

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

Justine Twomey¹

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

¹ 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.

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.

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 significance².

- (b) Native title claims materials

This category of materials would generally encompass materials created for the purposes of native title litigation. This might include

² 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.

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 client³. 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 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 purposes⁴.

³ 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.

⁴ 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.

(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 advice⁵. Documents and other information subject to client legal privilege may not be adduced into evidence in Court proceedings without the consent of the client⁶. 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 proceedings⁷.

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)⁸. 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.

⁵ *Evidence Act 1995* (Cth) s117.

⁶ *Evidence Act 1995* (Cth) ss 118, 119.

⁷ 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.

⁸ *Harman v Secretary of State for the Home Department* [1983] 1 AC 280.

Breach of this implied undertaking may constitute contempt of Court⁹.

(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.

⁹ *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.

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.

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 it 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
<ul style="list-style-type: none"> • NTRB / LC corporate information • General resources • Native title claim materials • Land and sea country project management materials 	<ul style="list-style-type: none"> • Deposited material • Native title claim materials • Land and sea country project management materials

Where access is required for the purpose for which the material is held

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.