



National  
Native Title  
Tribunal



**AIATSIS**  
Australian Institute of Aboriginal  
and Torres Strait Islander Studies

# Getting Outcomes Sooner

Report on a native title connection workshop  
Barossa Valley, July 2007

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November 2007

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## Executive Summary

The 'Getting Outcomes Sooner' workshop was held in the Barossa Valley in South Australia in July 2007. Its aim was to bring together a range of experienced native title practitioners – lawyers, anthropologists and representatives from various levels of government – to find more efficient ways of preparing and assessing materials that establish native title claimants' 'connection to country'.

Several themes emerged strongly over the course of the workshop: the limited resources available within the native title system; and the need for clearer and more open communication between lawyers and anthropologists preparing connection material, and between those preparing the material and those in government agencies who assess it.

A number of strategies were proposed to help overcome the resource shortages apparent within the system. These ranged from proposals to encourage more people to work as anthropologists on native title claims to adopting a more regional focus in researching and strategising claims. In addition, workshop participants suggested ways in which research could be shared or resource materials made more accessible to avoid delays and unnecessary duplication of effort.

At almost every stage throughout the workshop, participants observed that more open communication between those preparing and those assessing connection material would help to streamline the process by clarifying the nature of each side's expectations and avoiding misunderstandings. Participants also noted that other respondent parties were often excluded from the assessment process and that their needs for information were often left unmet. It was suggested that a meeting between all relevant parties at the start of the process could help clarify people's information needs and identify any particular areas of concern that needed to be addressed in the resulting connection material. Closer collaboration between legal staff in native title representative bodies and the anthropologists researching and preparing connection material could also help in ensuring that the final product complies with the *Native Title Act* and relevant case law and meets the needs of governments and other respondent parties. In addition, it was hoped that earlier, and more open, communication between the relevant parties could help make the process more flexible and better able to accommodate a greater range of outcomes.

Participants commented that the workshop provided an invaluable opportunity to meet their counterparts and exchange views on improving the process of preparing and assessing connection material. For some, it was the first time that those who prepare material had met those who assess it.

Many participants agreed that there was a need for future workshops and made several suggestions for issues they wanted to address. These include training workshops for those who prepare connection materials; a workshop on interpreting threshold issues of proof to ensure that anthropological analyses are situated within the appropriate legal context; a workshop to develop a best practice model for preparing connection material; and a workshop to consider alternative settlement packages and how these might be approached.

Participants recognised that, thus far, it is taking too long to resolve native title claims and all agreed that changes in practice are required to help speed up the process.

## **Abbreviations**

AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
NTRU	Native Title Research Unit (of AIATSIS)
NNTT	National Native Title Tribunal
NTRB	Native Title Representative Body
NTSP	Native Title Service Provider
RATSIB	Representative Aboriginal and Torres Strait Islander Body
ILUA	Indigenous Land Use Agreement
NTA	Native Title Act
PBC	Prescribed Body Corporate
FaCSIA	Department of Families, Community Services and Indigenous Affairs
The Court	Federal Court of Australia
ACT	Australian Capital Territory
NSW	New South Wales
NT	Northern Territory
QLD	Queensland
SA	South Australia
WA	Western Australia
DVD	Digital Video Disc
GIS	Geospatial Information System

## 1. Introduction

The 'Getting Outcomes Sooner' workshop took place at the Novotel Barossa Valley Resort between 24 and 26 July 2007, under the joint sponsorship of the Native Title Research Unit (NTRU) at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) and the National Native Title Tribunal (NNTT).

The aim of the workshop was to explore ways in which native title claims can be resolved more quickly. Its particular focus was on the requirements for establishing native title claimants' connection to country and the way in which this is assessed while claims are in mediation.

The workshop arose out of a preliminary analysis which was undertaken by NTRU in 2005-06 of State and Territory connection processes. The scope of NTRU's analysis was limited and did not include direct input from all States and Territories. In 2007, discussions between Lisa Strelein and Toni Bauman of NTRU, Bardy McFarlane, NNTT member and Kim McCaul of the South Australian Attorney-General's Department resulted in a decision to hold the 'Getting Outcomes Sooner' workshop.

To maximise opportunities for discussion, it was agreed to limit the number of participants to 40 representatives of the national pool of professional researchers and legal expertise across the native title system. Participants included 11 representatives from the State and Territory governments, 20 representatives of Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) and 9 others with significant experience in native title but not affiliated with either of the aforementioned agencies (see Appendix 1 for a list of participants). Critically, workshop participants were invited to participate as technically-informed experts with an open mind, rather than as spokespersons for particular institutional viewpoints. They were strongly encouraged to 'step outside' any representative role and to keep an open mind about potential changes to the status quo.

This report discusses key issues which arose in the workshop and works towards identifying some possible best practice principles and associated strategies. It incorporates responses to a pre-workshop questionnaire and post-workshop evaluations and feedback from participants on a draft of this report.

This report was written for an audience familiar with native title processes. For readers unfamiliar with native title processes an overview has been provided at Appendix 2. Appendix 3 outlines the various State and Territory approaches to the preparation and assessment of connection reports.

## 1.1 Structure of the workshop

The workshop was facilitated by 4 members of the NNTT – John Catlin, Dan O’Dea, Gaye Sculthorpe and Graham Fletcher – with planning assistance from Toni Bauman, Visiting Research Fellow at AIATSIS, who facilitated the final plenary session.

Participants were allocated to four discussion groups to ensure a mix of expertise and geographic representation. Each group was facilitated by an NNTT member who did not ordinarily work with members of that group. An NNTT staff member was assigned as scribe to each of the four groups.

The four groups discussed similar issues and reported back to plenary sessions following each discussion.

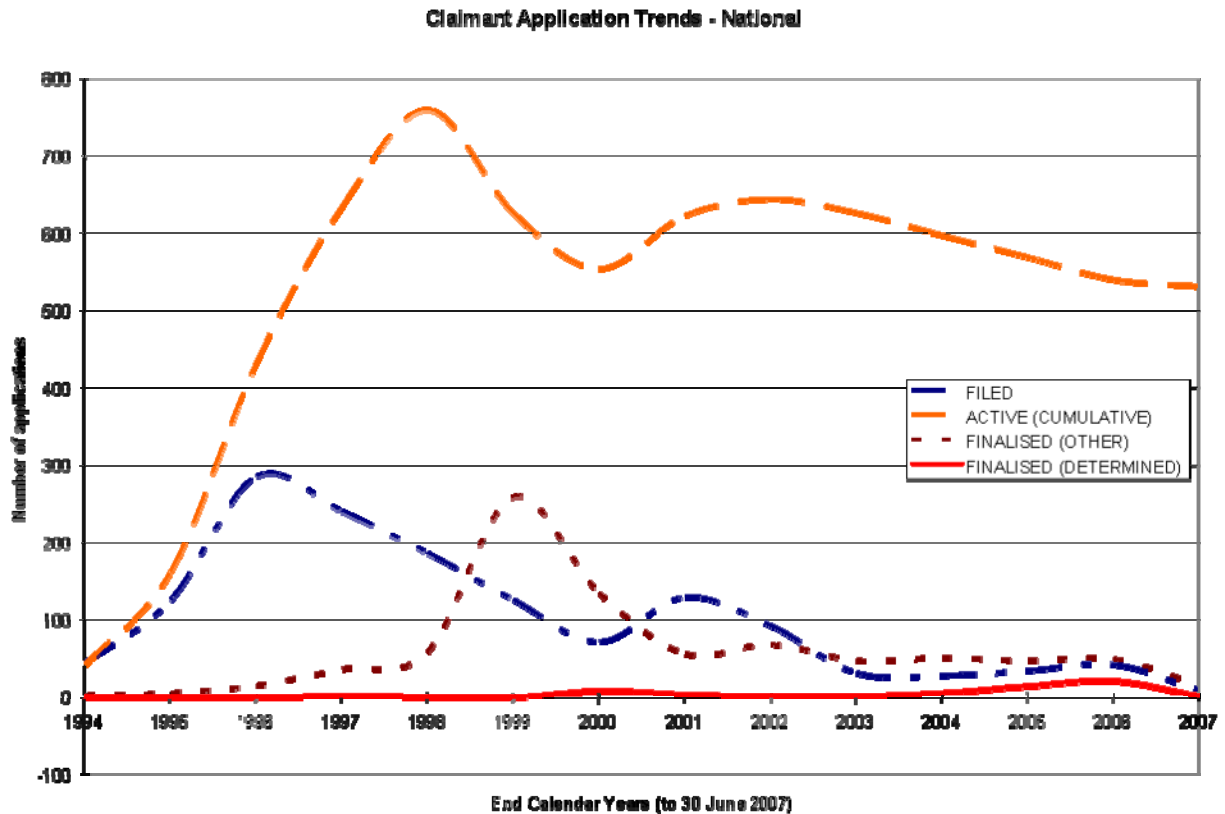
In the weeks before the workshop, participants were sent a questionnaire that asked them to rate the overall effectiveness of the current system for preparing and assessing connection materials in their jurisdictions; to identify what they saw as the strengths and limitations of the current system; to indicate whether they saw a need to change the current system; and, if so, what would be the single most important thing to change. Significantly, 31 of the 35 respondents, or 86%, said there was a need to change the current system.

Analysis of the questionnaire response identified seven themes which provided the basis for an agenda-setting exercise on the first evening of the workshop. Participants were asked to vote for the three most significant themes relating to processing native title connection, with workshop sessions following this order. The results were as follows:

- Assessment – 31
- Research planning and the research process – 27
- Mediating connection – 25
- Connection guidelines – 18
- Presenting research – 16
- Research strategies and resource allocation – 5
- Building relationships – 5

## 2. National statistics and connection processing

The workshop, 'Getting Outcomes Sooner', was a direct response to the slow rate of resolving native title claims in Australia.



**Table 1 National trends in claimant applications**

Table 1 illustrates the differential between the number of active native title claims (the orange line at the top of the chart) and the progress on determined claims (the red line at the bottom of the chart). It also indicates that while a significant number of claims have been settled by administrative means, including the withdrawal and amalgamation of claims (the brown line), a steady stream of new claims are also being lodged (the blue line).

As at 30 June 2007, there were 532 active claimant applications (ACT 1; NSW 37; NT 186; QLD 156; SA 22; VIC 16; WA 114). Claims had been filed for an average of 80 months. Claims in mediation (284) had been in mediation for an average of 72 months<sup>1</sup>. Although it is not possible to provide a precise estimate,

<sup>1</sup> Of those applications which were 'in mediation' as at 30 June 2007, this figure has been calculated based on the average elapsed time (in months) since the application first commenced mediation. Due to data

at the current rate of resolving claims, the existing native title system will run for another 30 years or more.

As at 4 June 2007, there were 103 determinations of native title registered on the National Native Title Register. 68 of those were determinations that native title exists (in part or all of the claim area) and of those almost 80% were made with the consent of the parties. The remaining 35 were determinations that native title does not exist, of which almost 70% were unopposed non-claimant applications.

The fact that many senior native title claimants are not surviving to see their claims settled is now broadly acknowledged. In June 2006, the Commonwealth Attorney-General, Phillip Ruddock, announced the Commonwealth's agenda for changes to the native title system and commented that:

*Ultimately the native title system concerns the recognition and protection of traditional rights of Indigenous persons. It is clear that changes to the system...are needed to ensure those rights are enjoyed by native title holders within their lifetimes. The native title system is not achieving the outcomes which it should. Resolution of native title issues within the current framework is too costly and time-consuming.<sup>2</sup>*

The Commonwealth Attorney-General has also recognised the pivotal role played by the States in native title claims and has said that 'State and Territory Governments are best placed to assess matters regarding connection... and to ensure that the system operates in a fashion which is more transparent to all parties'.<sup>3</sup>

State and Territory governments have a range of experience in assessing connection materials and entering into consent determinations. As at June 2007, there were approximately 78 connection reports, in a range of forms, awaiting assessment around Australia. Most were the product of a 2-3 year research process and most will enter an assessment process that can take up to three years. The reasons for this are complex; however, in any construction, the resolution of native title claims clearly needs to be more efficient and effective. Failure to resolve native title claims sooner will inevitably see another generation of claimants frustrated by the native title process and make it more difficult for them to have their native title rights and interests recognised.

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limitations this figure does not take into account breaks in mediation in the period between the application first commencing mediation and 30 June 2007.

<sup>2</sup> Philip Ruddock, 'Native Title: The Government's Proposals for Reform' (Paper presented at the Native Title Conference, Darwin, 26 May 2006).

<sup>3</sup> Ibid.

### **3. Summary of issues identified through the pre-workshop questionnaires**

Participant responses to the pre-workshop questionnaire showed different levels of satisfaction with the current system – even amongst participants from the same States or Territory. Most participants (31 of the 35 respondents, or 86%) noted the need to change the current system. Responses also indicated a range of views of what constitutes best practice approaches in processing connection.

Some responses centred on the fundamental relationship between mediation and the connection reporting and assessment process and suggested that the current method of assessing connection has simply relocated an adversarial evidentiary process from the Federal Court to State and Territory governments, without adopting any of the principles of mediation that would facilitate compromise between the parties. Concerns were also raised about pressures to prepare connection material for mediation while also being ready to move into litigation, with consequential impacts on how the research is documented and presented.

Other responses focussed more on the conventions surrounding the processes of preparing and assessing connection materials. These included the practice of restricting access to connection reports while they are being assessed by State and Territory governments, thereby limiting the scope of other respondents to participate in the process. This practice also limits the opportunities to educate other researchers and to share understandings about how the material was assessed. Research practices also attracted a spectrum of comment. These included the question of balancing the amount of evidence provided by claimants themselves against documented evidence from secondary sources; the acceptability of formats in which material can be presented; and whether reports have too little or too much input from historians, anthropologists or lawyers.

Respondents to the questionnaire also commented on the fact that some jurisdictions have published connection guidelines and others do not, which leads to different processes for reporting on and assessing connection materials. Issues of uniformity, transparency and consistency were raised by most of the respondents, with some suggesting that there should be standard national criteria for connection reports, although there was no consensus on what these would be.

A number of responses indicated that a lack of NTRB and NTSP resources (including human resources such as competent consultant researchers) is a major issue in the effective and efficient preparation of connection material. This is compounded by the need to extend these resources to other areas such as responding to future act notices.

Other issues which were raised include:

- the different level of connection reporting requirements for alternative settlements including ILUAs;
- the role of the NNTT in mediating connection issues with its expanded powers under the 2007 amendments to the NTA; and
- the need to build relationships and trust between NTRBs and NTSPs and State and Territory government representatives through improved communication.

## **4. Issues discussed at the workshop**

As might be expected, there was a substantial degree of overlap in the discussions of the various topics. For example, in the first session on 'assessment' participants raised issues that related to 'connection guidelines', 'mediating connection' and 'presenting research'. Similarly, discussion in later sessions referred back to 'assessment'. For that reason, this report does not summarise the issues in the order in which they were scheduled or discussed. Rather it presents the issues in an order that more logically mirrors the processes of preparing and assessing connection materials.

### **4.1 Resources, funding and prioritisation**

An issue raised frequently at the workshop was the lack of resources to do the work at hand. All of the workshop participants noted the lack of suitably qualified anthropologists available to prepare or assess connection reports and a number of suggestions were put forward. This issue is discussed separately in more detail in the next section.

Many of the NTRB and NTSP representatives commented that their organisations are under-funded; this issue was discussed in some detail by one group which proposed a number of solutions. It was suggested that applicants do not meet timeframes for research and connection report writing because NTRBs do not get enough funding. To try to resolve this, it was thought that FaCSIA should be given a clearer idea of what is expected in a connection report and the amount of time and effort it entails, noting that it is difficult to plan research within a 12 month recognition period. It was also suggested that an agreement to access state government records could help limit costs or that it might be possible to seek a limited discovery order for authorised information (on people and places).

A number of suggestions were put forward to make the most of the limited resources available. One group noted that parallel processes can shorten timeframes if all parties have the capacity to engage, leaving substantive issues until after connection is established. Pastoralists, for example, may not have issues with connection, and want to enter into an ILUA before a consent determination. It was noted, however, that there may be resource implications in proceeding with ancillary negotiations before connection materials have been

prepared and assessed. If it is later found that connection cannot be established, the resources expended would have been wasted and unrealistic expectations may have been raised.

There was a suggestion that claims which had been lodged to secure the right to negotiate might be withdrawn to allow time for more comprehensive research. However, this raised the issue of protecting procedural rights and the right to negotiate. It was suggested that an ILUA for a fixed period might preserve the right to negotiate while allowing time to conduct appropriate research.

Several groups noted the need for research to be specifically targeted so that researchers have a clear idea of the information they are seeking before commencing research. This was seen as particularly important in helping to get the most benefit from limited resources, especially given that field work and archival research can be resource intensive. This issue is discussed further in section 4.5 , 'scoping connection reports'.

Workshop participants also discussed the potential for regional approaches to create greater efficiencies in the system. It was thought that a regional approach could:

- assist in identifying regional systems of laws and customs;
- provide a regional historical overview, site lists, and genealogies;
- underpin priority setting and the production of individual claim connection reports;
- move toward settling issues on a regional basis;
- assist in planning strategies;
- promote the sharing of research and avoid duplication;
- resolve overlapping claims; and
- identify weak or problematic claims from a regional overview.

However, it was also suggested that a regional approach would not necessarily be beneficial if it meant reducing the research needed on individual claims to settle disputes between claimants or develop decision-making processes for specific areas. Concern was also expressed that a regional approach might have long term repercussions for claims if claim boundaries need to be redrawn later due to minimal initial research.

#### **4.1.1 Possible strategies for overcoming limited resources**

- Improved regional planning and improved operational planning between the State and Territory governments and NTRBs and NTSPs to identify annual plans and strategic claim priorities.

- Meetings between States and Territories, NTRBs and NTSPs and FaCSIA to develop understandings of funding requirements, what is expected in a connection report and the amount of time and effort that entails.
- Simpler, cheaper access to government records and/or the use of limited discovery orders (under Order 15 of the Federal Court Rules) for easier access to relevant information;
- Collaborative research between NTRBs and NTSPs with access to each others' archives;
- The development of an annotated bibliography covering key anthropological issues and materials relevant to native title. This could include ethnographic material; theoretical texts dealing with issues like society, migration, succession and so on; and native title cases.
- Parallel mediation of connection and other issues rather than sequential mediation.

#### **4.2 Developing expertise in preparing connection reports**

Most, if not all, participants agreed that the shortage of suitably qualified anthropologists with relevant experience to prepare or assess connection reports, both as consultants and as staff within government departments and NTRBs and NTSPs, is a major obstacle to getting connection outcomes sooner.

The shortage of anthropologists is problematic in two ways: it means significant delays in research being undertaken and can result in the preparation of connection reports which do not always address the requirements of State guidelines and consequently give rise to requests for revisions and additional information. There is, therefore, an urgent need for short and long term strategies to develop a pool of researcher expertise upon which the native title system may rely into the future.

Workshop participants made it clear that working within the native title system is not always an attractive proposition for anthropologists: there is the prospect of appearing as an expert witness in Court hearings; the nature of many work settings is very demanding; and there is a perception that native title research is not 'real' anthropology and will not therefore provide opportunities for broader academic research positions.

Externally imposed timeframes make it difficult for researchers to produce the quality of work they would prefer and do not allow the development of comprehensive understandings of the Indigenous societies they are working with; and yet there is always the possibility that they will be required to give evidence in a Court hearing based on this limited research. It was suggested that there needs to be greater appreciation that researchers are skilled interpreters and not

simply scribes. Researchers, who may be meeting claimants for the first time, may be required to negotiate sensitive issues with native title claimants, many of whom are suspicious of anthropologists, have little understanding of the research process and of the need for anthropologists to be independent, and who may have unrealistic expectations of the outcomes of claims.

In addition, it is difficult to develop specific research expertise for native title. The results of research are almost never circulated and this reduces opportunities for professional practice to develop among the community of native title researchers. While there is a need for researchers to discuss and debate actual case materials, issues of confidentiality and the need to protect information in the event that it becomes part of litigation are matters that have yet to be resolved.

What emerged from the various discussions was a need for access to best practice models for writing connection reports, and to use edited or 'sanitised' reports for training purposes. It was suggested that, given the range of jurisdictional approaches, State and Territory representatives who are involved in assessing connection materials might also be involved in training sessions in writing connection reports.

A number of suggestions were made as to the formal mentoring and supervision of less experienced researchers, including staff of NTRBs and NTSPs, and that the latter might carry out a significant amount of preliminary research in-house. However, the idea of joint research was met with a cautionary note about jointly authored reports. People were mindful of the Court's comments in the Yulara case criticising perceived inappropriate collaboration of experts, and its previous comments that anthropologists without field expertise in the area under consideration are not necessarily experts. It was also noted that the involvement of additional researchers would add to the costs of producing connection reports.

#### **4.2.1 Possible strategies in developing research expertise**

- NTRBs and NTSPs provide more information to native title claimants about the research process and the requirements of researchers as experts before the research is started;
- NTRB or NTSP anthropologists carry out more of the preparatory work for the consultant anthropologist, eg historical research, genealogies, identification of sites; this approach could also include the senior anthropologist mentoring a junior and/or joint report writing;
- NTRBs and governments adopt joint strategies that increase the research skills base in each region or jurisdiction including the development of a pool of senior researchers who could undertake supervision of junior anthropologists 'on the ground' with support from NTRBs or NTSPs (centralised researchers);
- producing 'sanitised', publicly available versions of connection reports so that researchers, lawyers and educators have access to connection

reports produced elsewhere, subject to appropriate protection of particular material;

- establishing a specialist training centre at a university<sup>4</sup> or some form of apprenticeship system based around intensive study sessions several times a year; this could be accompanied by the establishment of a funded programme to enable Indigenous staff in NTRBs and NTSPs to become suitably qualified. In addition, NTRBs could fund junior anthropologists to attend the Australian Anthropological Society conferences to discuss native title issues;
- Aurora<sup>5</sup> to provide State and Territory based training workshops based on State and Territory requirements; as part of this approach State and Territory governments could work with Aurora to investigate the WA Government model which has been used to conduct training sessions on writing connection reports.

### **4.3 A multi-disciplinary team approach**

Success in preparing connection materials requires both ethnographic research and an understanding of the legal requirements. Successful connection reports require high standard multi-disciplinary collaboration in a context where a completed report can be the product of several versions of the research or legal briefs. Comprehensive research conducted in close consultation with legal teams and continued collaboration between researchers and the legal team throughout the process is fundamental to success and has significant benefits even after the claim is resolved.

Successful collaboration between researchers and lawyers can be difficult to achieve, as anthropologists may not fully understand the legal requirements of connection reporting and lawyers may not appreciate the difficulties researchers face in meeting the requirements of the NTA and relevant case law. One of the

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4 It should be noted here that the University of Queensland recently announced a project aimed at improving capacity in native title research. The goals of this project include: carrying out practical training activities during 2007-8 to further address the need for capacity building in this area of applied research; providing leadership across the applied anthropology profession by profiling aspects of native title research; generating discussion and exchanges through professional writing; and generally assisting to maintain necessary debate among colleagues and students who are potential contributors to the pool of research capacity in this area.

5 The Aurora Project is the collective name for a number of programs that work with Australia's Indigenous communities and organisations to facilitate prosperity through capacity building. To achieve this, the Project focuses on professional development in law, anthropology, management, education and other disciplines. <http://www.auroraproject.com.au/About.htm>

concerns raised at the workshop was that anthropologists often do not understand what 'native title' is and, rather than addressing the requirements of the NTA, instead produce the equivalent of 'claim books' with an emphasis on primary spiritual responsibility and local descent groups as required under the *Aboriginal Land (NT) Act 1976*. Some workshop participants commented that anthropologists sometimes get caught up in critiquing theoretical issues, rather than addressing the required facts. However the suggestion that connection reports might be written by lawyers, with appendices by anthropologists and historians, could be problematic if the case proceeds to litigation.

Whatever the case, it was agreed that lawyers have a clear responsibility to maintain a 'hands on' role to ensure that the report is 'fit for purpose' and to provide clear briefs to researchers to avoid any misunderstandings as to how reports should be written. Their focus should be on the form of the report rather than the content and ensure that facts are clearly distinguished from opinions.

#### **4.3.1 Possible strategies toward a multi-disciplinary approach within NTRBs and NTSPs**

NTRB and NTSP lawyers could:

- develop a standard and clear brief which establishes the requirements of s223 of the NTA that the research must address;
- work closely with researchers, remaining engaged throughout the research process; and
- undertake a proofing process with researchers, to help them better understand the nature of questions which might be asked in the Federal Court.

State and Territory governments could assist in this by working with the NTRBs and NTSPs to develop standard briefings for legal and research requirements.

#### **4.4 Connection report guidelines and flexibility**

There was a range of views as to whether guidelines for preparing connection reports are useful, although it was noted that in some jurisdictions guidelines had been developed at the request of NTRBs. Some workshop participants expressed the view that their State's guidelines made a substantial contribution to the efficient recognition of native title, while others expressed frustration with a perceived lack of clarity. Still others regarded government requirements as excessively onerous, both in terms of the length of time and resources they demand in preparing and assessing reports as well as the demands that they place on the claimant group.

It was recognised that guidelines can assist in focussing research and ensuring consistency across a jurisdiction, but flexibility was seen as equally important

since some claimant groups may not be able to provide documentary evidence to address all elements of the connection guidelines. In the Northern Territory, the lack of formal guidelines appears to have encouraged discussion between NTRBs and the government and enabled greater flexibility.

It was suggested that where guidelines are in place, they might be expanded to provide greater clarity, including the development of checklists and dot points to explain and contextualise particular activities. A representative from the Queensland government indicated that the government would consider developing a checklist to assist in making the process more transparent.

It was suggested that ILUAs and other 'non native title' alternative settlements should have 'scaled down' requirements for connection reporting with distinct guidelines for categories of agreements. In at least one jurisdiction, minimal information is required for alternative settlements, as long as the native title holders and the basis of their claim are clearly identified.

#### **4.4.1 Possible strategies towards the consistent and flexible use of guidelines**

NTRBs and NTSPS and governments could collaborate to:

- co-write guidelines to ensure they are flexible, clear and consistently applied;
- supplement guidelines with checklists (eg the State's legal checklist, to contextualise particular activities);
- produce a template for research and develop a 'how to' manual with sample documents; and
- develop clearly articulated and distinct guidelines and policies with scaled requirements for consent determinations, ILUAS without consent determinations and 'non native title' alternative settlements.

#### **4.5 Scoping connection research**

It was generally agreed that, given adequate time and resources, a more comprehensive approach to research assists in informing land management and governance issues including decision-making and dispute management processes and the subsequent establishment of the Prescribed Body Corporate (PBC).

However, time and resources are scarce and participants agreed that there should be clearly agreed limitations on the information required by State and Territory governments before research is begun and areas of potential contention identified.

At issue also was the fact that time and money can be wasted on research on land over which native title may be shown to be wholly or partially extinguished

by grants made by the Crown which will override (or extinguish) native title rights and interests. Native title rights and interests may be partially extinguished where the extent of the non-Indigenous interest allows for some native title rights to coexist. Significant time and effort could be saved if tenure research, at least into the major areas of land in question, was conducted before active research begins.

It was suggested that an early conference of all relevant parties could assist in clarifying a range of matters and could expedite research and assessment considerably. Such a conference could also be used to determine the information needs of respondent parties. The need to keep all parties informed of progress was also stressed throughout the workshop.

#### **4.5.1 Possible strategies for scoping the research**

There was broad agreement that there is a need for external researchers, NTRBs, NTSPs and State and Territory governments to scope the research at the start of the process, before active research begins. This should occur in a spirit of co-operation and collaboration. Such a scoping conference could be aimed at:

- assisting the parties to narrow the research brief by identifying specific issues that need to be addressed for that particular claim and eliminating issues which are not contentious;
- clarifying the information the State or Territory government is seeking, especially in the light of intended or possible outcomes;
- facilitating regular meetings between the authors of the connection reports and State or Territory governments;
- seeking the views of State or Territory governments on 'living evidence' and the use of various technologies;
- clarifying the identities of State and Territory decision-makers in the process;
- identifying the needs and expectations of respondent parties;
- establishing ways of keeping all parties informed;
- establishing the possibility of state government representatives obtaining 'in-principle' directions from Cabinet for a consent determination and/or ILUA;
- investigating the possibilities of parallel processes; and
- establishing processes for tenure research.

## 4.6 Presenting research

The need for an agreed format for the provision of connection material was repeatedly raised at the workshop, as was the need for high standard professional ethnography. While the content of the connection material is often prescribed in guidelines, the method of providing it is not. This provides the potential to allow some flexibility in how material is presented.

There were a number of comments at the workshop around the lack of uniformity and uncertainty surrounding the detail required in connection reports (sometimes within the same State). One participant noted that claimants and NTRBs and NTSPs were 'between a rock and a hard place' in deciding the required level and detail of connection reporting. Whilst some advocated that 'sometimes less is more', others advocated a risk minimisation strategy in preparing the report as if for litigation and following the Court rules for giving expert evidence.

Concerns were also expressed that emphasis on a written connection report minimises opportunities for claimants to state their case directly to governments and other respondent parties and to develop relationships over time. Some workshop participants suggested that claimants often appear marginalised from the connection reporting process and thought there should be a greater emphasis on 'living Indigenous evidence' and on creating opportunities for claimants to be more involved.

However, it is not clear what kinds and forms of evidence governments would accept. While governments and other respondents might speak to claimants face-to-face, there is significant potential for miscommunication and misinterpretation of claimant responses if this does not occur in a structured and managed way. One suggestion was to structure connection reports more like expert reports by using 'witness statements' that are contextualised in the report.

Other suggestions involved the use of a range of technologies in presenting research materials. In some cases it was noted that DVDs had been used successfully to present evidence of connection to country while in others their use was seen as largely ancillary to the report. There were suggestions that using DVDs, maps and photographs could be less resource intensive and that presentations based on Google Earth have the potential to be visually compelling as they can include dreaming tracks and accumulations of personal spatial biographies. Other forms of GIS software also offer the ability to present complex data in diagrammatic form. Databases were also seen as a useful way to compile a comprehensive body of material, although questions were asked about how they might be used, their long term storage options and confidentiality issues. It should also be noted that consultant researchers and NTRBs/NTSPs may not have the necessary technical skills to maximise the effectiveness of GIS or database software.

#### **4.6.1 Possible strategies for presenting research**

Whichever format is chosen there needs to be a clear understanding between governments and NTRBs and NTSPs on which forms of connection evidence might be acceptable before commencing research.

- NTRBs and NTSPs and governments need to reach clear understandings about acceptable forms of evidence and explore strategies to expedite direct evidence.
- Discussions at the workshop indicated that connection reports should:
  - be well indexed;
  - contain full citations rather than a précis of reference material;
  - be closely edited and use a consistent orthography;
  - avoid regional inconsistencies; and
  - be designed to separate sensitive material easily for easier distribution of the core material and to assist connection research to serve other purposes (eg Court or State or Territory government position paper to distribute to other respondent parties).
- Several suggestions were put forward to incorporate more direct evidence from claimants, including:
  - using DVDs, maps, oral histories, and geo-spatial tools (eg Google Earth) to supplement written reports;
  - convening on-country meetings as a way of presenting evidence to governments and other respondents;
  - using the inquiry process provided for in the amended NTA to obtain direct evidence from claimants; and
  - making greater use of the Court's capacity to take preservation evidence.

#### **4.7 Assessing connection materials**

Some workshop groups questioned whether connection assessment processes have become adversarial particularly in interpretations of threshold legal issues according to 'black letter law'. Concerns were expressed about the ways in which the NTA and case law are interpreted and applied to the standards of proof and evidence required to support a claim. It was noted that in some states there is a heavy reliance on principles articulated by the High Court in *Yorta Yorta*, although there has since been variation in the way these principles have been

applied by the Federal Court. In addition, some participants thought there is a tendency for governments to demand a high level of proof in the belief that the Court will require such proof in making a determination. They pointed out that native title jurisprudence is evolving and the Court itself is not always consistent in what it finds to be an acceptable level of proof.

The issue of transparency of the assessment process was also discussed. One group thought that assessment reports should be provided in substantial detail to NTRBs and NTSPs and should clearly distinguish between legal and anthropological issues. It was thought that one way to achieve greater transparency in the assessment of connection materials would be for governments to make clear why some connection reports are accepted and others are not. It was noted that there are inconsistencies in the assessment of connection reports across the country and, given that the NTA and case law has national application, it was asked whether a national approach to assessing connection material is possible. Alternatively, some participants suggested that a national panel of experts could be established to assess connection material. If this was not thought possible, then an alternative suggestion was for an NTRB or NTSP and relevant State or Territory government to agree on a list of independent experts to assess connection materials.

Of particular concern at the workshop was the need for State and Territory governments to provide explicit statements on how their understandings of issues such as the meaning of 'normative societies', 'traditional laws and customs' and 'change and continuity' are interpreted as threshold legal issues. There were also comments that some State and Territory governments appear to have a preconceived view of what an Indigenous society should look like, for example that a claim group should consist of a single language group. Others suggested that the assessments by some State governments appeared to be based on broad assumptions about the negative impacts of historical processes (eg mining, pastoralism, removals, etc) rather than on the actual ethnographic material in the connection report and case by case facts. One participant commented that governments sometimes assume that an absence of historical records means an absence of connection.

The workshop also discussed the possibility of a tiered approach to the assessment of connection materials: establishing first that the correct native title holders have been identified, and then identifying other information which is required to support the claim. This approach could link threshold issues more closely to desired or likely outcomes.

Workshop participants noted that it is important to take into account the needs of other respondent parties to understand the assessment process. It was suggested by one group that the NNTT could work with parties to develop a policy, guidelines and a process that would avoid delays later. It was also noted by one group that respondent parties did not necessarily agree that State or Territory governments should make the primary, or only, assessment of

connection materials. It was suggested that more use be made of meetings of all relevant parties at the start of the research process; this might avoid later requests for information delaying the process. The need to keep all parties informed of progress was also stressed.

#### **4.7.1 Possible strategies to assist in the assessment of connection materials**

- State and Territory governments to have discussions with NTRBs and NTSPs concerning:
  - interpretations of threshold issues;
  - the anthropology of connection and traditional laws and customs;
  - the possibility of a range of thresholds to match the range of native title rights and interests claimed; and
  - analysing why some connection reports are accepted and others are not.
- NNTT to convene meetings of all relevant parties at the start of the research and assessment process to develop policy and guidelines that would ensure the process is transparent and keep all parties informed of progress.

## **5. Principles for future practice in the preparation and assessment of connection materials**

A number of participants raised the need for a national approach or framework to provide national uniformity, consistency and standards in the processing of connection. It is understood that State and Territory governments may not wish to have a national approach imposed on them, and have their own preferred ways of operating. However it is possible to extract some guiding principles from the workshop which would go some way towards ensuring transparency, consistency, uniformity and 'better' and 'sooner' outcomes.

### **5.1 Towards best practice principles in the current legal and policy environment**

Basing connection processes on the following principles would significantly enhance connection outcomes:

- Connection assessment processes are non-adversarial and observe the principles of good faith, co-operation and goodwill. In other words the preparation and assessment of connection materials should form part of the mediation framework, and not a precursor to it.

- All parties are mindful of resource limitations and plan together to ensure practical outcomes and realistic timeframes for preparing research and assessing connection.
- The early scoping of connection requirements with independent process management can:
  - clarify the needs and expectations of all parties;
  - assist the parties to narrow the research brief by identifying specific issues that need to be addressed and eliminate issues which are not contentious;
  - identify areas of concern;
  - clarify threshold issues which match the nature of agreements;
  - establish appropriate methods for incorporating direct evidence from Indigenous witnesses and the preferred formats for presenting research;
  - facilitate regular meetings between the authors of the connection reports and government representatives;
  - establish ways of keeping all parties informed;
  - establish processes for tenure research; and
  - investigate the possibilities of parallel processes.
- Collaboration and co-operation involves the sharing of information, resources and support to produce reports in a timely manner and takes place during the production and assessment of research, with frequent consultation.
- Independent analysis of what is succeeding and what is unsuccessful will assist native title researchers, lawyers and claimants.

## **5.2 Suggested policy and strategic changes**

A number of suggestions were made at the workshop that would require a significant shift in the policies of governments at State, Territory and Commonwealth levels including:

- State and Territory governments removing their requirement for comprehensive proof of connection before entering into negotiations;
- developing a national framework and standards; and
- forming a national panel of peer review experts;

## **6. Conclusion**

This workshop provided the first opportunity for NTRBs, NTSPs, State and Territory governments, external legal and research consultants to meet face-to-face at a national level to discuss the preparation and assessment of connection materials. A number of suggestions were made as to future forums, which could build on this initial 'breaking of the ice' and discussion.

### **6.1 Suggestions for future forums and possible strategic approaches**

The following issues and forums were suggested either at the workshop or in the subsequent evaluations:

- State and Territory based workshops aimed at streamlining processes and developing mutual understandings;
- State and Territory based connection report training workshops;
- A workshop to focus on the development of a best practice model with flexibility for modification;
- Specific forums on core issues including the roles of the NNTT and the Federal Court under the amended NTA;
- A workshop on interpreting threshold issues of proof such as normative societies, laws and customs, tradition and the relative weight of evidence;
- A workshop to consider alternative settlement packages and alternative approaches.

### **6.2 Concluding comments**

The repeated references in various contexts during the workshop to the need for better communication, transparency and collaboration between the parties cannot be overstated. However, openly competing with that transformative sentiment is the pressure on both governments and representative bodies to be well prepared for claim litigation. This has an inevitable impact on how creative or open the connection research process can be and is arguably the major limitation to reforming the context within which connection materials are prepared and assessed. It also highlights that, while s 86A of the *Native Title Act* sets out that mediation by the NNTT should assist parties to reach agreement on who the native title holders are, in most jurisdictions the current processes have simply relocated the evidentiary process from the Court to, largely, State or Territory governments. As some participants suggested during the workshop, it appears that greater duress is being applied to reaching agreement on connection in the mediation process than could reasonably be expected at trial.

The processes by which connection materials are prepared and assessed create significant costs and risks, not only for claimants in reaching a consent determination but also for the public as represented by governments and other active respondents. The stated preference of State and Territory governments to reach mediated outcomes provides an invaluable opportunity for the parties to build better relationships and arrive at agreed outcomes without resorting to litigation. However, the scope of the opportunity provided by mediation has, to date, been very narrowly interpreted. A commitment to mediate hasn't led to significant shifts in how evidence is addressed outside the courts and in only a limited number of instances has mediation been driven by a government commitment to address not only native title rights but the underlying interests of the native title claimants. A frustration with this fundamental limitation in native title mediation was apparent during the workshop despite the best efforts of all participants to focus on the parameters of the existing systems for managing native title connection. Ultimately, given the number of claims that remain in the native title system and the complexities attached to settling claims over areas of settled Australia, we need to be looking not only at efficiencies in the management of connection reporting but functional alternatives to that system. This is the discussion that didn't take place during the connection workshop but which must be given priority in the near future.

## **Appendix 1: List of workshop participants**

### **Commonwealth Government**

Iain Anderson (Attorney-General's Department)

Louise Anderson (Federal Court of Australia)

### **Northern Territory**

Stephen Herne (Aboriginal Land Division)

Kim Barber (Northern Land Council)

James Nugent (Central Land Council)

### **Western Australia**

Sheila Begg (State Solicitor's Office)

Debbie Fletcher (Office of Native Title)

Bill Lawrie (South West Aboriginal Land and Sea Council)

Jodi Neale (Pilbara Native Title Services)

Robert Powrie (Kimberley Land Council)

Janet Osborne (Goldfields Land and Sea Council)

Malcolm O'Dell (Central Desert Native Title Services)

Nick Smith (Central Desert Native Title Services)

Carolyn Tan (Yamatji Land and Sea Council)

### **Victoria**

Vincent Leveridge (Justice Dept)

Ian Parry (Justice Dept)

Diana McCarthy (Native Title Services Victoria)

Libby Bunyan (Native Title Services Victoria)

### **Queensland**

Colin Sheehan (Department of Natural Resources and Water)

Kevin Murphy (Department of Natural Resources and Water)

John Liston (Cape York Land Council)

Jurgen Kahne (Gurang Land Council)  
Fiona Cambell (Carpentaria Land Council)  
Valerie Cooms (Queensland South Land Council)  
Kim de Rijke (Central Queensland Aboriginal Land Council)  
Kym Elston (North Queensland Land Council)  
Michael Southon (North Queensland Land Council)

### **New South Wales**

Tim Dauth (Attorney General's Dept)  
John Gibbins (Lands Dept)  
Ken Lum (New South Wales Native Title Services)

### **South Australia**

Kim McCaul (Attorney General's Department)  
Peter Tonkin (Attorney General's Department)  
Susan Woenne-Green (Aboriginal Legal Rights Movement)

### **Consultant anthropologists**

Sandra Pannell  
Lee Sackett  
Basil Sansom  
David Trigger

### **Barristers**

Vance Hughston  
Tony McAvoy  
Marshall McKenna

### **Australian Institute of Aboriginal and Torres Strait Islander Studies**

Toni Bauman (Visiting Research Fellow)

**National Native Title Tribunal**

John Catlin (Facilitator)

Gaye Sculthorpe (Facilitator)

Graham Fletcher (Facilitator)

Dan O'Dea (Facilitator)

Ross Boyd (Scribe)

Rita Farrell (Scribe)

Kathryn Neville (Scribe)

Raine Quinn (Scribe)

## Appendix 2: An overview of native title processes

Native title claims in Australia are governed by the *Native Title Act 1993* (Cth) (NTA). The two main objects of the NTA are to provide for the recognition and protection of native title and to establish mechanisms for the determination of native title claims.<sup>6</sup>

The Federal Court of Australia (the Court) has oversight of all native title applications and makes native title determinations. Claim applications are lodged with the Court which then sends the application to the Native Title Registrar in the National Native Title Tribunal (NNTT) who applies the registration test to the application. Successful registration allows the claim group to access certain procedural rights including the 'right to negotiate'. The Native Title Registrar notifies relevant groups, persons and the public about the application thereby enabling those whose rights may be affected by a determination to apply to the Court to become parties to the proceedings. The Court usually refers the matter to the NNTT for mediation once the party list is finalised.

The emphasis of the NTA is on agreement-making through non-adversarial processes such as mediation and negotiation. There are three main forms of native title determinations though some determinations may also contain elements of each - (mediation and litigation, for example). They are: unopposed determinations where the application is uncontested; consent determinations if the parties to mediation reach an agreement about native title; and litigated determinations where, if an application is contested in court, a Federal Court judge makes a determination after hearing evidence.

Federal Court determinations of native title are defined under s. 225 of the NTA and must contain details of:

- (a) whether or not native title exists in relation to the area, and if it does;
- (b) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
- (c) the nature and extent of the native title rights and interests in relation to the determination area; and
- (d) the nature and extent of any other interests in relation to the determination area; and
- (e) the relationship between the rights and interests in paragraphs (c) and (d) (taking into account the effect of this Act); and
- (f) 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

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<sup>6</sup> See Native Title Act 1993 (Cth) preamble and s 3.

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.

Regardless of whether a determination of native title is by litigation or by consent, the NTA requires claimants to meet a number of evidentiary thresholds that have been established by the NTA and relevant case law. Subsection 223(1) of the NTA states that:

The expression native title or native title rights and interests means 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.

Thus, in order for native title rights and interests to be recognised, Indigenous people must show that the rights and interests arose under the traditional laws and customs of the society which was present on the land and waters at the time the British Crown asserted sovereignty over the area; that the group as a whole have maintained a connection by those traditional laws and customs with the land and waters over which the native title rights and interests are claimed in a substantially uninterrupted way from that time until the present; and that the rights and interests have not been extinguished under the common law or the NTA.<sup>7</sup>

## **2.1 Consent determinations**

Sections 87 and 87A (see also s. 94A) of the NTA sets out what the Federal Court takes into consideration when making an order in relation to an agreement between parties to the whole or part of the claim area. Under the NTA, in order to have a consent determination approved by the Court, the onus is on the parties to provide the court with a reasonable basis for making the consent determination that is consistent with the requirements of s. 223 and s. 225. A consent determination under s. 87 can only be made if all the parties to the

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<sup>7</sup> Note there are some rights that the common law will not recognise but in a normal sense such rights have not been extinguished eg exclusive rights offshore will not be recognised.

proceedings agree about issues in relation to connection to traditional land or waters.<sup>8</sup>

Courts have generally taken a beneficial approach to agreements about connection evidence reached between parties for consent determinations, and accept the material placed before them.

## **2.2 Indigenous Land Use Agreements and Alternative Settlements**

In native title claims, the form of the order that the Court can make is limited to s 225 (as discussed above). Native title claimants may also explore options to reach a settlement which does not require legal proof of connection. Parties may pursue Indigenous Land Use Agreements (ILUAs) which are legally binding agreements registered with the NNTT and which might, for example, provide for negotiating over future acts by governments or developers or for the recognition or surrender of native title. ILUAs are binding on all native title holders and limit compensation to the terms of the agreement.<sup>9</sup> They can also provide for the formal recognition of traditional ownership of lands where native title has been extinguished; consultation or joint management agreements; or grants of interests in land under State or Territory land rights legislation.

These alternatives enable parties to reach flexible solutions that are not based on narrowly defined native title outcomes and are often referred to as 'non native title outcomes' and alternative settlements.

## **2.3 Connection Requirements**

A consent determination of native title requires the Court to recognise that all parties to the claim have voluntarily agreed that the claim has met the requirements of the NTA. The States and Territories have an obligation and responsibility to act in the public interest and to be satisfied that they will be entering into agreements on behalf of their constituents with the people who hold native title over a particular area.

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8 Under s. 87A, a consent determination may be made over part of a claim area if parties to the proceedings with an 'interest' in that area plus certain other parties such as a Representative Aboriginal and Torres Strait Islander body are parties to the consent agreement. It does not require other parties that have an interest in other parts of the claim area to agree to the determination although the Court is required to take into account the objections of those parties before deciding whether to make the consent determination.

9 Native Title Act 1993 (Cth), s 24BA to 24EC; National Native Title Tribunal, ILUA Information (2006) <<http://www.nntt.gov.au/ilua/>> at 18 April 2006.

Some State and Territory governments will not agree to enter into mediation until they are satisfied that the claim meets the evidentiary requirements of the NTA and case law, in particular s 223 and the requirement for proof of connection.

Prior to Court and NNTT processes, State and Territory governments assess the connection material which is provided by the applicant's legal representative, usually a Native Title Representative Body (NTRB) or Native Title Service Providers (NTSP), to determine whether there is sufficient evidence to meet their understanding of the requirements of the NTA.

Their connection requirements are often articulated in policy documents that are set out as 'guidelines', 'frameworks' or 'requirements' for preparing connection reports. Most States now have Connection Guidelines which provide applicants and their representatives with guidance as to how to prepare connection evidence, usually in the form of a Connection Report which may include detailed anthropological, historical and linguistic and other information.

A Connection Report is not a statutory requirement under the NTA, but rather is required as a matter of policy by the States and Territories in order to manage the claims process more efficiently given the large number of outstanding claims. State and Territory governments vary in their policy and procedural approaches to connection reporting and potential outcomes.

State and Territory government connection processes thus play a major role in native title processes, and in influencing the kind of connection material which is produced, the order of processes and the allocation of resources.

## **Appendix 3: An overview of State and Territory approaches to the preparation and assessment of connection materials**

### **New South Wales**

Indigenous interests in land in New South Wales are governed by both the Commonwealth NTA and the Aboriginal Land Rights Act 1983 (NSW). Its connection processes are managed by the Crown Solicitor's Office and Cabinet Office in negotiation with New South Wales Native Title Services Ltd. The NSW Government does not have a published version of what it refers to as 'Credible Evidence Guidelines' which have been in place since 1998. The document lists 52 questions to be addressed and is provided on a case-by-case basis to applicants and Indigenous respondent parties. It is usually accompanied by a letter, noting that the guidelines must be read in conjunction with qualifications arising from the findings in the *Yorta Yorta* native title application. A draft policy or 'guidelines' is currently being reviewed in the interests of greater clarity.

The NSW Government accepts a range of material in various forms and has expressed a preference for direct primary evidence such as affidavits and witness statements rather than an 'expert' comprehensive and integrated Connection Report. A written interim assessment is provided which may request clarification of some issues, highlight deficiencies or request supporting material. Assessment is not shared with other respondents.

The NSW government supports the use of ILUAs as a way of resolving native title claims through 'co-operation and agreement rather than lengthy litigation'<sup>10</sup> and suggests that this approach gives flexibility in the resolution of matters by ILUA or other forms of agreement. Most ILUA approaches in NSW involve the withdrawal of claims, and few ILUAs proceed to a consent determination.

### **Queensland**

The assessment of connection material is managed by the Indigenous Services section of the Department of Natural Resources and Water.

The Queensland government has stated in its 2003 published guidelines that it prefers 'to settle determinations of native title in the Federal Court through a

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10 Carr B, 'Memorandum No 99-23: Native Title and Indigenous Land Use Agreements', NSW Premier's Department (1999)

<[http://www.dpc.nsw.gov.au/publications/memos\\_and\\_circulars/ministerial\\_memoranda/1999/m1999-23](http://www.dpc.nsw.gov.au/publications/memos_and_circulars/ministerial_memoranda/1999/m1999-23)> at

18 April 2006.

process of mediation'<sup>11</sup>, and that it will only agree to a consent determination where the claimant group can 'provide evidence of their connection to the lands and waters claimed under their traditional laws and customs'. This evidence is required in the form of a connection report. A separate 2003 document, 'Guide to Compiling Connection Reports for Native Title claims in the Torres Strait', addresses connection in the Torres Strait. The key date at which claimants must demonstrate connection on the mainland is noted in the Guidelines as 26th January 1788, whilst for the Torres Straits it is 1872 or 1879 depending on annexation.

## **South Australia**

In South Australia, the Native Title Section of the Crown Solicitor's Office in the Attorney-General's Department manages connection processes. The Government has published a set of guidelines developed in consultation with the ALRM, the NTRB for the whole of South Australia, and provides assistance and guidance on research and reporting.<sup>12</sup>

The SA Government has pursued a policy of consent determinations in addition to ILUAs through participation in a State-wide ILUA process. The 'agreement making approach' has been designed to promote partnerships between government, industry and the community through providing employment and training opportunities while developing 'partnerships on country'.<sup>13</sup> This collaboration is intended to address the needs of industry, the claimants and the government in managing native title rights and interests into the future.

## **Victoria**

In Victoria, the Native Title Unit of the Department of Justice manages the assessment of connection material. In 2000 the Victorian Government released its Native Title Policy which identified the recognition of native title as a possible outcome of mediation. The Policy refers to a whole of government approach to native title matters. It has also signed a Protocol for the Negotiation of a Native Title Framework in Victoria identifying the possible outcomes from native title

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11 Native Title and Indigenous Land Services, Guide to Compiling a Connection Report for Native Title Claims in Queensland, Department of Natural Resources and Mines, State of Queensland (2003).

12 Crown Solicitor's Office, Consent Determinations in South Australia: A Guide to Preparing Native Title Reports, Government of South Australia (2004).

13 Ian Dixon, Parry Agius and Peter Hall, 'Implementing the South Australian Indigenous Land Use Agreement (ILUA) Statewide Negotiations', Paper presented at the Native Title Conference: The Human Face of Native Title, Coffs Harbour, NSW, 2005.

negotiations.<sup>14</sup> Its 'Guidelines for Native Title Proof (September 2001)', are currently under review to achieve greater certainty and provide more guidance to NTSV and there is some discussion around whether a connection process should be referred to as a 'review' or as an 'assessment'. In the past, the Government has accepted a preliminary batch of connection material and then requested more as required. The current guidelines provide some guidance on potential sources and type of information required and are not prescriptive on questions of format.

The result of the *Yorta Yorta* decision in Victoria suggests that Indigenous people in the south-eastern areas of Australia who have experienced the most sustained contact with settlers since the British claimed sovereignty, face a difficult battle when trying to prove that they have maintained their traditional connections to country. The current Victorian Guidelines refer to a sliding scale approach according to the nature of rights and interests sought and the evidence that might be available to claimants to sustain a native title claim. Subject to appropriate evidence a consent determination of native title is possible, otherwise ILUAs offer alternative ways to resolve claims.

## **Western Australia**

In WA the Office of Native Title in the Department of Treasury and Finance and the State Solicitor's Office assess connection material.

The Western Australian Government's approach to native title is outlined in a number of public documents and its connection policy has been reviewed several times since its first detailed policy in 1994-95. The basis of its policy is highlighted in its Guidelines for the Provision of Information in Support of Applications for a Determination of Native Title and its companion guide Preparing Connection Material: A Practical Guide.<sup>15</sup> Its main guidelines were developed in response to a Review of the Native Title Claim Process in Western Australia – Report to the Government of Western Australia<sup>16</sup> which made a number of recommendations in relation to claims management practices in

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14 This protocol was negotiated with the now defunct Aboriginal and Torres Strait Islander Commission and Mirimbiak Nations Aboriginal Corporation (the then native title representative body for Victoria). See Agreements, Treaties and Negotiated Settlements Database, Protocol for the Negotiation of a Native Title Framework Agreement for Victoria (2002) <<http://www.atns.net.au/agreement.asp?EntityID=1830>> at 15 May 2006.

15 Office of Native Title, Preparing Connection Material: A practical guide, Department of Premier and Cabinet, Western Australia (April 2006).

16 Paul Wand and Chris Athanasiou, Review of the native title claim process in Western Australia, report to the Government of Western Australia (2001).

Western Australia. The State has a preference for integrated and comprehensive connection reports but has accepted expert reports prepared for litigation (history, anthropology, linguistics, ethno-botany etc) for assessment in mediation in some claims.

There have been a number of consultations and native title forums designed to clarify the expectations of the State. The Office of Native Title has conducted two workshops with NTRBs around dealing with connection material in November 2004 and 27-28 July 2006; another workshop is scheduled for November 2007. The recent growth in the resources sector, other industries and the associated need for infrastructure has placed pressure on the State not only in terms of native title but also heritage management.

### **Northern Territory**

Processing connection in the Northern Territory occurs against a legislative backdrop of the Commonwealth NTA and the *Aboriginal Land Rights NT Act 1976*. Connection is processed by the Aboriginal Land Unit in the Department of Justice with the Central and Northern Land Councils. The Northern Territory has not published criteria for a consent determination for native title and dialogue occurs between anthropologists and lawyers in a more inquisitorial than adversarial form within mediation. The Northern Territory Government will accept a less comprehensive report where connection is not regarded as highly contentious, particularly, for example, where there is already considerable documentation obtained through claims made under the *Aboriginal Land Rights NT Act 1976* and the same group is making the native title claim.

## Appendix 4: Main institutions involved in the preparation and assessment of connection materials

State/Territory	Preparation of connection reports on behalf of native title claimants - NTRBs	Assessment of connection report and negotiation of consent determinations
New South Wales	New South Wales Native Title Services Ltd	Crown Solicitor's Office; Cabinet Office
Northern Territory	Northern Land Council; Central Land Council	Aboriginal Land Unit, Department of Justice
Queensland	Torres Strait Regional Authority; North Queensland Land Council; Carpentaria Land Council Aboriginal Corporation; Central Queensland Land Council; Gurang Land Council; Queensland South Native Title Services	Indigenous Land Services, Department of Natural Resources and Water
South Australia	Aboriginal Legal Rights Movement	Native Title Section, Crown Solicitor's Office, Attorney-General's Department
Victoria	Native Title Services Victoria Ltd	Native Title Unit, Department of Justice
Western Australia	Kimberley Land Council Aboriginal Corporation; Yamatji Land and Sea Council; Ngaanyatjarra Council; Goldfields Land and Sea Council; South West Aboriginal Land and Sea Council	Office of Native Title, Department of Treasury, State Solicitor's Office



## National Native Title Tribunal



For more information about native title and services of the Tribunal, please contact the National Native Title Tribunal GPO Box 9973 in your capital city on **Freecall 1800 640 501**. A wide variety of information is also available online at **[www.nntt.gov.au](http://www.nntt.gov.au)**

The National Native Title Tribunal has offices in Adelaide, Brisbane, Cairns, Darwin, Melbourne, Perth and Sydney.