



AIATSIS

Returning native title materials – a digital approach

**Esperance Tjaltjraak Native Title Aboriginal
Corporation (ETNTAC) case study report**

Dr Christiane Keller, Ophelia Rubinich, Helen Wright
and Jasmine Tearle

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Table of Contents

| | |
|---|----|
| Introduction | 2 |
| Background | 2 |
| The co-design meeting | 3 |
| Overview of stakeholder roles and the process of returning materials | 4 |
| Grant Thornton (Anthony Beven, Partner Grant Thornton) | 4 |
| ETNTAC (Gail Reynolds-Adamson, Chair of ETNTAC) | 4 |
| AIATSIS (Helen Wright, Director - Indigenous Country and Governance) | 5 |
| Overview of the materials | 5 |
| Development of procedures of handling and returning materials | 6 |
| Digital forensic analysis | 7 |
| Interim retrieval process for ETNTAC | 10 |
| Privacy, confidentiality and legal professional privilege | 11 |
| Cultural and gender sensitivities | 11 |
| Dispute resolution and risk-management | 11 |
| Possible future role for AIATSIS and other collecting institutions | 12 |
| Ongoing challenges of the returns process | 13 |
| The forensic approach is not infallible | 14 |
| Without a detailed inventory the native title material is of limited use to the PBC | 14 |
| Self-management of native title materials by PBCs | 14 |
| Funding implications | 15 |
| Conclusion | 16 |
| Appendix 1: List of interviews | 17 |
| Appendix 2: List of meeting attendees | 17 |
| Appendix 3: Meeting Agenda | 18 |
| Appendix 4: ETNTAC native title materials policy and procedure | 20 |

Introduction

This report summarises the progress of the return of native title materials to Esperance Tjaltjraak Native Title Aboriginal Corporation (ETNTAC) from the Goldfields Land and Sea Council (GLSC).

The case study is part of a wider body of case study research with Native Title Representative Bodies and Service Providers (NTRB/SPs), Registered Native Title Bodies Corporate (RNTBCs, commonly known as PBCs) and communities as a part of the Returning Native Title Materials Project (the RNTM Project) conducted by Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). The RNTM project is investigating how research materials from native title claims can be returned to native title groups or PBCs.

The Esperance case study is focused on co-designing the process of cataloguing and safely returning the native title research materials to ETNTAC. Of particular interest is the digital forensic analysis approach as a tool to assist in the transfer.

Background

In 2014, the Federal Court formally recognised the native title claim of the Esperance Nyungar people.¹ During the claims process, research materials were held by GLSC, the registered native title representative body for the region at the time. Soon after determination ETNTAC, the RNTBC for the Esperance Nyungar native title holders, requested the return of native title research materials held by GLSC on a regular basis. ETNTAC provided GLSC in 2016 with a clear resolution authorising the service provider to return the materials. For the next three years the PBC regularly asked GLSC to progress the return and provided several occasions to the service provide to explain why they were unable to return the files and why deadlines promised by them had not been met. GLSC claimed limited human resources to prepare materials for return, legal issues around privacy, difficulties around defining who the client was in relation to issues of privilege, and a perception based on informal feedback during meetings that members of ETNTAC may not necessarily support the return of files. Before the return was commenced GLSC lost its funding as service provider on 30 June 2019 and Grant Thornton Australia was appointed as the administrator on 1 July 2019.² By the end of

¹ *Bullen on behalf of the Esperance Nyungar People v State of Western Australia* [2014] FCA 197.

² GLSC, *Goldfields Land Management Rangers*, n.d., viewed 26 February 2021, <<https://www.glsc.com.au/>>; *Goldfields Land and Sea Council Aboriginal Corporation v Minister for Indigenous Affairs* [2019] FCA 2010.

November 2019, Native Title Services Goldfields (NTSG) was announced as the new native title service for the Goldfields region replacing GLSC.³

All documents previously held by GLSC were transferred to Iron Mountain, a specialised file storage facility in Perth, bar five sample boxes of ETNTAC materials that were transferred to Grant Thornton's premises. At this stage, the administrator proposed to return native title materials to ETNTAC directly rather than transfer them to a new service provider.

During the duration of Grant Thornton's administration, the National Indigenous Australia Agency (NIAA) asked AIATSIS to support the continuation of the returns process. AIATSIS assisted by co-designing the first stage, along with ETNTAC, NTSG, Grant Thornton and ex-GLSC employees, providing initial advice on archiving and documenting the transfer process.

AIATSIS also carried out subsequent interviews with the administrator and ETNTAC to review the returns process in December 2020, see Appendix 1: List of interviews.

The co-design meeting

A co-design meeting was held in Perth on 11 November 2019, with ETNTAC, AIATSIS, Grant Thornton, the former GLSC and NTSG (see Appendix 2: List of meeting attendees and Appendix 3: Meeting Agenda). Follow up interviews and a report review process were also used to clarify issues and detail the progress of the returns process.⁴

The aims of the meeting were to:

1. Update on the role of stakeholders in the process of returning materials.
2. Provide an overview of the materials including procedures to digitise and sort materials while respecting cultural protocols.
3. Develop procedures for the handling and return of digital and physical native title materials to traditional owners.
4. Address privacy, confidentiality and legal professional privilege hurdles.
5. Discuss cultural and gender sensitivities.
6. Develop dispute resolution and risk-management strategies.
7. Identify next steps including timeframes, responsibilities, and work schedules.

³ National Indigenous Australians Agency, *Native Title Services Goldfields commences operations*, Text, 2019, viewed 20 March 2020, <<https://www.niaa.gov.au/news-centre/indigenous-affairs/native-title-services-goldfields-commences-operations>>.

⁴ For an attendance list, see Appendix 1 and the agenda see Appendix 2.

This list of topics established for the agenda of the co-design meeting is used as a framework to report on issues raised during the meeting and how the returns process progressed until June 2021.

Overview of stakeholder roles and the process of returning materials

Grant Thornton (Anthony Beven, Partner Grant Thornton)

Grant Thornton facilitated the meeting as the interim NTSP. They received authority from GLSC to hold possession and access (under limited circumstances) GLSC's native title documents. The intent of GLSC and the administrator was for the administrator not to be the long-term custodian of these materials. In fact, Esperance Tjaltjraak native title holders have repeatedly authorised ETNTAC to assume this role.

The administrator confirmed at the meeting that their role as interim NTSP and assisting with the establishment of the new service provider NTSG was ending on 30 June 2020. Nevertheless, Grant Thornton would retain responsibility for some corporate functions including former GLSC records.

ETNTAC (Gail Reynolds-Adamson, Chair of ETNTAC)

The Chair of ETNTAC, Gail Reynolds-Adamson, advised the meeting that the RNTBC had been attempting to secure the materials collected for the native title claim since the determination in 2014. Esperance Nyungar people as a group wanted the native title materials returned so they can have access to it locally rather than having to go through a third party.

Esperance Nyungar as a group wanted to be able to make the decisions about how the material is managed and shared in the future. At ETNTAC, any decisions or matters relating to Esperance Nyungar culture and heritage are referred to the Council of Elders to advise the ETNTAC board. Esperance Nyungar had aspirations to revive their language, generate a seasonal Nyungar calendar and fill gaps about dreaming stories. To fulfil these aspirations they wanted access to the native title materials.

Furthermore, the Esperance Nyungar people also needed the materials to inform the implementation of the ETNTAC Healthy Country Plan, respond to proposals from others to carry out works impacting on Esperance Nyungar country, and for the passing of knowledge from Elders to the next generations.



Figure 1: Attendees at the Perth co-design meeting. From left to right: Jasmine Tearle, Jeffrey Paul, Helen Wright, Anthony Beven, David Lanagan, Andrew Burke, Henry Dabb, Aldrin Khaw, Tahnee Adamson, Gail Reynolds-Adamson, Fiona Blackburn.

AIATSIS (Helen Wright, Director - Indigenous Country and Governance)

AIATSIS was brought to the meeting as a representative of a collecting and archiving institution for the initial co-design of the returns process. The intent of the AIATSIS presence was to establish the project aims, procedures, governance and engagement with ETNTAC and traditional owners. AIATSIS was able to provide initial advice on archival protocols and procedures for description and management of materials. Fiona Blackburn advised that a full inventory is advisable and while documenting the original order, files may be rearrange or reorganised to make them more useful and accessible and a document management system might be needed.

Overview of the materials

A total of 3.5 million electronic files and more than 900 archive boxes were held by GLSC. These contained materials of numerous native title claims in the Goldfields region. The materials relevant to the Esperance Nyungar claim had only partially been identified. A total of 91 boxes had clear labelling as belonging to ETNTAC and contained folders with additional information on their content. These boxes held a variety of materials relating to ETNTAC (although not all native title related) and were earmarked for immediate transfer which has not yet taken place (as of 30 June 2021). The remaining boxes have been transferred in November 2019 to Iron Mountain, a Western Australian storage facility. From the millions of electronic files the administrator initially identified approximately 50,000 relevant digital files using automated indexing software with the key search term 'Esperance Nyungar'. Around 20 000 digital files were unreadable either because they were corrupted or password protected but have been retained on the GLSC servers until further processes may result in these files becoming accessible.

Development of procedures of handling and returning materials

The procedure of returning materials required consolidating, scanning and indexing digital and hard copy files. The administrator originally proposed to outsource the scanning process. As some information was restricted and confidential, this step required consent from ETNTAC's governance bodies, the ETNTAC board and the Council of Elders. They approved the scanning process to be conducted in-house at Grant Thornton.

The identified and indexed digital files and the hard copy files listed to a container level needed to be combined. To do this, a digital forensic process was employed utilising specialised software called NUIX. This process is described in detail below. The digital forensic process searched and indexed all files with key search terms including alternative spellings and common misspellings, language terms, family and personal names and site locations. In January 2020 ETNTAC members supplied an additional list of key search terms that they considered as important in this context. The list was formulated through a mixture of workshops and individual consultations with Elders and directors and other senior traditional owners from each family group.

Once the forensic analysis process was finalised by June 2020, the administrator prepared for the transfer of materials. This required the establishment of a management, access and dispute resolution policy by ETNTAC (see Appendix 4), as well as appropriate secure storage arrangements at ETNTAC. The RNTBC had already purchased storage cabinets three years earlier to house the materials requested from GLSC. They also moved to new premises in March 2020 where these cabinets were installed.

Additional, ETNTAC needed to provide a secure and upgraded IT system to house the final NUIX database. When, in September 2019, the administrator and NIAA initially met with the ETNTAC board to discuss the native title material transfer and the digital forensic approach, no specific IT upgrades were required. ETNTAC was to receive an 'off-the-shelf', inexpensive database from the administrator. These requirements had changed during the file preparation process and the administrator advised ETNTAC during 2020 that it must upgrade its IT system and needed to nominate a person to manage file access. Both requirements were outside of ETNTAC's realm without additional funding. Until ETNTAC was able to fulfil all requirements, Grant Thornton retained the materials and established an interim process of retrieval as outlined below (Diagram 2).

When NTSG officially took over the role of service provider in the Goldfields region in November 2019 it brought Grant Thornton's roles as administrator and interim NTSP to a close. Grant Thornton continued to receive funding until 30 June 2020 to finalise the returns process with ETNTAC. This returns process was heavily delayed by the requirements placed on ETNTAC to receive the materials and by the global COVID-19 pandemic that plunged Australia in a total lockdown that halted all travel and gatherings

for several months and required a rethink of work and safety practices for everybody. Grant Thornton is eager to hand over the native title materials as soon as possible, but will only do so when ETNTAC is appropriately set up and ready for the hand over.

Digital forensic analysis

After the co-design meeting and additional instructions from ETNTAC such as the provision of lists of key terms, Grant Thornton adopted the following process (visualised in Diagram 1):

1. Data dump from various GLSC sources (after special administration)

- 1.1. After GLSC was defunded as a NTSP, the administrator received all native title materials and records from GLSC. This included digital files on the GLSC servers and large numbers of archival boxes which were indexed to a container level and some hard copy files were scanned and digitised. Digitised hardcopies and existing digital files were combined into a single searchable database.
- 1.2. After completion of this process the original servers were decommissioned. The hard copies remain until further notice in the storage facility with Iron Mountain.
- 1.3. This process did not include the establishment of an inventory, the archival management tool indicating the content, nature and provenance of each file/ folder/ box necessary to manage access and preservation of the materials.

2. Data imaging

- 2.1. Some hard copy records from GLSC were scanned on a needs basis through an Optical Character Recognition (OCR) software. This software scanned any format of document including clear handwritten documents for characters to be recognised and made searchable.
- 2.2. The electronic copy created through this process was then uploaded into the administrator's Information and Communication Technology (ICT) systems. The ICT system is a set-up consisting of hardware, software, data and the people who use them.

3. Data cleansing

Cleansing of the data saw that the duplicates of files within the database consolidated into a single entry. This reduced the size of the database and streamlined the search results returned during a query. No files being hard or soft copies were deleted or destroyed at any time.

4. Ingesting the cleansed data into a NUIX database for search capability.

Ingestion is understood as the input of the cleaned data into the NUIX forensic software. Using the OCR searchable terms provided by ETNTAC, the administrator applied a filter that allowed for searches with more nuanced and comprehensive results. Whilst OCR and filters are not infallible in their application (see below), they deliver a high degree of accuracy and greatly improve the reliability and usefulness of a forensic indexing systems. The 91 boxes of hard copy archival materials relating to

ETNTAC has been scanned but large quantities of non-ETNTAC documents still remain in storage at Iron Mountain and will only be scanned on a needs basis.

5. Continued use of the database through a search capability currently facilitated by Grant Thornton.

5.1. As materials are requested by ETNTAC, the NUIX database can pinpoint if the material is an electronic file or a hard copy stored at Iron Mountain not previously identified as an ETNTAC record. For requests involving hard copy files, human involvement is required to scan, OCR, and add this document into the forensic database on a needs basis.

5.2. When answering requests, cultural and legal professional privilege protocols are considered. The process of requesting documents is outlined in Diagram 2.

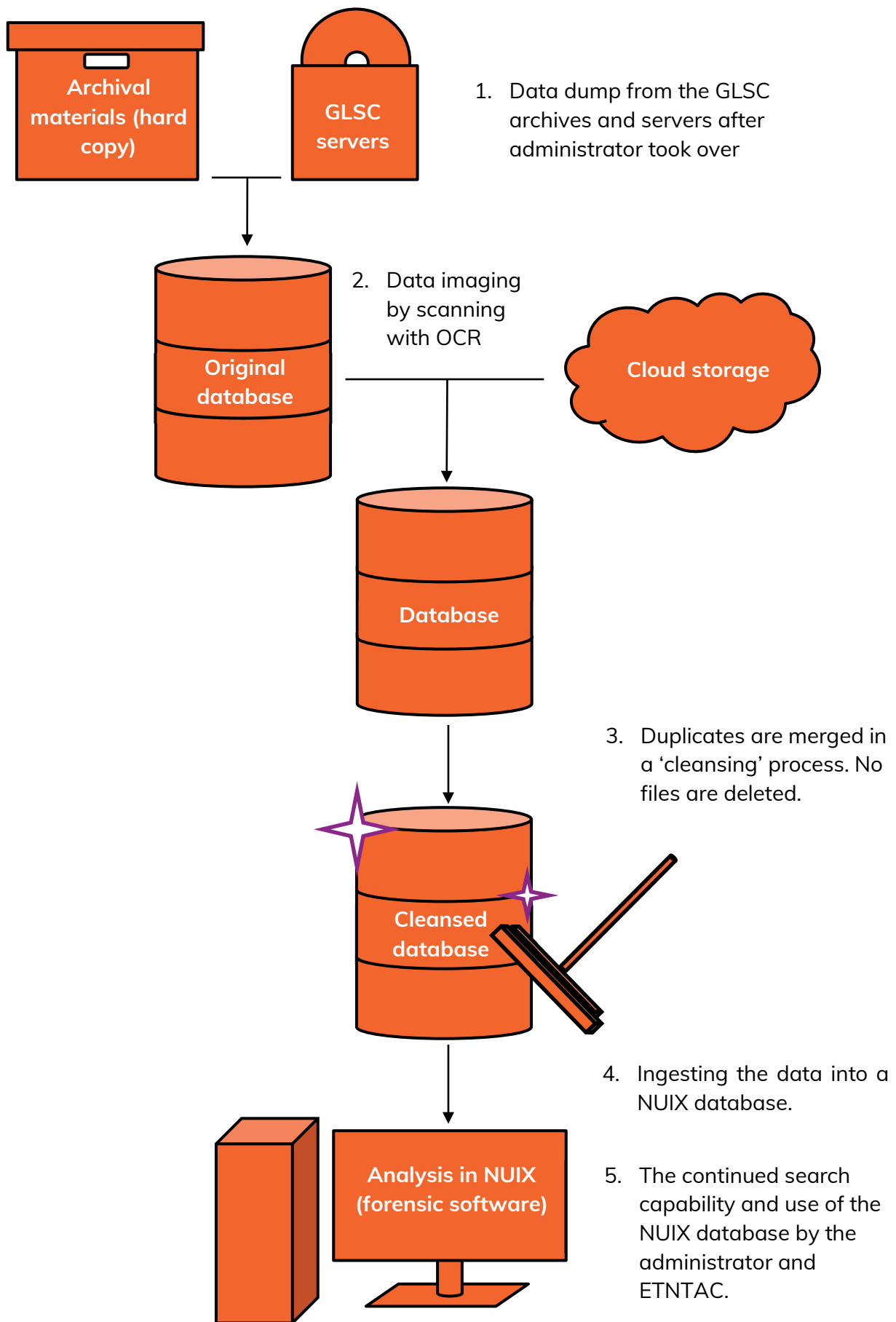


Diagram 1: Forensic analysis process

Interim retrieval process for ETNTAC

The administrator established a retrieval process for ETNTAC to access their native title materials, as outlined in Diagram 2. Since this process was fully operational in October 2020 it was used by ETNTAC several times.

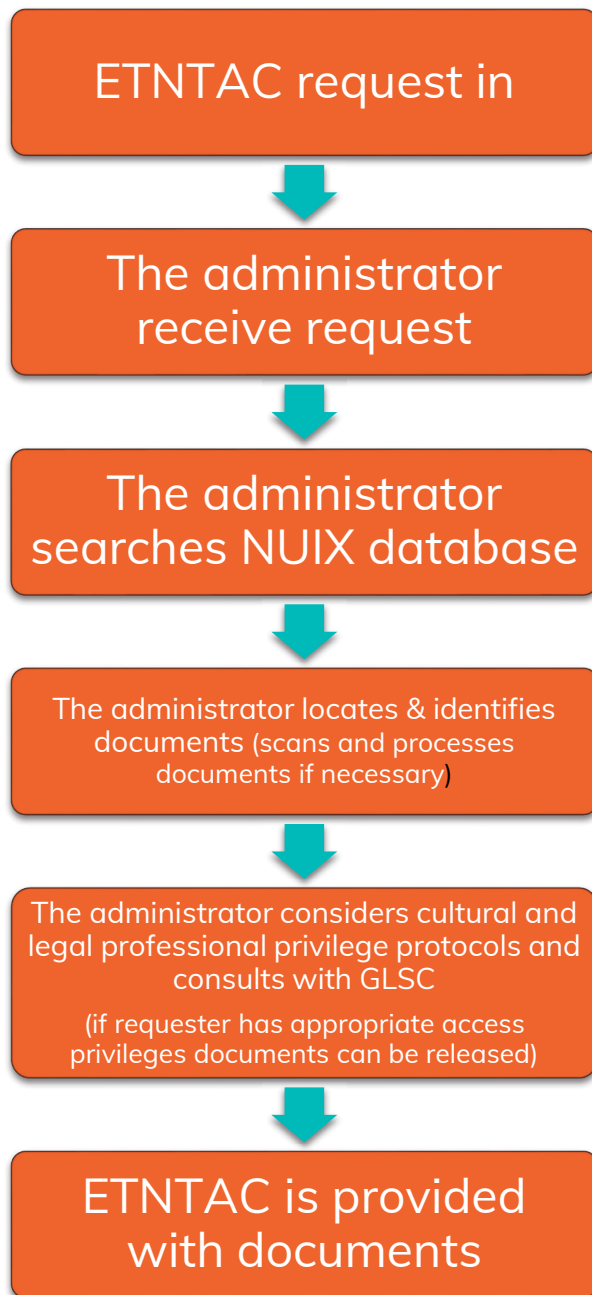


Diagram 2: ETNTAC information request process

Privacy, confidentiality and legal professional privilege

A number of legal in-confidence and copyright issues and privacy concerns from members have been raised. In order to overcome these hurdles, a pragmatic approach has been taken. Firstly, key stakeholders were consulted to talk through appropriate approaches. An application to the Federal Court for directions and orders was also considered if certainty was required by the parties in addressing any matters.

Provenance, understood as the archiving principle referring to the source, place of origin (original source location), creator, former custodians or chain of ownership of items in a collection, remains essential to determine what actions can be taken in relation to the materials and whether they are covered by other legal regimes or arrangements (e.g. Indigenous Cultural and Intellectual Property (ICIP), contracts, etc.). To record the provenance of native title materials is important in regards to rights to deposit as well as future access and use of these materials, but is limited for hard copy files and easier for electronic documents. Provenance enables protection of materials against inappropriate use by others. The original order of materials is also important to identify these materials and how they would have been used in the event the claim is revisited or within other future claims processes.

Because there is no full inventory of ETNTAC materials provenance, access rights and future use of materials needs to be determined once ETNTAC has received full access.

Cultural and gender sensitivities

ETNTAC representatives identified concerns with outsourcing the scanning processes for its materials, preferring it to be undertaken in-house by the administrator. As a response, with the view to maximise efficiency and minimise risk, the administrator engaged a temporary team, including the anthropologist Dr James Taylor and traditional owners Leo Thomas and Sonya Hills to oversee the packing and transport of all GLSC hard copy records by Iron Mountain. It was seen as important to establish protocols for handling and storing culturally sensitive gender specific materials, particularly for the hard copies of the GLSC materials that also needed to be digitised.

Dispute resolution and risk-management

A series of governance mechanisms were considered by the administrator and ETNTAC to mitigate against risk or potential conflicts once material is accessible at the RNTBC in Esperance. The transfer process to the RNTBC involved an inherent risk of disagreement, dispute, and potential conflict. One RNTBC member had already expressed the wish that material relating to his/her family may not be returned to ETNTAC. In order to safeguard the transfer, management of and access to materials, a dispute resolution process was established by ETNTAC in consultation with Elders and the broader membership (see Appendix 4).

Another risk was raised in the co-design meeting relating to the safety of materials held by a corporation or NTSP that may go into administration. Suggested was a process that triggers an assessment of an organisation's holding of materials and temporary safe-keeping if necessary. Under the reviewed *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) the Office of the Registrar of Indigenous Corporations (ORIC) has the power to handle materials and assets held by the corporation once a corporation is placed into special administration. It was proposed that the administrator could inform an independent advisory group made up of organisations like AIATSIS, National Archive of Australia (NAA), NIAA and other representatives who could then advise on assessing materials and preservation risks. Should the materials be deemed at risk, steps for temporary removal and storage could form part of the special administration process while the NTRB or RNTBC is brought back to community management. It should be acknowledged that this process is less than ideal. It removes power from the RNTBC in question and the implication of such a process should be discussed and implemented where organisations have asked for or assented to its future usage.



Figure 2: Gail Reynolds-Adamson, Chair of ETNTAC (left); Helen Wright, AIATSIS (right) at Grant Thornton Offices, Perth, WA, 2019.

Possible future role for AIATSIS and other collecting institutions

During the co-design meeting ETNTAC representatives suggested a possible future role of AIATSIS and other national or state collecting institutions was discussed in regards to safeguarding native title materials. National or state institutions may have a key role in supporting RNTBCs with the ongoing risks of managing returned materials. ETNTAC representatives recommended that once materials have been received by the RNTBC an external entity, such as, for example AIATSIS, may hold a directory of passwords to files and databases to ensure continued access in the same way they protect other sensitive

or secret-sacred information. ETNTAC could envisage the development of a 'red flag' policy on conditions that trigger removal and temporary storage of materials alongside a set of protocols to support the actions. Such an approach would require funding for the assessment, temporary storage and potential digitisation of materials and would create the need for an independent 'umpire'. It would also require consultation within said institutions how this approach could work.

In the follow-up interview in Feb 2021 Gail was of the firm opinion that AIATSIS's role in their returns process was to provide advice and help with documenting and archiving. She envisaged AIATSIS staff coming to Esperance or Perth respectively, looking at the boxes and digital files and working out a system how to best create an inventory and how to archive the materials. She also envisioned AIATSIS staff coming to Esperance and workshoping the options for this process with native title holders. This will allow them to make an informed decision and have the final say in these matters.

Furthermore, the ETNTAC Native Title Materials Policy and Procedure (Appendix 4) mentions the requirement of a secure facility for storage and preservation of the hard copy materials. They intend to ask AIATSIS to store these materials on behalf of ETNTAC.

AIATSIS will need to assess if there is capacity within the organisation and what level of assistance could be offered. There is also a need to discuss the long-term security and preservation of native title materials on a national level involving organisations such as AIATSIS, NAA, NIAA and others.

Ongoing challenges of the returns process

The digital forensic analysis approach was considered as a method in which timely access to documents could be provided to a RNTBC within a limited budget. The cost is dependent on the quantity and the sensitivity of the native title materials and whether they are subject to specific confidentiality orders of a court or have privacy or confidentiality requirements. Even without a comprehensive inventory and archival process in place the NUIX database has provided a fast turnaround in identifying and retrieving documents. If a title or keyword is provided by an ETNTAC enquiry the NUIX database can locate the document in minutes. Timeframes vary depending on the richness of search material given.

By the end of June 2021, the returns process has not been finalised for ETNTAC and they are required to access their native title materials through the interim process via Grant Thornton. A number of challenges that have occurred during the digital forensic approach utilised for the ETNTAC materials are highlighted below.

The forensic approach is not infallible

Some issues exist with incorrect information attributed to non-scanned (therefore not OCR-able) hard copy materials within the databases. These can slow down the retrieval process. Anthony Beven from Grant Thornton provided the following example: ETNTAC requests a document containing the phrase 'the sky is blue'. This phrase might be included in a hard copy document titled 'all things red'. A general location of this document can be provided (i.e. contained in which box/file), but a staff member needs to retrieve this document from the box, scan it, OCR it and then ingest the file into the database. With these systems in place the finding and retrieval process is possible but somewhat delayed. Issues like these were expected, as the system was never designed to be a 100% infallible process.

Furthermore, some anomalies have been identified, with documents that have been attributed to ETNTAC but are unrelated. This was also expected and mitigated by the human involvement required in processing requests. This should happen less often as more documents are ingested in the database.

Without a detailed inventory the native title material is of limited use to the PBC

Gail Reynolds-Adamson highlighted in the follow-up interview that, although the keyword search indicated the right content in a specific document, ETNTAC still doesn't know if this document is the most relevant to their needs. This is why ETNTAC only requested to retrieve materials a couple of times through the interim process. From ETNTAC's perspective the entirety of the material requires appropriate documentation establishing the nature, content and provenance of each document to aid the understanding of the collection as a whole and help with their long-term management. This is where they asked AIATSIS for advice in how to document, categorise and manage hard copy files, as well as digital files, so that both filing systems are corresponding. Fiona Blackburn, then collection manager at AIATSIS, estimated this process, if done properly from a professional archivist's perspective, could take up to seven years for the amount of ETNTAC native title materials.

Self-management of native title materials by PBCs

Anthony Beven at Grant Thornton is of the opinion that by implementing a digital forensic approach, establishing a cleansed database and a retrieval process they provided a flexible framework for ETNTAC with options suited to their abilities:

Option 1: ETNTAC takes over housing and management of the digital database and the physical archive (hard copies).

Option 2: ETNTAC takes over the digital database and some highly significant hard copies. The rest of the physical archive stays stored at Iron Mountain with retrieval and maintenance cost occurring to ETNTAC.

Option 3: The digital and physical archive gets stored at Iron Mountain with retrieval and maintenance cost occurring to ETNTAC.

According to Anthony Bevan the self-management of native title materials by RNTBCs on their own premises becomes a business decision for the RTNBC. Without appropriate funding support many RNTBCs like ETNTAC are not in a position to self-manage or pay third parties to access their native title materials.

In complying with requirements set out by Grant Thornton ETNTAC wrote in December 2020 to NIAA with a funding request. This request included around \$50,000 for upgrading their IT systems and the support of one FTE position within ETNTAC, initially for one year, to take on responsibility for the management of the Esperance Nyungar native title materials. Until ETNTAC has received this funding they are not in a position to self-manage their native title materials.

Funding implications

The reality for RNTBCs like ETNTAC is that they have no inherent funding or revenue model and their future is uncertain. ETNTAC estimates that it costs around \$400,000 per annum to fulfil its functions as a RNTBC. The available basic support funding has historically been far less than that and requires an arduous annual application process. The expectations and responsibilities of RNTBC's are growing each year. The responsibility to manage native title materials is an example of another layer of responsibility that requires additional human resource and others costs.

To date Grant Thornton is providing retrieval services at no cost to ETNTAC but is looking to resolve their obligations for ETNTAC's native title materials as soon as possible as they are no longer funded to do so.

In June 2021, NIAA agreed to provide approximately \$110,000 for the IT upgrade and 0.5 FTE administered through NTSG. ETNTAC is now in the process of procuring the IT upgrade to have the NUIX database transferred. ETNTAC is unsure about the future ability to self-manage their native title materials, as there is no certainty that the funding support for the person managing these materials is continuing beyond 2022. As established above, the materials need significant documentation and it is doubtful that the current 12 months funding will be sufficient. The future of the hard copy files is also in question as ETNTAC can only assess if these files need to be held on site once they have full access to the NUIX database. The sheer volume of documents might also exceed the space in the secure storage cabinets held on their premises. ETNTAC is looking for a national solution

Conclusion

The RNTM project established that the return of materials has been in the too hard basket for several decades. Only a limited number of returns have been made so far across the country and the best practice is still to be worked out.⁵ Typical barriers for NTRB/SPs and RNTBCs are:

- lack of resources
- lack of funding
- clear process or models
- legal impediments⁶

The return of native title materials was never integrated in the native title process although the information, stories and knowledge included in these materials belong to the native title holders and their RNTBCs. They are an important asset to aid their function as RTNBC and generate benefits for their community. Therefore, they should have access to and control over these materials and need adequate funding to do so.

Only when the return of native title materials to ETNTACs is finalised, they can provide insights if the digital forensic approach is a viable option for RTNBCs and provide lessons learned from the process.

⁵ A different model has been established by Yamatji Marlpa Aboriginal Corporation, see Brooke St James, Amy Usher, Leanne Evans, Royce Evans & Kelly Slattery, 'Robe River Kuruma Aboriginal Corporation and Yamatji Marlpa Aboriginal Corporation: return of native title materials', paper presented at AIATSIS Summit 2021, Adelaide, AIATSIS, 3 June 2021, viewed 30 June 2021, <<https://aiatsis.gov.au/presentation/return-native-title-materials-robe-river-kuruma-aboriginal-corporation-and-yamatji>>.

⁶ For a summary of legal issues to be contemplated when returning native title materials, see Angus 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>>.

Appendix 1: List of interviews

| Date | Interviewee | Interviewer |
|------------------|--|----------------------|
| 17 November 2020 | Anthony Beven, Partner, Grant Thornton | Dr Christiane Keller |
| 5 February 2021 | Gail Reynolds- Adamson Chair, ETNTAC | Dr Christiane Keller |

Appendix 2: List of meeting attendees

ETNTAC: Gail Reynolds-Adamson (Chair), Henry Dabb (Board Member), Tahnee Adamson (Operation Manager),

Grant Thornton: Anthony Beven (Partner), Aldrin Khaw (IT and Records Coordinator)

NTSG: David Lanagan (CEO)

AIATSI: Helen Wright, Jasmine Tearle, Jeffrey Paul, Fiona Blackburn

Other: James Taylor (Anthropologist), Andrew Burke (Observer GLSC and GT)

Appendix 3: Meeting Agenda



AGENDA

NATIVE TITLE MATERIALS TRANSFER PILOT PROJECT

Monday, 11 November 2019

10.30am – 4.00pm

City Beach meeting room, Level 43, Central Park

152-158 St Georges Terrace, Perth

10.30am

1. Welcome and apologies (Anthony Beven)
2. Background of the pilot project (Gayle Reynolds-Adamson / Anthony Beven)
3. Aim of the pilot project
 - Develop policy and procedural protocols for the handling and return of native title materials to traditional owners
4. Overview of roles
 - Grant Thornton (Anthony Beven)
 - Esperance Tjaltjraak (Gayle Reynolds-Adamson, Donald Abdullah and project officer)
 - AIATSIS (Helen Wright)
5. Scope of Esperance Nyungar native title materials (Aldrin Khaw, Grant Thornton)
 - Categories (types) of Esperance Nyungar native title materials in the custody and/or control of the Goldfields Land and Sea Council
 - Identification and indexing of native title materials
 - Preview of sample Esperance Nyungar native title materials

1.00pm – 1.30pm - Lunch (provided)

6. Native title materials governance
 - Identification of Esperance Nyungar native title materials, including expert advice
 - Conditions of Goldfields Land and Sea Council for transfer of native title materials

- Addressing issues of privacy, confidentiality and legal professional privilege
- Managing cultural and gender sensitivities
- Protocols for transfer and safe custody of Esperance Nyungar native title materials
- Protocols for access to Esperance Nyungar native title materials (post-transfer)
- Dispute resolution (prior to and subsequent to transfer)

7. Next meeting

4.00pm

8. Close of meeting

Appendix 4: ETNTAC native title materials policy and procedure

Esperance Tjaltjraak Native Title Aboriginal Corporation RNTBC

Native Title Materials Policy and Procedure

24 November 2020

Background

Goldfields Land & Sea Council (GLSC) 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.

In 2019, the GLSC went into administration and Grant Thornton as grant controller have agreed to the return of native title materials to ETNTAC subject to the development of this policy.

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 remains 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 (ie 2 ETNTAC directors from each family group)
 - ii) reps from Circle of Elders
 - iii) ETNTAC staff
 - iv) Aldrin Khaw from Grant Thornton
 - v) Dave Guilfoyle and Genevieve Carey (male and 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 (Genevieve Carey) 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 personal and private information is protected. If there are 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 Genevieve Carey. 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 (ie 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.