

Land, Rights, Laws: Issues of Native Title



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The common law recognition of native title in the High Court's Mabo decision in 1992 and the Commonwealth Native Title Act have transformed the ways in which Indigenous peoples' rights over land may be formally recognised and incorporated within Australian legal and property regimes. The process of implementation has raised a number of crucial issues of concern to native title claimants and other interested parties. This series of papers is designed to contribute to the information and discussion.

Queensland and Western Australia require Connection Reports to establish the relationship between claimants and the land claimed. This paper discusses the purposes and form of the reports, their differentiation from the NNTT registration process, considerations anticipating litigation, confidentiality and potential conflicts of interest by the State as respondent. A shortened form of this paper was presented at Negotiating Country, National Native Title Tribunal Forum, Custom House, Brisbane, August 2001.

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ANTHROPOLOGY AND CONNECTION REPORTS IN NATIVE TITLE CLAIM APPLICATIONS

Dr. Julie Finlayson

The focus of the forum at which this paper was first presented was agreement making with the objective of providing basic information and practical experience on specific native title processes to achieve that end. Within this context of agreement making, I address three points.

1. What is a connection report and what is its purpose?
2. What anthropological considerations impact on connection reports?
3. Emerging issues with regard to connection reports.

Before discussion of these points it is worth repeating the requirements in the common law of native title for a successful determination of native title. To establish native title applicants must:

- identify the group,
- show descent from the group holding native title to the area at the time of sovereignty,
- establish that they continue to observe a system of traditional laws and customs and that these traditional laws and customs connect them with the land and waters claimed, and
- establish the nature of the rights and interests claimed and show evidence that these claimed rights derive from traditional laws and customs.

A Connection Report will, and does, have a role to play in establishing evidentiary aspects for these general elements of native title. However, what constitutes a Connection Report and when it contributes to the process of determining native title is not explicit, even in contexts where published directions for researching connection documents are available. Consequently, in this paper I survey at a broad level the published guidelines of the Queensland and Western Australian governments for researching and writing a Connection Report. The particular documents examined are as follows:

- the Western Australian Government's *General Guidelines Native Title Determinations and Agreements*,
- the Wand Review of these Western Australian guidelines,¹ and
- the Department of Premier and Cabinet, Queensland Native Title Services, *Compiling a Connection Report*.

Currently, these States are the only ones with a public policy stance on Connection Reports and provision of guidelines. It should not be assumed, however, that other governments including the Commonwealth have no policies in place, but because publicly accessible information is limited, only preliminary comments can be made here.

What is a connection report and what is its purpose?

A connection report is *not* a statutory requirement of the Native Title Act (NTA). It is a document that has arisen in relation to government policy for management of the native title process, in the context of mediation primarily, but also to provide:

- a degree of certainty with respect to questions of who constitutes the claimant group,
- the identification and location of claim areas, and finally,
- the presentation of evidence about the nature of the connection between the claimant group and the area of claim under traditional law and custom.

Some aspects of these matters are required when a claim application is submitted to the National Native Title Tribunal for registration. However, Connection Reports

should not be confused either in terms of their content or purpose with the intent of Tribunal's registration test.

There are clear differences between these two processes, not least the fact that registration is a purely administrative test applied for a specific purpose and its description of a claimant group differs markedly from the Connection Report's description of the group's attachment to land.

Under the amended NTA all claims are now required to submit to a registration test (ss.190B and 190C) to assess particularly, the negotiation provisions in respect of future acts (for example, s.29 notices). Registration also provides access to other benefits such as the requirement that registered claimants must be a party to any area ILUAs covering the area for which they are registered (s.24CD).

However, the Tribunal's registration test is not, and should not be seen as indicative of the merits of an application.²

Once it was recognised that the registration test cannot be relied upon as a measure of the merits of a claim some State governments developed formal approaches for effecting 'certainty' in the initial stages of their relationship with applicants. This was the origin of the Connection Report. I suspect it was also a means of formalising what had often been an oral presentation of evidence from claimants during initial mediation sessions in the early years of the native title process.

Specific documentation from the claimants has now become an obligatory requirement for government participation in mediation in both Queensland and Western Australia. Where government has chosen to act as the peak respondent body on behalf of other government instrumentalities, the requirement for documentation of connection is also a means to ensure that a government's public interest responsibility is observed and participation in an agreement making processes can begin. However, the purpose and mandatory inclusion of Connection Reports in mediation has occurred neither systematically nor as a standardised government response Australia wide.³

Nevertheless, at least two State governments have sought to manage the agreement making process by seeking and assessing Connection documents as a first point of entry into a mediation process. Increasingly, these documents are linked to potential consent determinations or other forms of agreement making. In Queensland both the Liberal and Labor governments adopted the view that mediation between applicant and respondent parties will not proceed without prior production and assessment of a Connection Report. Moreover the document must conform with the State's published guidelines for the content and structure of a Connection Report.

Varying standards: What makes an acceptable Connection Report?

Threshold standards for the content of Connection Reports vary. Both Queensland and Western Australia publish guidelines for researching and writing a Connection Report. Some common points exist, although the nature and standards of the required evidence differ. For example, until recently in Western Australia (under the Court-led Liberal government) the bar for acceptable evidence was placed at the level of litigation and dovetailed with a wider policy to litigate in the majority of native title claims. In Queensland on the other hand, the Connection Report is increasingly a means, led admittedly by the State, to begin to explore with all respondents the potential for reaching a consent determination. According to the Queensland Guide:

A Connection Report provides an authoritative statement about the Applicant group and is produced to gain acceptance of their native title claim by the State Government. Such acceptance is a type of preliminary acknowledgment of the nature and scope of the rights and interests sought in relation to the claimed land and/or sea.⁴

Australia wide details on how other States or Territories use Connection Reports is sketchy. In general the approaches outside of Queensland and Western Australia are largely ad-hoc. Situations vary with access to evidence operating through informal processes. In South Australia for instance, the need for connection documents has been subsumed under a broad process of implementing a State wide framework agreement. Victoria may be following a similar path with a number of agreement making processes in train; although at this point it is unclear how far such processes will be an alternative to litigation. In Tasmania, the incumbent government has declared no native title exists and has sought to deal with Indigenous connections to land through a transfer of title, notably in the Bass Strait Islands.

In New South Wales, Connection Reports are not a standard requirement. The situation is confused to some extent by the continuing circulation of an initial document representing preliminary policy efforts to establish evidentiary thresholds. While the document continues to circulate it appears to have limited currency. In practice, some form of connection report appears to be required by the NSW government specifically for negotiated agreements and as a preliminary step in most negotiations. In terms of content, the evidentiary threshold is addressed on a case-by-case basis with, in some cases, different thresholds linked to different outcomes.⁵

Objectively speaking, government's insistence on production of a Connection Report provides a degree of certainty for establishing the identity of the applicant group, the area of land with which connection is asserted and the legitimacy and nature of that connection. Yet Indigenous critics of the reports argue that the requirement to produce such documents is unnecessarily onerous on claimants and the resources of their representative bodies.

However, the Native Title Representative Bodies who provide facilitation and assistance on claim matters also need certainty with respect to the identity of the claimants and the nature of the evidence behind the claim application. In situations of claimant dispute or uncertainty, there is good reason why claimants and their representatives will need to research applications. Furthermore, it is evident that, for the purposes of the organisation's own strategic claims management, the process by which Representative Bodies offer or decline assistance to applicants will require adherence to a systematic investigative process and a transparent methodology.

At the same time there is an issue with Connection Reports that Representative Bodies must carefully consider. I refer to the strategic question of the extent of any full and frank disclosure of research in a Connection Report. Certainly there is a need to ensure that the documentation ensures respondents are comfortable with the identity of the claimants and their connections to the country under claim in order to encourage full participation in mediation. Unfortunately, it is also a fact of life that, if mediation fails, claims are likely to be litigated. This will entail 'discovery' of the Connection Report and its incorporation in the litigation process.

In summary, Connection Reports have the capacity to provide all parties with certainty across a number of critical fundamental issues, but applicants will have particular concerns, including matters of confidentiality and strategic management that must be addressed.

The Western Australian case

In Western Australia the Labor government has decided to explore options for consent determinations rather than continue to litigate all applications. A decision of this nature reverses previous policy and the high evidentiary threshold expected of Connection Reports.

In Queensland, by contrast, some flexibility has been increasingly assumed since 1998 in line with a desire by the Labor government to explore the potential for native title consent determinations and other forms of agreements. Standards of evidence continue to remain high, however, if only because they appear to have been set by expectations that most claims will arise in remote areas. Like many of the south eastern States, Queensland has yet to grapple with standards for negotiated outcomes in settled areas.

The Queensland case

Premier Beattie's Forward to the Queensland Native Title Services 'Compiling a Connection Report' makes a point of linking the evidentiary threshold of Connection Reports with negotiated outcomes. He writes,

The Queensland government made a determined effort in 1998 to bring some finality and certainty to the native title debate with a major legislative program establishing a new regime for dealing with native title issues in future land use. Significantly our whole approach was built on a determined policy shift away from litigation towards negotiated agreements between native title claimants and other land users ... An important starting point for negotiated and mediated agreements between native title claimants and the State of Queensland is the compilation and presentation of a Connection report, aimed at establishing that applicant groups are the traditional owners of the land or waters claimed. [Compiling a Connection Report] is part of the process. As well as setting out clearly the State's requirements in a Connection Report, it is designed to shortcut the often tedious and time consuming research process by 'signposting' sources of relevant material and offering guidance on compilation of oral histories.⁶

To an extent the confidence of the punters will rest on the methodology involved when assessing Connection Reports. However, not all respondents feel government should be the sole assessor of Connection Reports and a view is currently circulating that Connection documents should be subject to scrutiny and assessment by all respondent parties. Proponents of the argument say that in order for them to properly assess the specific identity of the claimants involved and the asserted evidence of connection, unfettered access to the documents must be possible to all respondents.

This view raises a wider question of the role of Connection Reports in negotiation processes and how the integrity of a mediation-based process can be protected.

If agreements are the objective then the level of evidence required in a Connection Report should reflect a different threshold than that expected in a contested hearing. The lower threshold should also, I suggest, reflect the settlement history of the particular State's native title profile. In settled Australia, the complexity of Aboriginal relationships to land will be shaped by the social legacy of removal policies, the position of 'historical' people⁷ and the existence of Indigenous connections to land that are not recognised under the NTA.

What anthropological considerations affect Connection Reports?

Connection reports and their evidentiary requirements will differ from State to State. Reasons for this include:

- the nature of the policy and political approach of a particular government to resolution of native title,
- the specific nature of the colonial settlement history and associated legislation in each State,
- the tenure history of the State,
- the State wide Indigenous cultural profile,
- the geographic spread of the Indigenous population, and
- contemporary Indigenous principles of corporateness and connection to land and waters.

It is not possible to comment on these reasons in this paper. However, anthropological implications will flow from government policy positions in terms of how each government views the nature of native title and how this is reflected in the assessment process for Connection Reports. The environment in which these requirements were developed is dynamic and subject to a range of pressures. Certainly, the environment in which a Connection Report operates is increasingly complex compared to its introductory context. What role a Connection Report can continue to effectively play is yet to be tested through process and circumstance. On the face of it, Connection Reports may emerge as increasingly important, if not key elements of negotiation processes.

Content

At a general level, the content of a Connection Report is guided by the evidentiary requirements of the NTA where the onus of proof rests with the applicants. However, in practise some governments have found it of practical use to produce focused guidelines including a reminder to researchers that such documents have a specific purpose and should not be viewed as 'academic theses'.⁸ While general direction as to particular content is provided by the Guidelines, the authors suggest that the Guide 'is not intended as a template'.⁹

Authorship: Who writes the Connection Report?

In Queensland, Connection Reports were adopted by the previous Liberal Government. Policy shifts at various levels mark differences of approach to native title, including the development of Connection Reports. Currently, Native Title Services is charged with assisting claimants to access archival sources and relevant information held by other agencies. The Guidelines describe in detail expectations with respect to the structure of the report, encompassing the historical and anthropological content. Source materials to consult are listed too with the addition of a commentary on the methodological use of specific kinds of sources such as oral testimony.

Information of this kind can be helpful and provide shortcuts to critical agencies. But the offer of assistance can also pose problems for applicants and their representatives, given the position of the State as a respondent. The following comment on assistance is quoted from the Queensland Guide:

Researchers are welcome to approach the Unit to seek further advice at any stage of compilation of a Connection report, including seeking comment when reports are at a draft stage.¹⁰

A statement of this nature is problematic. It raises questions of the extent to which a Connection Report is implicitly shaped by assumptions within the Guidelines about appropriate evidence and what standard of connection will be acceptable as indicative of native title connections between people and land. In addition, the notion of participating as an applicant's representative in a relationship with government (who is also a respondent party) when shaping a document of proof requires careful consideration. The general question of a relationship of assistance between applicants and government needs to be carefully addressed. The new draft guidelines review of the Western Australian Guidelines by Wand and Athanasiou (s.3.11) recommends that government should not jointly produce Connection Reports.¹¹

Admittedly, it is often beneficial for government and applicants' representatives alike to work cooperatively within a defined administrative process and to develop economies of scale for processes of mutual benefit. For example, such a partnership would be useful and acceptable when trying to streamline future act notifications. But involvement between government and applicants' representatives with respect to Connection Reports may be compromised in terms of conducting a transparent assessment because it involves evidentiary issues at the heart of a claim. In any case, research and evaluation of evidentiary documents differs significantly from process administrative data.

Confidentiality

Confidentiality with regard to access to and evaluation of Connection Reports is, in the view of some respondents, a matter open to contestation. According to the Queensland Guidelines once Connection Reports are provided to the State, confidentiality is assured across the assessment process.

The Applicant group or their representative body forwards their Connection Report to the Director, Native Title Services within the department of the Premier and Cabinet. The report is kept in a locked

cupboard and is assessed within the Historical and Anthropological Unit.

The State is particularly conscious of its obligations to maintain and ensure the confidentiality of culturally sensitive material provided for the purposes of a Connection Report. If required, specific procedures can be negotiated to limit access to the material to those directly involved in reviewing the Connection Report...

It should also be remembered that all aspects of a Connection report prepared as part of mediation of a claim are confidential to the mediation process. This includes the State's response to the Connection Report.¹²

Similarly, the Western Australian General Guidelines address confidentiality, although it is clearly provisional and contextual. For example, these Guidelines set out the broad circumstances and conditions under which confidentiality is assured. But it is also made plain that the protection is retractable.¹³

This means that while a negotiation process is conducted 'without prejudice' confidentiality can encompass sections of the Connection Report as long as these areas are identified to government. Within government circles the State also undertakes to restrict circulation of the document. However, again, these measures are conditional.

Claimants should be aware that, if the application goes to trial, the State does not undertake to continue to preserve the confidentiality of the connection report in the event that evidence at the trial is inconsistent with the connection report. That is to say, claimants and their experts should ensure that statements in the connection report are made with the same care as would statements in court.¹⁴

While the Guideline documents for both Queensland and Western Australia speak of confidentiality on 'without prejudice' terms and envisage the protection of sensitive cultural matters, it is evident that such protection cannot be guaranteed. In such circumstances claimants' representatives may decline to provide other than minimalist Connection Reports. Another reason for caution by applicants' representatives is that a Connection Report is undertaken at an initial stage of claim research. It may not indicate the full extent or depth of knowledge, as claimants become more involved in and confident of the process and its capacity to result in a determination.

Emerging Issues with Regard to Connection Reports

Connection Reports have yet to reach their full potential. To date they have been used in conventional ways, primarily as an informal test of the relevant evidence. It is to be expected that, once governments and respondents generally come to appreciate the full advantages of agreement making, the capacity to develop more lateral connection documents will emerge.

At present, confusion exists among many applicants and respondents as to the purpose of Connection Reports and their role in the claim process. The Queensland Guidelines

explicitly state that the purpose of such documents is to offer a ‘starting point for negotiated and mediated agreements between native title claimants and the State of Queensland’.¹⁵ For the former West Australian Liberal government, a Connection Report was a mandatory pre-condition of negotiation, and a necessary, but not sufficient path to consent determinations. The policy of that time stated that ‘Each native title claim is assessed on its own merits to determine if there is scope for a consent determination of native title’.¹⁶

But few Representative Bodies in Western Australia considered the Guidelines productive of either agreement-making or consent determinations. New Guidelines are now being developed by consultants, Paul Wand and Chris Athanasiou. The recommendations for new Guidelines will follow consultations with government, Representative Bodies and the Tribunal to ‘settle negotiation priorities’ through a process, while advice on the preparation of Connection Reports is a key aspect of the review brief.¹⁷

I mentioned earlier that some respondents think that assessment of Connection Reports should be conducted under transparent processes with the option of being contested. They argue that a State-based monopoly on assessment of Connection Reports should be challenged. A counter argument is that contesting evidentiary matters should be managed through the Federal Court.

Costs

Preparation of a Connection Report represents a significant outlay in human and financial resources for Representative Bodies. Many respondents are unlikely to have any realistic idea of the cost of a Connection Report and estimation of costs is difficult. Indeed the question of costs is bit like asking ‘how long is a piece of string’?

The extent and content of Connection Reports differs for each claimant group and for different parts of the country – and costs are proportional to the variables. While working in the Western Queensland region I estimated that Connection Reports undertaken there cost on average between \$25-50,000. That figure would include hire of a consultant, the consultant’s travel and accommodation, salary, time in the field, consultation and meetings with claimants, archival research and report writing. But it is also an estimate that comes out of a very specific situation where the administrative structure to service such work was minimal and the overheads low.

By comparison, a colleague working in an established Representative Body in a remote area with a significant component for travel estimates a figure well in excess of my calculations. My colleague factored in the same set of common factors (travel, accommodation, salary, fieldwork, claimant meetings and so on) with the addition of in-house staff time for discussions and consultations with the consultant, preparation of documents and administration of the consultancy and so forth. In his estimation, these ‘hidden costs’ raised the average cost of the Connection Report to close to \$200,000. I suggest that my figures and his figures set the parameters of a sliding cost scale.

There is a further factor to consider when estimating costs; namely, the availability of qualified experienced personnel to undertake native title research. This is becoming an increasingly complex area of research management particularly in the light of recent Federal Court decisions about confidentiality of primary research data such as

anthropological field notes (see *Daniel v State of Western Australia*¹⁸ and *Smith v Western Australia*). It is also an additional reason for reconsideration of the terms of reference, management and primary research that contributes to a Connection Report and the consequences of how these processes are managed when a claim is contested.

Assessment method

Finally, based on arguments propounded by respondents, Connection Reports will need to be managed by the State in terms of how they are assessed and the extent to which confidentiality is provided. The Historical and Anthropological Unit of the Native Title Services Unit undertakes assessment of Connection Reports in Queensland. Such assessments have been undertaken for at least five years. Once the Historical and Anthropological Unit has arrived at a recommendation this goes to the Executive of the State government.

However, the assessment criteria are not publicly accessible, although the Guidelines set out the matters sought in an acceptable Connection Report. As the Guide suggests, 'We hope it sets out clearly and fully what needs to be included in a Connection Report to support a claim'.¹⁹

In the future it may be preferable to evaluate Connection Reports by engaging a team of independent assessors comprised of suitably experienced and qualified people. Such a team could be chosen through public advertisement and subsequent establishment of a Register of Consultants.

In this respect, questions of evaluation, confidentiality and purpose within a process go to the matter of the principles by which the negotiation process operates. Certainty is of concern to all parties, although they may address the issues from different perspectives. Again, confidentiality provisions will have an important bearing on claimants' views as to how optimistically they can engage in the negotiation process. Such considerations may equally form part of an Representative Body's strategic view as to how best to protect claimants' native title rights and interests without undue exposure at the mediation stage. Anthropologists have observed that materials claimants wish to restrict are not confined solely to culturally sensitive information but may include personal information too. For these reasons, some restrictions on open access will be warranted.

Conclusions

In this paper I have only discussed the situation of Connection Reports in Queensland and Western Australia, the only States with currently published guidelines. Australia wide there is no common requirement by governments for a Connection Report. I have suggested, however, that where such a document is sought it can provide mutual confidence to all parties; with the caveat that Representative Bodies may have strategic concerns with respect to the nature of the content and the role of the document in a wider outcome driven process. Yet in spite of the potential for Connection Reports to benefit all parties at some level, the incorporation of Connection Reports as a standard aspect of a negotiation process is surprisingly limited.

One explanation for hesitation is perhaps the rapid change in the native title environment over the past few years. Not only has the legislation been amended, but

governments have also had to grapple with different entailments of native title policy and organisational responsibilities. Nevertheless two facts remain; native title is part of the common law and resolutions need to embrace options other than simply litigation. Connection Reports can play a purposeful role in a negotiation process for reaching a consent determination or other agreements.

¹ Paul Wand and Chris Athanasiou, *Wand Review of the Western Australian General Guidelines – Native Title Determinations and Agreements Draft Negotiation Guidelines*, Western Australian Government, forthcoming.

² There are a number of reasons why the registration test should not be thought of in this way. For example, the purpose of the test is administrative; the registration test has changed over time through the impact of developing case law and different applications have had different tests applied to them. Applicant groups may not submit to the registration test for strategic reasons; many of the matters of the registration test are concerned with form not content; and so on.

³ One explanation for this ad-hoc response could be the structural position of native title policy within a government organisational structure. Indeed, in some States various departments with prior responsibility for indigenous issues (such as heritage) compete with one another for control of the native title agenda and this can subvert the potential to implement a whole-of-government response.

⁴ Queensland, Department of Premier and Cabinet, *Compiling a Connection Report*, Native Title Services, 1999, p. 6.

⁵ Personal communication, NSWALC July 2001.

⁶ Queensland, Department of Premier and Cabinet, *op. cit.*, p.3.

⁷ The term ‘historical people’ refers to indigenous people who were removed from their own country to other areas under legislation. See Rosalind Kidd 1997. *The Way We Civilise: Aboriginal Affairs the Untold Story*. University of Queensland Press, Brisbane.

⁸ Queensland, Department of Premier and Cabinet, *op. cit.*, p. 12.

⁹ *Ibid.*, p. 5.

¹⁰ *Ibid.*, p. 10

¹¹ Paul Wand and Chris Athanasiou, *op. cit.*, p. 8 s.3.12.

¹² Queensland, Department Premier and Cabinet, *op. cit.*, pp. 6, 10.

¹³ Western Australia, *General Guidelines – Native Title Determinations and Agreements*, Western Australian Government, 2000.

¹⁴ *Ibid.*, p. 2.

¹⁵ Queensland, Department Premier and Cabinet, *op. cit.*, p. 3.

¹⁶ Western Australia, *op. cit.*, p.1 sA 1.0.

¹⁷ Paul Wand and Chris Athanasiou, *op. cit.* The final report to the Cabinet Standing Committee on Native Title will be 23 August 2001.

¹⁸ On *Daniel v State of Western Australia* see Robert Blowes and David Trigger, ‘Experts, Documents and Lawyers in Native Title Claims: The Implications of *Daniel v State of Western Australia*’, *Indigenous Law Bulletin*, March 2000, pp. 4-9.

¹⁹ Queensland, Department of Premier and Cabinet, *op. cit.*, p. 5.

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