

WPS LAW

Guide to Native Title Occupation Evidence



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This document is intended as a guide only. This does not constitute legal advice. There may be additional and important considerations that should be taken into account in your specific circumstances. If you or your organisation has a legal issue, you should obtain professional advice from a legal practitioner.

Background

- Sections 47A and 47B of the Native Title Act 1993 (Cth) are special beneficial provisions that provide a statutory exception to the general principle that where native title has been extinguished at law, that extinguishment is permanent.
- Under native title law, native title is ‘extinguished’ (i.e. ceases to exist) over areas where there has been a valid prior grant of an inconsistent interest (such as a freehold interest).
- However, under sections 47A and 47B of the Native Title Act 1993 (Cth), extinguishment of native title can be disregarded over some categories of land, if certain conditions are met.
- For section 47A to apply, the land must have been held for the benefit of or on trust for Aboriginal or Torres Strait Islander Peoples at the date of the claim.
- For section 47B to apply, the land must have been ‘vacant’ Crown land at the date of the claim.
- For either provision to apply, a native title claim group must establish that a member of the claim group ‘occupied’ the relevant area of land at the date the native title claim application is made.

Legal principles

- ‘Occupation’ evidence is a different type of evidence to ‘connection’ evidence in native title proceedings. Occupation evidence is focused on the specific area of land to which section 47A or section 47B might apply, although evidence about a witnesses’ connection to that country more broadly will still be relevant and important.
- A claim group does not need to show that people were permanently living on that area at the date of the claim application to establish occupation. If the claim group can show that a member of the claim group had some type of presence on the land, such as performing activities like fishing, gathering, camping, or visiting cultural sites, that will be sufficient to establish ‘occupation’.
- There are now a number of cases which provide guidance as to what is required by way of occupation evidence. Key authorities include: Northern Territory of Australia v Alyawarr (2005) 145 FCR 442; Moses v Western Australia (2007) 160 FCR 148; Banjima People v State of Western Australia (2015) 231 FCR 456; and Fortescue Metals Group v Warrie (on behalf of the Yindjbarndi People) (2019) 273 FCR 350.

- These cases establish key principles, including:
 - Whether occupation has been established involves a factual enquiry and each case is a question of ‘fact and degree’, taking into account the spiritual, cultural and social context of the relevant activities (Moses at [210], [215]; Warrie at [480]-[481]).
 - Occupation of land by assertion of traditional rights and interests is not limited to areas in which Aboriginal people are physically present (see the Warrie at [474]-[475] and the authorities cited therein).
 - Occupation may be established by reference to a wider area, ‘over which the particular area forms part’ (see the Warrie at [474] and the authorities cited therein).
 - Occupation doesn’t have to be ‘traditional’ (Moses at [215], citing Rubibi (No 7) [2006] FCA 459 at [84]).

Strategic Considerations

- Below are some key considerations for practitioners in preparing for and taking occupation evidence from native title claim group members.

Evidence

- For section 47A, consider the terms of the grant of the relevant land and whether that may suffice to establish occupation.
- Otherwise, occupation evidence will often take the form of a witness statement or affidavit from claim group members. However, as discussed below, it may be beneficial to consider alternate ways of preparing evidence.

Timing

- Occupation evidence should be taken after there has been agreement in principle between the State or Territory party and the Applicant over what areas section 47A and section 47B may apply to, subject to meeting the requirements for occupation.
- Once the areas where occupation evidence is needed are known, detailed maps should be prepared showing each of the areas.
- This will assist in identifying whether there are a number of parcels co-located in a similar area, or otherwise linked. It may be possible that some parcels can be grouped so that evidence can cover multiple parcels.
- Knowing where the parcels are physically located will also assist in identifying suitable witnesses to provide evidence.

Preparing for witness interviews

- Before proceeding to interview potential witnesses, it is necessary to understand how the claim has been prepared and the claim group description. For example, do different family groups have responsibility for different parts of the claim area?
- Practitioners should review previous evidence, including any evidence or material provided by potential witnesses.
- Some other practical and strategic considerations may be:
 - How will you deal with lots of parcels or multiple areas? Is there something that links them together, so that evidence can cover multiple areas?
 - Can evidence be better prepared in alternative ways to a statement, such as videos, paintings, maps?
 - Has occupation evidence been given by a broad spectrum of witnesses from the claim group (e.g. different ancestors, language or family groups, generations and genders)?

Cultural considerations

- How will you ensure that evidence is taken in a culturally safe and appropriate way?
- Can the witness speak English fluently? If not, have you engaged an interpreter?
- Are there cultural protocols that will need to be followed and how they may be accommodated (e.g. if the witness requires their evidence be taken by a lawyer of a particular gender; how will people that have passed away be referred to?)
- Encourage and seek feedback from the witness about what works best for them.

Legal and ethical obligations

- Like taking any evidence in native title proceedings, it is important to understand and carefully comply with ethical and legal obligations.

Free, prior and informed consent

- Adhere to the principles of seeking free, prior and informed consent, throughout the evidence taking process.
- Legal practitioners should clearly explain who they are and their role to any potential witness, and the process of giving evidence.
- Witnesses should understand that the process is voluntary and that whilst their information is valued, they do not have to participate if they do not wish to.

- Witnesses must clearly understand how their evidence will be used – will it be filed in Court or provided to respondent parties on a confidential basis? Is it possible to place any restrictions on the cultural information provided? Do they understand the risks of potentially being called as a witness in Court?

Note that it can be helpful to prepare a simple fact-sheet to give witnesses which covers off this information.

- **Ethical obligations and conduct rules**

Carefully adhere to your State or Territory's conduct rules (e.g. South Australian Legal Practitioners' Conduct Rules (LPCR) about evidence and witnesses). Be aware that:

- A legal practitioner must not coach a witness (LPCR rule 24).
 - A legal practitioner must not confer with more than one lay witness at the same time about any issue which there are reasonable grounds for the practitioner to believe may be contentious at a hearing and where such conferral could affect evidence to be given by any of those witnesses (LPCR rule 25).
 - If a deponent is unable to read or is blind, refer to the Federal Court rules about how their evidence should be given.
- Consider any relevant guidance about working with Aboriginal and Torres Strait Islander People, for example:
 - Lawyers' Protocols for Dealing with Aboriginal Clients in South Australia.
 - Northern Territory Law Society's Indigenous protocols for lawyers.
 - The Law Society of NSW's resource Working with Aboriginal and Torres Strait Islander Clients.

Interviewing witnesses

- For an example scaffold of how to structure an interview or meeting with witnesses – see [MPS Law's Witness Statement Checklist for Native Title Claims](#).
- Key questions and topics to explore with a witness are included below.

Key questions and topics for witness interviews

- **Establish claim group membership, identity and cultural authority**
 - Explain who their parents and/or relevant family members are.
 - How does the witness get their connection to the claim area?
 - Age of witness at date of claim?
- **Growing up**
 - When and where was the witness born?
 - Where did they grow up? Include relevant details about time spent on-country
- **Date of claim**
 - What was the witness doing or where were they living around the date of the claim?
- **Knowledge and familiarity with relevant parcels requiring evidence of occupation**
 - How do they know the area?
 - What is that country like?
 - Dreaming stories, song lines or cultural sites that are connected to that area/country that they are comfortable speaking about?
 - Are there any cultural rules about the area that they are comfortable speaking about?
 - What does that area mean to them?
- **Establishing occupation of the relevant area**
 - When has the witness been to that area?
 - How often would they visit?
 - What would they do there? Are there any particular activities?
 - Would they have been going there at the date of the claim? If so, how would they access the area? Where would they be travelling from?
 - Would anyone else go with them?
- Is there anything else the witness would like to say about the area?