



Government of **Western Australia**
Department of **the Premier and Cabinet**

Guide to Evidentiary Requirements of Occupation under Sections 47A and 47B of the Native Title Act 1993 (Cth)

A decorative graphic consisting of several overlapping, flowing orange lines that start from the left and converge towards the right, ending in a small arrowhead.

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Purpose

This guide is intended to assist stakeholders understand the requirements of the Government of Western Australia (WA Government) when assessing evidence submitted to prove occupation for the purposes of sections 47A and 47B of the *Native Title Act 1993 (Cth)* ("NTA"). The guide briefly outlines major aspects of these sections, provides definitions of key terminology, considers interpretations by the Court and concludes with a summary of the WA Government's evidentiary requirements.

Overview

Native title may exist where Indigenous people continue to follow their traditional laws and customs, have maintained an association with their country, and where it has not been extinguished because of acts done, or allowed, by government.

The beneficial provisions of ss 47, 47A and 47B of the NTA provide that in certain circumstances, previous extinguishment of native title can be disregarded. Where connection evidence has demonstrated that native title exists and the requirements of ss 47, 47A or 47B of the NTA are met, then despite earlier extinguishing events, native title can be recognised over:

- claimant-held pastoral leases (s 47);
- claimant-occupied Aboriginal land or reserves (s 47A); or
- claimant-occupied vacant or unallocated Crown land ("UCL") (s 47B).

One of the conditions of ss 47A and 47B of the NTA is that one or more members of the native title claim group must have been in occupation of the area at the time the Native Title Determination Application ("the Application") was made.

Section 47 of the NTA

Section 47 of the NTA¹ may apply when native title is claimed over pastoral leases held by, or for the benefit of, members of the native title claim group at the time that the Application is made.² Where native title rights and interests would otherwise be extinguished as a result of the lease being granted, s 47 of the NTA allows that extinguishment to be disregarded.

Where the Applicant asserts that extinguishment should be disregarded pursuant to s 47 of the NTA, evidence is required to support that assertion. In accordance with s 47(1)(b) of the NTA, the Applicant is required to establish the identity of the holders of the pastoral lease at the time the Application was made, and to provide this information to the WA Government.

¹ This section of the guide should be read in conjunction with ss 47, 47A and 47B of the NTA.

² For further detail on when s 47 applies see s 47(1) of the NTA.

Section 47A of the NTA

Where native title is claimed over land expressly granted to, or held for the benefit of, Aboriginal people and where the land was occupied by at least one member of the claimant group at the time that the Application was made, s 47A of the NTA may operate to disregard prior extinguishment.³

Where the Applicant contends that extinguishment should be disregarded pursuant to s 47A of the NTA, evidence is required to support this contention. The WA Government requires the Applicant to provide evidence demonstrating that the area was occupied by at least one member of the native title claim group as at the date the Application was made.

Section 47B of the NTA

Section 47B of the NTA allows prior extinguishment to be disregarded over UCL which was occupied by at least one member of the native title claim group at the time that the Application was made. The UCL must not be covered by (i) a freehold title or lease, (ii) a reservation, proclamation, dedication, condition, permission or authority made or conferred by the Crown in any capacity, or by the making, amending or repeal of any legislation of the Commonwealth, a State or Territory, under which the whole or a part of the land is to be used for public purposes or for a particular purpose, or (iii) subject to a resumption process.

Where the Applicant contends that extinguishment should be disregarded pursuant to s 47B of the NTA, evidence is required to support this contention. The WA Government requires occupation of the area to be established by the Applicant as at the date the Application was made.

This Guide sets out the nature and form of the evidence the WA Government expects to receive in relation to ss 47A and 47B, and the approach the WA Government takes to assessing such evidence.

³ For further detail on when s 47A applies, see s 47A(1) of the NTA.

Terminology

Sections 47A(1)(c) and 47B(1)(c) of the NTA apply if, “**when the application is made**, one or more members of the native title claim group **occupy the area**” (emphases added). The temporal, area and occupation requirements of this condition are explained below.

Time

The WA Government takes the view that, while it is not necessary to establish that the area was occupied on the exact day the Application was filed, the evidence must relate to the approximate time that the original Application covering the area was made.

The Area

For the purposes of s 47A, “the area” refers to the area held expressly for the benefit of the particular Aboriginal group under the relevant grant.⁴

For the purposes of s 47B, “the area” refers to the particular area of UCL where native title has been extinguished, and where extinguishment is sought to be disregarded.⁵

Consequently, if it is contended that s 47A or s 47B of the NTA applies to two or more separate areas, evidence of occupation needs to be provided in relation to each area.

Evidence of Occupation

General principles

In assessing evidence of occupation, the WA Government is particularly guided by the principles identified by the Full Federal Court in *Moses v Western Australia*⁶ (the leading authority on “occupation” under ss 47A and 47B). The Full Court said that the following constitutes a “general approach” to assessing occupation, based upon common sense, the words of ss 47A and 47B in their context, and the prior authorities:⁷

- (1) to “occupy” an area for the purposes of ss 47A and 47B of the NTA involves the exercise of some physical activity or activities in relation to the area;
- (2) to “occupy” an area does not require the performance of an activity or activities on every part of the land;

⁴ *Risk v Northern Territory* [2006] FCA 404, [885] (Mansfield J) (**Risk**); see also *Neowarra v Western Australia* [2003] FCA 1402 (**Neowarra**), [686].

⁵ *Neowarra*, [686], [721]; *Northern Territory v Alyawarr* (2005) 145 FCR 442, [171]; *Rubibi v Western Australia (No 7)* [2006] FCA 459, [69]-[71] (**Rubibi (No. 7)**); *Risk*, [886]-[887], [893]; *Western Australia v Moses* (2007) 160 FCR 148, [206], [214].

⁶ (2007) 160 FCR 148 (**Moses**).

⁷ *Ibid*, [215].

- (3) to “occupy” an area does not necessarily involve consistently or repeatedly performing the activity or activities over part of the area;
- (4) to “occupy” an area does not require constant performance of the activity or activities over parts of the area; it is possible to conclude that an area is occupied where there are spasmodic or occasional physical activities carried on over the area;
- (5) to “occupy” an area at a particular time does not necessarily require contemporaneous activity on that area at the particular time; it is possible to conclude that an area of land is occupied in circumstances where at the time the Application is made there is no immediately contemporaneous activity being carried on in the area;
- (6) the fact of occupation does not necessarily entail a frequent physical presence in the area; for example, the storage of sacred objects on the area or the holding, from time to time, of traditional ceremonies on the area may constitute occupation for the purposes of the NTA: see for example, *Rubibi Community v Western Australia* (2001) 112 FCR 409 at [182];
- (7) evidence to establish occupation need not necessarily be confined to evidence of activities occurring on the particular area; it may be possible to establish that a particular area is occupied by reference to occupation of a wider area which includes the particular area: see for example, *Risk* [2006] FCA 404 at 890;
- (8) occupation need not be “traditional”: see for example, *Rubibi (No 7)* [2006] FCA 459 at [84];
- (9) whether occupation has been made out in a particular case is always a question of fact and degree.

According to the Full Court:

[T]he word “occupy” denotes some physical presence or activity by one or more members of the claim group from time to time, not necessarily continuously, and a presence or activity in the area so that as a matter of practicality that presence or activity involves the assertion of being established over the area itself. The occupation must be contemporaneous rather than historical. If the native title rights and interests over the area were exclusive, so there was a right to control access to the area, the exercise of the right to exclude strangers from the area would indicate its occupation. To occupy an area under the NTA, given its purposes and context, involves the exercise of possessory rights over the area, but the exercise of those rights does not require their continuous exercise, or their exercise at the precise time of the application because the occupation of which ss 47A and 47B speak is a state of affairs

which must exist rather than the precise activity which illustrates the existence of the state of affairs.⁸

The WA Government also has regard to other authorities as applicable. For example, the following principles may be helpful or applicable in particular cases:

- “The occupation of land should be understood in the sense that the indigenous people have traditionally occupied land rather than according to common law principles and judicial authority relating to freehold and leasehold estates and other statutory rights. The use of traditional country by members of the relevant claimant group which is neither random nor co-incidental but in accordance with the way of life, habits, customs and usages of the group is in the context of the legislation sufficient to indicate occupation of the land.”⁹
- “[A] broad view should be taken of the word "occupy" in the requirement in s 47A(1)(c) that one or more members of the native title claim group occupy the area. ... [T]his requirement is met where a claimant member is one of many people who share occupancy, and that the land may be relevantly occupied even though the person is rarely present on the land so long as the person makes use of the land for the reserved purpose as and when that person wishes to do so.”¹⁰
- “[T]he occupation that must be established for the purposes of s 47A(1)(c) is an occupation in respect of the relevant ‘area’, that is the whole, rather than merely a part, of the particular area the subject of the freehold estate, lease, vesting etc.”¹¹
- Although evidence in relation to connection for the purposes of s 223(1)(b) of the NTA can be relevant to occupation under ss 47A and 47B, occupation cannot be simply equated with connection.¹² In other words, the fact of there being native title rights and interests over a claim area including an area to which s 47B might apply does not of itself establish occupation.¹³
- “[T]here is no proper basis for reading a requirement of traditional occupation into ss 47A and 47B. However, traditional use was successfully relied upon to establish occupation in *Hayes* and *Daniel*. Where the use is not traditional, the question remains whether the evidence about connection, use, habitation or visitation is sufficient to warrant a conclusion, as a matter of fact, that the requisite occupation has been established.”¹⁴

⁸ *Ibid*, [216].

⁹ *Hayes v Northern Territory* (1999) 97 FCR 32, [162(c)] (**Hayes**).

¹⁰ *Western Australia v Ward* (2000) 99 FCR 301, [449].

¹¹ *Rubibi (No. 7)*, [70]; see also [98].

¹² *Ibid*, [83]; *Moses*, [210].

¹³ *Risk*, [891].

¹⁴ *Rubibi (No. 7)*, [84].

- Where evidence as to occupation of a particular area relates to an area outside of the subject “area” (the particular area of UCL in the case of s 47B), it may be possible to draw inferences from that evidence that the subject area was “occupied” at the relevant time.¹⁵ However, whether such inferences are possible will depend upon, among other things, the nature of the terrain, the relative position of areas and the location in relation to important geographic features.¹⁶ It may not be possible to draw inferences if, for example, the evidence indicates that activities denoting physical presence are confined to a particular area, and do not include the area in question, or if the areas to which the evidence relates are physically separate from, or comprise a geographically different part of a wider area.¹⁷ It follows that “mere proximity” of residence or activities to an area may not be sufficient to establish occupation of the area.¹⁸

Examples of activities amounting to “occupation”

Whether an area is “occupied” in any particular case is a complex question of fact and degree, to be established through a factual inquiry taking into account the context of the individual case. Nonetheless, the following examples from the case law provide a guide as to the types of activities which the WA Government may accept as establishing occupation of particular areas in a given case:

- Hunting and gathering food;¹⁹
- Collecting bush medicines;²⁰
- Collecting firewood;²¹
- Camping;²²
- Fishing and other similar activities;²³
- Frequently visiting sacred sites and assisting in the protection of sacred sites;²⁴
- Use of the land for bush camps in relation to the training and initiation of young men;²⁵
- Obtaining water;²⁶
- Continuing supervisory and protective activities of senior law men;²⁷
- Holding of traditional ceremonies as and when senior law men authorise those activities;²⁸

¹⁵ See *Alyawarr v Northern Territory* (2004) 207 ALR 539, [313]; *Northern Territory v Alyawarr* (2005) 145 FCR 442, [191]; *Risk*, [890]; *Moses*, [215(7)].

¹⁶ See *Moses*, [228], [231]; *Western Australia v Sebastian* (2007) 160 FCR 148, [294] (**Sebastian**).

¹⁷ *Moses*, [223], [228].

¹⁸ *Moses*, [231].

¹⁹ *Hayes*, [163(ii)]-[163(iii)], [163(viii)]; *Alyawarr v Northern Territory* (2004) 207 ALR 539, [313]; *Rubibi* (No. 7), [105]; *Moses*, [227]-[228].

²⁰ *Hayes*, [163(iii)], [163(v)], [163(viii)].

²¹ *Ibid*, [163(iii)]-[163(v)], [163(viii)].

²² *Ibid*, [163(iv)], [163(v)].

²³ *Moses*, [222], [226]-[228].

²⁴ *Hayes*, [163(i)].

²⁵ *Ibid*, [163(v)].

²⁶ *Ibid*, [163(viii)].

²⁷ *Rubibi v Western Australia* (2001) 112 FCR 409, [182].

- Continued storage of sacred objects;²⁹
- Residence on or near the relevant area.³⁰

Activities may take place on or near the relevant “area” (see above), but where the activities take place (or have taken place) outside of the relevant area, any inferences to be drawn about occupation of the area will be guided by the principles set out above.

Depending on the context, the WA Government is more likely to accept that an area is occupied where the evidence demonstrates a number or range of activities of the types set out above, rather than a single activity.

Based upon the case law, the WA Government is unlikely to accept that an area or areas are occupied on the basis of the following:

- Mere evidence of driving along a road through or near the area;³¹
- Mere evidence of walking across or near the area;³²
- Evidence of use of the area which is “random or coincidental”,³³
- Evidence of use of another area far from the relevant area; or
- Evidence of use of the area or a nearby area that is not contemporaneous with the filing of the Application (for example, evidence that relates to the distant past).

Summary of the WA Government’s Requirements to Prove Occupation

For the purposes of s 47(1)(b) of the NTA, the WA Government requires Applicants to establish the identity of the holders of the pastoral lease at the time the Application was made and provide this information to the State with the connection material.

For the purposes of ss 47A and 47B, the WA Government requires Applicants to provide evidence of occupation of the relevant “area” or areas (being the land expressly granted to, or held for the benefit of, Aboriginal people for the purpose of s 47A, and the particular area or areas of UCL for the purpose of s 47B). The evidence must demonstrate, to the WA Government's satisfaction, that one or more members of the claim group occupied the relevant area or areas at the time the Application was made, in accordance with the principles identified in the case law. A summary of the general principles by which the Government is guided in making its assessment is set out on page four of this Guide.

The WA Government considers that first-hand evidence from claimants themselves is the strongest form of evidence in establishing occupation. Accordingly, while the

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ *Ibid.*; *Neowarra*, [725], [757]; *Alyawarr v Northern Territory* (2004) 207 ALR 539, [313]; *Griffiths v Northern Territory* (2006) 165 FCR 300, [702]-[703].

³¹ *Neowarra*, [752], [759]-[760]; *Moses*, [234].

³² See *Rubibi (No. 7)*, [117]; *Sebastian*, [296].

³³ *Hayes*, [162(c)].

Government does not prescribe that the evidence must be provided in any particular form, affidavit evidence is preferred. Where affidavits identify particular places, maps may assist in identifying the location of those places relative to the “the area” in question.

No particular fact(s) must be shown to demonstrate occupation. In all cases, the WA Government makes an assessment upon the whole of the evidence provided in the Applicant's affidavits, and any other relevant evidence. Nonetheless, the activities identified above provide a guide as to the types of activities which **may** be sufficient to demonstrate occupation to the WA Government's satisfaction. Evidence of a combination of activities rather than a single activity is more likely to satisfy the WA Government's requirements, though each case will be determined on its own facts.

Further Information

For clarification of any of the information provided in this document, please contact the Land, Approvals and Native Title Unit of the Department of the Premier and Cabinet.

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The Department of the Premier and Cabinet's *Guidelines for the Provision of Connection Material* (February 2012)³⁴ also provide some guidance.

This Guide supersedes the 2008 Office of Native Title publication *Evidentiary requirements of occupation under s47A and 47B, Native Title Act*.

³⁴ <http://www.dpc.wa.gov.au/lantu>