

Consent Determinations

in South Australia:



A GUIDE TO PREPARING NATIVE TITLE REPORTS

**CROWN SOLICITOR'S OFFICE
NATIVE TITLE SECTION**



**Government
of South Australia**

The information in this Guide does not represent legal advice and may change from time to time.

© Government of South Australia (Crown Solicitor's Office) 2004
Reprint 2005 with updated font

PREAMBLE

The State of South Australia is committed to resolving native title by negotiation rather than litigation wherever possible.

This document "Consent Determinations in South Australia - A Guide to Preparing Native Title Reports" ("the Guide") explains the process by which the State Government will seek to resolve native title claims by agreement.

The Guide was developed in consultation with the Aboriginal Legal Rights Movement Inc., which plays a unique role in the native title process as the Native Title Representative Body for South Australia.

The State must be satisfied that a claim meets the legal requirements of the *Native Title Act (Cth) 1993* before it can agree to a consent determination. The Guide provides a summary of native title case law and explains the kind of evidence the State requires to assess claims.

The Government is keen to resolve native title claims in a way that respects the rights of all interest holders, including claimants, pastoralists, miners, and local government bodies. The Guide illustrates how all parties can participate in and benefit from the process. There can be no consent determination without the agreement of all the parties to a claim.

I am confident that the process set out in this Guide provides a means to achieving transparent, certain and fair native title outcomes for the benefit of all South Australians.



A handwritten signature in black ink, appearing to read "Mik Atkinson".

The Honourable Michael Atkinson, MP
Attorney-General

TABLE OF CONTENTS

| | |
|---------------------------------------------------------------------------------|-----------|
| PREAMBLE | ii |
| 1 - INTRODUCTION | 1 |
| INDIGENOUS LAND USE AGREEMENTS AND THE CONSENT DETERMINATION PROCESS 1 | |
| Indigenous Land Use Agreements..... | 1 |
| Consent Determinations..... | 1 |
| The Role of Other Parties in the Consent Determination Assessment Process | 3 |
| STRUCTURE OF THIS GUIDE | 4 |
| 2 - PARTIES TO A NATIVE TITLE DETERMINATION | 5 |
| THE NATIVE TITLE CLAIM GROUP | 5 |
| THE REPRESENTATIVE BODY | 5 |
| THE STATE | 5 |
| THE COMMONWEALTH | 6 |
| OTHER PARTIES..... | 6 |
| THE NATIONAL NATIVE TITLE TRIBUNAL | 6 |
| 3 - LEGAL BACKGROUND | 7 |
| INTRODUCTION | 7 |
| DEFINITION OF NATIVE TITLE | 8 |
| NATIVE TITLE RIGHTS AND INTERESTS | 8 |
| LAWS AND CUSTOMS..... | 9 |
| Traditional | 9 |
| Sovereignty | 9 |
| Normative System..... | 9 |
| Link between ‘Laws and Customs’ and ‘Society’ | 10 |
| INTERRUPTION | 11 |
| ADAPTATION AND CHANGE..... | 11 |
| CONNECTION | 12 |
| TENURE HISTORY | 13 |
| 4 - CRITERIA REQUIRED TO DEMONSTRATE NATIVE TITLE | 14 |
| THE SOCIETY OF THE NATIVE TITLE CLAIM GROUP | 14 |
| DESCENT FROM THE NATIVE TITLE HOLDERS AT THE TIME OF SOVEREIGNTY | 16 |
| CONTINUED EXISTENCE AND VITALITY OF TRADITIONAL LAWS AND CUSTOMS | 18 |
| CONNECTION TO LAND OR WATERS BY TRADITIONAL LAWS AND CUSTOMS..... | 20 |
| RIGHTS AND INTERESTS..... | 22 |
| 5 - PREPARING A NATIVE TITLE REPORT | 24 |
| INTRODUCTION | 24 |
| CONTENT OF THE NATIVE TITLE REPORT | 24 |
| Expert Opinion | 24 |
| Forms of Evidence | 25 |
| Disregarding extinguishment..... | 25 |
| Field Notes | 25 |
| Restricted Information | 25 |
| FORMAT OF THE NATIVE TITLE REPORT..... | 26 |
| WHAT HAPPENS TO THE NATIVE TITLE REPORT | 27 |

| | |
|---------------------------------------------------------------------------------------|-----------|
| 6 - THE ASSESSMENT OF NATIVE TITLE REPORTS..... | 28 |
| THE ASSESSMENT PROCESS | 28 |
| Introduction | 28 |
| The Process..... | 28 |
| THE APPOINTMENT OF ASSESSORS..... | 32 |
| The Assessors | 32 |
| Appointing Assessors..... | 32 |
| CONCLUDING THE ASSESSMENT | 33 |
| 7 - ARCHIVAL AND LIBRARY RESOURCES | 34 |
| APPENDIX 1..... | 39 |
| GUIDELINES FOR EXPERT WITNESSES IN PROCEEDINGS IN THE FEDERAL COURT OF AUSTRALIA..... | 39 |
| ENDNOTES | 42 |

1 - INTRODUCTION

Indigenous Land Use Agreements and the Consent Determination Process

The State of South Australia has a long history of seeking to resolve issues relating to Aboriginal people through discussion and negotiation, rather than confrontation and litigation. South Australia was the first jurisdiction in Australia to implement land rights legislation (the *Aboriginal Lands Trust Act* in 1966). In addition, in the early 1980s, before native title was legally recognised, the Government reached agreement with Aboriginal groups for the transfer to them of inalienable freehold title over the Anangu Pitjantjatjara and Maralinga Tjarutja lands in the northwest of South Australia. These lands cover approximately 20% of the State.

The State is taking a unique, state-wide approach to negotiating native title claims. So far this initiative has focused on reaching Indigenous Land Use Agreements, which can be concluded without having to pass through the Federal Court system. Providing a framework for reaching consent determinations represents the next step. A consent determination adds the Federal Court's recognition, in law, of pre-existing native title rights and interests to the agreements between the State, claimants and other parties.

Indigenous Land Use Agreements

An *Indigenous Land Use Agreement* (ILUA) is an agreement under the *Native Title Act (Cth) 1993* (NTA) about how a body of land or water will be used or managed. It is a legally binding agreement between the parties that is registered with the National Native Title Tribunal. Resolution of native title issues can be achieved through ILUAs alone, or through a combination of ILUAs and consent determinations.

Through ILUA negotiations all parties can reach lasting and enforceable agreements about the rights enjoyed by them and their successors over land and waters subject to native title claims. ILUAs can achieve:

- certainty in use and management of South Australia's land and water resources;
- cultural, social, economic and environmental benefits for the State's citizens; and
- practical integration of Aboriginal and non-Aboriginal land management systems.

State-wide ILUA negotiations are a way of resolving key native title issues between native title claimants and the Government, pastoralists, the mining industry and others with an interest in land and waters. Those agreed positions can then be applied in 'local level' ILUAs. This minimises the considerable cost, time and stress associated with native title claim litigation and creates a positive climate for future relationships between all groups.

Consent Determinations

In addition to an ILUA, claimants may want to increase the social and legal recognition of their association to land and waters by obtaining a Federal Court determination of their rights and interests. A Federal Court determination sets out the rights and interests enjoyed by the native title claim group and is valid as against the whole world.

In principle, the State is prepared to assess the appropriateness of a consent determination in all native title claims. For such assessment to be considered, a native title claim group must fulfil the following basic criteria:

- The group is willing and able to engage in the process;
- The group is stable and represented by a functioning native title management committee;
- The group has a current connection with the claim land; and
- There are no contested overlapping claims.¹

When negotiating a consent determination, parties to the native title claim must reach agreement on the nature and extent of native title rights and interests in all or part of the claim area. If that is achieved they can ask the Federal Court to make a determination of those rights and interests with the consent of all parties to the claim, i.e. a *consent determination*.

Prior to approaching the Court for a determination of native title the State, as the principal respondent, has a responsibility to ensure that the claim fulfils the legal requirements of the NTA.

For this purpose, claimants will need to provide the State with evidentiary material in the form of one or more reports, possibly with other material. Because the aim of those reports is to demonstrate the continued existence of native title, they will be referred to as *Native Title Reports*.

This document provides guidance about the issues that Native Title Reports must address, the legal context in which the State will be assessing them and the assessment process the State will adopt.

The State acknowledges that the preparation of Native Title Reports can be difficult, time-consuming and costly for both the claimants and their representatives. The effort expended in their production is likely to be substantial, but still considerably less than that required for preparing and presenting a claim for trial.

Obtaining, assessing and presenting evidence in litigated native title claims can be protracted and very expensive. Legal and other professional staff need to be engaged for extended periods. Large groups of people need to be housed, fed and moved across often remote parts of the country, all of which can be a considerable logistical and financial exercise. There are many variables that can lead to delays and complications.

Litigation places substantial stress on individuals subject to cross-examination and on entire communities. The structure of the adversarial system tends to polarise positions during trial and that can adversely affect relationships long after the actual trial has ended. In the end, there is no guarantee that the result will be satisfactory; appeals to higher Courts are still very common in native title cases, adding further cost. Even where litigation results in a determination of native title, parties will still need to negotiate about the practical exercise of co-existing rights.

A High Court judge has questioned whether litigation provides the appropriate framework for resolving native title issues² and a Federal Court judge described the problems of appropriately ascertaining facts in native title cases when using the adversarial system.³

The State will ensure that the assessment of evidence for a consent determination is rigorous and that the evidence meets the requirements of the NTA. There will, however, be no cross-

examination and the overall costs, both financial and human, for all parties are likely to be substantially lower than those of litigation.

The fact that the State engages in the assessment process is no guarantee that a consent determination will be the end result. The assessment may show that the claim does not fulfil the requirements of the NTA.

Although the State may be prepared to consent to a determination, other parties may not. A consent determination, by its very nature, requires the consent of *all* parties. Even if all parties support a determination, the final decision lies with the Federal Court, which will need to be convinced that it is within its power to make the orders sought.⁴

If it is not possible for all parties to agree to a consent determination, they may still be able to negotiate other outcomes in the form of ILUAs or other arrangements. Alternatively, any of the parties (the claimants, the State or another respondent) may pursue a litigated outcome. The process set out in this Guide has been created with the clear intention to provide an alternative to litigation wherever possible.

The Role of Other Parties in the Consent Determination Assessment Process

This Guide focuses on the State's processes. It sets out what evidence the State requires from claimants and how it will assess that evidence. The State cannot and does not attempt to tell other respondent parties what position they should take on native title claims. The State's process is transparent so that all parties can understand the criteria that the State will be using to assess the merits of any given claim.

Throughout the process other parties have the opportunity to:

- be informed about the progress of the assessment;
- discuss their involvement in the assessment process;
- put forward any relevant information that they may have and would like the State to consider in its assessment process; and
- negotiate with the claimants about accessing the Native Title Report and arrange for their own assessment.

Other parties may choose to wait until the State releases its Position Paper before considering their position. This could save them considerable time and money. If the State supports a consent determination, the Position Paper will provide all parties with a clear understanding of why the State has reached that conclusion. If the State does not support a consent determination, it will inform the other parties of this decision.

The State is confident that its assessment principles set out in this Guide reflect the current legal requirements for a determination of native title, but it understands that other parties may wish to make their own assessment. This Guide does not predict how this would happen. The State recognises that all parties should have time to consider and explore their position on any claim that has been through the State's assessment process. A consent determination cannot be finalised unless all parties to the claim reach agreement.

Structure of this Guide

This Guide sets out the process by which the State satisfies itself that it can consent to a determination of native title. The Guide will be particularly relevant to professionals preparing Native Title Reports, but claimants and others affected by a native title claim will also benefit from reading this document before seeking a consent determination. Potential parties to native title claims are detailed in **Part 2 - Parties to a Native Title Determination**.

The facts used to substantiate native title need to be assessed in the particular legal framework of the NTA and related judicial interpretations. To help researchers understand that context, **Part 3 - Legal Background** discusses the current legal requirements for native title as interpreted by the South Australian Crown Solicitor's Office (CSO).

This legal discussion provides the general context in which Native Title Reports will be considered by the CSO. It isolates certain key concepts, commonly used by social scientists that have particular legal definitions.

Following the legal background, the Guide addresses the actual preparation of Native Title Reports. **Part 4 - Criteria Required to Demonstrate Native Title** sets out the five key criteria the State will consider when assessing the evidence provided in the reports. The questions asked under each heading are indicative of ways in which these criteria might be addressed. They are not necessarily comprehensive and researchers may well be able to address the issues in other ways.

Part 5 - Preparing a Native Title Report - deals with the content and format of Native Title Reports. It comments on the status of researchers' field notes and restricted cultural information and outlines the format in which the State would like information to be presented.

Part 6 - The Assessment of Native Title Reports explains how the information will be assessed.

Part 7 - Archival and Library Resources provides contact details for a number of research institutions and brief descriptions of their relevant holdings.

The information in this Guide does not represent legal advice. The facts of each claim will have to be considered on their own terms and each party will need to obtain their own legal advice. The NTA is regularly subject to new interpretation by the Courts and as a result the requirements set out in this Guide may change from time to time.

2 - PARTIES TO A NATIVE TITLE DETERMINATION

The Native Title Claim Group

The *native title claim group* are all those Aboriginal people on whose behalf a native title claim is brought. The NTA requires the native title claim group to include *all* those persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed. The *named applicants* are those individuals who are bringing the claim on behalf of the native title claim group. Named applicants must be duly authorised by the native title claim group.⁵

The Courts have made clear that the onus of proof in native title claims rests largely with the native title claim group, which must establish that it can validly claim native title. That is why the native title claim group has the initial burden of preparing a Native Title Report.

The Representative Body

The Aboriginal Legal Rights Movement Inc. (ALRM) is the Native Title Representative Body for the whole of South Australia, recognised by the Commonwealth Minister for Aboriginal and Torres Strait Islander Affairs pursuant to section 203AD of the NTA. The ALRM has certain functions under the NTA, including to provide facilitation and assistance to native title claimants and to certify claims for registration by the National Native Title Tribunal.⁶ The ALRM has an overarching responsibility to give priority to the protection of the interests of native title holders.⁷

The ALRM does not act as the legal representative for all claim groups, nor has it certified all claims, but it is entitled to be a party to all native title matters in the State.⁸

The State

The State is automatically a respondent to any native title claim affecting land or waters in the State.⁹ Due to this position, and because of its level of resources and expertise, the Court and other respondents frequently rely on the State to provide support in the management of claims and the testing of evidence. The Native Title Section of the Crown Solicitor's Office (CSO) is the agency within Government that deals with the day-to-day management of native title claims and the implications of the NTA in South Australia.

The State must keep the interests of the entire community in mind when dealing with native title claims and ensure that, by its assessment, the criteria of the NTA have been met. The process for resolving native title claims set out in this document was developed with this responsibility in mind. The primary challenge for the State, addressed in this Guide, is the need to assess evidence in a manner that is rigorous and transparent, but also respectful of the cultural and personal information that claimants need to provide.

The Commonwealth

The Commonwealth has a dual role in the native title system; it administers the NTA and it is party to some claims. It may at any time intervene in a proceeding under the NTA.¹⁰ The Commonwealth has expressed a clear policy of seeking negotiated outcomes in preference to litigation. For consent determinations the Commonwealth wants to be assured:

- that the determination creates certainty about the native title rights recognised;
- that those rights are allowed by the common law;
- that the determination complies with the requirements of the NTA; and
- that the process by which the determination was made is transparent.¹¹

Other Parties

There are potentially many respondent parties, including local governments, pastoralists, farmers, fishers, recreational users and any others with interests in the land or waters claimed. These persons do not automatically become parties to a native title claim; they must apply to the Court and show an interest that would be affected by a determination.¹²

Industry peak bodies such as the South Australian Farmers Federation (SAFF), South Australian Chamber of Mines and Energy (SACOME), Local Government Association (LGA), South Australian Fishing Industries Council (SAFIC) and the Seafood Council of South Australia (SCSA) participate with the ALRM and the State in the state-wide ILUA process that deals with overarching native title issues. Most of these peak bodies do not become parties to individual claims, but their constituents may.

The consent of all the individual parties to a claim is required to obtain a consent determination from the Court. Some respondent parties may accept the State's assessment of evidentiary material when considering whether they should consent to a determination or not. Others may wish to consider all or some of the material themselves. How this is done will need to be negotiated with the claim group in any given case.

The National Native Title Tribunal

The National Native Title Tribunal (NNTT) is not strictly speaking a party to any native title claim. It is an independent statutory body, experienced in supporting native title negotiations. It is likely that most negotiations for a consent determination will occur when a native title claim has been formally referred to the NNTT by the Federal Court for mediation under the NTA. To assist the NNTT in the exercise of its statutory responsibilities this Guide will be made available by the State to the NNTT and the parties to the particular mediations. In managing the mediation process the NNTT will consider the Guide and the views of the other parties.

3 - LEGAL BACKGROUND

Introduction

Section 223(1) of the *Native Title Act 1993 (Cth)* (NTA) requires that in order to gain recognition and protection of native title rights and interests through a determination of native title, Aboriginal people must show that they have maintained a 'connection' to the land or waters over which those native title rights and interests are claimed. It also requires that the rights and interests claimed are recognised by the common law of Australia. This means that a consent determination can only be made over an area of land where native title has not been extinguished by previous dealings in land.

The decisions of the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria*¹³ (*Yorta Yorta*), and *Western Australia v Ward*¹⁴ (*Ward HC*) and the Full Federal Court in *Western Australia v Ward*¹⁵ (*Ward FC*) and *De Rose v South Australia*¹⁶ (*De Rose FC*) provide guidance as to what is required in order to show the necessary connection and that it has been maintained.

In summary, the Court will need to be satisfied of the following:

1. That there is a recognisable group or *society* that presently recognises and observes *traditional* laws and customs in respect of particular land or waters;
2. That the group or society has continued to exist as a group acknowledging and observing those laws and customs since *sovereignty*;
3. That the observance of those traditional laws and customs by that group or society has continued *substantially uninterrupted* since sovereignty;
4. That, by those laws and customs, the claimants have a *connection* in relation to the land or waters claimed;
5. That the *native title rights and interests* claimed are possessed under those traditional laws and customs.

The italicised terms and phrases in the above five points have been specifically interpreted by the Courts in the native title context. A proper understanding of them is crucial to the preparation of Native Title Reports. This part gives a brief overview of the principal legal discussions of those terms. For a full understanding, practitioners preparing Native Title Reports are advised to consult the relevant judgments.

The Federal Court will also need to be satisfied that native title still exists over the area of the determination before making any order. For this reason, the compilation and assessment of the tenure history of the land claimed is important and is discussed at the end of this chapter.

Definition of Native Title

The term 'native title' is defined in section 223(1) of the NTA as follows:

- s223(1) *“the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:*
- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and*
 - (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and*
 - (c) the rights and interests are recognised by the common law of Australia.”*

Native Title Rights and Interests

Native title rights and interests are the rights and interests possessed under the traditional laws and customs of Aboriginal people or Torres Strait Islanders. Native title rights and interests may usefully be described as a 'bundle of rights'. This means that there may be more than one right or interest and that there may be several *kinds* of rights and interests possessed under traditional law and custom.¹⁷

In order to be recognisable by the common law, native title rights must be rights and interests that relate to land or waters. These are likely to amount to rights to use and control use of land or waters. To the extent that claims for the right to maintain and protect 'cultural knowledge' go beyond the right to deny or control access to land or waters, they are not rights in relation to land or waters.¹⁸

In making a determination of native title the Court must comply with the requirements of section 225 of the NTA. Section 225 provides:

- s225 *“A determination of native title is a determination whether or not native title exists in relation to a particular area (the **determination area**) of land or waters and, if it does exist, a determination of:*
- (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and*
 - (b) the nature and extent of the native title rights and interests in relation to the determination area; and*
 - (c) the nature and extent of any other interests in relation to the determination area; and*
 - (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and*
 - (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease - whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.”*

In *Ward HC* the Court observed that, in order to satisfy section 225(b), it is preferable to express claimed rights by reference to activities that may be conducted as of right on or in relation to land and waters, rather than by blanket expressions.¹⁹ Unless the rights claimed amount to exclusive use of the land there is no point in using phrases such as 'possession, occupation, use and

enjoyment' to describe the rights. Rights and interests possessed under traditional laws or customs must be separately identified in a claim for native title.²⁰

Laws and Customs

Native title rights and interests must be possessed under traditional laws and customs acknowledged and observed by the claimant group.

Traditional

'Traditional' laws and customs are laws and customs that find their origin in laws and customs that existed at the time of sovereignty.²¹ Rights or interests that were created after sovereignty are not 'traditional' as they cannot be said to find their root in pre-sovereignty laws and customs.²²

Similarly, where there has been dispersal of a society that formerly acknowledged and observed laws and customs and the content of those laws and customs is later adopted by a new society, those laws and customs cannot be described as traditional. This is because they are not rooted in pre-sovereignty laws and customs, but rather in those of the new society.

It is arguable that the laws and customs of a group may be transmitted to another group without losing their traditional character provided that such transmission is permitted under those laws and customs. Comments on the issue of transmission have been made in at least two decisions of the Federal Court since the decision of the High Court in *Yorta Yorta*.²³ However, the issue has yet to be clearly settled.

Sovereignty

Sovereignty was the act whereby the British Government claimed ownership of the different parts of Australia. There were several such acts across Australia, but the relevant dates for South Australia are as follows:

- 1788 for the area from the eastern border to 135° of east longitude.
- 1825 for the area from 135° of east longitude to the western border.

The historical record or oral histories for Aboriginal people in South Australia will never reach back to those dates. In some areas there was little or no contact between Europeans and Aboriginal people until the late 19th and early 20th centuries. The State will review the available material in any given case and make appropriate inferences as to the relevant society at the time of sovereignty.

Normative System

The High Court in *Yorta Yorta* stated that the laws and customs that give rise to native title rights and interests "must be laws and customs having a normative content and deriving, therefore, from a body of norms or normative system".²⁴ In other words, the laws and customs must constitute *rules* observed and acknowledged by the claimants (within a society) rather than mere "observable patterns of behaviour".²⁵ The Court noted that this does not necessarily require the system in question to be a system of laws with all the characteristics of European law; native title rights and interests will often reflect a different concept of property and belonging.²⁶ Nor is there a need to distinguish between what is a traditional 'law' and what is a traditional 'custom'.²⁷ Federal Court decisions have since applied the notion of the 'normative system' to evidence in other cases.

In *Daniel v Western Australia*²⁸ (*Daniel*), for example, the traditional laws and customs were held to be normative in character because they were fundamental to the existence of the applicants as a society. The claimants' observable behaviours were "more than social habits" and they had the

quality of being a social rule “in that some at least (and indeed a considerable number) of the first applicant’s group look upon the behaviour in question as a general standard to be followed by the group as a whole”.²⁹

Link between ‘Laws and Customs’ and ‘Society’

The High Court in *Yorta Yorta* recognised that laws and customs “do not exist in a vacuum” and are “socially derivative and non-autonomous”. As such, the laws and customs must be acknowledged and observed by an identifiable society. A “society” is “a body of persons united in and by its acknowledgement and observance of a body of law and customs”.³⁰

In *De Rose FC*, the Full Federal Court said that to satisfy this requirement the claimants themselves did not need to form a discrete “social, communal or political organisation” on or near the claim area. It was sufficient that the claimants were recognised within a wider society, of which they were a part, as having rights and interests in relation to the claim area according to the traditional laws and customs acknowledged and observed by that society. In other words, the claim group may not always comprise the entire society from which the traditional laws and customs derive; it may be constituted of only some members of that society.³¹

The High Court in *Yorta Yorta* observed that the reference in section 223(1)(a) of the NTA to rights or interests in land or waters “being *possessed* under traditional laws acknowledged and traditional customs observed by the peoples concerned”, requires that “the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had continuous existence and vitality since sovereignty”.³²

Thus, in order to show the necessary connection, the present group or society will need to show that it is descended from the group or society that was in existence at the time of sovereignty. This does not necessarily mean that each individual in a claim group must be biologically descended from a member of the group or society as it existed at sovereignty. Indeed, as the Full Federal Court in *De Rose FC* pointed out, there is nothing in the definition of native title in section 223(1) of the NTA that incorporates a requirement of biological descent.³³

According to the High Court in *Yorta Yorta*:

“If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist. And any later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title.”³⁴

If the society which once observed the traditional laws and customs ceases to exist as a group which acknowledges and observes those laws and customs (i.e. as a society), even where the content of those laws and customs is passed on from individual to individual, the rights and interests to which those laws and customs gave rise will no longer exist. Mere knowledge of the content of the laws and customs, of itself, is unlikely to be sufficient evidence of the existence of a normative system.

Interruption

In order that the laws and customs observed by a group can properly be described as traditional, the acknowledgement and observance of those laws and customs must have continued *substantially uninterrupted* since sovereignty.³⁵

In *Yorta Yorta*, the Court described the qualification “substantially” as “not unimportant” as it recognises the effects of European settlement upon Aboriginal societies.³⁶ It also recognises the fact that uninterrupted acknowledgement and observance of oral traditions over the many years since sovereignty will be inherently difficult to prove.³⁷

The Court in *Yorta Yorta* provided little guidance to assist in determining the significance of any interruption in the enjoyment or exercise of native title rights and interests. It seems that the fundamental question is whether the laws and customs are capable of being characterised as traditional.³⁸ However, the Court did note that the relevant statutory questions are directed to the *possession* of rights and interests rather than their exercise.³⁹ In this sense, the lack of physical use or lack of evidence of observance of laws and customs for a time may not necessarily mean that the required connection has been broken.

In *Daniel*, Justice RD Nicholson considered the situation where, as a result of various historical circumstances, the claimants did not live on the claim area. In determining the significance of this, Nicholson J observed that it was important to bear in mind “the reasons for that fact, whether attempts had been made to overcome it and whether it has in fact led to a loss of connection with the claim area”.⁴⁰ Nicholson J held on the evidence that the fact that none of the claimants were resident in the claim area did not mean that they had lost their connection to the land.⁴¹

Adaptation and Change

The High Court in *Yorta Yorta* found that some adaptation or change to traditional laws and customs would not necessarily be fatal to a native title claim.⁴² The Court went on to say that while there is no “single bright line test” for determining the significance of any change or adaptation, the key question is again whether the law or custom can be characterised as traditional.⁴³

In *Mabo [No.2]* Justice Brennan commented that:

“...in time the laws and customs of any people will change and the rights and interests of the members of the people among themselves will change too. But so long as the people remain as an identifiable community, the members of whom are identified by one another as members of that community living under its laws and customs, the communal native title survives to be enjoyed by the members according to the rights and interests to which they are respectively entitled under the traditionally based laws and customs, *as currently acknowledged and observed*” (emphasis added).⁴⁴

The High Court in *Yanner v Eaton*⁴⁵ held that the use of a dinghy powered by an outboard motor to hunt crocodiles, although not a method of hunting known to the appellant's tribe before contact with Europeans, was not inconsistent with the traditional hunting laws and customs of the community to which the appellant belonged.

In *Daniel*, Justice RD Nicholson found that, where the claimants were unable to continue their traditional initiation practice due to the effects of European settlement, a change in the initiation practices of the group represented “their desire to observe traditional law and custom in a form of initiation rather than a disjunctive break in their observance of traditionality”.⁴⁶

In *De Rose FC*, the Full Federal Court found that the rules for determining who holds traditional rights and interests in an area could adapt without impairing the native title claim, as long as the adaptation was of a kind contemplated by the traditional laws and customs of the relevant society.⁴⁷

Connection

Connection to the land or waters claimed must have its source in the traditional laws and customs acknowledged and observed by the claimants. A current connection in relation to the land or waters is required. However, the phrase ‘traditional laws and customs’ incorporates notions of continuity of connection from the time of sovereignty.

It is not necessary to prove continued use of land or waters to establish connection.⁴⁸ The Full Federal Court in *Ward FC* said:

“Actual physical presence upon the land in pursuit of traditional rights to live and forage there, and for the performance of traditional ceremonies and customs, would provide clear evidence of the maintenance of a connection with the land. However, the spiritual connection, and the performance of responsibility for the land can be maintained even where physical presence has ceased, either because the indigenous people have been hunted off the land, or because their numbers have become so thinned that it is impracticable to visit the area. The connection can be maintained by the continued acknowledgment of traditional laws, and by the observance of traditional customs. Acknowledgment and observance may be established by evidence that traditional practices and ceremonies are maintained by the community, insofar as that is possible, off the land, and that ritual knowledge including knowledge of the Dreamings which underlie the traditional laws and customs, continue [sic] to be maintained and passed down from generation to generation. Evidence of present members of the community, which demonstrates a knowledge of the boundaries to their traditional lands, in itself provides evidence of continuing connection through adherence to their traditional laws and customs.”⁴⁹

When the matter was appealed, the High Court said in relation to connection:

“[T]he absence of evidence of some recent use of the land or waters does not of itself require the conclusion that there can be no relevant connection. Whether there is a relevant connection depends, in the first instance, upon the content of traditional law and custom and, in the second, upon what is meant by “connection” by those laws and customs.”⁵⁰

In *De Rose FC*, the Full Federal Court similarly held that the appropriate standard to judge continuing connection was that imposed by the traditional laws and customs themselves.⁵¹

These cases demonstrate that the Courts will have regard to the content of the relevant traditional law and custom in determining whether the claimants have maintained the requisite connection to

the land or waters. Thus, it will be vital to the success of any claim that the content of the traditional law and custom relied upon to establish the claim is clearly identified.

Tenure History

The Federal Court can only make a consent determination order if native title still exists over the whole area covered by the consent determination. Assessing whether native title has been extinguished by previous dealings in land is time consuming, expensive and has the potential to be controversial. There have been a number of High Court decisions that consider issues of extinguishment and co-existence of rights and interests, notably *Wik People v Queensland*⁵² (*Wik*), *Commonwealth v Yarmirr*⁵³ (*Croker*), *Wilson v Anderson*⁵⁴, and *Ward*.

The State will need to compile and assess a comprehensive tenure history over the relevant area of land before it can support a consent determination. If other parties have tenure information relevant to an area of land being considered for a consent determination (e.g. a common law lease), they can provide this to the State via the NNTT at any stage.

Undertaking tenure searches is a time and labour intensive activity. Relevant factors include the size of the area, whether a tenure history has already been compiled for the area or parts of it, configuration of the land in the past, quality and completeness of the tenure information and whether there are discrepancies between the actual layout of the land now and what was surveyed and recorded on public maps in the past. The point at which the State will compile and assess an extensive tenure history will depend on State resources and the other factors discussed above. In some situations the State may also compile a current tenure search over the relevant area early in negotiations to give parties a general idea of the tenure status of the land.

The State will automatically provide the claimants with the tenure history as soon as it is prepared. The State will also provide it to any parties who have indicated that they wish to see it. Some parties may choose to evaluate the tenure of the relevant area themselves. Other parties may choose to rely on the State's position about extinguishments, which will be outlined in the State's Position Paper (see part 6 of this Guide).

4 - CRITERIA REQUIRED TO DEMONSTRATE NATIVE TITLE

The Society of the Native Title Claim Group

1. **The Native Title Report should clearly identify the native title claim group and its society.**⁵⁵

Legal Background

- It must be demonstrated that the native title claim group is a society, or part of a society, united in and by its acknowledgement and observance of a body of law and custom.⁵⁶
- When the society whose laws and customs existed at sovereignty ceases to exist, the rights and interests in land to which these laws and customs gave rise cease to exist.⁵⁷
- Laws and customs and the society that acknowledges and observes them are inextricably interlinked.⁵⁸

Explanatory Note 1

The evidence provided in the Native Title Report should enable an understanding of how the native title claim group views and constructs its identity and of the principles that underpin its membership, including those principles of traditional law and custom that may make the group part of a wider society. It must be clear that both historical and contemporary evidence has been considered. Should the native title claim group be dispersed, point 1.6 is of particular importance. If appropriate, supporting information from neighbouring groups about the extent of the native title claim group's country would be highly desirable.

Group Identification

- 1.1. In what ways do the claimants describe themselves as a group? Give examples of how such descriptions are used when individuals describe themselves as well as other members of the group. What are the focuses of group identification?
 - 1.1.1. What kind of focus is there on language or dialect?
 - 1.1.2. What kind of focus is there on connection to country?
 - 1.1.3. What is the nature of connections among the group and are they expressed in kinship terms?
 - 1.1.4. Do the claimants describe themselves as a group based on spiritual and ceremonial connections? If so provide illustrations.
 - 1.1.5. What are the principles of entitlement to rights and interests held by the group?
- 1.2. Is the claimant group a sub-group of a wider society? Does it contain any sub-groups? Noting the criteria mentioned in the points above, describe the bases upon which sub-groups (if any) are identified?

- 1.3. Provide a critique of evidence from archival sources and the historic and ethnographic record regarding group identification, taking into account the earliest written archival and historical records relevant to this claim. Has the identity of the group been affected by a particular historical process? If there are differences between historic identifications and the view the claimants have of themselves, discuss the possible reasons for the differences.

Laws and Customs

- 1.4. What are the laws and customs that define group membership? Some examples are descent, birth on country, adoption, and spiritual and geographic knowledge of country.
- 1.5. How are the laws and customs expressed and acted on amongst the claimants today? How is membership acknowledged, maintained and transmitted? If some of the examples in 1.4. are considered to be more important than others, how are such differences expressed by the claimants?
- 1.6. If the claimants are presently geographically dispersed, how have they continued to operate as a society observing and acknowledging a system of traditional laws and customs?

Extent of Country

- 1.7. Map the extent of country of the native title claim group as a whole.
 - 1.7.1. Identify the relationship between country traditionally associated with this group and the extent of the native title claim.
 - 1.7.2. Identify any areas that are of particular significance to the current exercise of rights and interests.
 - 1.7.3. If a particular sub-group asserts specific connection, describe the relationship between the wider-group's and the sub-group's country.

Neighbouring Groups

- 1.8. Is there support for the identification of the native title claim group and the extent of their country from neighbouring Aboriginal groups? Discuss.
- 1.9. In the event of accommodated overlaps with other claims, describe the social and cultural relationship between the two (or various) native title claim groups and the principles of accommodation and interaction.

Descent from the Native Title Holders at the Time of Sovereignty

2. The Native Title Report should establish the native title claim group as the descendants or successors of the native title holders for the claim area at the time of sovereignty or provide material from which inferences can be drawn to establish them as such.⁵⁹

Legal Background

- A substantial degree of ancestral connection between the original native title holders and the present community is necessary to enable the native title claim group to be identified as one acknowledging and observing the traditional laws and customs under which the native title rights were possessed at sovereignty. This does not preclude adoption or other traditional forms of social incorporation.⁶⁰

Explanatory Note 2

Genealogical material provided as part of the Native Title Report should be sufficiently detailed to show links back to the group of native title holders at the time of sovereignty or allow reasonable inferences of such links. It does not need to be exhaustive, but should provide a general impression of the native title claim group's genealogical history, including its historic association with the claim area, and highlight any patterns identified by the researcher. The author of the Native Title Report should refer to the genealogies when discussing changes and continuities in the principles and practice of kinship, individual and group relationships to land or other topics that could be usefully illustrated by examples of family histories.

A detailed discussion of tribal boundary maps or other ethnographic information is particularly important where that information does not, on the face of it, support the claim.

Genealogies and Kinship

- 2.1. Set out genealogical details of the group and the methodology used when preparing the material. Ideally the genealogies will include the following information:
 - 2.1.1. Personal names (English, vernacular, nicknames);
 - 2.1.2. Sex; and
 - 2.1.3. The places and dates of birth, death, burial and other defining events.
- 2.2. Describe the structure and explain the terminology that characterise the kinship system of the native title claim group. How do claimants attribute the kinship system and its operation to traditional laws and customs?
- 2.3. Explain what constitutes the claimants' definition of family, giving details of kinship terminology and its application.

2.4. Note and comment on any relevant archival genealogical or family history material. How does this information compare with the claimants' own information about family members and the principles of kinship? If there are differences between the two sources of information, provide possible explanations.*

Historical Evidence of the Group's Association to Land

2.5. Was the claim area always associated with this group in the ethnographic record? Comment in detail on 'tribal boundary' maps (Davis, Elkin, Strehlow, Tindale and so on) and any other evidence from the historical ethnographic record regarding the group's association to land. How does that information compare with the claimants' claim boundary? If there are differences, provide possible explanations.

* The State is conscious of the possible sensitivity of this kind of information and will treat it appropriately.

Continued Existence and Vitality of Traditional Laws and Customs

3. While keeping the limitations of the ethnographic and historical record in mind, the Native Title Report should show that, for the society of the native title claim group, the traditional laws and customs have had “continued existence and vitality” and their observance has been “substantially uninterrupted” since sovereignty.⁶¹

Legal Background

- The traditional laws and customs must constitute a system that has been passed from generation to generation of the claimants’ society.⁶²
- For the purposes of this inquiry it is not necessary to distinguish between law and custom.⁶³
- Laws and customs are only ‘traditional’ if their content can be traced to the laws and customs of the Aboriginal society that existed at sovereignty.⁶⁴
- There must be a link between the laws and customs as they are now acknowledged and observed and those acknowledged and observed at sovereignty. It is necessary to consider both past and present acknowledgment and observance in order to determine whether the current laws and customs can be properly described as traditional.⁶⁵
- Some change or adaptation to traditional laws and customs will not be fatal provided it can be established that the laws and customs now acknowledged and observed are rooted in pre-sovereignty law and custom. Traditional laws and customs, modified in response to changed circumstances, may still constitute the basis of native title, but new laws and customs cannot.⁶⁶

Explanatory Note 3

Within the limitations of the historical and ethnographic record, the evidence provided in the Native Title Report should particularly address the issues of continuity and adaptation in the traditional laws and customs of the native title claim group from sovereignty until the present.

Laws and Customs

- 3.1. Note and comment on information from the historical and ethnographic record and the claimants' oral histories regarding laws and customs that define this particular society.
 - 3.1.1. If there are any differences between the various sources of information, set those out clearly and provide possible explanations for them.
 - 3.1.2. How does the evidence from these sources illustrate that the laws and customs have remained substantially uninterrupted since sovereignty?
- 3.2. Explore the nature and possible causes of any changes the system of laws and customs may have experienced as a result of the native title claim group's contact history. Comment on the nature of the difference (if any) between historically recorded laws and customs and the current practice among the claimants.
- 3.3. How does the native title claim group ensure that its system of laws and customs is maintained and transmitted?

Connection to Land or Waters by Traditional Laws and Customs

4. The Native Title Report should show that, by its laws and customs, the native title claim group has a connection to the land or waters claimed.⁶⁷

Legal Background

- The manner in which the land or waters are used may reveal something about the kind of connection that exists, under traditional law and custom, between Aboriginal peoples and the land and waters claimed.⁶⁸
- The absence of evidence of some recent use of the land or waters does not of itself require the conclusion that there can be no relevant connection.⁶⁹
- The courts have not yet determined the precise role of 'spiritual connection' to establishing native title, but it is clearly recognised as an important factor.⁷⁰
- It is the traditional laws and customs themselves that determine whether the non-observance of some laws and customs is fatal to the question of connection.⁷¹

Explanatory Note 4

The Native Title Report should clarify the principles of establishing association to land and waters, and how land ownership is understood and practiced by the native title claim group. The discussion should cover both past and present.

Connection, Rights and Responsibilities

- 4.1. Discuss the mechanisms by which relationships to land and waters claimed are established. Some examples are descent, birth on country, burial of ancestors, ceremonial activity, marriage, adoption, and spiritual and geographic knowledge of country.
- 4.2. How are ownership of and responsibility for the claim land expressed amongst the claimants? Compare the claimants' actions and explanations in light of the ethnographic record. For example, comment on:
 - 4.2.1. Knowledge and experience of the land;
 - 4.2.2. Rights to use the land or sites and areas within it;
 - 4.2.3. Responsibilities for care and maintenance of the land or sites and areas within it;
 - 4.2.4. The role of senior men and women in discussion and decision-making concerning the land or sites and areas within it;
 - 4.2.5. Spiritual dimensions of the land; and

- 4.2.6. Transmission of rights and responsibilities in relation to the land or sites and areas within it.
- 4.3. Discuss how traditional concepts of land ownership and responsibility have been adapted or modified following contact and the way in which those traditional concepts have been maintained.
- 4.4. Outline events since contact that may have impacted upon physical connection. Describe how connection has been maintained in such circumstances.
- 4.5. Discuss the spiritual aspects and significance of particular sites and areas of land. A map of sites and areas of significance may be useful.*
- 4.6. How was the knowledge and significance of particular sites and areas of the claim land transmitted in the past? Discuss what claimants say about the transmission of such cultural information today.
- 4.7. Are there any restrictions on the receipt or transmission of knowledge based on gender, age, group identification, situation or location?

*Gender restrictions may apply to this and a number of other topics raised in this document. The State is conscious of this and can ensure that any restricted material provided by the claimants is treated appropriately.

Rights and Interests

5. The Native Title Report should detail the native title claim group's rights and interests in the claim area and demonstrate how they arise from traditional laws and customs.⁷²

Legal Background

- It is necessary to state the *nature* and *extent* of the native title rights and interests in relation to the land and waters in the determination area.⁷³
- The relevant rights and interests must be separately identified.⁷⁴
- It is preferable to express the claimed rights by reference to activities that may be conducted, as of right, on or in relation to land and waters rather than by blanket expressions such as 'possession, occupation, use and enjoyment'.⁷⁵
- The metaphor 'bundle of rights' is useful in two respects. It draws attention first to the fact that there may be more than one right or interest and secondly to the fact that there may be several kinds of rights and interests in relation to land that exist under traditional law and custom.⁷⁶
- While evidence of particular rights and interests may assist in explaining the operation of traditional laws and customs, only rights and interests in relation to land or waters can be recognised.⁷⁷

Explanatory Note 5

The Native Title Report must readily identify the rights and interests in the claim area and their origin in traditional laws and customs. The report should include a summary table that sets out the rights and interests (some examples are the right to hunt, the right to gather flora, the right to conduct ceremonies, and so on), the areas of land where they are enjoyed, and any other observations that may be relevant.

Rights and Interests

- 5.1. What rights and interests does the native title claim group assert in the claim area? List them separately.
- 5.2. What evidence is there from the historic ethnographic literature and archival material regarding rights and interests enjoyed by the native title claim group and their ancestors over the claim area?
- 5.3. How does the native title claim group explain how their rights and interests in the claim area have arisen?
- 5.4. Discuss the current exercise of rights, interests and responsibilities in the claim area.

- 5.5. Discuss how traditional laws and customs regulate the exercise of rights, interests and responsibilities.
- 5.6. Are particular rights, interests and responsibilities associated with particular parts of the claim area?
- 5.7. If applicable, discuss how the responsibilities for land can be maintained from outside the claim area. Give specific examples.
- 5.8. In the event of accommodated overlaps with other claims, discuss how the rights and interests of the groups co-exist within the area of the overlap.

5 - PREPARING A NATIVE TITLE REPORT

Introduction

Experts preparing reports for litigation before the Federal Court are guided by the Federal Court practice direction for expert witnesses.⁷⁸ The Court has recently provided further guidance of the principles that apply to the preparation and presentation of expert reports in native title cases.⁷⁹

Native Title Reports prepared under the process outlined here are specifically for the purpose of reaching a consent determination (where possible) and **not** for litigation before the Federal Court. However, as a consent determination must ultimately be made by that Court, it is still appropriate to follow its recommendations as to the format of reports.

The State will treat the evidentiary material provided by a native title claim group as the property of that group at all times. This means that, subject to a court order, it would not be made available to any other parties or the general public without the express permission of the native title claim group. Any requests for access to material by other parties or government agencies outside the CSO will be referred to the claimants' representatives. Because the Native Title Report has been prepared for the purposes of settling a native title claim it will be legally privileged.

Content of the Native Title Report

Expert Opinion

Professionals compiling Native Title Reports are expected to be experts in their field. As experts, they are qualified to interpret and analyse the information they are presenting and to express opinions. In doing so they must demonstrate that they have considered the entire range of available evidence and that, based on that evidence, their opinions are even handed.

Authors will at times need to decide between differing sources of information, including between that of the claimants and the written record. Sometimes information may be complementary, but at other times different information can be hard to reconcile. A researcher may have to favour one source and discount another. Where this situation arises, the reasoning that underlies such choices needs to be made clear.

Authors of Native Title Reports must be aware that they are not advocates for the claimants, but experts who are ultimately assisting the Federal Court in their area of expertise. They should provide detailed curriculum vitae with their reports. It is particularly important to establish what their areas of specialised study and experience are, and to make clear why they are experts in their field.⁸⁰

At the conclusion of their reports, the author(s) should declare that "*I have made all the inquiries which I believe are desirable and appropriate and that no matters of significance which I regard as relevant have, to my knowledge, been withheld from the Court.*"⁸¹

The State's independent assessors will be bound by a similar declaration in the preparation of their assessment report.

Forms of Evidence

The principal aim of the Native Title Report is to satisfactorily address the five overarching criteria set out in Part 4, so that all parties can agree that the legal requirements for a native title determination are met.

To address those criteria, it is expected that a native title claim group will provide evidentiary material in the form of at least one report by an anthropologist and possibly additional reports by archaeologists, historians, linguists or other professionals. The reports would be based on literature research and, where appropriate, fieldwork with the native title claim group.

Claimants may also choose to provide affidavits, video and sound recordings, i.e. primary evidence coming straight from the claimants. These sources of information should be appended to the Native Title Report, and it is recommended that their content is analysed and interpreted in the body of the report to ensure their evidentiary potential is maximised.

Disregarding extinguishment

Extinguishment can be disregarded in limited circumstances as set out in sections 47, 47A and 47B of the NTA. These provisions relate to certain land held by or for the benefit of Aboriginal people. Where the claimants assert extinguishment should be disregarded pursuant to section 47, the Native Title Report should include information that supports this assertion. Where the claimants assert extinguishment should be disregarded pursuant to sections 47A or 47B, the Native Title Report should contain information that illustrates occupation relied upon to support this assertion.

Field Notes

The State is conscious of the sensitivities that may surround the field notes of anthropologists and other researchers. In litigation, if a report is relied upon, all notes on which the report is based are discoverable and it is standard practice for respondent parties to obtain copies of field notes.

In the consent determination process, the State will not necessarily seek access to field notes with every Native Title Report. The State may, however, ask to view all or some of the researchers' field notes at any time during the assessment process, if that seems necessary for a satisfactory assessment of the evidence. Researchers and claimants need to be aware of this possibility when reports are being prepared.

Restricted Information

There are aspects of Aboriginal culture that are restricted or sensitive and not usually exposed to outsiders. The inquiries required under the NTA are far reaching, and the existence of usually restricted knowledge may, in some cases, be relevant to demonstrate the laws and customs which define a native title claim group's society and determine its rights and interests in land.

The State will treat any information provided to it with respect. It is able to restrict both the number and the gender of the people who will have access to restricted information. Specific arrangements can be made on a claim by claim basis.

Claimants should be aware, however, that other parties to the claim may also want to gain access to their restricted information at some point in the process. The State will not release any restricted information, but claimants may have to negotiate specific arrangements with other parties in any given case.

To expedite the assessment process it would be helpful if claimants submitting gender restricted or otherwise confidential material to the State could adopt the following procedures:

- Give the CSO advance notice of whether gender restricted material will be provided and what the restrictions will be, so that appropriate staff and assessors can be made available.
- Provide any restricted or confidential material as a separate item, either a separate report or a clearly identified appendix.
- Ensure that conclusions that can be made on the basis of unrestricted evidence are not confined to the restricted part of the report. If certain conclusions can only be made from restricted evidence, it would be helpful to state the conclusions in general terms in the open evidence and cross reference them to the restricted evidence on which they are based.
- Ensure that, as far as practicable, only material that really is restricted or confidential is treated as such.
- Consider whether material can be treated as gender sensitive rather than gender restricted.⁸²

Format of the Native Title Report

It is expected that Native Title Reports will include a table of contents and be divided into several sections with separate headings and sub-headings.

In addition the reports should have numbered paragraphs. While this is not standard practice in the social sciences, it greatly facilitates the detailed discussions required in this context. As Justice Lindgren observed in respect of expert reports:

“[T]he use of short numbered paragraphs will not only facilitate reference to, and discussion about, a report, but may serve as a useful reminder to all concerned that the report is being written for legal purposes.”⁸³

Authors should endeavour to distinguish their opinions and interpretations from the data they have compiled. For example, markers such as ‘In my opinion’, ‘It is my view’, or ‘On the basis of the available information I conclude’ are useful to indicate that authors are drawing on their specialised area of knowledge to form an opinion on the basis of the available data.⁸⁴

Equally, authors should clearly mark the views of others represented in their report. It is standard practice in the social sciences to make reference to the literature consulted, but information supplied by informants is often not specifically referenced. In the case of Native Title Reports, general statements such as ‘People told me’ or ‘It was said’ are not helpful. Ideally, informants who are the source of significant statements will be identified⁸⁵ and the author’s field books should be referred to like any other form of reference material.

Either at the beginning or end of the report, authors should itemise all the material they produced in the course of their research for the report (e.g. fieldnotes, videos, tapes and so on). A bibliography identifying the materials consulted should also be included at the end of the report.

What Happens to the Native Title Report

In the first instance the Native Title Report will be provided to the State. Part 6 below explains how the report will be assessed to establish whether it provides a basis for the State to consent to a determination of native title. Upon concluding its assessment of the Native Title Report, the State will prepare a *Position Paper*. The Position Paper will refer to the Native Title Report and the State's independent expert assessments. It will give a flavour of the available evidence, without making public any information that may be confidential.

If all parties agree to seek a consent determination, the Native Title Report and the Position Paper will be submitted to the Federal Court. Together they will demonstrate to the Court why the parties are consenting to a determination of native title and why it is appropriate for the Court to make a determination in the terms sought.

Should it become clear that a consent determination cannot be reached, there will be no need to provide the Native Title Report and the Position Paper to the Court or other parties, and the State will return the report to the claimant group.

6 - THE ASSESSMENT OF NATIVE TITLE REPORTS

The Assessment Process

Introduction

This section sets out the assessment process the State will adopt for Native Title Reports. The assessment process will be co-ordinated by the Native Title Section of the Crown Solicitor's Office (CSO).

In addition to assessing evidentiary material, the State will also compile and assess tenure history information for the claim area. In parallel, there will be ongoing negotiations between the State, the claimants and other participating parties, usually under the auspices of the NNTT. These close working relationships should mean that the rigorous assessment process will take place in a positive and transparent environment of co-operative communication between all affected parties.

In the assessment process, the State will test the evidence against its own records and seek and consider the advice and professional opinion of appropriately qualified experts (e.g. anthropologists, archaeologists, historians) on the Native Title Report. A senior lawyer will assess the Native Title Report, the expert opinions and comments by CSO officers. The State can seek additional information from the claimants at any stage during the process.

These key steps are shown in their overall context in the following process outline, which is best considered together with the flowchart on page 33.

The Process

Step 1 - The State and the claimants' representatives engage with other parties about the process

- The State and the claimants' representatives engage with other parties to explain the consent determination process, including time-frames for the preparation and assessment of a Native Title Report and tenure history information.
- Other parties will be invited to provide information to the CSO for consideration in the assessment process. They will be supplied with background material about the claim to assist them in determining whether they hold relevant information.

Step 2 - Claimants provide a Native Title Report to the State and as appropriate to other parties

- The claimants have prepared a Native Title Report, which they supply to the CSO for the assessment process. The claimants will advise the NNTT when this has occurred.
- Claimants may decide to provide some or all of the Native Title Report to other parties as appropriate and useful in any given case. The claimants will advise the NNTT when this has occurred.

Step 3 - Preliminary CSO in-house assessment

- The CSO gains an initial impression of the completeness of the Native Title Report.
- If the CSO is aware of any relevant information that has not been considered, it will bring this to the attention of the claimants. This applies throughout the assessment process.
- It may be established that further information is needed to address the criteria required for a consent determination. Otherwise the report, along with any relevant material submitted by other parties, is sent to assessors drawn from a register of experts.
- **NOTE:** At this and all other steps of the assessment process it will be ensured that gender restricted information is only viewed by persons of the appropriate gender.

Step 4 – Native Title Report assessed by independent experts

- It is expected that the Native Title Report will go to at least one anthropologist as well as assessors from other disciplines as appropriate.
- The assessors prepare reports independently of one another, each commenting on his or her area of expertise.

Step 5 - Expert assessment is considered by CSO

- The CSO considers the separate assessments, identifies common themes or disparate opinions raised by the assessors and prepares a summary statement.
- The CSO may query the assessors, discuss issues with them in person or facilitate a meeting of assessors to permit discussion between them on particular areas of concern.
- The CSO provides preliminary feedback to the claimants' representatives and may seek additional information on certain areas.
- Other parties will be informed when this stage of the assessment process has been completed.
- Any additional material supplied by the claimants may go back to the assessors for further comments.

Step 6 - Legal Assessment

- An experienced legal professional is briefed to consider all of the material (i.e. Native Title Report, assessment reports, tenure history information, CSO summary) and to provide an opinion on whether the Native Title Report fulfils the legal requirements.
- The legal assessor will have the option of consulting with the independent experts or CSO officers to clarify any areas of uncertainty.

Step 7 - CSO prepares a Position Paper

- On the basis of the various assessments the CSO prepares a Position Paper explaining the State's position on a consent determination.
- If the Position paper does not support a consent determination it will only be provided to the claimants' representatives. The consent determination process will cease at this point, although ILUAs and non-native title outcomes may still be possible.
- If the Position Paper does support a consent determination it goes to the claimants' representatives first, to ensure it does not inadvertently reveal any confidential information.
- The Position Paper and the Native Title Report are then provided to the other parties to the negotiations. Any restricted information contained in the Native Title Report will only be supplied to other parties once the claimants and the other parties have agreed appropriate access arrangements.
- Other parties will not be expected to express a position until they have had adequate time to consider the Position Paper and the Native Title Report.

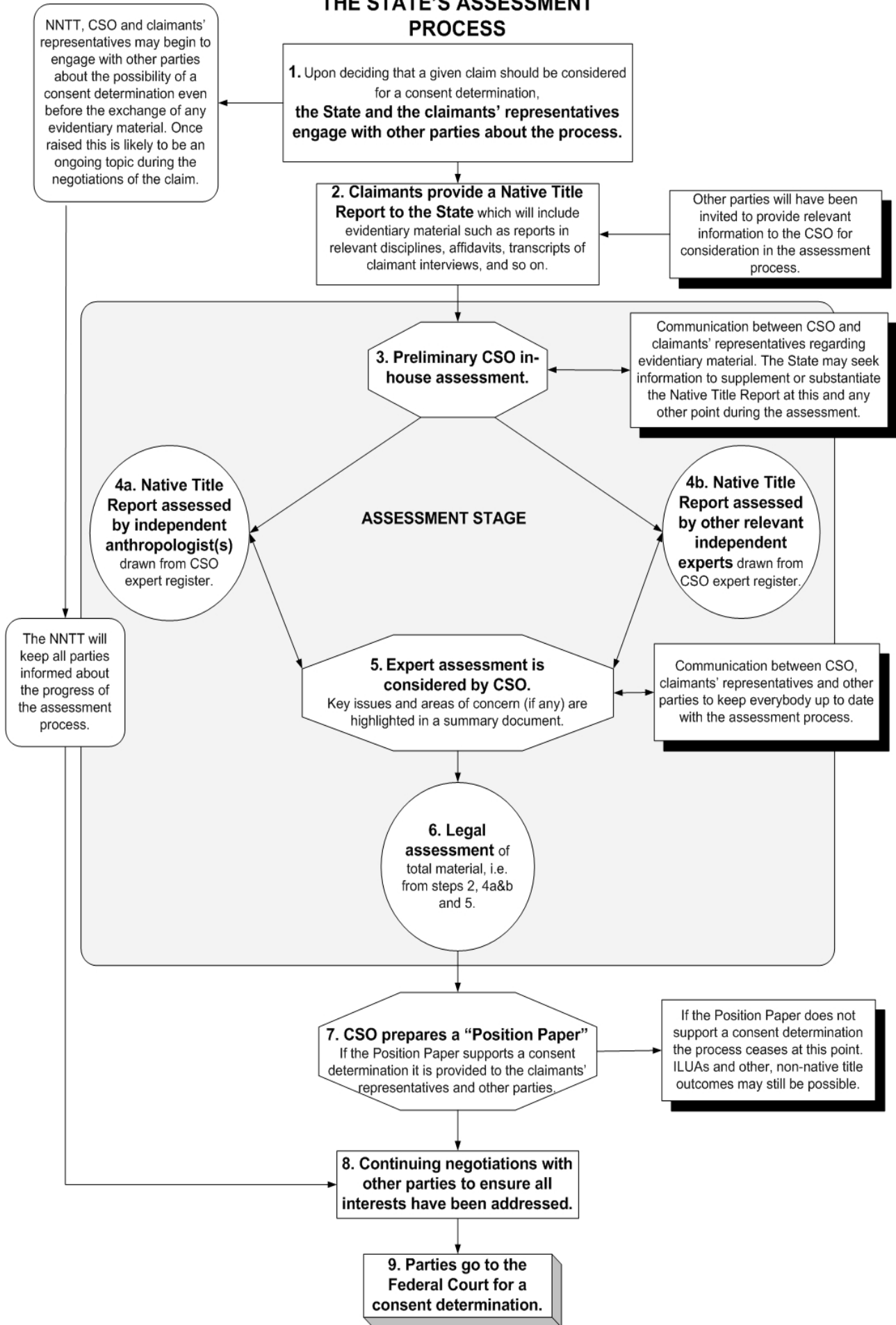
Step 8 - Continuing negotiations with other parties to ensure all interests have been addressed

- If the parties agree to a consent determination, negotiations will now occur about the form and content of draft consent orders to reflect the interests of all parties and the agreement that has been reached.
- A consent determination cannot occur without the consent of all parties. If it becomes clear at this point that one or more parties will not agree to a determination the issues that cannot be agreed may need to be resolved through litigation. Even if the claim goes to trial, parties can still discuss the possibility of a consent determination during court ordered mediation.

Step 9 - Parties go to the Federal Court for a consent determination

- The Court is provided with the Native Title Report, the State's Position Paper and a draft determination agreed between the parties.
- Any draft determination will be consistent with the evidence of the Native Title Report and the assessment in the State's Position Paper.
- The Court must be satisfied that it is appropriate to make orders in the terms proposed by the parties.

THE STATE'S ASSESSMENT PROCESS



The Appointment of Assessors

The Assessors

The anthropologists and other experts for Stage 4 in the assessment will be drawn from a public register of experts maintained by the CSO. Suitable candidates on the register will be considered on a case-by-case basis. The legal assessor for Stage 6 in the assessment will be appointed according to the standard practices of the legal profession.

The experts must have a minimum honours level tertiary degree, with post-graduate qualifications considered preferable. In addition, they have to demonstrate relevant experience in Aboriginal Australia and native title matters.

Whether they need to have previous experience with the culture of the native title claim group in question will depend on the circumstances of any given case. In some cases that may be desirable, while in others more general, theoretical expertise may be more appropriate.

The assessing lawyers will have experience in native title, ideally with a track record of having represented more than one kind of party, i.e. claimants, governments or other parties.

Appointing Assessors

It is expected that anthropologists and lawyers will always be involved in the assessment. Archaeologists, historians, linguists and other specialists may be required on a case-by-case basis.

The CSO will appoint appropriate assessors according to the following criteria:

- professional standing;
- native title experience;
- expertise in any relevant issues;
- history with native title claim groups in South Australia;
- employment history generally;
- any potential conflicts of interest;
- other issues that could in some way compromise the recognition of the assessment process;
and
- availability.

Assessors will be bound by confidentiality clauses (including for dealing with restricted cultural material) and guidelines to ensure their impartiality, adapted from the Federal Court's *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia*, which can be found in Appendix 1.

Concluding the Assessment

Upon concluding its assessment of the Native Title Report, the State will prepare a Position Paper. If the Position Paper does not support a consent determination it will only go to the claimants' representatives. The consent determination process will cease at this point, although ILUAs and other, non-native title outcomes may still be possible. Other parties will be notified of this outcome, but they will not be provided with the Position Paper.

If the Position Paper supports a consent determination, it will be provided to the claimants' representatives first, to ensure it does not inadvertently reveal any confidential information. It is then provided to the other relevant parties to explain the basis of the State's position.

The Position Paper will discuss how the claimants' evidence, and any material provided by other parties or obtained by the State, relates to the key issues set out in Part 4 of this Guide. It will identify the native title rights and interests that the State believes are open on the available evidence. The Position Paper will also identify any areas of land where, based on the State's tenure history research, native title rights and interests cannot be held because of extinguishing tenures. This information will give other parties to the claim a clear idea of the position the State is adopting, without binding them in any way.

There are a variety of legitimate positions other parties may take when negotiating a native title claim. These include consenting to a determination on specific terms only and not consenting at all. The State will explore the possibility of consent determinations, ILUAs or non-native title outcomes with all parties in a respectful, co-operative and flexible way.

7 - ARCHIVAL AND LIBRARY RESOURCES⁸⁶

Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS)

The AIATSIS Library contains one of the most comprehensive collections of print materials on Australian Indigenous studies in the world. As well as regular search options, the library catalogue can be searched according to language group and geographical locations. Journal articles are entered separately in the catalogue, which also includes field notes, sound recordings, film and photographic images. The library and archival catalogue is an excellent starting point for native title research. The AIATSIS Native Title Research Unit provides a research service for those people engaged in native title proceedings or background research for the preparation of native title applications. The service assists researchers to identify, locate and interpret material in the AIATSIS Library and Archives.

Contact Information:

Telephone: (02) 6246 1182

Acton Peninsula

Facsimile: (02) 6261 4287

Lawson Crescent

www.aiatsis.gov.au

Acton ACT 2601

The National Native Title Tribunal (NNTT)

The NNTT publishes a wide range of informative material about native title processes and agreement making: from speeches to fact sheets to CDs, maps and research papers. Products are available either free of charge or for cost price. The NNTT's Research Unit prepares bibliographies for anyone wanting to locate readily available published material about Indigenous Australian people within a particular region or locality. The main subject areas covered in these bibliographies include historical documents identifying cultural groups, and the definition of the geographic areas occupied by those groups, usually by maps or geographical descriptions. Based on the bibliographies the NNTT prepares research reports for every native title claim and parties to a claim will have access to the relevant report. In addition, parties to a claim and consultants engaged by native title parties can access the NNTT library services. The NNTT library offers a unique collection of resources on native title and land rights as well as mediation and negotiation, history, anthropology, sociology; cross-cultural awareness and resource management.

Contact Information:

Telephone: (08) 8306 1230

South Australian Office

Facsimile: (08) 8224 0939

Level 10, Chesser House

Freecall: 1800 640 501

91 Grenfell Street

www.nntt.gov.au

Adelaide SA 5000

National Archives of Australia

The National Archives of Australia are the principal repository of Commonwealth Government records. The collection's main strength is material created since Federation in 1901 by agencies of the Commonwealth government, such as departments, Royal Commissions, statutory authorities, military units, security, intelligence and law enforcement agencies, diplomatic posts and foreign relations. These are complemented by substantial collections of nineteenth-century records. Among others, files relating to the Woomera Prohibited Area, railways (e.g. Ooldea) and some Royal Commissions may be relevant to native title researchers in South Australia.

The head office of the Archives is located in Canberra and there are offices in each State capital and in Darwin.

Contact Information:

Telephone: (02) 6212 3600
Facsimile: (02) 6212 3699
www.naa.gov.au

Canberra Reading Room:
Queen Victoria Terrace
Parkes ACT 2600

The State Library of South Australia

The State Library of South Australia has a significant and developing amount of specialist material relating to Australian Aboriginal cultures, including published material, archival records, photographs, films, sound recordings and art works.

The Library has a number of unpublished archival records relevant to Aboriginal people, such as the Ngadjuri Oral Histories (OH 482), the Antikirinja Social History Project (OH 569), the Point McLeay Aboriginal Mission (SRG 698) and material from the Aboriginal Education Foundation of SA (SRG 102). The most important archival material is a unique collection of C. P. Mountford's field notes and diaries with photographs and artworks he collected from the 1930s to the 1960s (PRG 1218). Material covers Aboriginal communities from the remote areas of South Australia and the Northern Territory. Access to this and other, smaller anthropological collections is arranged through staff.

The State Library also houses the library of the Royal Geographical Society of South Australia, which contains many rare books and journals with information about Aboriginal people in the State.

Contact Information:

Telephone: (08) 8207 7250
Facsimile: (08) 8207 7247
SA Country callers (Freecall): 1800 182 013
www.slsa.sa.gov.au

North Terrace
Adelaide SA 5000

South Australian Museum

The South Australian Museum Archives host the entire collection of fieldnotes by Norman B. Tindale who worked throughout most of South Australia and the rest of Australia. The Tindale collection has a comprehensive index that can guide researchers to relevant material.

In addition, the Archives hold many other items of relevance to Aboriginal people across the State. Not all of the collection has yet been indexed, but the archival staff will be able to direct researchers to relevant material. The museum library provides another valuable resource with a substantial selection of old and rare books and journals.

Contact Information:

Telephone: (08) 8207 7375
Facsimile: (08) 8207 7222
www.samuseum.sa.gov.au/archives/index.html

North Terrace
Adelaide SA 5000

State Records of South Australia

State Records is the official custodian for records of the South Australian Government, statutory authorities and local government bodies. The State Records archival collection of government records contains many references relating to Aboriginal people on a variety of subjects.

The minutes of the Aboriginal Protection Board and the Aboriginal Affairs Correspondence Files (letters received) 1866 - 1968 are just two 'series' from the Department of Aboriginal Affairs records with a wealth of information about Aboriginal people and how their lives were affected by government intervention. Many other series from the Department of Aboriginal Affairs and other government agencies have records of similar value. To access State Records documents, researchers will need the authorisation of the relevant government department.

State Records has a dedicated Aboriginal Project Officer who can assist researchers and claimant groups in locating relevant materials.

Contact Information:

Telephone: (08) 8226 7750

115 Cavan Road

www.archives.sa.gov.au

Gepps Cross SA 5094

Library and Information Services - Department of Human Services

The South Australian Department of Human Services' library contains a considerable collection of largely unpublished research reports on Aboriginal health and housing. The library is open to the public by prior appointment from 9am - 5pm Monday to Friday.

Contact Information:

Telephone: (08) 8226 6438

Level 2

162 Grenfell Street

Adelaide SA 5000

Central Archive - Department of Aboriginal Affairs and Reconciliation

Under the *Aboriginal Heritage Act* (SA) 1988, the South Australian Department of Aboriginal Affairs and Reconciliation (DAARE) maintains a Central Archive containing:

- a Register of Aboriginal Sites and Objects of significance to Aboriginal archaeology, anthropology, history and tradition; and
- copies of cultural heritage survey reports, maps and photographs of anthropological, historical and archaeological sites across the State.

DAARE can advise whether there are sites entered on the register or reported to the Central Archive for any given area, but the consent of the relevant Aboriginal community is required to access reports or more detailed site information.

Contact Information:

Telephone: (08) 8226 8933

Level 1

Facsimile: (08) 8226 8999

22 Pultney Street

www.dossa.sa.gov.au

Adelaide SA 5000

Births, Deaths and Marriages Registration Office - Office of Consumer and Business Affairs

The Births, Deaths and Marriages Registration Office is responsible for maintaining registers of births, deaths, marriages, changes of name and adoption of children that occur in South Australia. All records from the office date back to 1842, except for Change of Name records, which date back to 1896. If you do not know the date of an event, the office will conduct a ten year search for the normal cost of a certificate. It is unlikely that the office will have comprehensive early records for Aboriginal people, especially from remote regions.

Contact Information:

Telephone: (08) 8204 9599
Facsimile: (08) 8204 9605
www.ocba.sa.gov.au

Level 2, Chesser House
91-97 Grenfell Street
Adelaide SA 5000

Barr Smith Library - University of Adelaide

The Barr Smith Library contains an extensive collection of published books and journals relevant to Aboriginal anthropology, history and linguistics. The Special Collection in the Barr Smith Library houses rare books and unpublished manuscripts by former University staff. The on-line library catalogue also gives access to holdings of the university's other libraries, which include the Elder Music Library, the Roseworthy Campus Library and the Waite Library.

Contact Information:

Telephone: (08) 8303 5372
Facsimile: (08) 8303 4369
www.library.adelaide.edu.au/search

University of Adelaide
Adelaide SA 5005

Strehlow Research Centre (SRC)

The SRC serves as a repository for cultural material relating to the Aboriginal people of Central Australia. The late Professor TGH Strehlow accumulated material of both a secular and sacred nature, between 1932 and 1978.

Most of the information held at the SRC relates to the Northern Territory, but there is also material relevant to the north of South Australia. All requests for access should be in writing for consideration by the SRC Board.

Contact Information:

Telephone: (08) 8951 1111
Facsimile: (08) 8951 1110
www.dcdsca.nt.gov.au/dcdsca/intranet.nsf/pages/StrehlowResearchCentre

Alice Springs Cultural Precinct
cnr Larapinta Drive and Memorial Avenue
Alice Springs NT 0870

The Lutheran Archives

The Lutheran Archives hold material from a number of mission stations. The largest collection comes from Hermannsburg in the Northern Territory, followed by Killalpaninna Mission on the Cooper's Creek. Other material relates to missions at Yalata, Koonibba, Port Lincoln, Ceduna and Adelaide. Much of the older material is in German.

Contact Information:

Telephone: (08) 8340 4009
www.lca.org.au/resources/archives

27 Fourth Street
Bowden SA 5007

United Aborigines Mission (UAM)

The UAM archives have some records relating to their missions at Ooldea, Gerard, Swan Reach and Finniss Springs as well as the Colebrook Home for Aboriginal children.

Contact Information:

Telephone: (03) 9841 6022

23 Pine Way
Doncaster East VIC 3109

Other Archives

The information provided here is not intended to be a comprehensive listing of libraries and archives that may contain relevant material for native title claims in South Australia. The official archives and libraries of all the States bordering South Australia, as well as of the Northern Territory, may contain relevant information. Equally all the major university libraries and archives across the country may contain rare or specialised items relevant to South Australia. On the local level, historical societies and even local libraries may have information of relevance to particular areas. It is up to researchers to identify and draw on such additional resources as appropriate.

APPENDIX 1

Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia

This Practice Direction replaces the Practice Direction on Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia issued on 15 September 1998.

Practitioners should give a copy of the following guidelines to any witness they propose to retain for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based on the specialised knowledge of the witness (see - Part 3.3 - Opinion of the *Evidence Act 1995 (Cth)*).

M.E.J. BLACK
Chief Justice
4 September 2003

Explanatory Memorandum

The guidelines are not intended to address all aspects of an expert witness's duties, but are intended to facilitate the admission of opinion evidence ([footnote #1](#)), and to assist experts to understand in general terms what the Court expects of an expert witness giving opinion evidence. Additionally, it is hoped that the guidelines will assist individual expert witnesses to avoid the criticism that is sometimes made of expert witnesses (whether rightly or wrongly) that they lack objectivity, or have coloured their evidence in favour of the party calling them.

Ways by which an expert witness giving opinion evidence may avoid criticism of partiality by ensuring that the report, or other statement of evidence:

- (a) is clearly expressed and not argumentative in tone;
- (b) is centrally concerned to express an opinion, upon a clearly defined question or questions, based on the expert's specialised knowledge;
- (c) identifies with precision the factual premises upon which it is based;
- (d) explains the process of reasoning by which the expert reached the opinion expressed in the report;
- (e) is confined to the area or areas of the expert's specialised knowledge; and
- (f) identifies any pre-existing relationship between the author of the report, or his or her firm, company etc, and a party to the litigation (eg a treating medical practitioner, a firm's accountant etc).

Experts are not disqualified from giving evidence by reason only of the fact that they have a pre-existing relationship with the party that calls them as a witness, but the nature of the pre-existing relationship should be disclosed. Where an expert has such a relationship with the party the expert may need to pay particular attention to the identification of the factual premises upon which the expert's opinion is based. The expert should make it clear whether and to what extent the opinion is based on the personal knowledge of the expert (the factual basis for which might be required to be established by admissible evidence of the expert or another witness) derived from the ongoing relationship rather than on factual premises or assumptions provided to the expert by his or her instructions.

All experts need to be aware that if they participate to a significant degree in the process of formulating and preparing the case of a party, they may find it difficult to maintain objectivity.

An expert witness does not compromise his or her objectivity by defending, forcefully if necessary, an opinion based on the expert's specialised knowledge which is genuinely held but may do so if he or she is, for example, unwilling to give consideration to alternative factual premises or is unwilling, where appropriate, to acknowledge recognised differences of opinion or approach between experts in the relevant discipline.

The guidelines are, as their title indicates, no more than guidelines. Attempts to apply them literally in every case may prove unhelpful. In some areas of specialised knowledge and in some circumstances (eg some aspects of economic "evidence" in competition law), their literal

interpretation may prove unworkable. The Court expects legal practitioners and experts to work together to ensure that the guidelines are implemented in a practically sensible way which ensures that they achieve their intended purpose.

Guidelines

1. General Duty to the Court ([footnote #2](#))

1.1 An expert witness has an overriding duty to assist the Court on matters relevant to the expert's area of expertise.

1.2 An expert witness is not an advocate for a party.

1.3 An expert witness's paramount duty is to the Court and not to the person retaining the expert.

2. The Form of the Expert Evidence ([footnote #3](#))

2.1 An expert's written report must give details of the expert's qualifications, and of the literature or other material used in making the report.

2.2 All assumptions of fact made by the expert should be clearly and fully stated.

2.3 The report should identify who carried out any tests or experiments upon which the expert relied in compiling the report, and give details of the qualifications of the person who carried out any such test or experiment.

2.4 Where several opinions are provided in the report, the expert should summarise them.

2.5 The expert should give reasons for each opinion.

2.6 At the end of the report the expert should declare that "[the expert] has made all the inquiries which [the expert] believes are desirable and appropriate and that no matters of significance which [the expert] regards as relevant have, to [the expert's] knowledge, been withheld from the Court."

2.7 There should be included in or attached to the report (i) a statement of the questions or issues that the expert was asked to address; (ii) the factual premises upon which the report proceeds; and (iii) the documents and other materials which the expert has been instructed to consider.

2.8 If, after exchange of reports or at any other stage, an expert witness changes his or her view on a material matter, having read another expert's report or for any other reason, the change of view should be communicated in a timely manner (through legal representatives) to each party to whom the expert witness's report has been provided and, when appropriate, to the Court ([footnote #4](#)).

2.9 If an expert's opinion is not fully researched because the expert considers that insufficient data are available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate without some qualification, that qualification must be stated in the report ([footnote #4](#)).

2.10 The expert should make it clear when a particular question or issue falls outside his or her field of expertise.

2.11 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports ([footnote #5](#)).

3. Experts' Conference

3.1 If experts retained by the parties meet at the direction of the Court, it would be improper conduct for an expert to be given or to accept instructions not to reach agreement. If, at a meeting directed by the Court, the experts cannot reach agreement on matters of expert opinion, they should specify their reasons for being unable to do so.

footnote #1

As to the distinction between expert opinion evidence and expert assistance see Evans Deakin Pty Ltd v Sebel Furniture Ltd [2003] FCA 171 per Allsop J at [676].

footnote #2

See rule 35.3 Civil Procedure Rules (UK); see also Lord Woolf "Medics, Lawyers and the Courts" [1997] 16 CJK 302 at 313.

footnote #3

See rule 35.10 Civil Procedure Rules (UK) and Practice Direction 35 - Experts and Assessors (UK); HG v the Queen (1999) 197 CLR 414 per Gleeson CJ at [39]-[43]; Ocean Marine Mutual Insurance Association (Europe) OV v Jetopay Pty Ltd [2000] FCA 1463 (FC) at [17]-[23]

footnote #4

The "Ikarian Reefer" [1993] 20 FSR 563 at 565

footnote #5

The "Ikarian Reefer" [1993] 20 FSR 563 at 565-566. See also Ormrod "Scientific Evidence in Court" [1968] Crim LR 240.

ENDNOTES

1 - Introduction

¹ The presence of overlaps between two or more claims does not necessarily mean that those claims cannot seek a consent determination as long as all affected claim groups agree about their shared rights and interests and the extent of any overlap.

² McHugh J in *Western Australia v Ward* (2002) 76 ALJR 1098 at [561]

³ O'Loughlin J in *De Rose v South Australia* [2002] FCA 1342 at [89] & [144]

⁴ NTA s87(1); see for example *James on behalf of the Martu People v The State of Western Australia* [2002] FCA 1208 at [4]

2 - Parties to a Native Title Determination

⁵ NTA s61(1); s251B

⁶ NTA s203B

⁷ NTA s203B(4)

⁸ NTA s84(3)

⁹ NTA s84 (4)

¹⁰ NTA s84A(1)

¹¹ Daryl Williams AM, QC, MP, 'Native Title: The Next 10 Years – Moving Forward by Agreement', paper presented at the Native Title Conference Outcomes and Possibilities, Geraldton, 4 September 2002.

¹² NTA s84(3) & s84(5)

3 - Legal Background

¹³ (2002) 77 ALJR 356

¹⁴ (2002) 76 ALJR 1098

¹⁵ (2000) 99 FCR 316

¹⁶ [2003] FCAFC 286

¹⁷ *Ward HC* at [95]

¹⁸ *Ward HC* at [57]-[59]

¹⁹ *Ward HC* at [52]

²⁰ *Ward HC* at [18]

²¹ *Yorta Yorta* at [46]

²² *Yorta Yorta* at [43], [44] & [83]

²³ *Daniel v Western Australia* [2003] FCA 666 at [382] & [383]; *Neowarra v Western Australia* [2003] FCA 1402 at [150]

²⁴ *Yorta Yorta* at [38]

²⁵ *Yorta Yorta* at [42]

²⁶ *Yorta Yorta* at [39]-[40]

²⁷ *Yorta Yorta* at [42]

²⁸ [2003] FCA 666

²⁹ *Daniel* at [304]; see also at [436]

³⁰ *Yorta Yorta* at [49]

³¹ *De Rose FC* at [273]-[283]

³² *Yorta Yorta* at [47]

³³ *De Rose FC* at [200]

³⁴ *Yorta Yorta* at [47]

³⁵ *Yorta Yorta* at [87]

³⁶ *Yorta Yorta* at [89]

³⁷ *Yorta Yorta* at [82]

³⁸ *Yorta Yorta* at [83]

³⁹ *Yorta Yorta* at [84]

⁴⁰ *Daniel* at [421]

⁴¹ *Daniel* at [422]

⁴² *Yorta Yorta* at [83]

⁴³ *Yorta Yorta* at [82] & [83]

⁴⁴ *Mabo and Others v Queensland (No.2)* (1992) 175 CLR 1 at [61]

⁴⁵ (1999) 201 CLR 351 at [68] & [69]

⁴⁶ *Daniel* at [423]

⁴⁷ *De Rose FC* at [260]-[268]

⁴⁸ *Ward HC* at [63]

⁴⁹ *Ward FC* at [243]

⁵⁰ *Ward HC* at [64] see also [57]-[63]

⁵¹ *De Rose FC* at [309] see also [310]-[315] NB. Claimants must still satisfy s223(1)(a), NTA and demonstrate they do observe and acknowledge traditional laws and customs *De Rose Hill FC* at [281] - See "Laws and Customs" above.

⁵² (1996) 187 CLR 1

⁵³ (2001) 208 CLR 1

⁵⁴ (2002) 190 ALR 313

4 - Criteria Required To Demonstrate Native Title

⁵⁵ *Yorta Yorta HC* at [50]-[52]

⁵⁶ *Yorta Yorta HC* at [49]; *De Rose FC* at [273]-[283]

⁵⁷ *Yorta Yorta HC* at [53]

⁵⁸ *Yorta Yorta HC* at [55]

⁵⁹ *Yorta Yorta HC* at [89]

⁶⁰ *Ward FC* at [230]-[233]

⁶¹ NTA s223(1)(a); *Yorta Yorta HC* at [47], [50], [56], [83], [87], [89] & [95]

⁶² *Yorta Yorta HC* at [87]

⁶³ *Yorta Yorta HC* at [42]

⁶⁴ *Yorta Yorta HC* at [46]

⁶⁵ *Yorta Yorta HC* at [56]

⁶⁶ *Yorta Yorta HC* at [82] & [83]

⁶⁷ NTA s223(1)(b); *Ward HC* at [64]; *Yorta Yorta HC* at [84]-[86]

⁶⁸ *Ward HC* at [64]

⁶⁹ *Ward HC* at [64]

⁷⁰ *Ward HC* at [64] & [14]

⁷¹ *De Rose Hill FC* at [309]

⁷² NTA s225; *Ward HC* at [51], [52], [94] & [95]

⁷³ *Ward HC* at [51]

⁷⁴ NTA s225; *Daniel* at [136]; generally *Ward HC* at [78]-[82]

⁷⁵ *Ward HC* at [52]

⁷⁶ *Ward HC* at [95]

⁷⁷ *Ward HC* at [59]

5 - Preparing a Native Title Report

⁷⁸ see Appendix 1

⁷⁹ *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 7)* [2003] FCA 89

⁸⁰ *Harrington-Smith* at [32]

⁸¹ Adapted from the Federal Court practice direction for expert witnesses - see Appendix 1.

⁸² *Jango v Northern Territory of Australia* [2003] FCA 1230 at [11]

⁸³ *Harrington-Smith* at [30]

⁸⁴ *Harrington-Smith* at [28]

⁸⁵ *Harrington-Smith* at [31]

7 - Archival and Library Resources

⁸⁶ The information in this section is largely based on the web sites of the institutions and may be subject to change.