



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

Guidelines for the Provision of Connection Material

February 2012

1.0 Introduction

- 1.1 The Western Australian Government (“the Government”) prefers to settle native title determination applications (“claims”) through negotiation. The purpose of the Guidelines for the Provision of Connection Material (“the Guidelines”) is to advise native title parties on what evidence is required for the Government to support a consent determination of native title.
- 1.2 The Guidelines will be open to review over time.
- 1.3 Consultation between native title claimants and the Government before connection research is undertaken is strongly recommended.

2.0 Legal Compliance

- 2.1 To achieve a determination of native title, native title claimants must demonstrate that their claim can be established at law. The criteria required to substantiate a native title claim are found in the *Native Title Act 1993* (Cth) (“the NTA”) and in resultant case law. A determination of native title must be consistent with the NTA and the common law.
- 2.2 In lodging an application for a determination of native title (‘a claim’), native title claimants initiate a legal proceeding seeking a determination by the Federal Court that their claimed native title rights and interests can be established at law. In doing so, the onus is on native title claimants to present information sufficient to establish the basis of their native title rights and interests consistent with the law.
- 2.3 In *Clarrie Smith and others on behalf of the Nharnuwangga, Wajarri and Ngarla People v the State of Western Australia*, Justice Madgwick observed that “State governments are necessarily obliged to subject claims for native title over lands and waters owned and occupied by the State and State agencies, to scrutiny just as careful as the community would expect in relation to claims by non-Aborigines to significant rights over such land”.¹
- 2.4 Importantly, the State Government cannot consent to a determination of native title if other parties to the application have not had the opportunity to participate in the process. Section 87 of the NTA requires that all parties to an application must agree for a consent determination to take place.² The onus is on native title

¹ *Clarrie Smith and others on behalf of the Nharnuwangga, Wajarri and Ngarla People v the State of Western Australia* [2000] FCA 1249; (2000) 104 FCR 494, paragraph 38.

² *Munn for and on behalf of the Gunggari People v State of Queensland* [2001] FCA 1229, paragraphs 24 – 33.

claimants to provide sufficient information to the other parties to secure their agreement to the terms of a determination.

- 2.5 In addition, the Federal Court must be satisfied that it is able to make an order consistent with the terms agreed in any consent determination. The Federal Court is bound by ss87, 87A, 94A, 223 and 225 of the NTA.
- 2.6 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”.³
- 2.7 The State Government must give thorough consideration to and be reasonably satisfied that there exists credible evidence to support the factual basis upon which the claimants assert that native title exists, and that the case presented by the claimants is reasonably arguable in light of the existing case law.

3.0 Form and Content of Connection Material

- 3.1 The connection material provided in support of a native title claim must satisfy the requirements of ss223 and 225 of the NTA and developing case law. Lawyers acting for claimant groups have an obligation to ensure that the brief issued to researchers is clearly informed by the legal requirements of the Act and relevant case law.
- 3.2 It would assist this process if any connection material provided is accompanied by a brief legal submission setting out how that material satisfies the relevant criteria.
- 3.3 To assist in the research process, researchers are encouraged to consult the Department of the Premier and Cabinet before they prepare connection material. Early consultation can assist in clarifying issues about the scope and form of research to be undertaken.

Form

- 3.4 Connection evidence can be presented in a mixture of media or forms. This includes the use of photographic, video and audio recordings as well as print material. On-country meetings with claimants who are able to explain particular features of their connection to respondent parties are also encouraged.

³ *Munn for and on behalf of the Gunggari People v State of Queensland* [2001] FCA 1229 (23 August 2001), paragraph 29.

- 3.5 A connection report in the form of a single “book” or submission is not a prerequisite. The primary aim is that evidence is presented in a logical, clear and inclusive manner.

Content

- 3.6 Connection material should be practical, straightforward and clear.
- 3.7 The most important information in support of claimed native title rights and interests is primary evidence provided by Aboriginal people.
- 3.8 Connection material should clearly distinguish between information from Aboriginal people and opinions provided by experts (e.g. historians, anthropologists, linguists) and clearly explain the basis upon which opinions are expressed.⁴
- 3.9 Connection material should include an account of the methodology, including research with the claimants and other Aboriginal groups, research into ethnographic literature, genealogical research and reference to any research carried out by assistants supervised by a senior consultant.
- 3.10 A reference list of bibliographic sources listing all published and unpublished material relied on in the preparation of the material should be provided in the connection material.
- 3.11 The Government may request copies of particular source material if necessary. Copies of any material included in the bibliography, and not easily obtainable, may be requested by the Government during its assessment of the connection material.
- 3.12 Bibliographies should also indicate which sources of information are available on the public record.

Essential Requirements

- 3.13 Identity of the claim group. The research should establish:
- (a) the apical ancestors of the claimant group (where descent is a relevant criterion);

⁴ *Harrington-Smith on behalf of the Wongatha People v Western Australia and others (No 7)* [2003] FCA 893, paragraph 21.

- (b) analysis of the genealogical evidence will be assisted by identification of the family groups and individuals who make up the contemporary claimant group;
- (c) how membership is determined, including whether it is on the basis of biological connection to forebears, marriage, adoption, incorporation or some other basis;
- (d) that the claim group is a society, or part of a society, defined and united through its observance and acknowledgement of a normative system of traditional law and custom;
- (e) whether there are subgroups and, if so, whether the rights and interests held by any subgroups differ in any way from the rights and interests held by the members of the group as a whole;
- (f) identify how the claim group is similar or different to neighbouring native title groups, including whether a neighbouring group shares similar laws and customs;
- (g) the source of identity label(s) used by the claimants to refer to their group, for example, whether it is the name of a language/dialect or it has emerged through a particular historical process, and whether other labels have been used over time;
- (h) that the claimant group has continued to observe and acknowledge a traditional system of law and custom which has connected them to the land claimed since sovereignty;
- (i) whether other Aboriginal groups in the area recognise the claimant group and its asserted native title rights and interests;
- (j) genealogical links from the claimant group to apical ancestors, including relevant Aboriginal and European names, dates and locations for births and deaths and any other relevant biographical information - this information is particularly important in relation to the location and presence of apical ancestors as close as possible to the time of sovereignty; and
- (k) where any rights are shared with other Aboriginal people.

3.14 Traditional laws and customs in relation to the asserted native title rights and interests. The research must establish that the claimants hold native title rights according to a normative system of traditional law and custom which has

remained substantially unchanged since the time of the acquisition of sovereignty. In particular, the connection material should:

- (a) provide an account of how the traditionally based system operates and how native title rights and interests are exercised;
- (b) establish a continuity of connection and that the system has had a continuous existence and vitality since the time of the acquisition of sovereignty. Where inferences are required to be drawn in order to establish continuity, a sufficient factual basis for such inferences must be provided;
- (c) establish that the claimant group has continued to acknowledge and observe the traditional laws and customs. The material should describe how the system of laws and customs is acknowledged and observed by the group and the ways in which these laws and customs connect the group to the claimed area. A description of observable patterns of behaviour is insufficient; rather it must be established that patterns of behaviour reflect the existence and continued acknowledgement and observance of the traditional laws and customs of the group;
- (d) where change and adaptation in the traditional system of law and custom has occurred, provide an account of the changes and explain why they do not constitute a substantial change from the system which prevailed at sovereignty;
- (e) explain how the system of law and customs acknowledged and observed by the claimant group has been transmitted from generation to generation;
- (f) where relevant, explain how the subgroups are traditional in their nature and composition;
- (g) show that the apical ancestors or other forebears had rights and interests in the area covered by the application according to the normative system of law and custom;
- (h) provide a map showing the extent of the claimants' native title rights and interests in relation to the claimed area and, where appropriate, the general location of areas of significance and, if relevant, the areas to which particular sub-groups assert specific connection;
- (i) establish the claimant group's connection to the whole of the claimed area, by the traditional laws acknowledged and the traditional customs observed;

- (j) provide an analysis of the history of the claimant group, relevant to that connection with the claimed area and how connection has been maintained;
- (k) identify any areas where sub-groups may assert a particular connection to parts of the claimed area.

3.15 Boundary of claim area. The research should provide:

- (a) an analysis of early records of the boundary of the claimant group;
- (b) support from surrounding groups for the boundary of the claim, and if there are overlapping applications, include a description of the nature and extent of the overlap and an explanation if shared rights are asserted.

3.16 The asserted native title rights and interests in the claim area. The research should:

- (a) 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 s225(b) of the NTA;
- (b) substantiate how each right and interest claimed is possessed under the traditional laws acknowledged, and the traditional customs observed, by the claimant group;
- (c) indicate whether the native title rights and interests are held as a group, communally or individually;
- (d) explain the nature and extent of any shared native title rights;
- (e) clearly list the areas of land and waters to which particular rights and interests apply, ideally in a separate table that is referenced to the connection material.

Exclusive Possession Native Title

- 3.17 If a right to exclusive possession, occupation, use and enjoyment of the land is claimed, such a right must be demonstrated to exist in accordance with traditional law and custom. In other words, the manner in which, and the reasons for, the claimant group excluding others or requiring that permission be sought to come onto country should be clearly set out so that a right of exclusive possession is made out on the evidence.

Occupation Evidence – Section 47

3.18 Sections 47, 47A and 47B of the NTA provide that prior extinguishment of native title over some areas of land may be disregarded if the requirements of those sections are met. These areas may include:

- pastoral leases held by or on behalf of the claimants (s47);
- freeholds, leases or reserves granted to or reserved on behalf of Aboriginal people (s47A); and
- unallocated Crown land ('UCL') (s47B).

Where connection evidence has demonstrated the requirements of ss47, 47A or 47B are met, then despite earlier extinguishing events, native title can be recognised over:

- claimant-held pastoral lease;
- claimant-occupied land held or reserved expressly for the benefit of Aboriginal people; or
- claimant-occupied UCL.

3.19 Where possible, the connection material should address any claims under ss47, 47A and 47B of the NTA. One of the conditions under ss47A and 47B NTA is that one or more members of the native title claim group must have been in occupation of the area at the time the application was made.

3.20 However, the definitive areas for which occupation evidence will be required for the purposes of ss47A and 47B will be established following the provision of the historical tenure by the Government. It is acknowledged that occupation evidence may not be provided until this time.

4.0 Submitting Connection Material

4.1 Connection material should be submitted to the Research Section within the Native Title Unit of the Department of the Premier and Cabinet.

4.2 Materials should be delivered by hand to the Department of the Premier and Cabinet or, if mailed, marked in the following way:

- 'Confidential – contains culturally sensitive information'.
- Addressed:
Manager Research
Native Title Unit

Department of the Premier and Cabinet
PERTH WA 6000.

5.0 Confidentiality

- 5.1 The Government strongly recommends that restricted material is only provided as part of connection material when it is critical to the claimants' case. If it is deemed necessary to include restricted material, it should not be included as part of a broader text but can be cited in the text and presented to the Government as a discrete, clearly marked item that can be treated appropriately by Government officers and any external expert involved in assessing the material. This will improve the security of restricted material without compromising analysis of the unrestricted content.
- 5.2 The Government undertakes, to the extent that it is able to do so at law,⁵ that information provided in connection materials and any other information exchanged during any negotiation process will be, unless otherwise agreed, without prejudice and confidential. Material will be managed in accordance with cultural restrictions communicated to the Government.

6.0 Assessment of Connection Material

- 6.1 On receiving the connection material, the Department of the Premier and Cabinet will:
- undertake an internal review;
 - request legal advice from the State Solicitor's Office;
 - on a case by case basis, external expert comment on the connection material may be sought by the Government.
- 6.2 A preliminary review of the material may identify whether there are any fundamental matters which have not been addressed in the connection material. Wherever possible, the claimants will be advised of those findings and given the opportunity to provide supplementary research.
- 6.3 If supplementary research is required the expectation is that it will be provided in a timely manner. Supplementary research submissions will be supported on a case-by-case basis. However, the native title claimants have the ultimate responsibility to make decisions about their connection evidence and to provide

⁵ 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, the Department of Premier and Cabinet would seek to apply the exemption provisions of the *Freedom of Information Act 1992* (WA).

respondents and the Federal Court with realistic schedules to complete their research.

- 6.4 The material will be assessed by the State Solicitor's Office who will provide the Department of the Premier and Cabinet with a legal opinion.
- 6.5 If deemed necessary, independent legal or anthropological comment may be sought on the connection material. All independent experts will be suitably qualified.
- 6.6 Written advice regarding the outcome of the assessment of the connection material will be provided upon completion of the assessment. 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.
- 6.7 The Government will not distribute a "position paper" or statement of its assessment. Any opinion developed within Government will be confidential to the mediation and without prejudice to future mediation or litigation.
- 6.8 A final position on any claim is subject to the endorsement of the State Cabinet. Opinions expressed by Government officers in good faith during confidential and without prejudice mediation are not binding on the Government.
- 6.9 At the invitation of the claim group, the Government will participate when the claimants provide other respondents with advice about the nature of the claim and the claim evidence.

7.0 Requirements of the State Records Act

- 7.1 Connection material received by the State in support of an application is a State record and, in Western Australia, is to be kept in accordance with the *State Records Act 2000*.
- 7.2 Due to its evidentiary value in protecting the rights of claimants and the State, connection material will be kept permanently.
- 7.3 These permanent records will be kept under restricted access for 100 years with conditions attached for access applications.