

Information held on Federal Court native title files

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 contractual 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.

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