades by elders who have grown old or passed. Native title holders and the wider community may want these materials returned so they can be used:

- to pass on to younger generations
- in current and future activities (e.g. future acts and heritage protection)
- to progress community aspirations
- to help with new native title or compensation claims³
- to help with membership questions
- as mementoes of elders now passed
- to archive for the future.

While these materials are very valuable to the community, they were collated and written for the purpose of progressing a native title claim. They can also contain culturally and/or personally sensitive materials. Accessing sensitive material requires careful management of access protocols.

In addition, cultural ownership of native title materials can be difficult to identify, as materials were created, stored or shared across organisations and parties involved in the native title process, including the applicant, the NTRB/SP, the solicitor, the expert conducting the research and individual Traditional Owners. The circumstances of collections can vary as they could have been collected in the contexts of disputes over boundaries or group membership, as well as directly for the purposes of the litigation. Sometimes, they are collated at a regional level to assist in determining the basis for applications to be lodged.

When can native title materials be returned?

While some native title materials can be returned pre-determination to individuals and groups of individuals, a return of materials to a PBC can only take place after the native title determination, when the PBC has been determined by the Court to manage the rights and interests associated with a positive determination of native title.

³ The NTRB/SP should alert the PBC that if the group wants to lodge a compensation claim, care should be taken about the dissemination of native title research into the community, as doing so might affect the credibility of witnesses. It is suggested that the PBC gets targeted advice on this issue.

What materials can be returned?

Published materials

Published materials like books and articles are (by definition) in the public domain and available to everyone.

Unpublished materials

Some research materials are not published but available to anyone, because they are in the public domain. These include manuscripts, ethno-historical documents, drafts, texts created by local historians etc. Unpublished research material held in libraries, museums and state archives may be restricted by the internal policies of those institutions, or contractual access parameters agreed upon by the institution and the creator.

Materials may also be subject to additional cultural restrictions. For example, skeletal genealogies, connection reports and expert reports may contain sensitive information and only be released to PBCs if adherence to relevant cultural restrictions and protocols has been met. This can also apply to photos and videos collected as part of the evidence building process.

What restrictions might apply to materials?

A number of categories of restrictions can apply to native title materials. These are:

- personal – restrictions imposed by the creator of the material
- confidential – information within the material
- culturally restricted – knowledge within the material (e.g., gender restrictions, secret knowledge)
- legal – restrictions placed on access to the material (e.g. by the court in a native title proceeding, or due to legal professional privilege)
- institutional – restrictions on access to documents imposed by the holder of that information, e.g. material sourced solely for native title proceeding purposes
- copyright – restrictions require permission of the copyright holder except where exceptions apply, such as fair use or licensed agreement.

These restrictions might apply to some of the materials held by the NTRB/SP and may be the reason why certain materials cannot be returned to the PBC.

Principles for return of native title materials

It is suggested that the following principles might apply to the return of native title materials from NTRB/SPs to PBCs:⁴

- native title holders should control the storage, use of and access to native title research materials associated with the recognition of native title rights and interests
- native title holders must agree to transfer of native title materials from the NTRB/SP to their PBC
- existing obligations (confidentiality, privacy, privilege, intellectual property) and restrictions (imposed by the Court or determined under traditional laws and customs) should not be affected by a transfer of materials
- to enable the PBC to maintain such obligations and restrictions, the NTRB should identify them as far as possible
- both the NTRB/SP and the PBC should be obliged to ensure that the PBC has adequate storage facilities and the capacity to properly manage the storage, use of and access to the native title materials in accordance with the requirements of the native title holders
- consideration should be given to whether the NTRB should retain copies or the originals of some documents, and if so, the appropriate conditions for the storage, management and use of these materials
- the NTRB/SP and the PBC should agree on the:
 - purposes for which
 - persons by whom
 - conditions in accordance with which

the native title research materials held by the NTRB/SP and/or the PBC will be accessed, used or disclosed.

⁴ See Frith, 'Legal issues in transferring research materials from NTRB/SPs to RNTBCs'.

Models for the transfer process

Yamatji Marlpa Aboriginal Corporation (YMAC)⁵ has returned several sets of research materials to PBCs over the last six years. Through those processes, and through consultation with Traditional Owners and considering legal advice, YMAC has developed three models for returning native title materials. These models vary in the level of YMAC involvement, depending on the capacity of the PBC and the common law holders' aspirations for how they want their information managed and used in the future.

The first step in each case is a request from the PBC for the return of native title materials. Then, NTRB/SPs can start the process of collating and indexing materials for return. All models support the personal return of materials through its own process.

YMAC retains a copy of the returned information for its own record keeping (and as an archive and backup for PBCs) and as part of its NTRB functions. The information is not used for other purposes unless the NTRB gets permission to do so from the PBC. For specific data and personal information, NTRBs will request permission from the informant or next of kin.

Model A

This is the most involved process and provides more time and space for in depth discussions between the NTRB/SP and the PBC about the materials. It involves:

- a formal request for materials to be returned is made by the PBC board or the applicant.
- the PBC establishes a Cultural Advisory Committee (CAC) once Model A has been decided on.
- the NTRB/SP starts to look at what materials can be returned, allocates staff and considers timing and other resource issues.
- funding options are identified (if applicable).
- Workshops are conducted with the CAC, the PBC and nominated common law holders to discuss the materials, policy issues and restrictions on access.
- the NTRB/SP implements the outcomes of the workshops as part of the return process and builds those outcomes into the final policy document.
- The native title materials management policy document is finalised by the NTRB/SP and the PBC.
- common law holders meeting to ratify process and policy.
- an acknowledgement of the receipt of the research materials is signed by the PBC upon receipt of the materials and policy. This identifies that the material has been returned and certain restrictions and procedures are agreed on. Personal returns of information are ongoing.
- This is YMAC's preferred process. The NTRB/SP facilitates consultations with the PBC and the nominated Cultural Advisory Committee. While the NTRB/SP still needs to adhere to legal and ethical requirements, the process is led by the group, while the NTRB/SP seeks funding for the workshops to occur.

⁵ YMAC is the NTRB for the Pilbara and Geraldton regions in Western Australia.

Model B

In this model the NTRB/SP is semi-involved in managing the native title materials. It involves:

- a formal request for materials to be returned is made by the PBC board or the applicant.
- the NTRB/SP prepares an index of materials as well as a Considerations document setting out legal, cultural and ethical matters for the PBC to consider when it receives the materials.
- all information that can be returned is formally provided to the PBC (including family information or genealogies as set out in any reports).
- the NTRB/SP may consult with the PBC around policy and provide further suggestions to assist the management of the materials.
- personal returns of information are ongoing.

The NTRB/SP can suggest ways to handle, access and store materials to the PBC and also make suggestions for policy on an ongoing basis. The NTRB/SP can provide targeted advice when engaged to do so by the PBC. This option does not provide any opportunity for the NTRB/SP and the PBC to work through the materials in detail. Any workshops or assistance to write policy is funded by the PBC.

Model C

This model has the least NTRB/SP involvement in managing the native title materials held by the PBC. It involves:

- a formal request for materials to be returned is made by the PBC board or the applicant (where the request is made pre-determination).
- the NTRB/SP prepares an index of materials as well as a considerations document setting out legal, cultural and ethical matters for the PBC to consider when it receives the materials.
- all information that can be returned is formally provided to the PBC (including family information and genealogies as set out in any reports).
- personal returns of information are ongoing.

The NTRB/SP has no role in managing the materials once they have been delivered to the PBC. Management and access are completely left to the PBC and its board and who they decide to consult regarding the materials. Any workshops or assistance to write policy is funded by the PBC.

Timeframe for the return of native title materials?

Generally, the timeframe for the return of native title materials depends on a number of factors:

- complexity and quantity of materials to be returned
- format of the materials
- the format of the return process
- staff allocation and availability
- funding (most NTRB/SPs are not Commonwealth funded for this work)
- ability and timing for holding workshops and for the appropriate people to attend (i.e. Model A)
- meeting calendar for ratifying decisions and policies (i.e. Model A).

Recent experience has demonstrated that the minimum time required for a Model A process is eight months; however, a more realistic timeframe is 12–18 months.

What costs are involved?

The cost of returning native title materials varies depending on factors including the model chosen, the extent and format of the materials and the remoteness and size of the receiving community.

The below examples are based a number of case studies carried out in partnership with Yamatji Marlpa Aboriginal Corporation (YMAC), Robe River Kuruma Aboriginal Corporation (RRKAC) and the Esperance Tjaltjraak Native Title Aboriginal Corporation (ETNTAC).

For a Model C return YMAC provided the following figures:

- NTRB/SP preparing materials (including digitisation): 35 days of staff time @ \$1250 per day (being daily rate of an anthropologist's wage at a subsidised rate) estimated at \$43,750
- legal advice to produce a considerations document estimated at \$5,000)

Total cost of return = \$48,750

For a Model A return YMAC provided the following figures:

- Staff travel, meeting/workshop attendance = \$18,000
- NTRB/SP preparing materials (including digitisation, seeking advice and consultation with community) estimated at 123 days (@ \$1,250 per day anthropologist cost – subsidised rate) = \$153,750

Total cost of return = \$171,750

For a digital return ETNTAC and NIAA provided the following figures:

- Staff travel, meeting/workshop attendance = \$5,000
- Administrator preparing materials (including digitisation and building of NUIX database) = \$153,750
- IT upgrade at PBC offices = \$62,000
- Required PBC staff managing materials 0.5 FTE for 1 year = \$58,000

Total cost of return = \$278,750

Appendices

Further readings

Bauman, T & Parsons, D 2020, Aboriginal land claims in the Northern Territory: Documenting and preserving the records and memories. Report of focus group meeting, AIATSIS, Canberra, p. 67, viewed 22 April 2020, <<https://aiatsis.gov.au/sites/default/files/2020-09/aboriginal-land-claims-northern-territory-report.pdf>>.

Frith, A 2021, 'Legal issues in transferring research materials from NTRB/SPs to RNTBCs', paper presented at AIATSIS Summit 2021, Adelaide, AIATSIS, viewed 30 June 2021, <<https://aiatsis.gov.au/presentation/legal-issues-transferring-research-materials-ntrb/sps-rntbcs-angus-frith>>.

Keller, C, Rubinich, O, Wright, H & Tearle, J 2021, Returning native title materials – a digital approach: Esperance Tjaltjraak Native Title Aboriginal Corporation (ETNTAC) case study report, AIATSIS, Canberra, ACT, p. 17, viewed 22 April 2020, <https://aiatsis.gov.au/sites/default/files/research_pub/AIATSIS%20ETNTAC%20case%20study%20report.pdf>.

Keller, C & Strelein, L 2011, 'Returning native title materials – 30 years in the too hard basket', viewed 24 November 2021, <<https://nativetitle.org.au/publications/returning-native-title-materials-30-years-too-hard-basket>>.

St James, B, Usher, A, Evans, L, Evans, R & Slattery, K 2021, 'Robe River Kuruma Aboriginal Corporation and Yamatji Marlpa Aboriginal Corporation: return of native title materials', paper presented at AIATSIS Summit 2021, Adelaide, AIATSIS, viewed 30 June 2021, <<https://aiatsis.gov.au/presentation/return-native-title-materials-robe-river-kuruma-aboriginal-corporation-and-yamatji>>.

Tommy on behalf of the Yinhawangka Gobawarra v State of Western Australia (No 2) [2019] FCA 1551 [2019].

Policy example

Esperance Tjaltjraak Native Title Aboriginal Corporation RNTBC

Native Title Materials Policy and Procedure

24 November 2020

Background

The NTRB/SP gathered a significant amount of information as part of the preparation and litigation of the Esperance Nyungar native title claim.

The Esperance Tjaltjraak Native Title Aboriginal Corporation RNTBC (ETNTAC) has been seeking the return of native title materials for a number of years.

There are a number of issues to consider that are relevant to the return of documents although the recent decision of the Federal Court in *Tommy* appears to clarify the issue around a PBC's entitlement to materials as the client for whom those materials were prepared whilst the native title claim was being prepared.

There remain issues around privacy, cultural sensitivity and legal privilege around certain material as well as more practical issues around storage, access and management of information.

This policy is designed to set out how ETNTAC will facilitate the return of native title materials and manage these materials going forward.

Process for Return of Native Title Materials

1st phase – Assessment of Materials

- An initial assessment has been undertaken and a summary of the names of files has been produced on the materials held that are to be transferred (see attached).
- There are a number of cultural or legal restrictions which apply to some of the documents and there are also items where further permissions may be required from individual informants or from senior men or women or where information has only been provided for purposes of native title litigation.
- The documents will be stored offsite and a report will be produced on the ICT capacity of ETNTAC to manage and store the materials. ETNTAC will also engage with Aldrin Khaw from Grant Thornton re the technical IT requirements to enable the transfer and the software/hardware requirements.
- General categories of materials with restrictions to be applied are listed at Schedule 1.
- ETNTAC has also sought to identify any native title holders or family groups who do not want ETNTAC to have access to materials or who have expressed concerns generally. In this regard a notification was placed on the Native Title Holders' meeting notice calling for any objection and this issue was addressed at the Native Title Holders' meeting as part of the resolution approving the transfer. Further details around these additional restrictions are included at Schedule 2.

2nd phase –Workshop 14 October 2020

- A workshop was convened which included
 - i) ETNTAC board (i.e. 2 ETNTAC directors from each family group)
 - ii) reps from Circle of Elders
 - iii) ETNTAC staff
 - iv) Grant Thornton staff
 - v) One male and one female anthropologists
- Broad Objectives of workshop were to
 - i) give overview of native title materials that will be transferred.
 - ii) confirm the principles for the transfer of native title materials

- iii) identify the group's responsibilities and practices for protecting and managing the materials for native title holders
- iv) assist ETNTAC to develop a policy and management plan for the materials which will be endorsed by the native title holders

- Workshop addressed the following issues:

- i) what materials the Native Title community can access

Generally the Native Title Community and ETNTAC itself can access the materials subject to the restrictions that are placed on documents. The restrictions will be implemented by a dedicated person (female anthropologist) who will have set access protocols for different documents and will agree to maintain the confidentiality status of the documents.

- ii) who will be able to access the materials and for what purpose

Generally, native title holders will be able to access information relevant to their family as well as general information relevant to the Esperance Nyungar native title claim and the history of Esperance Nyungar people where that material is not otherwise restricted. Restrictions will apply to certain types of information and it will be a matter for the dedicated person to assess how these restrictions are applied. The precautionary principle will apply so any issues or concerns or uncertainty will be referred to the Circle of Elders for determination and then signed off by the ETNTAC CEO or Chair.

- iii) what will be the restrictions and limitations to accessing material

See schedule 1.

- iv) how might requests for restricted materials be processed

There will be a form produced which is required to be completed and signed as part of any access request. Needs to state the purpose of the request. If restrictions apply and there is any doubt in relation to whether access should be granted matter will be referred to circle of elders for determination and then must be signed off by either the Chair or CEO of ETNTAC.

- v) how will personal or private information be protected

The nominated person who has responsibility for managing access will have responsibility for ensuring that person and private information is protected. If there any issues around whether information is legally protected the matter will be referred to ETNTAC lawyer and then signed off by CEO or Chair of ETNTAC.

- vi) who will be responsible for managing materials

Nominated person. Initially anthropologist. Note that ETNTAC will approach Commonwealth for funding to support this position.

- vii) how will decisions be made regarding access to materials

See above. Nominated person will have certain delegated authorities with any issues or grey areas to be referred to circle of elders and then signed off by CEO or Chair.

viii) who will make decisions regarding access to materials

See above. Nominated person with reference to Schedule 1.

ix) how will disputes regarding access and using materials be resolved

Any disputes will be referred to circle of elders initially. If matter cannot be resolved then will be referred to circle of elders and board of directors. Parties must agree to enter into mediation first before the matter is referred to arbitration. Arbitrator will be appointed by President of National Native Title Tribunal.

x) what is the long term preservation plan for the materials

Will need to be stored offsite in an appropriate facility. Approach AIATSIS to store materials on behalf of ETNTAC.

3rd Phase – Agreement or Authorisation

- Final stage is to formalise outcomes of the workshop, obtain approval of native title holders (see attached notice and minutes from NTHs meeting) and execute a deed with GLSC to facilitate the transfer.

Schedule 1

i) Publicly available material which has previously been published or is otherwise available at museums, libraries or as part of court transcripts.

No restrictions.

ii) Legal materials which belong to the client such as material received from client, documents prepared by the solicitor for the client, documents received by the solicitor from a 3rd party for use in the matter, communications between the solicitor and the Court. Note that there may also be materials belonging to solicitor which may include internal notes, minutes, court documents etc.

Information restricted to ETNTAC. Any request for access to this material from native title holders or third parties needs to be consented to by ETNTAC board.

iii) Personal Research Material provided by individual informants during interview and field trips and which may include photos, video materials, personal written materials, recordings, field notes, witness statements, claimant materials.

Information restricted to use by that individual informant's family. Need nominated family representative to provide consent for any third party access.

iv) Cultural Restrictions which may require limitation of access for cultural reasons

Information restricted. Circles of Elders consent needed for access.

v) Court Ordered Restrictions and Documents to which Legal Professional Privilege applies

Privileged material will sit with ETNTAC and can be used by ETNTAC or consent to for use by ETNTAC. Court ordered restrictions will continue to apply and any access will require the court to consent.

- vi) Material where individual privacy restrictions apply and which may contain information which is of a personal or sensitive nature and therefore which an obligation of confidentiality arises under Australia Privacy Principles. For example personal addresses.

Information remains private with the individual. Any third party access requires that person to provide consent.

- vii) Genealogical information

All requests for genealogical information are to be approved by the Circle of Elders and must also be approved by the two family group representatives who sit on the ETNTAC board.

- viii) Materials subject to current claims (i.e. island and sea claim material)

Confidential to ETNTAC.

- ix) Court transcripts that have been purchased for use by solicitor.

Not confidential.

- x) Materials subject to copyright.

Copyright preserved.

- xi) Materials which disclose financial transactions.

Confidential to ETNTAC.

Schedule 2

Specific restrictions.

Person X (name redacted) has requested that all his/her personal information be kept confidential and that no access be permitted without his/her consent.



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