



Office of  
**native title**

**Guidelines for the Provision  
of Information in Support of Applications  
for a Determination of Native Title**

**October 2004**

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## **1. INTRODUCTION**

- 1.1 The Government of Western Australia is committed to creating an environment where applications for a determination of native title may be settled by way of agreement, rather than through litigation, wherever possible. The *Guidelines for the Provision of Information in Support of Applications for a Determination of Native Title* (“the Guidelines”) are intended to assist those involved in the native title claims process to understand clearly the information the Government requires in order to make a decision as to the possibility of settling a native title application by agreement. The Guidelines give all parties confidence in both the fairness and integrity of the Government’s approach to resolving native title issues.
- 1.2 In order for a determination of native title to be made, native title claimants must show that the claims made in the application can be established at law. This is not a condition imposed by the State Government; rather it derives from the fact that establishing the existence of native title is a legal process. The criteria required to substantiate the claims in a native title application are found in the *Native Title Act 1993 (Cth)* (“the Native Title Act”) and the case law. A determination of native title must be consistent with the Native Title Act and, where it is applicable, the common law.
- 1.3 In lodging an application for a determination of native title, native title claimants initiate a legal proceeding, the outcome of which is a determination by the Federal Court as to whether the existence of the native title rights and interests claimed can be established at law. In commencing this legal proceeding, native title claimants accept the onus to present information sufficient to establish the nature and basis of the rights and interests they claim in order that the Court can make a determination consistent with the law.
- 1.4 The State Government's preference that native title applications are concluded by agreement wherever possible is intended to ensure that where there is sufficient information to support a determination that native title exists, this result is achieved in a more timely, cost effective and cooperative way. Consistent with this intention, the Government provides native title claimants with the opportunity to submit information in support of the claims made in their applications so that the claimants and the Government can fully explore the possibility of resolving the claims made in the application by agreement.
- 1.5 Of course, the Government cannot act alone or only with claimants to agree to a determination of native title - it must consider other parties to the application. Any other respondent such as a pastoralist, a mining company, the Commonwealth Government or another native title claimant group can challenge the basis upon which the Government has decided to enter into negotiations over a proposed consent determination or can seek to have the matter litigated if they do not agree with the terms of the proposed determination.

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- 1.6 In addition, the Federal Court must be satisfied that it is able to make an order consistent with the terms agreed. The requirements the Federal Court must consider are provided by sections 87, 94A, 223 and 225 of the Native Title Act.
- 1.7 There is a responsibility upon the Government to give thorough consideration to the evidentiary basis of the claims made in a native title application before proceeding to negotiate the terms of an agreed determination. The provision of evidentiary material by native title claimants is therefore a necessary precondition to the Government's participation in consent determination negotiations. These Guidelines are provided to assist those involved in the native title process to understand the basis upon which the Government will enter into such negotiations.
- 1.8 The Government expects that the information submitted by claimants will consist of an expert report or reports, together with supporting material. While the Government will not participate directly in the production of these evidentiary reports ("connection reports"), it is anticipated that early consultation between native title claimants and/or their representatives and the Office of Native Title will facilitate the production of connection reports by clarifying issues relating to their form and content.
- 1.9 As noted, the evidentiary basis upon which a determination can rest is determined by the Native Title Act and by the case law on native title. Connection reports must therefore have sufficient detail to establish that the native title claimants are the persons or groups who hold native title.
- 1.10 The material provided in a connection report must provide a credible basis for establishing the existence of the native title rights and interests claimed. The provision of sufficient, credible information is necessary to ensure that both native title claimants and respondent parties have confidence in the process and the outcomes it delivers. However, it is not expected that connection reports be academic theses – they should be practical documents capable of assessment by Government. Importantly, connection reports should include information provided by Aboriginal people themselves as well as contextual analysis by anthropologists, historians, linguists or other relevant experts.
- 1.11 The Government is aware that, in preparing material which addresses the evidentiary basis of their claim, claimants may engage a number of experts (anthropologists, historians, linguists and so on) to collate information and to provide contextual analysis. The Government recognises that, while the main connection report would usually be prepared by an anthropologist, supplementary reports by other relevant experts may be required to accommodate the multidisciplinary nature of research on the elements of proof of native title.

- 1.12 The Government also recognises that the information of Aboriginal people themselves is the most important information in determining the continued existence of native title. The Guidelines therefore set out the Government's requirements in relation to the provision of this information.
- 1.13 In preparing connection reports, native title claimants should consider that the Federal Court is likely to require material to be filed in the proceedings to support any determination it is being asked to make under section 87 of the Native Title Act. In addition, where there are parties other than the Government to the proceedings, those parties may require from the native title claimants material in support of the claims made before they will agree to a determination of native title.
- 1.14 The Government does not expect that material presented in connection reports be as detailed and rigorous as information presented in the context of a contested hearing before the Federal Court. However, the Government has a responsibility to ensure that there is a sufficient evidentiary basis to agree to a determination of native title in the terms sought by the applicants. In *Munn for and on behalf of the Gunggari People v State of Queensland*, Emmett J expressed the view that: "the Court ... needs to be satisfied at least that the State, through competent legal representation, is satisfied as to the cogency of the evidence upon which the applicants rely".<sup>1</sup>
- 1.15 The Government acknowledges that the preparation of connection reports represents a significant investment for native title claimants and their representatives. However, the alternative of resolving the application through litigation would be substantially more resource intensive for all parties. The provision of these Guidelines will ensure that participants in the native title claims process have a clear sense of the Government's expectations and responsibilities with regard to assessing the evidentiary basis of native title applications, thus ensuring that progress towards resolving applications can occur in the most timely and cost-effective manner possible.

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<sup>1</sup> *Munn for and on behalf of the Gunggari People v State of Queensland* [2001] FCA 1229 (23 August 2001), paragraph 29.

## **2. OVERLAPPING APPLICATIONS**

- 2.1 There may be more than one native title application made over an area or parts of an area (“overlapping applications”). The resolution of overlapping applications is not necessarily a precondition to negotiating an agreed determination of native title. However, the overlap may make it more difficult for the claimants to satisfy the evidentiary requirements that are preconditions to such a determination.
- 2.2 The claimants should explain the reason for the overlapping application(s). For instance, it should be established whether the overlapping applications reflect shared rights or a dispute between claimant groups over boundaries of their respective applications.
- 2.3 While the existence of overlapping applications does not necessarily preclude the possibility of an agreed determination of native title, the Government will have to assess in each case whether, given the existence of overlapping applications, the evidentiary standards have been met sufficiently to support an agreed determination, particularly where the overlapping applications are a manifestation of a dispute between groups.

## **3. THE INFORMATION OF ABORIGINAL PEOPLE**

- 3.1 It is the information of Aboriginal people themselves that is the most important information in determining the continued existence of native title rights and interests and the traditional laws and customs from which they flow. It is important that the Government create opportunities for Aboriginal people to tell their stories as part of the process of providing material in support of their claims.
- 3.2 The Government expects that connection reports will include information provided by Aboriginal people that directly addresses the basis of the claims made within an application. The analysis presented in connection reports should draw on the information provided by Aboriginal people, including any evidence given in judicial proceedings, to substantiate the assertions and conclusions offered by experts, and should also provide the necessary historical, anthropological and/or linguistic context for that information.
- 3.3 Connection reports should clearly identify the information that has been supplied by Aboriginal people, and identify those people, such that the reports distinguish between the expert opinions contained in them and the basis upon which those opinions are expressed.<sup>2</sup>

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<sup>2</sup> *Harrington-Smith on behalf of the Wongatha People v Western Australia and others (No 7) [2003] FCA 893*, paragraph 21.

- 3.4 In some cases, connection reports may not set out sufficiently for the Government's purposes the information provided by particular Aboriginal informants, or may not adequately present that information in such a way as to enable the Government to assess the evidentiary basis of the claims made in the application, given the primacy of information provided by Aboriginal people over the opinions of expert researchers. In such cases, the Government may wish to receive direct evidence from Aboriginal people and to have that evidence tested. Where direct evidence is required, limited sessions will be required before the Federal Court.
- 3.5 The necessity and timing for limited sessions of direct evidence will be discussed with the claimants or their representatives in advance. The necessity for direct evidence is dependent on the nature of the connection material submitted and the circumstances of the native title application in question. In some cases, the Government may canvass the possibility of receiving direct Aboriginal evidence ahead of, or concurrently with, information presented in the claimants' connection report. In other cases, it may be of more assistance for Aboriginal evidence to be heard after the Government has completed an assessment of the connection report in accordance with the assessment process set out in part 10.
- 3.6 The Government is sensitive to the fact that some claimants may wish to avoid having to present connection evidence in the context of a limited hearing before the Federal Court, and the Office of Native Title will seek to avoid the requirement of direct evidence wherever possible. It is anticipated that early consultation between the Office of Native Title and native title claimants or their representatives regarding the incorporation of information from Aboriginal people into connection reports will ensure that the material satisfies the Government's requirements in this regard.
- 3.7 Where the Government considers that the direct evidence of Aboriginal people may be of assistance in determining whether there is a sufficient basis on which to embark on consent determination negotiations then it will be a matter for the claimants and their representatives to determine who the best people are to provide such evidence on behalf of the claimant group.

#### **4. FIELD NOTEBOOKS**

The Government may request, as part of the material comprising connection reports, copies of field notes (or like material) relied upon by the claimants' experts in the preparation of the reports.

## **5. CONFIDENTIALITY**

- 5.1 The Government undertakes, to the extent that it is able to do so at law,<sup>3</sup> that information provided in connection reports and any other information exchanged during any negotiation process will be, unless otherwise agreed:
- ‘without prejudice’ and confidential; and
  - dealt with in accordance with cultural restrictions communicated to the Government, the basis of which is demonstrated.
- 5.2 In preparing a connection report, native title claimants should consider the extent to which they need to rely upon restricted information. It will not assist the process of negotiation if cultural restrictions on the information provided are such that the Government’s ability to consider it, despite reasonable attempts to accommodate cultural concerns or restrictions, is so inhibited that it cannot assess the material.
- 5.3 However, in the event that the Government is prepared to negotiate the form of a determination of native title, the connection report or some modified version of the report will have to be provided to the Federal Court to satisfy the Court that there is a sufficient basis upon which it can make a determination under section 87 of the Native Title Act in the terms agreed by the parties. In addition, other respondent parties may also seek access to the material before they are prepared to agree to enter into the negotiations. This issue is dealt with in part 6 below.

## **6. OTHER PARTIES**

- 6.1 The Government favours a staged approach to the production and assessment of connection material. As the major respondent party, the Government has a responsibility to ensure that claims made in native title determination applications are based on cogent evidence. In the event that the Government’s assessment of the connection material is such that it is prepared to enter negotiations over the form of a determination of native title, section 87 of the Native Title Act still requires that all parties to an application must agree to a consent determination.<sup>4</sup>

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<sup>3</sup> The *Freedom of Information Act 1992 (WA)* provides for public access to information held by Government agencies. However, in relation to documents of the nature described in part 5, the Office of Native Title would seek to apply the exemption provisions of the *Freedom of Information Act 1992 (WA)*.

<sup>4</sup> *Munn for and on behalf of the Gunggari People v State of Queensland* [2001] FCA 1229 (23 August 2001), paragraphs 24 – 33.

- 6.2 The Government will be bound by its confidentiality undertakings to the native title claimants attaching to its receipt of connection reports. The onus is upon the native title claimants to provide sufficient information to the other parties, if this is necessary, to secure the agreement of those other parties to the terms of any proposed determination.
- 6.3 It is open to other parties to rely on the conclusions that the Government draws from its assessment of the connection report. In any event, following the completion of its assessment, the Government will inform other parties as to whether the material provides a sufficient basis for the Government to enter into negotiations towards an agreed determination of native title.

## **7. PRESCRIBED BODIES CORPORATE**

- 7.1 Section 55 of the Native Title Act requires that a Prescribed Body Corporate (PBC) be determined by the Federal Court to hold the native title, with the nomination process for the PBC being part of the steps required before the making of such a determination.
- 7.2 The absence of a PBC presents considerable problems for the Government in the ongoing management of land subject to native title. Therefore, while the Government is prepared to negotiate the terms of an agreed determination of native title prior to the nomination of a PBC, it will require, as part of the negotiations, that agreement be reached with the native title claimants regarding arrangements to deal with future act matters in the period after the determination of native title is made, but before a PBC is determined to hold the native title on behalf of the claimant group.

## **8. REVIEW OF GUIDELINES**

The Guidelines will be progressively reviewed and amended in accordance with developments in the case law. The Government will consult with key native title parties in relation to proposed amendments to the Guidelines.

## **9. THE FORM AND CONTENT OF A CONNECTION REPORT**

The connection report should include the following sections:

### **9.1 Introduction**

The introduction should provide:

- a) an executive summary;
- b) an overview of the material that comprises the report; and
- c) a description of any research carried out (such as investigations among the claimants and other Aboriginal groups, research of literature and primary sources, mapping of country and genealogical research) including reference to any research carried out by assistants supervised by a senior consultant and the research methodology used.

### **9.2 The Native Title Claimant Group**

The connection report should clearly identify the persons or groups of persons comprising the claimant group, or the means by which those people can be readily identified. Further, the report should present information and analysis which establishes the group as a society, or part of a society, defined and united through its observance and acknowledgement of a normative system of indigenous law and custom which is the foundation of the traditional laws and customs under which native title rights and interests are asserted to exist. The report should contain:

- an explanation of the identity label(s) used by the claimants to refer to their group. For example:
  - Is the identity label the name of a language/dialect, or is it derived from some other source?
  - Did the identity label emerge through a particular historical process? If so, what label(s) were used to identify the group in the past?
  - In particular, what label(s) were used to identify the group at the time of the acquisition of sovereignty?
- information which establishes that the claimant group has continued to observe and acknowledge a system of law and custom which has connected them to the land claimed since the acquisition of sovereignty. The Government does not expect evidence that every generation since sovereignty has acknowledged and observed the relevant system. However, the Government will require that sufficient evidence be provided to enable an inference to be drawn that the relevant system has been observed by every generation and has had a continuous existence and vitality since sovereignty;

- an explanation of how the laws and customs structure the behaviour of the claimant group. A description of observable patterns of behaviour is in itself insufficient to support a determination of native title. It must be established that patterns of behaviour reflect (and are exercised in accordance with) the traditional laws and customs which are acknowledged and observed by the claimant group;
- an analysis of the ways in which membership of the claimant group is determined according to the system of traditional law and custom, including whether membership is reckoned on the basis of biological connection to forebears, marriage, incorporation or some other basis (or a combination of these);
- an account of how the laws and customs acknowledged and observed by the group have been transmitted from generation to generation;
- an explanation of whether other Aboriginal groups in the area recognise the claimant group, both its existence and its connection to and holding of native title rights and interests in respect of the claim;
- an explanation of the membership of the claimant group and where the claim asserts the existence of subgroups:
  - how the subgroups are recognised within the system of law and custom; and
  - whether the rights and interests held by any subgroups are different to, or more particular than, the rights and interests held by the members of the group as a whole;
- genealogies showing relevant deceased forebears from whom the living members of the claimant group trace descent, together with a representative sample of families showing living native title holders. Where possible genealogies should include relevant Aboriginal and European names, dates of birth (and death in the case of deceased persons), places of birth (and death in the cases of deceased persons) and any other biographical information considered relevant; and
- where any shared rights are asserted with other overlapping claimant groups, an explanation of who the claimed native title holders are for the shared area and how the interests of both groups/members of both groups might be accommodated in a determination of native title.

### 9.3 The Traditional System of Law and Custom

The connection report should describe the features of the body of traditional law and custom by which the native title rights and interests of the claimants operate. For the purposes of a determination of native title, the claimants must establish that they hold native title rights and interests according to a normative system of traditional law and custom which has remained substantially unchanged since the time of the acquisition of sovereignty. Claimants must also establish that

there has been no break in their observance of the relevant body of law and custom. In particular, the connection report should:

- provide an account of how the traditionally based system for holding native title operates and how native title rights and interests are exercised;
- establish that the system has had a continuous existence and vitality since the time of the acquisition of sovereignty;
- establish that the claimant group have continued to acknowledge and observe the traditional system of law and custom. The connection material should describe how elements of the system are acknowledged and observed by the group and the ways in which these laws and customs connect the group to the claimed area. As already noted, a description of observable patterns of behaviour is insufficient; rather it must be established that patterns of behaviour reflect the rights and interests in land that are asserted to exist under the traditional laws and customs observed by the group;
- where change and adaptation in the traditional system of law and custom has occurred, provide an account of the changes and an explanation of why they do not constitute a substantial change from the system which prevailed at sovereignty. Where changes in the system have occurred, it is important to establish that they do not represent a departure from the traditional laws and customs for holding native title;
- establish that there has been no break in the observance of laws and customs by the claimant group. Where change and adaptation have occurred, it must be shown that the laws and customs observed by the claimant group are nevertheless founded in tradition;
- explain how the system of law and customs acknowledged and observed by the claimant group has been transmitted from generation to generation;
- provide a map showing the extent of the claimants' native title rights and interests in relation to the claimed area, where appropriate, the general location of areas of significance and, where relevant and practicable to the claimant group, the areas to which particular sub-groups assert specific connection;
- Unless it is asserted that descent does not play a part in the transmission of native title rights and interests, show that the apical ancestors or other forebears relied on had rights and interests in the area covered by the application according to the normative system of law and custom.

9.4 The Connection Between the Claimant Group and the Claimed Area

The connection report should establish the claimant group's connection to the claimed area and emphasise the ways in which that connection has been maintained in accordance with the acknowledgement and observance of a normative system of law and custom. To the extent that the following have not been dealt with under the previous headings, the connection report should provide an analysis of the history of the claimant group, relevant to their connections to the area claimed, including a description of the basis of connection. It must be shown that the claimant group has continued to exist as a society or part of a society which has maintained its connection with the claim area since sovereignty.

9.5 Description of the Boundary of the Claimed Area

This section should include a description of the nature and extent of any overlapping applications, including a statement as to whether the overlap is the result of a dispute over the boundary of the application or a situation where shared rights are asserted.

9.6 The Claimant Group's Asserted Rights and Interests in the Claimed Area

The connection report should clearly describe the nature and extent of the claimants' native title rights and interests in the claimed area for the purposes of the terms of a determination, as referred to in section 225(b) of the Native Title Act, and should substantiate how each right and interest claimed is possessed under the traditional laws acknowledged, and the traditional customs observed, by the claimant group. Claimants should be mindful of the fact that only rights and interests in land and waters are capable of recognition as native title rights and interests.

Where relevant, and to the extent not otherwise addressed in other sections, the connection report should indicate:

- the traditional connection to the claimed area from which conclusions as to the nature and extent of native title rights and interests can be made;
- whether the native title rights and interests are communal, group or individual rights and interests;
- whether different rights and interests are held by different subgroups or individuals and/or in respect of different parts of the claimed area; and
- if the claimed area is subject to overlapping native title applications, the report should, where practicable, describe the nature and extent of acknowledged shared or concurrently held rights and interests, and the different groups or individuals holding those rights, or explain any dispute between different native title claimant groups concerning those rights and interests.

The asserted rights and interests should be clearly listed in a separate section setting out the areas of land and waters to which the rights and interests apply. Substantiating examples, including reference back to relevant parts of the connection report and/or any accompanying material such as Aboriginal information, should be given for each right or interest asserted.

9.7 Sections 47, 47A and 47B

Where the claimant group claims that extinguishment of native title over all or part of the claimed area should be disregarded, pursuant to section 47 of the Native Title Act, then the connection report must provide information to establish that section 47 applies (including information establishing the identity of the holders of the pastoral lease at the time the application was made).

Where the claimant group claims that extinguishment of native title in relation to all or part of the claimed area should be disregarded, pursuant to sections 47A or 47B of the Native Title Act, the connection report should provide details of the occupation relied upon to support such a claim.

9.8 Conclusion

The conclusion should summarise the findings of the connection report.

9.9 Expert Declaration

Connection reports should contain a declaration that the expert who produced the report has made all the inquiries that the expert believes are desirable and appropriate to the production of the report and that no matters of significance have, to the expert's knowledge, been withheld.

9.10 Curriculum Vitae

A statement of the qualifications and relevant experience of the author(s) should be included with the report. Where research assistants were used in the preparation of the report, a statement of their qualifications should also be provided.

9.11 Research Brief

A copy of the research brief for the production of the connection report should be attached.

## 9.12 Bibliography

A reference list of bibliographic sources listing all published and unpublished material relied on in the preparation of the report should be provided. Copies of any material included in the bibliography, and not easily obtainable, should also be provided.

## **10. ASSESSMENT OF CONNECTION MATERIAL**

10.1 The Office of Native Title, within the Department of the Premier and Cabinet, is the agency responsible for conducting native title negotiations on behalf of the Government. Connection reports should be submitted to the Executive Director of the Office of Native Title. In finalising the reports for submission to the Office of Native Title, native title claimants should:

- ensure that the material addresses the Government's *Guidelines for the Provision of Information in Support of Applications for a Determination of Native Title* (October 2004);
- be cognisant of developments in the case law with respect to establishing the basis of a determination under section 87 of the Native Title Act;
- be mindful that the assessment of connection material is an onerous task which the Court is likely to scrutinise.<sup>5</sup>

10.2 On receiving the connection report or reports, the Office of Native Title will undertake a preliminary internal review to identify whether there are any fundamental requirements which have not been addressed in relation to the form and content of the material. The purpose of this internal review is to expedite the assessment process where the material clearly does not address the Government's requirements. In such cases, it is beneficial to all parties to have any fundamental issues addressed by the claimants before the material is subjected to a further review by an independent expert.

10.3 The Office of Native Title will provide written advice to the claimants in as timely manner as possible regarding the initial assessment of the connection material.

10.4 Following its internal assessment, the Government will appoint an appropriate person or persons to undertake an independent review of the connection material and to provide advice to the Government as to their assessment. Reviewers will have appropriate qualifications and expertise to be able to provide expert advice on the information and analysis presented in the material.

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<sup>5</sup> Wand, P. and Athanasiou, C. *Review of the Native Title Claim Process in Western Australia* (September 2001), p. 101.

- 10.5 The length of time required to complete the review will be affected by matters such as the availability of a suitable reviewer and the nature of the information supplied by the claimants. The timing for both the provision of connection material and completion of the Government's assessment of such material will be discussed and agreed with claimants and/or their representatives on a case-by-case basis in the context of mediation.
- 10.6 The outcomes of the review process will be communicated to the claimants in writing. The written advice will indicate whether:
- there are matters which require further clarification or information;
  - the Government requires further limited sessions of Aboriginal evidence before the Federal Court, unless the necessity for such evidence has already been canvassed with the claimants and their representatives as being required ahead of, or concurrently with, information presented in the connection report.
- 10.7 Before making a recommendation to Government as to whether the information submitted (including any direct evidence of Aboriginal people heard before the Federal Court) is sufficient to support a decision to enter into negotiations towards an agreed determination of native title, the Office of Native Title will seek legal advice regarding the evidentiary basis of the claim. The legal advice will consider the connection material submitted by the claimants, any direct Aboriginal evidence heard in relation to the claim and the advice provided by the Government's appointed expert reviewers.
- 10.8 At any stage in the assessment process, the claimants may request the return of connection reports and the Government will return all material without retaining copies. However, should negotiations result in an agreed determination, it will be necessary for the State to retain a copy of the report (or some version thereof) so that a record of the basis upon which the Government entered into the agreement is preserved. The form of evidentiary material to be retained by the State to justify the agreed determination and ongoing arrangements for the management and archiving of the material in accordance with cultural restrictions and the requirements of the *State Records Act 2000 (WA)*, will be settled between the Government and the claimants in the context of the consent determination negotiations.