

# **Guidelines for preparing and assessing connection material for Native Title Claims in Queensland**

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## 1 Introduction

Native Title claims are filed in the Federal Court of Australia, and the State of Queensland (the State) is a party to all claimant applications over any land and waters in Queensland. The State prefers to negotiate claimant applications with a view to reaching an agreed outcome, by way of a consent determination of native title.

The native title claim group, represented by 'the Applicant', has the onus of proving that the claim group has native title rights and interests in the claim area. Before it can consent to a determination that native title exists, the State must be satisfied as to the evidence upon which the Applicant relies in support of the claim. As required by the Court, the State must take a real interest in the proceedings in the interests of the community generally. The State must also be satisfied that there is a credible basis for the claim.

Queensland is a very large area with great diversity of Traditional Societies with divergence of the models of those societies and a 'one size fits all' approach cannot be applied.

These guidelines apply to connection material provided for the negotiation of native title claimant applications. Although the legal requirements for proving native title are the same for a negotiated outcome and a trial, the State will accept a lesser standard of information for negotiations towards a consent determination. If the claim cannot be resolved by agreement and the matter goes to trial, it may be that additional material will be required for the Court to be satisfied.

These guidelines are intended to assist native title claim groups and other parties to understand what connection material will satisfy the State for the purposes of consenting to a determination of native title, as well as the process the State will follow in assessing the connection material. The guidelines include specific information on what should be included in connection reports prepared by experts such as anthropologists or historians. The guidelines also provide information about Queensland archival and other source material that may assist native title claim groups to prepare their connection material.

Aboriginal and Torres Strait Islander Land Services (ATSILS) within the Department of Natural Resources and Mines is the State agency responsible for dealing with all native title claims within Queensland. ATSILS works closely with Crown Law to progress all aspects of native title claims in the Court, including the assessment of connection.

These guidelines have been prepared in consultation with the Queensland Representative Body Alliance, and the State acknowledges their assistance.

*The information in this document does not constitute legal advice. Each party to a native title claim should obtain their own legal advice.*

## 2 The connection material to be provided to the State

The State will consider all the connection material which the Applicant provides to it in support of its native title claim. The material should include the following:

- a) **Connection report:** The connection report should be prepared in accordance with these guidelines. It should refer to and discuss the Connection Mud Map and Genealogies, but it needn't refer to the Table of Rights and Interests (as discussed below). It may be that the Applicant will provide more than one connection report, each prepared by a different expert in their respective disciplines.

- b) **Genealogies:** The Applicant’s Genealogies must include:
- i. all apical ancestors identified in Schedule A of the Form 1 Native Title Determination Application and their descendants (as far as they are known)
  - ii. all named Applicants for the claim and their forebears (as far as they are known)
  - iii. all native title claimants relied on in the connection report as a source of information, other than those only briefly referred to

Genealogies should be presented in a standard anthropological format including, where possible, dates and places of birth, death and marriage. Annexure C: (*Sample Genealogy (extract)*) provides an example of how the genealogies may be set out. Other formats may also be acceptable.

- c) **Connection Mud Map:** The Applicant’s Connection Mud Map should give an indicative location for all places referred to in the connection report, not just the location of significant sites. The map is intended to show the distribution of connection evidence within and proximate to the claim area. This will also provide an early guide to areas that may require additional evidence.

A notation should be made against each location on the map, giving the paragraph numbers from the report where the location is discussed. For example: ‘ • Rocky Ck [257], [296]’. If the map will be cluttered by too many notations against a particular location, those notations should be listed in a table, and annexed to the map. Where approximate locations are unknown, the map can show a wider area within which the location is situated. The National Native Title Tribunal (NNTT) may be able to assist with the preparation of the Connection Mud Map, either by way of NT Vision or a NNTT-hosted website. The Connection Mud Map can be provided as a separate document but it should ideally be referred to in the connection report.

- d) **Table of Rights and Interests:** The sample table below sets out the format and column headings which should be adopted for the Table of Rights and Interests. The information in the table below is included by way of example only, and none of the examples should be taken as sufficient evidence of the existence of the given right. The Table of Rights and Interests does not need to be prepared by the author of the connection report, nor does it need to be discussed in the connection report.

<b>Right claimed</b>	<b>Information</b>	<b>Source</b>	<b>Date</b>	<b>Location</b>
<i>Exclusive</i>	<i>Opposition to proposed new bridge on Stony Creek</i>	<i>B Claimant &amp; C Claimant [CR* 55], Author’s assertion [CR 158]</i>	<i>Late 1980s</i>	<i>Rocky Creek</i>
<i>Exclusive</i>	<i>No opposition from neighbouring groups to claim</i>	<i>Author [CR 120]</i>	<i>Current period</i>	
<i>Hunting, Fishing, Use of Resources &amp; Teaching</i>	<i>Mustn’t take X species as per Dreaming</i>	<i>D Claimant, as taught during childhood [CR 167]</i>	<i>Around 1930s</i>	<i>X Mission surrounds</i>
<i>Hunting, Fishing &amp; Teaching</i>	<i>Taught to share take with older relatives</i>	<i>E Claimant, during childhood [Affidavit of E Claimant at 15]</i>	<i>Around 1960s</i>	<i>Claim area</i>

<i>Exclusive &amp; Use of Resources</i>	<i>Group of Aboriginal people waving spears at us</i>	<i>Kennedy expedition survivors' account [CR 275]</i>	<i>1848</i>	<i>Cape Point</i>
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\*CR' being 'Connection Report

- e) **Lawyer's letter:** The State asks the Applicant's legal representative to prepare a letter to the State which includes the following statement:

'I confirm that I have provided *[insert author's name]* ('the Applicant's expert') with a copy of the Federal Court's General Practice Note, *Expert Evidence Practice Notes (GPN-EXPT)*, commencing 25 October 2016 (including annexures), and informed the Applicant's expert of the obligations under the *Federal Court Rules 2011* in relation to expert witnesses and expert reports. I have also referred the Applicant's expert to the State's document entitled *Guidelines for preparing and assessing connection material for Native Title Claims in Queensland* and asked the Applicant's expert to read it. I confirm that I have read the report prepared by the Applicant's expert for the purposes of this claim.'

Other documents such as maps, extracts from transcripts, photographs, diagrams, affidavits and print-outs from websites may also be provided, however they should ideally be included as annexures to the connection report, so that the author may properly refer to them and discuss their relevance. Audio and visual material (e.g. YouTube) may also be relied upon, and should also ideally be referred to and discussed in the report.

As discussed at Item 6.b. below (The State's Assessment Process), all connection material should be provided to the State in an electronically searchable format by email (where possible), or otherwise on a disk or USB stick.

### 3 The contents of the connection report

It is a matter for the author of the connection report to determine the structure of the report, however the State asks that it include the following:

- a) **Executive summary**
- b) **Methodology**, in no more than half a page
- c) **The author's curriculum vitae**
- d) **Terms of reference**
- e) **Description of the claim area**, including topographic features
- f) **Information to satisfy the State's requirements for connection.** This should comprise the bulk of the report. See Item 4 below (*Information to Satisfy the State's Requirements for Connection*) for details of what information should be provided.
- g) **Bibliography**
- h) **Appendices**, if any. Appendices may include extracts from transcripts of interviews or legal proceedings, extracts from historic and other source documents, affidavits, maps, photographs, diagrams, etc. All appendices must be referred to and discussed in the body of the report.

## 4 Information to satisfy the State's requirements for connection

This section of the guidelines outlines the State's requirements for proving native title and suggests a wide range of information that may be relevant.

These guidelines suggest a wide range of potentially relevant information to assist the Applicant to put its best case to the State at the outset, without having to prepare additional information following the connection assessment. If the Applicant is unable to provide information on a particular topic it may not necessarily preclude the State from accepting connection, depending on the topic.

The connection material for each claim will be considered on a case-by-case basis, and the material provided will be considered as a whole.

This part of the connection report may be formatted according to the sub-headings listed in this section, to ensure that all issues are addressed, however the State does not require this structure to be followed.

The definition of 'native title', as interpreted by the Courts, does not comprise a simple list of distinct elements. Each of the requirements for native title is related to each other requirement. The bold sub-headings below seek to address all requirements, however there will inevitably be some overlap between the items. For example, the requirement that the claim group comprise a 'society' will depend upon whether the requirement for ongoing acknowledgement and observance of traditional laws and customs has been satisfied. Rather than repeat the relevant information throughout the connection report, the author should simply refer to the previous paragraphs in the report containing the relevant information.

### a) **The Identity of the Claim Group**

- i. **Self-identity:** How does the claim group identify itself and distinguish itself from neighbouring groups?
- ii. **Rules for membership:** Discuss the rules for membership of the group, e.g. cognatic, patrilineal, matrilineal, adoption, birth on country, recognition or other criteria.
- iii. **Language:** What is the relevance of language or dialect in identifying the claim group?
- iv. **Genealogies:** Refer to and discuss the Genealogies (see the requirements at Item 2.b. (*Genealogies*)). The connection report should show that the current claim group is descended from the apical ancestors identified in Schedule A of the Form 1 Native Title Determination Application and in the Genealogies.
- v. **Group structure:** How is the claim group structured? Describe any sub-groups or clans and any division of the claim area into estates associated with the sub-groups or clans.
- vi. **Society:** Does the claim group comprise a society? Strictly speaking, this question is answered by showing that the group is bound by the acknowledgement and observance of laws and customs that have been acknowledged and observed, substantially uninterrupted since sovereignty. This section of the report could simply refer to the discussion of traditional laws and customs at sub-paragraphs c. (*Traditional Laws and Customs at Sovereignty*), d. (*Continued Acknowledgement and Observance of Traditional Laws and Customs*) and e. (*The Claim Group's Current Acknowledgement and Observance of Traditional Laws and Customs*) below.
- vii. **Regional society:** is the claim group part of a regional society?
  - A. A regional society will only exist where there is some level of commonality of laws and customs in relation to land and waters. The breadth of a society is a question of degrees, and will depend upon the *number* of commonalities between groups and the relative *importance* of those commonalities.

- B. Identify and discuss any 'contingent' (cf 'core') rights held in relation to the claim area by the members of other groups within the regional society.
- C. Identify the regional society by reference to the common laws and customs.
- D. Discuss the claim group's place within the regional society.
- E. If any group within the society has had a determination of native title, it is expected that the determination would have been made on the basis of the regional society. If the determination was made on a different societal model to that asserted by the claim group, the report should explain the inconsistency.

**b) The Claim Area**

- i. Boundary: Identify the boundary of the claim area, including by reference to the claim group members' own knowledge, Dreaming stories, etc. Identify the boundary of any adjoining determination areas, where the claim area is situated within the claim group's country and by reference to neighbouring groups' country. The State accepts that these boundaries may be approximate or subject to ongoing negotiations.
- ii. Historic mapping: The report should refer to all early European attempts to map or otherwise describe group boundaries, and discuss any anomalies.
- iii. Apicals' association with the area: Provide information to show that the apical ancestors identified in the Form 1 Native Title Determination Application were associated with the claim area. Such information may include places of birth, death or marriage, as recorded in the Genealogies, as well as places of residence or employment. Inferences may also be drawn. All references to the apical ancestors' association with the claim area must be noted on the Connection Mud Map, in accordance with Item 3.c. (*Connection Mud Map*).
- iv. Others associated with the area: Identify any other individuals or groups that were ever associated with the claim area, and discuss why they are not included in the claim group.
- v. Overlaps: Identify and discuss any overlaps with neighbouring groups.
- vi. Regional society: Is the claim group is part of a regional society:
  - A. identify the boundary of the regional area
  - B. identify and discuss any shared country (which is most likely to exist within a regional society)
  - C. identify any instances where the claim group has succeeded to any part of the claim area, and provide information to show that the succession occurred in accordance with traditional laws and customs. Succession can only occur within a regional society, and is distinguished from transmittal, which is unlikely to have been based on traditional laws and customs.
- vii. Neighbouring groups: If possible, provide information to show that neighbouring groups acknowledge the claim group's claim to the claim area. If neighbouring groups are unwilling to acknowledge the claim group's claim to the claim area, do they at least acknowledge that any families within the claim group and their forebears have an association with the claim area? If no such information is available from the neighbouring groups themselves, do the claimants have any idea what their neighbours' views are?



c) **Traditional Laws and Customs at Sovereignty**

i. What are traditional laws and customs?

- A. Traditional laws and customs are the society's rules or norms of behaviour.
  - B. There should be an expectation that they will be followed and there may be sanctions for non-compliance, however if they have not always been followed it won't necessarily mean that the law or custom does not exist.
  - C. Traditional laws and customs needn't have a spiritual character: they may relate to utilitarian matters.
  - D. Information should be given about all identifiable traditional laws and customs, not just those relating to land and waters.
- ii. Effective sovereignty: For mainland Queensland British sovereignty was established on 26 January 1788 (see Annexure B below: *Establishing British Sovereignty in Queensland*). In most cases the author may wish to infer that the laws and customs which existed at around the time of first substantive contact were the same as those which existed at sovereignty. The time of first substantive contact is known as 'effective sovereignty' and can be used as the commencement point for assessing connection. Depending upon the circumstances, the point of (effective) sovereignty may be as late as the end of the 19th century.
- iii. Sources: This part of the connection report should refer to relevant archaeological, linguistic, anthropological, historical and archival sources. The author should seek to draw inferences regarding the group's traditional laws and customs at (effective) sovereignty, on the basis of that material.
- iv. Early teachings: Information given to older members of claim group when they were very young will also be relevant in identifying the traditional laws and customs at effective sovereignty.
- v. Examples: The sorts of traditional laws and customs which the Courts have recognised as existing at sovereignty include the following:
- A. rights are acquired by descent
  - B. rights are communal and not individual
  - C. rights in country are inalienable
  - D. rights in country are not held uniformly across the group: they are held according to sub-group divisions (e.g. estate groups, patricians or dialect groups) each having higher-level rights to their respective part of country
  - E. rules about and deriving from Dreaming stories
  - F. rules about the importance of transmission of knowledge and restrictions on such transmission (e.g. gender, age, association with particular areas)
  - G. obligations to look after the land (including significant sites)
  - H. belief that the land can be dangerous if it is not protected
  - I. rights to control use of and access to country
  - J. rights to speak for country
  - K. rules about skin systems, totems, moieties and kinship relationship and terms

- L. ceremonies, rituals
- M. rules about hunting, fishing and gathering resources
- N. rules about the use of language
- O. rules about death and burial
- P. customs about naming children

d) **Continued Acknowledgement and Observance of Traditional Laws and Customs**

The society must have continued to acknowledge and observe the traditional laws and customs, substantially uninterrupted, since (effective) sovereignty.

- i. The traditional laws and customs: This part of the connection report is likely to be quite lengthy, and should address all the traditional laws and customs which the author has identified pursuant to Item 4.c. above (*Traditional Laws and Customs at Sovereignty*). The report should include as much information as possible to show that each of those laws and customs has been acknowledged and observed since (effective) sovereignty. The connection report should particularly focus on the continued acknowledgement and observance of laws and customs concerning land and waters.
- ii. Transmission: This part of the connection report should also focus on how information about laws and customs has been transmitted since (effective) sovereignty, the emphasis which the claim group places on the importance of teaching and laws and customs about teaching. When Indigenous informants are being asked to provide information on topics relevant to connection, they should always be asked to advise how they acquired their knowledge on each given topic, including who told them, when and where they learnt it and whether any laws and customs apply to the transmission of the knowledge. See Annexure D (*Guideline Questions for Affidavits*). This information should be included in the connection report.
- iii. Physical presence: This part of the connection report should outline the extent of the claim group's physical presence on the claim area, or specific parts of it, since (effective) sovereignty. Relevant information may include whether individuals reside on the area, work on the area, visit the area for camping trips or holidays or visit the area for the purpose of looking after particular sites. The frequency and duration of any visits will also be relevant.
- iv. Lack of physical presence: If there has been a lack of physical presence on the claim area the connection report should include information from which connection can be inferred. Such information may include:
  - A. the reason for the lack of physical presence, e.g. forced removals from country, European-imposed access restrictions, lack of natural resources, topographic impediments to access
  - B. any attempts to gain access to those areas
  - C. acknowledgement and observance of traditional laws and customs on nearby areas
  - D. knowledge and beliefs about the claim area, including Dreamings, significant sites and any ceremonies, songs and dances associated with the claim area
  - E. knowledge about the boundaries, geographic features and natural resources of the claim area
  - F. whether any claimants or their forebears live(d) near the claim area

- G. whether the claim group continues to believe that the area is 'theirs', e.g. continuing to speak for country and continued assumption of responsibility for country, notwithstanding the difficulty in discharging that responsibility
- H. the period during which there has been a lack of physical presence

If the Connection Mud Map (see Item 2.c. (*Connection Mud Map*) for requirements) indicates little or no activities, sites or other references to large parts of the claim area, this should be discussed.

- v. European contact: The connection report should document the deleterious impact of European contact on the society, which may include frontier violence, removals from country to missions and elsewhere, the imposition of Christianity and displacement caused by pastoral, mining and forestry industries. The report should then seek to demonstrate how the claim group has maintained its society, by ongoing acknowledgement and observance of traditional law and custom in relation to the claim area. The sort of information outlined above, in relation to a lack of physical presence on the claim area, may be relevant. Other relevant information may include:
  - A. the extent to which the claim group and their forebears have occupied or visited the claim area
  - B. employment on the claim area, particularly where it involved living in camps or close quarters with other members of the claim group, opportunities to visit sites and opportunities to transmit information to younger members of the claim group
  - C. whether the conditions at any mission allowed for any use of language, traditional hunting and fishing, camping trips, ceremony, etc.
  - D. the extent to which the claim group and their forebears have maintained ongoing contact with other members of the group
- vi. Adaptation: The connection report should identify any instances where traditional laws or customs have been adapted. If the original law or custom has ceased to be acknowledged and observed, and it has been replaced by a new law or custom, this will not be an adaptation. An example of an adaptation accepted by the Courts is the change in a group's laws governing the acquisition of rights from one of patrilineal descent to one of ambilineal or cognatic descent.

The report should also refer to any changes in the way activities are conducted, to show that they are still based on traditional law and custom. For example, guns may now be used for hunting, but the law that imposes age restrictions on taking certain species is still acknowledged and observed.

The society's land-holding system may have changed from one involving small units held by smaller sub-groups to one involving broader divisions across larger areas. If that is the case, the author should discuss whether this constitutes an adaptation, such that the current system is rooted in the pre-sovereignty system, or whether the classical system has been replaced by a new system.
- vii. Revival: If a society ceases to acknowledge and observe traditional laws and customs, and their descendants 'take them up again', those laws and customs may not be traditional. The claim group's knowledge about laws and customs should be shown to have been acquired as part of a normative system, i.e. within a society. If knowledge was acquired by non-traditional means or through the informant's own research, it may not be traditional. Any suggestion that there has been a 'restoration', 'revival' or 'recreation' of traditional laws and customs will similarly be problematic.
- viii. New laws and customs: Any laws or customs created after sovereignty will not be 'traditional'.

**e) The Claim Group's Current Acknowledgement and Observance of Traditional Laws and Customs**

- i. Current traditional laws and customs: The report should identify the traditional laws and customs which the claim group currently acknowledges and observes. This list should comprise those laws and customs which were acknowledged and observed at (effective) sovereignty, as adapted. This list should exclude any for which there has been a substantial interruption in acknowledgement and observance.
- ii. Current activities: The connection report should include information as to how the claim group members currently acknowledge and observe traditional laws and customs. For example, individuals' involvement in future act consultations, cultural heritage surveys and clearance activities may be relevant. It may also be that individuals employed in resource management (e.g. national park rangers), cultural tourism or primary industries (e.g. pastoral, forestry, and fishing) could be shown to acknowledge and observe traditional laws and customs during opportunities presented by their work.
- iii. Is there still a society? The report should seek to show that the claim group as a whole acknowledges and observes the traditional laws and customs. Even where a determination is sought in favour of individuals or a small group, it must still be show that they are part of a society. The connection report should seek to show approximately how many members of the society or approximately what proportion of them acknowledge and observe the traditional laws and customs today. Relevant information may also include whether claim group members reside in close proximity to each other, whether they maintain regular contact within and between family groups, and whether they continue to engage with each other regarding cultural matters, even where the engagement involves a dispute.

**f) Rights and Interests**

The connection report must show what rights and interests the claim group has in the claim area.

- i. 'Possessed under': The connection report should include information to show that the rights and interests which the Applicant asserts in Schedule E of the Form 1 Native Title Determination Application are possessed under the claim group's traditional laws and customs. There must be some nexus between the traditional laws and customs on the one hand, and the rights and interests on the other. For example it may not be enough to say that the claim group possesses rights to trade on the claim area solely by reason of a traditional law that says the area 'belongs' to them.
- ii. Evidence of rights and interests: The connection report must include some evidence in relation to each asserted right and interest in relation to land *and* waters. The State has requested that this evidence be extracted from the report and included in a 'Table of Rights and Interests' discussed at Item 2 above (*Connection Material to be provided to the State*). The column headings of the table provide guidance as to the sort of information that will be useful for the State's assessment. It is a matter for the Applicant whether the table is prepared by its legal representatives or the author of the connection report.
- iii. Exercise of rights and interests: The connection report should ideally include as many examples as possible of rights being exercised, as they may provide powerful evidence of the existence of the rights and their content. Depending upon the circumstances, it may be that a native title right can be recognised, notwithstanding a lack of evidence of it having been recently exercised.
- iv. Exclusive native title rights: If exclusive native title rights are claimed, the connection report should include specific information in support of those rights. Information about the following matters may be relevant:

- A. any permission systems for non-claimants to access the claim area, including who must be asked, whether they need to consult with others, whether different people must be asked for different parts of the claim area, whether the permission requirements are different for neighbouring or other groups seeking access, whether the permission requirements differ depending upon the type of activity sought to be conducted on the claim area
- B. any language terms for 'owner' or 'boss' of country
- C. any obligations to protect strangers from harm while on country
- D. any requirements for strangers to be accompanied by claimants while on country, and to follow their instructions
- E. any rituals for introducing strangers to country, including what the ritual involves, who can conduct it, when it is required, whether it applies to particular sites
- F. what happens if strangers access country without permission, including consequences for the stranger, consequences for the claimants and consequences for the land
- G. any resistance to European access, use and occupation
- H. any acknowledgement by neighbouring groups of the claim group's right to control use and access

The connection report should seek to include as many examples as possible to illustrate the nature of any permission requirements, how they operate and to show that they have been practiced.

g) **Focus on Particular Areas**

The State may have requested specific connection evidence in respect of particular areas (e.g. areas that are difficult to access due to topography or land use). This request could have been made during the preliminary strategy meeting (see Item 6.a. under *The State's Assessment Process*), or at any other time. Where such a request has been made, the connection report should include specific information to show that the laws and customs that related to *that* area had continued to be acknowledged and observed without substantial interruption. Connection to *that* area must be shown to have been substantially maintained since (effective) sovereignty.

## 5 Writing the connection report

In writing a connection report the author should always be conscious that the report is not an academic document: it is intended to meet the Applicant's terms of reference (see Item 3.d. (*The Contents of the Connection Report*)), these guidelines and the requirements of the Court.

Information provided by members of the claim group or their forebears will be the most valuable evidence in support of the claim, and the author should endeavour to include it in the connection report wherever possible.

- a) **Claimant evidence:** The source of that information should be identified, as should the time period to which it relates and any relevant geographic location. Where possible, details should also be given as to how, when and in what circumstances the source obtained the information. Affidavits by members of the claim group can be particularly helpful in establishing connection. Annexure D (*Guideline Questions for Affidavits*) lists questions which may be relevant to establishing native title. The questions may also be useful for anthropological field work.

- b) **Opinions:** The connection report should explain the basis for any opinion expressed in the report, preferably by reference to primary or secondary material.
- c) **Hypotheses and inferences:** The State acknowledges the difficulty with obtaining historical information in relation to an oral culture, and it will often be necessary for the author to hypothesise and draw inferences. In that case, the author should clearly identify the facts relied upon in support of the hypotheses or inference.
- d) **References:** All references should be sufficiently detailed so that they can be verified if necessary.
- e) **Federal Court guidelines:** The connection report should comply with the Federal Court's guidelines in relation to expert reports. See Annexure E (*Expert Evidence Practice Notes (GPN-EXPT)*).
- f) **Duty to Court:** Authors of reports should be aware that they are not advocates for claim groups – their paramount duty is to assist the Court on the matters relevant to their area of expertise.
- g) **Formatting:** The report should be formatted using headings and sub-headings, and all paragraphs should be numbered.
- h) **Length:** The State asks that connection reports focus on the issues identified in these guidelines. It is a matter for the author of a report (and the terms of their engagement) to determine the length of the report, however the State suggests that connection reports should usually be no longer than 300 pages.

The author should avoid lengthy quotes (more than a few paragraphs) from Court cases or documents which are known to be in the State's possession, including Form 1 Native Title Determination Applications, previous determinations and other connection material already provided to the State in support of the claim.

## 6 The State's assessment process

For future native title claims the State's assessment process will commence with an early strategy meeting, prior to or soon after the claim is filed. For existing claims, the process will commence with the provision of the Applicant's connection material.

The State welcomes any queries regarding the contents of these guidelines or any other connection-related matter at any stage in the process.

- a) **Early strategy meeting:** An early strategy meeting should ideally be held prior to filing a new claim and attended by representatives of the Applicant and the State to discuss:
  - i. the Applicant's aspirations
  - ii. the State's aspirations (e.g. possible indigenous land use agreements, tenure changes, regional issues)
  - iii. shared aspirations as between the State and the Applicant
  - iv. technical issues which may include:
    - A. whether there is or may be a regional society
    - B. any State requests for specific connection evidence in respect of particular areas (e.g. areas that are difficult to access due to topography or land use)

C. how to resolve any anticipated areas of overlap, and any State request for specific connection evidence in respect of those areas

- v. any relevant primary source material that the State's Connection Unit (situated within ATSILS) may be able to refer to the Applicant
- vi. any uncertainty the Applicant's legal representatives or experts may have about the contents of these guidelines

The early strategy meeting may also involve a presentation by officers from State Land Asset Management, Department of Natural Resources and Mines regarding land use.

- b) **Provision of connection material:** The Applicant should provide copies of the documents listed at Item 2 above (*Connection Material to be Provided to the State*) to the State by email (where possible), or otherwise on a disk or USB stick. The connection report should be in an electronically searchable format.
- c) **Preliminary assessment:** The State will conduct a preliminary assessment:
  - i. to ensure that all the documents listed at Item 2. above (*Connection Material to be Provided to the State*) have been provided
  - ii. to identify any obvious or fundamental deficiencies with the connection report (even if the State does not raise any concern at this stage of the assessment, it may still identify obvious or fundamental deficiencies at a later stage of the assessment)
- d) **Results of preliminary assessment:** The State will advise the Applicant of the results of the preliminary assessment:
  - i. if any of the connection material is missing, the State will ask the Applicant's legal representatives to provide it
  - ii. if the State has identified any obvious or fundamental deficiencies with the connection report, the State will contact the Applicant's legal representatives, ideally to arrange a discussion involving officers from the Connection Unit and the author of the report
  - iii. if the State is satisfied with the preliminary assessment, it will advise the Applicant's legal representatives that it has accepted the connection material for assessment purposes, and will provide a time estimate for the assessment.
- e) **Assessment of connection material:** The State will assess the connection material and any additional material provided to it. The assessment will be conducted by the Connection Unit from ATSILS and Crown Law. The State may also engage legal Counsel or a peer reviewer to assess the material. During the assessment process the State may request copies of source documents referred to in the connection report.
- f) **Insufficient:** If the State's view is that the connection material is insufficient, it will arrange a meeting with the Applicant's legal representatives (and possibly their experts) to identify and discuss the additional information which the State seeks. The State will also list / identify those matters in a letter to the Applicant's legal representatives.
- g) **Additional information:** The State is willing to consider any request that additional information be provided by way of site visits or meetings with members of the claim group. This would involve staff from the State's Connection Unit or Crown Law or the State's Counsel visiting sites or individuals in company with the Applicant's legal representatives (and possibly their experts).

- h) **Assessment of additional information:** Any additional connection material will be assessed in accordance with these guidelines. Ideally the additional material will address the State's concerns, however it may be that it does not, or that it raises new concerns, in which case there may be a further request for additional material. If this occurs the State will seek to work collaboratively with the Applicant's legal representatives and / or experts to minimise the number of requests made.
- i) **Acceptance of connection:** Once the State is satisfied that the connection material meets the State's connection requirements, it will write to the Applicant's legal representatives to advise that the material is sufficient for the purposes of entering into substantive negotiations towards a consent determination. The State's acceptance of connection may be expressed to be subject to certain conditions.
- j) **Filing:** Ideally the connection report and any additional information provided to the State should be filed with the Court prior to any consent determination. If however the Applicant wishes to file a truncated or otherwise different version of the material, it should be provided to the State in draft form well in advance of the consent determination hearing, so that the State has sufficient opportunity to review and comment on the material. The State has an interest in ensuring that the information upon which the State relies in consenting to the determination of native title is filed with the Court.

## 7 Access to and use of connection reports

To the extent it is able to do so under the law, and unless otherwise agreed, the State undertakes to deal with connection reports received in mediation on a 'confidential' and 'without prejudice' basis, as follows:

- a) **Persons who may access:** Connection material provided to the State will be accessed by officers from ATSILS (including staff from the Connection Unit), Crown Law staff, legal Counsel, and anyone the State may engage to conduct a peer review. It is possible that extracts from connection reports will also be provided to senior government officers or Ministers, and their staff, for the purposes of seeking instructions in relation to accepting connection.
- b) **Purpose of access:** Connection reports will only be accessed for the purpose of conducting a connection review and otherwise for the purposes of mediating and resolving **the** native title claim.
- c) **Copies of connection material:** The State may copy the Applicant's connection material, including the connection report, for the access purposes described above.
- d) **Restricted information:** If the claim group wishes to limit access to any gender-restricted information in the connection report, this should be discussed with the State before the report is sent to the State, so that appropriate arrangements can be made.
- e) **Retention:** The State will retain an electronic copy of the connection material with its file, under a restricted access system. A hard copy may also be kept.

## 8 Contact details

The Applicant's legal representatives or the author of a connection report may telephone officers from ATSILS at any time to discuss these guidelines, connection or any other matters relevant to a native title claim:

Director, Claim Resolution: (07) 3137 4221

Connection Unit: (07) 3137 4232



## Annexure A: Repositories and records

This section has been included in this guide to provide contact details and to summarise the major repositories that contain materials of potential use for researching the connection-related aspects of a native title claim.

This section is not comprehensive: additional repositories and sources may be relevant.

### Aboriginal and Torres Strait Islander Partnerships

The Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP), Community and Personal Histories' unit provides access to Queensland Government records relating to Aboriginal and Torres Strait Islander people in Queensland. It was established to facilitate access to the records created by the Department of Aboriginal and Torres Strait Islander Policy and Development Aboriginal, Torres Strait Islander Services, Department of Communities and its predecessor departments over the last hundred years, and can provide valuable assistance to Applicants and their consultant researchers with primary source information relating to:

- family history research
- community history research
- removal and exemption information
- births, marriages and deaths information
- native title research for connection reports and registration test

The Community and Personal Histories unit provides direct personal service to clients as well as providing assistance in the use of government records relating to Aboriginal people held at the Queensland State Archives, Brisbane. All services of Community and Personal Histories are free.

Applicants and their consultant researchers should contact Community and Personal Histories as soon as possible as the information held there can assist with the mediation process and compilation of information for the registration test and connection reports.

Brochures outlining the services provided and contacts for other agencies that will help with inquiries, are available from Community and Personal Histories in Brisbane.

**Free call:** 1800 650 230

**Address:** PO Box 15397  
City East Brisbane Qld 4002  
Level 6A, 75 William Street Brisbane Qld 4001

### Queensland State Archives

The Queensland State Archives is the Government agency charged with the responsibility of collecting records of Queensland Government departments, State courts, local government authorities, statutory authorities, government owned corporations and ministerial records which are considered worthy of permanent preservation for historical or other reasons. It is also concerned with ensuring government agencies create and keep their permanent records, whatever the format, for use by future generations of researchers.

Although the Archives do hold some records predating the separation of the Colony of Queensland on 10 December 1859, most of the Queensland State Archives' records were created after that date. The State Records

Authority of New South Wales holds most public records referring to areas now in Queensland prior to December 1859.

Records held at the Queensland State Archives are preserved in their original order, together with the finding aids of the creating department or agency.

The general public may view records on open public access in the Public Search Room. A Readers' Ticket is required. This can be obtained on arrival at reception by producing two forms of identification. One form of identification must contain a signature, or must be a record such as a driver's licence with a photograph. An application form for a Reader's Ticket is available on-line through the Archives' website. For convenience this form can be printed and completed prior to arrival at State Archives.

Most records have a 30-year access restriction, although records containing personal information of a sensitive nature may be restricted for longer periods.

A reference archivist is available to assist in the use of the records. There are no charges unless copies of records are required. For those researchers undertaking a long-term research project it is advisable to make an appointment with the Manager, Public Access. Email [info@archives.qld.gov.au](mailto:info@archives.qld.gov.au) for a preliminary interview.

See [www.archives.qld.gov.au](http://www.archives.qld.gov.au) for information about Queensland State Archives and its holdings.

An electronic database of the holdings can be accessed from the site's home page or directly at [www.archivessearch.qld.gov.au](http://www.archivessearch.qld.gov.au).

The website also provides links to other archives that will be of value to the researcher, such as the State Records of New South Wales.

**Phone:** (07) 3131 7777  
**Fax:** (07) 3131 7764  
**Email:** [info@archives.qld.gov.au](mailto:info@archives.qld.gov.au)  
**Address:** 435 Compton Road  
Runcorn Qld 4113  
PO Box 1397  
Sunnybank Hills Qld 4109

## **State Library of Queensland, Brisbane**

### **SLQ – Reference and General Collection**

The State Library of Queensland (SLQ) is the State's major public library, offering a wide range of library services and collections. It is situated in the Queensland Cultural Centre, South Brisbane.

The State Library provides a wide range of information resources and services across the State. A reference service is provided either by telephone (for quick answers to basic questions) or a written reference service. The State Library conducts an inter-library lending service for most items in the collection.

**Address:** Levels 2 and 3  
State Library of Queensland Cultural Centre  
Stanley Place, South Bank  
PO Box 3488  
South Brisbane Qld 4101

**Phone:** (07) 3840 7666

Further information about the State Library's collections and services, and access to the Library's online public access catalogue, can be obtained through the State Library's website [www.slq.qld.gov.au](http://www.slq.qld.gov.au).

The website provides links to other library collections including:

- National Library of Australia, Canberra
- AIATSIS Library and Audiovisual Archives
- State Library of New South Wales (including the Mitchell Library), Sydney
- State Library of Victoria (including the LaTrobe Library), Melbourne
- University of Queensland (including the Fryer Library), Brisbane
- James Cook University of North Queensland (including the North Queensland Collection), Townsville
- University of Central Queensland (including the Central Queensland Collection), Rockhampton
- Historical Society of Cairns

## SLQ Heritage Collections – John Oxley Library

The John Oxley Library is a reference and research collection relating to Queensland. Its collection includes books, periodicals, newspapers, government publications, pamphlets, manuscripts, personal and corporate archives, photographs and original art works which document and illustrate the history and development of Queensland. A copy of publications issued in Queensland is received under legal deposit and is held in the collection of the John Oxley Library. Some of the library's resources, such as the papers of the late Mrs Margaret Lawrie, are relevant to native title research in the Torres Strait.

The John Oxley Library provides a written and telephone reference service and offers a copying service for items held in the collections. The materials held in the John Oxley Library are not available for loan through the inter-library lending service.

**Address:** Level 4, State Library of Queensland  
Cultural Centre Stanley Place South Brisbane

**Phone:** (07) 3840 7880

**Fax:** (07) 3842 9126

## Queensland Museum, Brisbane

The Queensland Museum's archaeological, ethnographic and photographic collections can provide an important resource for native title research.

Community members and researchers should contact the Cultures and Histories Program staff for assistance.

### Research library

5000 serial titles. Resources for native title researchers include significant older journal runs in English (for example *Journal of the Royal Anthropological Institute of Great Britain and Ireland*) and other languages (e.g. *Tijdschrift voor Nederlandsch Indië*).

External researchers are welcome to visit by appointment. For more information about the Library and access to the main catalogue, refer to [www.qm.qld.gov.au](http://www.qm.qld.gov.au).

**Phone:** (07) 3840 7688  
**Facsimile:** (07) 3846 1226  
**Email:** qmlib@qm.qld.gov.au

## Registry of Births, Deaths and Marriages, Brisbane

Civil registration began in 1856 in the Colony of New South Wales (which at that time included the area which is the present State of Queensland). The Registry of Births, Deaths and Marriages has issued certificates of birth, death and marriage since that time. The records of the Registry provide valuable information relating to Aboriginal and Torres Strait Islander people.

The registry office is part of the Department of Justice and Attorney General. Information pertaining to services, forms and costs can be found on its website [www.justice.qld.gov.au](http://www.justice.qld.gov.au).

Certificates of registration held by the registry can be obtained through written application and payment of prescribed fees. These applications can also be lodged at the Registry in Brisbane or at any Magistrates Courts Office or Queensland Government Agency Program (QGAP) offices throughout Queensland.

The registry holds entries of registration of births, deaths and marriages from all areas of Queensland from 1 January 1890 to the present, Marine Births and Deaths relating to people who were born, or died, on voyages to Queensland from 1 January 1890, and deaths of service personnel who enlisted in Queensland and were killed in action during the First and Second World Wars. Records prior to 1 January 1890 are held at the Queensland State Archives and applications for certificates from registrations created from 1856 to 1889 need to be sent to that agency.

Only registry staff are allowed access to the official records. The registry will however undertake, for the prescribed fee, to search the indexes or registers to locate a particular registration of birth, death or marriage. To keep search fees to a minimum, as much information as possible should be provided, including possible variations in the spelling of names.

Indexes to births, marriages and deaths have been reproduced on CD, which can assist in locating information about individuals. Copies are available at major public libraries and family history societies throughout Queensland. A useful electronic search facility is to be found on the website that allows access to births registered in Queensland up to and including 1914, deaths registered in Queensland up to and including 1964 and marriages registered in Queensland up to including 1934.

**Address:** 110 George Street  
Brisbane Qld 4000  
  
PO Box 15188  
City East Brisbane Qld 4002

**Phone:** 1300 366 430  
**Email:** bdm-mail@justice.qld.gov.au

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

Services are offered to native title researchers at the Australian Institute of Aboriginal and Torres Strait Islander Studies.

When work is commenced on a native title claim, please consider contacting the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) for valuable material that will be most pertinent to your research.

The AIATSIS Library and the Audiovisual Archives contain some of the most comprehensive collections of material in Australia about and by Australian Indigenous people. Approximately 20 per cent of the Library holdings and approximately 25 per cent or more of the collections of audio, video and pictorial material in the Audiovisual Archives have content related to Queensland. Many of these items are held uniquely at AIATSIS.

Most of the information on this material is accessible through Mura, the on-line catalogue. A unique feature of the catalogue that will be of special help to native title researchers is that all entries can be accessed by language group and geographical area. A thesaurus of language names helps to ensure that alternate spellings are recognised.

### **In house service to native title clients**

The Native Title Research and Access Officer works solely with native title clients, offering a range of services to help them find what they need at the Institute. Requests may be made both by Institute visitors and remote clients.

Clients may do their own searches either remotely or at AIATSIS. Alternatively, a list of search terms can be sent to the Native Title Research and Access Officer, who can prepare a listing of all relevant material. Please provide information on the geographical spread of the claim, names of claimants and related family groups, language groups, and any historical detail about removals or missions or reserves so that the officer may be able to give you what you need. The service is free of charge for up to 200 citations.

Please visit the AIATSIS website [www.aiatsis.gov.au](http://www.aiatsis.gov.au) for other charges.

At present, some material from the Audio-visual Archive is not yet listed on the Web catalogue, however the Native Title Research and Access Officer has access to all listings and can make a comprehensive search. The completed searches can be posted or sent via email.

Some of the material may be restricted by the depositor for a variety of reasons, such as cultural sensitivity or pending publication, and such restrictions, where they exist, are shown for each catalogue entry. Clients have the responsibility to contact depositors and to arrange permissions to view, listen to or copy any restricted material. The Native Title Research and Access Officer can assist the client by interpreting the nature of the restriction, by supplying addresses and other contact details where clearances are necessary and by providing clearance forms.

### **Print collections**

Once relevant material has been identified, it may be accessed at the Institute free of charge or copies may be made for a fee. Copies must be made in accordance with the Copyright Act 1968 and within the conditions of access as set by the depositors. A large proportion of the Library's holdings are in the form of published material available in the open stacks, however there is a considerable collection of original manuscripts, rare books, personal papers, microfilm, rare serials and language materials held in a special room away from clients. The Native Title Research and Access Officer can assist clients in gaining access to this material, however it is best to request such information in advance by email or by phone before visiting the Institute.

## **Audio-visual collections**

Native title researchers can find much valuable documentation for their claims within the audio-visual archives. Recording and images can show important aspects of land ownership and management. Listings of much of this material are available on Mura, the web-based catalogue. Contact the Native Title Research and Access Officer for complete searches. Visitors and remote clients can order copies of photographic, recorded sound and video/film material. The amount requested will need to be negotiated depending upon staffing and time constraints. Contact the Native Title Research and Access Officer for requests relating to native title claims. Please see the AIATSIS website for charges. Researchers visiting the Institute should make an appointment to view or to listen to the material in-house.

## **Other AIATSIS activities involving native title**

The Native Title Research Unit identifies pressing research needs arising from the recognition of native title, conducts relevant research projects to address these needs, and disseminates the results. In particular, it publishes a regular newsletter, an Issues Papers series, and publications arising from research projects. The Native Title Research Unit organises and participates in conferences, seminars and workshops on native title and social justice matters. It aims to maintain research links with others working in the field. The newsletter, which is available online, also contains occasional listings of newly-catalogued material in the AIATSIS Library of specific interest to native title researchers. See the AIATSIS website for further information on the Unit and its work.

The Family History Unit gives research support to Indigenous clients who are in the process of tracing their own family histories. Although native title clients work with the Native Title Research and Access Officer, sometimes it is helpful for them to seek guidance from the Family History Unit, which is located next to the Library.

## **South Australia Museum, Adelaide**

The South Australian Museum archives contain valuable material that can assist in the researching of a native title claim. Information concerning the archives, its collections, access policies, and services can be found at [www.samuseum.sa.gov.au/archives/collections/aa338](http://www.samuseum.sa.gov.au/archives/collections/aa338).

Records held in the South Australian Museum that may relate to native title in Queensland include:

### **N.B Tindale Collection**

- Genealogies - Cherbourg, Mona Mona, Palm Island, Woorabinda, Yarrabah, Mornington Island, Forsyth Island and Doomadgee
- journals
- supplementary papers
- vocabularies and place name data
- maps
- data cards: sociological, anthropological, vital statistics, ACER
- social organisations
- correspondence
- photographs and slides
- crayon drawings

- film
- manuscripts

Information relating to the Tindale journals, supplementary papers and maps can be found on [www.samuseum.sa.gov.au/tindale](http://www.samuseum.sa.gov.au/tindale).

## **J.B. Birdsell Collection**

- Genealogies - Mona Mona, Yarrabah, Palm Island, Cherbourg, Woorabinda
- journals
- notebooks
- photographs

## **Church archives**

The involvement of the churches with Aboriginal and Torres Strait Islander people dates from the early years of European presence in the Colony of New South Wales. Missions were established by several denominations from the 1830s. During this period, the first missions to Aboriginal people were established in what is now Queensland, i.e. the German mission at Nundah and the Catholic mission on Stradbroke Island.

Towards the end of the nineteenth century, the several churches administered major Aboriginal reserves on behalf of the Queensland Government. This position remained in place until the 1970's and 1980's when the State assumed administrative responsibility for the management of the missions and Deeds of Grant in Trust (DOGITs) were issued to the community councils.

The records of the several Christian denominations can complement the official records held at the Queensland State Archives. The church records are held in archives of the respective denominations in repositories in Queensland and interstate.

Several of the major denominations such as the Uniting Church of Australia and the Lutheran Church of Australia have a complex administrative history. The contemporary churches trace their present Australia-wide structure to a number of different ecclesiastical bodies that were established in the different Australian colonies prior to Federation in 1901. Some of these earlier organisations assumed the responsibility for the management of Aboriginal missions in Queensland. For example, the Immanuel Synod in South Australia administered the Lutheran missions at the Bloomfield River and at Hopevale.

The records of these earlier ecclesiastical organisations are generally held in church archives or other major repositories such as the Mitchell Library in Sydney or the National Library of Australia in Canberra.

Conditions relating to access to church records should be noted as not all materials are open access.

A useful directory to government and non-government archives can be found at [www.archivists.org.au](http://www.archivists.org.au).

## **Anglican Church of Australia**

The Rev. John Vincent, the first Anglican clergyman at the Moreton Bay Penal settlement, arrived in March 1829. His accounts appear to have been limited to the penal established and their correspondence can be found in the records of the Colonial Secretary's Office Sydney at [www.records.nsw.gov.au](http://www.records.nsw.gov.au).

Letters in the Colonial Secretary's Office correspondence that referred to areas now in Queensland were copied from the originals now at State Records in Sydney and are available on microfilm at the John Oxley Library. There

is a chronological index to the material copied in New South Wales Colonial Secretary's Office. Letters received re Moreton Bay, 2 vols (1822-50; 1851-60).

Two Anglican missionaries, Rev F C Jagg (from the London-based Society for the Propagation of the Gospel (SPG)) and W T Kennett, were sent to the northern settlement of Somerset. Their reports on the Aboriginal people of northern Cape York and the Kaurareg people of the southern Torres Strait have been edited and reproduced in David R Moore, *Islanders and Aborigines at Cape York: an ethnographic reconstruction based on the 1848–1850 'Rattlesnake' journals of O W Brierly and information he obtained from Barbara Thompson* (Canberra: Australian Institute of Aboriginal Studies; New Jersey: Humanities Press, 1979).

The original correspondence is held in the United Society for the Propagation of the Gospel in London. Further information can be obtained on the Society's website [www.uspg.org.uk](http://www.uspg.org.uk).

The Jagg and Kennett correspondence forms a useful complement to the official correspondence at Queensland State Archives and in the Colonial Office records at the Public Record Office, London [www.pro.gov.uk](http://www.pro.gov.uk).

The records of the Anglican Church of Australia are held in the archives of the current Anglican dioceses. A network of Anglican Archives has been established with contact details for researchers. This can be found at [www.anglican.org.au](http://www.anglican.org.au).

The areas now in Queensland formed part of the Diocese of Newcastle. Information on the Newcastle archives can be found at [www.newcastleanglican.org.au](http://www.newcastleanglican.org.au).

The Diocese of Brisbane was established in 1860. The northern boundary of the diocese was located just north of Mackay (at the 21st parallel of south latitude). The records of the Diocese are held in the Diocesan archives at Webber House in Brisbane. Information concerning these records can be found at [www.anglicanarchives.org.au](http://www.anglicanarchives.org.au).

The area to the north of the 21st parallel, deemed to be part of the Parish of Ryde in the Diocese of Sydney, was erected into the Diocese of North Queensland in 1876. The records of this Diocese are held in Townsville. Inquiries should be made to the Diocesan Registry [www.anglicannq.org](http://www.anglicannq.org).

The Diocese of Rockhampton was formed from the northern areas of the Diocese of Brisbane in 1892. The records of the Diocese can be consulted at the Diocesan archives [www.archivists.org.au](http://www.archivists.org.au).

The Diocese of Carpentaria was established in 1900 from the northern areas of the Diocese of North Queensland. The Diocese of Carpentaria was re-incorporated into the Diocese of North Queensland in 1996. The records of the former Diocese of Carpentaria can be found at [www.anglicanarchives.org.au](http://www.anglicanarchives.org.au).

The Anglican Church of Australia assumed responsibility for several of the Aboriginal missions in Queensland. The mission in southern Queensland was:

Bogimbah (Fraser Island)	1997
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The north Queensland missions were:

Yarrabah	1893
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Mitchell River (Kowanyama)	1904
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Lockhart River	1912
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Edward River (Pormpuraaw)	1935
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The Anglican Church took over responsibility for the Torres Strait missions from the London Missionary Society in 1915.



Records of the Anglican churches from these missions are held either at the respective Diocesan archives or at the Churches. Some records of the former Mitchell River Mission (Kowanyama) are held at the Queensland State Archives.

Original responsibility for the Anglican missions was assumed by the Australian Board of Missions and then it passed to the responsibility of the Dioceses: the Diocese of North Queensland for Yarrabah and the Diocese of Carpentaria for the other mainland and Torres Strait missions. The Australian Board of Missions controlled the Bogimbah Mission from 1902 until it was discontinued in 1904 and the residents moved to Yarrabah. The records of the Australian Board of Missions are located in the Mitchell Library, Sydney.

## **Catholic Church in Queensland**

The Rev Father Hanly came to Brisbane during the last years of the Moreton Bay Penal settlement. Reference relating to the Catholic presence from that time can be found in the records of the Colonial Secretary's Office Sydney.

Some of this correspondence has been copied from the originals held at State Records, Sydney and is available on microfilm at the John Oxley Library. There is a chronological index to the material copied in: New South Wales. Colonial Secretary's Office. Letters received re Moreton Bay, 2 vols (1822-50; 1851-60).

Italian Passionist Fathers under the auspices of Archbishop Bede Polding established the first Catholic mission to the Aborigines on Stradbroke Island in 1843.

This mission had limited success and it closed in 1847. A useful discussion of this mission can be found in: Osmund Thorpe, *First Catholic Mission to the Australian Aborigines* (Sydney: Pellegrini, 1950).

The original correspondence can be found at the Diocesan archives in Sydney: [www.sydney.catholic.org.au](http://www.sydney.catholic.org.au). The Catholic Diocese of Brisbane was established in 1859. The records of the Diocese of Brisbane are located in the Archdiocesan offices in Brisbane.

The Diocese of Rockhampton was established in 1882. Information concerning the records of the Diocese and the Diocesan archives can be found at: [www.rok.catholic.net.au](http://www.rok.catholic.net.au).

The Diocese of Toowoomba was established in 1929. Information on the Diocesan archives can be found at: [www.archivists.org.au](http://www.archivists.org.au).

The Diocese of Townsville was established in 1930. Information on the Diocesan archives can be found at: [www.archivists.org.au](http://www.archivists.org.au).

The Diocese of Cairns was erected in 1941 from the Vicariate Apostolic originally established in Cooktown in 1877. Information on the Diocesan archives can be found at: [www.cairns.catholic.org.au](http://www.cairns.catholic.org.au).

Some of the religious congregations with foundations in the various Catholic dioceses maintain their own archives. For example, the Sisters of St Joseph: [www.archivists.org.au](http://www.archivists.org.au) and the Christian Brothers: [www.archivists.org.au](http://www.archivists.org.au).

A Catholic presence was established on Thursday Island by the French order, the Société des missionnaires du Sacré- Cœur. Priests and religious of the order assumed responsibility for the mission established on Hammond Island (Keriri) in 1922. Some of the records relating to mission will be found at the Queensland State Archives and in the Diocesan Archives in Cairns. The records of the order are located at Issoudun France and information can be found at <http://issoudun.cef.fr>.

A useful guide is: [www.misacor.org](http://www.misacor.org).

Records relating to the Society's Micronesian, Melanesian and Papua-New Guinea missions have been reproduced on seven reels of microfilm by the Pacific Manuscripts Bureau (reels 4597-4600). Copies of these films

are held by the National Library of Australia, the University of Sydney, University of Newcastle and the State Library of Victoria.

## **The Uniting Church of Australia**

The Uniting Church of Australia was formed on 22 June 1977 as a union of three churches: the Congregational Union of Australia, the Methodist Church of Australasia and the Presbyterian Church of Australia. The Uniting Church established a National Historical Committee and Archives in Sydney. Information relating to this repository can be found at <http://nat.uca.org.au>.

The Uniting Church archives holds some, but not all, of the records of the three churches that entered the union in 1977.

## **Presbyterian Church of Australia**

The Presbyterian Church of Australia was formed as a national body in 1901 when the Presbyterian churches in each of the States united together as the Presbyterian Church of Australia. Not all the congregations of the Presbyterian Church of Australia entered the Uniting Church; these continued as the Presbyterian Church of Australia.

The first Presbyterian presence in Queensland dates from 1838. Each of the separate Presbyterian congregations was attached to one of the several Synods in New South Wales:

Synod of Australia that looked to the Established Church of Scotland Synod of Eastern Australia that looked to the Free Church of Scotland Synod of New South Wales that looked to John Dunmore Lang

In 1863 representatives of the several Presbyterian congregations in Queensland agreed to enter into a union under the name of the Presbyterian Church of Queensland. A Federal Assembly was established in 1886 and this became a formal union of the several state churches in 1901.

Useful references for the history of the Presbyterian Church of Queensland and the Presbyterian Church of New South Wales can be found in:

Richard Bardon, *The centenary history of the Presbyterian Church of Queensland, 1849–1949* (Brisbane: Smith and Paterson, 1949)

James Cameron, *Centenary history of the Presbyterian Church in New South Wales, 2 vols* (Sydney: Angus and Robertson, 1905)

R Gordon Balfour, *Presbyterianism in the colonies: with special reference to the principles and influence of the Free Church of Scotland* (Edinburgh: MacNiven and Wallace, 1899)

Information concerning the records of the Presbyterian Church of Australia held by the Uniting Church of Australia can be found at <http://nat.uca.org.au>.

For the purposes of native title research, the records of the several Presbyterian missions are of some importance. The Presbyterian Church assumed responsibility for the management of several Aboriginal missions in Queensland. The original of the Presbyterian Church involvement with Aboriginal missions dates from the Federal Assembly in 1886 when it moved to raise funds for missions in Queensland:

Mapoon	1891
Weipa	1898
Aurukun	1904
Mornington Island	1914

A Board of Missions of the General Assembly managed the missions. The records of the Board of mission and BOEMAR records are located at the Mitchell Library, Sydney.

The continuing Presbyterian Church of Queensland also holds records relating to the former Presbyterian missions. The archives of the Presbyterian Church of Queensland are located in the Church's office at 35 Amelia Street, Fortitude Valley: [www.pcq.org.au](http://www.pcq.org.au).

The most comprehensive guide to the Presbyterian mission records is to be found in Geoffrey S Wharton, *Mission time: a guide to Queensland Presbyterian Church records relating to the Gulf Missions at Aurukun, Mapoon, Mornington Island, Weipa and the Thursday Island Mission Agency 1891–1978* (Brisbane: PCE Press, 2000).

Several early missions were established under the auspices of the Presbyterian Church. Mapoon, for example, was a Moravian mission, but was established under the auspices of the Presbyterian Church and the Rev John Dunmore Lang established the German mission at Nundah, with missionaries drawn from the Gossner Gemeinschaft in Germany. A useful historical overview of the Brotherhood's missionary activities can be found at: [www.gossner-mission.de](http://www.gossner-mission.de).

Correspondence relating to the German Mission at Moreton Bay can be found in the official correspondence of the Colonial Secretary's Office (Sydney) and in the records of the Presbyterian Church held in the Mitchell Library, Sydney.

An account of the mission activities at Nundah can be found in the Society's German-language journal *Die Biene auf dem Missionsfelde* (The bee on the mission fields). A microfilm copy of this periodical covering the years 1834 to 1857 has been microfilmed as part of the Pacific Manuscripts Bureau copying program (PMB 552) and is located in major library collections such as the National Library of Australia Canberra, the Australian National University Canberra, the Mitchell Library, Sydney and the State Library of Queensland.

## **Methodist Church of Australia**

The Methodist Church of Australia has a complex history. The Methodist Church of Australasia was the result of the amalgamation of several earlier Methodist ecclesiastical bodies:

Wesleyan Methodist Church	1847-1898
Primitive Methodist Church	1859-1898
Bible Christians	1866-1897

The Bible Christians entered into union with the Wesleyan Methodist Church in 1879. The Primitive Methodists and two of the three United Free Methodist congregations entered into a union in 1898. In January 1906 the united church became known as the Methodist Church of Australasia. Queensland Methodism was under the direction of the New South Wales Conference until 1893 when a separate Queensland Conference was established.

An outline of the history of Methodism in New South Wales and Queensland can be found in:

James Colwell, *The Illustrated History of Methodism: Australia 1812 to 1855, New South Wales and Polynesia, 1856 to 1902*. 2 vols (Sydney: Brooks, 1904)

R S C Dingle (ed), *Annals of Achievement: a Review of Queensland Methodism 1847–1947* (Brisbane: Queensland Book Depot, 1947)

Queensland Methodist Home Mission Society, *Jubilee Souvenir*, 1864–1914 (Brisbane: Queensland Methodist Home Mission Society, 1914)

The records of the Methodist Church of Queensland (and its predecessor bodies) are held with the Uniting Church records in Queensland. Some records are also held at the National Library of Australia, Canberra. A collection of

the minutes of the Overseas Mission of the Methodist Church of Australasia, 1855–1939 are held in the Mandeville Special

Collections Library, Geisel Library, University of California at San Diego. A reference to this collection is: [www.oac.cdlib.org](http://www.oac.cdlib.org).

One of the predecessor bodies of the Methodist Church of Australasia - the Primitive Methodist Church - established a mission on Fraser Island in 1871. It made little progress and was moved to the Noosa River in 1872 and an Aboriginal Reserve established at Lake Weyba. This mission also made little progress and was discontinued in 1873 with the reserve being rescinded in 1879. The Uniting Church's Historical Committee and Archives hold the few extant records of the Primitive Methodist Church in Queensland. The State Library of Queensland holds a microfilm copy of an imperfect run of the Queensland Primitive Methodist from July 1876 to July 1888.

## Congregational Union

Congregational or Independent churches were established in areas now in Queensland from the 1850s. The Queensland Congregational Union was formed in October 1861. The records of the Queensland Congregational Union are held with the records of the Uniting Church. A brief history of the Congregational Church in New South Wales and Queensland can be found in:

*Independent Congregationalism: will it promote, or will it destroy true religion* (Brisbane: Southern World, 1887)

G Lindsay Lockley, *The foundation, development and influence of Congregationalism in Australia with emphasis on the nineteenth century* [PhD thesis, University of Queensland, 1966]

Arthur C Nelson (ed and comp), *History of the effective establishment of Congregationalism in the Australian colonies and New Zealand* (Hobart: Walch, 1930)

The records of the Australian and New Zealand Committee of the London Missionary Society are held in the National Library of Australia.

## Lutheran Church of Australia

The Lutheran Church of Australia was formed in 1966 from the merger of the Evangelical Lutheran Church of Australia (ELCA) and the United Evangelical Lutheran Church in Australia (UELCA).

The United Evangelical Lutheran Church in Australia was established in 1921 and was the result of the merger of the:

- Evangelical Lutheran Immanuel Synod (South Australia)
- Evangelical Lutheran Immanuel Synod a.a.G. (South Australia)
- Evangelical Lutheran Synod of Victoria
- General Synod of Australia
- United German and Scandinavian Lutheran Synod of Queensland
- Evangelical Lutheran Synod of Queensland

The Evangelical Lutheran Synod of Queensland and the United German and Scandinavian Lutheran Synod of Queensland were established in 1885. After 1898 several Queensland congregations also affiliated with the Evangelical Lutheran Church of Australia.

There are several reference works that will assist the researcher:

- Alfred Brauer, *Under the Southern Cross: history of the Evangelical Lutheran Church of Australia*, Adelaide: Lutheran Publishing House, 1956; facsimile edition: Adelaide: Lutheran Publishing House, 1985)
- Theodor Hebart, *The United Evangelical Lutheran Church in Australia (UELCA): its history, activities and characteristics, 1838-1938*. English version ed by Johannes J Stolz (Adelaide: Lutheran Book Depot, 1938; facsimile edition: Adelaide: Lutheran Publishing 'House, 1985)
- Everard Leske, *For Faith and Freedom. The Story of Lutherans and Lutheranism in Australia 1838-1996* (Adelaide: Open book Publishers, 1996)

Useful references to the Lutheran Church in Queensland are:

- Erwin Becker, *Die Lutherische Kirche von Queensland vor dem Richterstuhl des Pastors E Becker* (Brisbane: Nord - Australische Zeitung, 1898)
- Evangelical Lutheran Synod of Queensland, *Jubilaumsschrift zum Andenken an das 25-jährige Bestehen der Evangelischen - Lutherischen Synode von Queensland* (Brisbane: Evangelical Lutheran Synod of Queensland, 1909)
- F Otto Theile, *One hundred years of the Lutheran Church in Queensland* (Brisbane: Publication Committee of the Queensland District, United Evangelical Lutheran Church in Australia, 1938)

The archives of the Lutheran Church of Australia and its predecessor bodies are held by the Lutheran Archives in Adelaide. Information concerning the archives can be found at [www.lca.org.au/lutherans](http://www.lca.org.au/lutherans).

The Lutheran Church assumed the management for several Aboriginal missions in Queensland. These include:

Bethesda (Beenleigh)	1866-83
Nerang	1877
Marie Yamba	1887-1902
Bloomfield River	1886-1905, 1959-86
Hopevale	1885-86

The church's involvement in Aboriginal missions is discussed in the reference works cited above. There are also several reference works, some of which are written in German, that relate specifically to Lutheran missions in Queensland.

These include:

- Kay Evans, 'Marie Yamba, Bloomfield and Hope Vale: the Lutheran missions to the north Queensland Aborigines 1886-1905', *Queensland Heritage*, vol 2 no 6 (May 1972), pp. 26-35
- Johann Flierl, *Gedenkblatt der Neuendettelsauer Heidenmission in Queensland und Neu-Guinea*, 2nd rev edn, *Missionsschriften*, 12 (Neuendettelsau: Verlag des Missons-Hauses, 1910)
- Johann Flierl, *In den Missionsdienst!: Reisebriefe eines alten Missionars an seinen Sohn Missionhaus* (Leipzig: H.G. Wallmann 1913)
- Gordon Rose, *Through a bamboo curtain: a history of Wujal Wujal Mission* (Brisbane: Keystone Activity

Therapy Centre, 1982)

Copies of the early Lutheran German-language periodicals such as the *Kirchen-und Missions-Zeitung* (Church and Mission News) are held in the Lutheran Archives, Adelaide. Microfilm copies are held in other libraries such as the State Library of Queensland.

## Seventh-Day Adventists

The official record of Seventh-Day Adventists in Australia dates from 1885 and the first church was established in Melbourne in January 1886. The Church assumed the responsibility for the management of two Aboriginal missions in Queensland:

Mona Mona	1913-63
Daintree River	1935

The Seventh-Day Adventist Church holds the church records. Researchers who wish to consult any of the church records will need to make an appointment with the Adventist Heritage Centre at the Avondale College Library. Inquiries can be directed to: [www.heritage.adventistconnect.org](http://www.heritage.adventistconnect.org).

**Address:** Adventist Heritage Centre  
Avondale College Library  
PO Box 19  
Cooranbong NSW 2265

## Salvation Army

The first Salvationist meeting in Australia was held in Adelaide in 1880. The Queensland Government handed over responsibility for the management of the Purga Mission to the Salvation Army in 1940. The mission was closed in 1948.

## **Annexure B: Establishing British Sovereignty in Queensland**

### **Off-shore islands**

While the determination of Queensland's land boundaries presents little difficulty, the question of ownership and sovereignty over the islands lying adjacent to the Queensland coast (at distances from 15 to 160 miles) remained in doubt until the Queensland maritime boundaries were extended in 1872 and 1879.<sup>8</sup>

From 1788 the territorial descriptions of the Colony of New South Wales described in the Governors' commissions included the 'adjacent islands'. The Colonial Office considered the description of the territorial extent of the Colony, as recited in the commission of Sir William Denison of 8 September 1855, following the granting of responsible government to New South Wales, as:

"Comprising all that portion of Her Majesty's territory of Australia lying between the one hundred and twenty-ninth degrees of east longitude and hundred and fifty-fourth degrees of east longitude<sup>9</sup> and northward of the fortieth degree of south latitude, including all the islands adjacent to the Pacific Ocean within the longitude and latitude aforesaid, and also including Lord Howe Island, being in or about the latitude of thirty-one degrees thirty minutes south and one hundred and fifty-ninth degree of east longitude..."<sup>10</sup>

The territorial description as at 8 September 1855 is the critical date for determining jurisdiction over islands outside the three-mile limit.<sup>11</sup>

The Letters-Patent establishing the Colony of Queensland in 1859 did not specify which islands adjacent to the coast passed from New South Wales to Queensland. The Imperial authorities, however, regarded the limits of adjacent islands 'as very narrow'.<sup>12</sup> R D Lumb notes:

"This absence of a precise maritime boundary in the constituent instrument prompted debate as to whether any distance from the coast criterion (that is, a three mile limit) was implicitly embodied in the description of boundaries in the Letters- Patent."<sup>13</sup>

### **Wellesley Islands**

The Letters-Patent of 1862 specifically include 'all and every the adjacent islands, their members and appurtenances in the Gulf of Carpentaria', i.e. the Wellesley Islands which lie between fifteen and sixty miles from the coastline.<sup>14</sup> Lumb considers that 'the original boundaries of New South Wales would therefore seem to have comprised some islands outside the three- mile limit'—the limit of the territorial waters prescribed by customary international law.<sup>15</sup> He also noted that by 1863 the Imperial Government had defined the extent of the Queensland boundaries to include the islands within the three-mile limit, while islands outside the three mile-limit were included only if they were occupied by British subjects as at 8 September 1855.<sup>16</sup>

### **Coastal islands outside the three-mile limit**

The Imperial authorities did not consider that islands situated outside the three-mile limit and adjacent to the east coast of Queensland (such as those along the Great Barrier Reef) had passed to the Colony of Queensland under the Letters-Patent of 1859.<sup>17</sup>

Consequently Letters-Patent were issued to the Governor of New South Wales in 1863 and 1868 to authorise the leasing of islands outside the jurisdiction of any colonial government within the limits of 10° south and the Antarctic Circle, and between 75° and 170° of east longitude.<sup>18</sup> The Queensland Government objected to the Governor of New South Wales issuing leases over islands so far from the New South Wales boundaries and so close to Queensland and petitioned the Imperial Government to extend the maritime boundary of Queensland to include islands not within the original limits of Queensland and situated within 60 miles of the coast. The Imperial

Government acceded to this request and Letters-Patent were issued to the Governor of Queensland on 30 May 1872, providing for 'all the Islands lying and being within 60 miles of the coasts of the said Colony should be annexed to, and form part of, the said Colony of Queensland...'<sup>19</sup>

Lumb considered that in 1872:

"...in relation to islands adjacent to Queensland which had not become part of that colony by a process of annexation or occupation, the British Crown acted on the basis that the absence of foreign claims established that those islands were dependencies of the adjacent colony as a result of discovery and voyages of exploration. They could be brought within the boundaries of that Colony by the formal process of annexation without first taking possession of each island in the name of the Queen."<sup>20</sup>

## Islands in the Torres Strait

The islands between Cape York and the New Guinea coast seem never to have been part of New South Wales as the original Commission of Governor Phillip (and his successors) did not extend beyond 10° south (Cape York). After the establishment of Queensland, the jurisdiction to lease some of these islands was assigned to the Governor of New South Wales.<sup>21</sup> In 1872 all the islands in the Torres Strait within 60 miles of Cape York became part of the colony of Queensland.<sup>22</sup>

From 1872 to 1878 a jurisdiction over certain islands in the Torres Strait that lay outside the 60-mile limit was exercised under the Imperial *Kidnapping Acts* (1872, 1875).<sup>23</sup> In February 1878, Henry Chester, the Police Magistrate at Thursday Island, was appointed a Judicial Commissioner in and for the Murray and Darnley Islands, Western Pacific Ocean by the Western Pacific High Commission to provide some form of jurisdiction in the Torres Strait Islands beyond the 60-mile limit.<sup>24</sup> Notwithstanding the exercise of such jurisdiction, this did not amount to a claim of sovereignty over those islands.

By 1877 the expansion of the pearl-shell and bêche-de-mer industries in the Torres Strait prompted the removal of the administrative centre from Somerset to the more central position on Thursday Island. Government officials at Thursday Island undertook patrols among the Torres Strait Islands situated within and outside the 60-mile limit and as far as the coast of New Guinea.

In 1877 the Imperial Government enquired whether the Queensland Government was prepared to annex the north-western Torres Strait islands. The Queensland Government accepted this offer and Letters-Patent were issued on 11 October 1878. This extended the maritime boundary of Queensland and provided for the annexation of certain islands in Torres Straits as well as islands of the Great Barrier Reef.

That is to say all islands included within a line drawn from Sandy Cape northward to the south-eastern limit of Great Barrier Reefs thence following the line of the Great Barrier Reefs to their north-eastern extremity near the latitude of 9.5° south thence in a north-westerly direction embracing East Anchor and Bramble Cays thence from Bramble Cays in a line west by south (south 79° west) true embracing Warrior Reef Saibai and Tuan [Dauan] Islands thence diverging in a north-westerly direction so as to embrace the group known as the Talbot Islands thence to and embracing the Deliverance Islands and onwards in a west by south direction (true) to the meridian of 138° of east longitude.<sup>25</sup>

In June 1879 the Queensland Legislature passed the *Queensland Coast Islands Act* of 1879 giving effect to the annexation and the islands described in the schedule of this Act became part of the Colony of Queensland on 1 August 1879.<sup>26</sup>

Lumb was of the opinion that the *Queensland Coast Islands Act* had the effect of replacing the Letters-Patent of 1872 and so constitutes the instrument the maritime boundaries of Queensland are to be ascertained.<sup>27</sup>



The validity of the annexation of the off-shore islands was confirmed by the Imperial Government with the *Colonial Boundaries Act 1895* (Imp).<sup>28</sup>

## Endnotes to Annexure B

<sup>1</sup> 'Governor Phillip's first commission, 12 October 1786' *Historical Records of New South Wales*, vol 1 pt 2: Phillip, 1783–1792 (Sydney: Government Printer, 1892), pp. 24–5; 'Governor Phillip's second commission, 2 April 1787', *Historical Records of New South Wales*, vol 1, pt 2, pp. 61–7. For a discussion on the establishment of the boundaries of New South Wales see Alan Atkinson, 'The first plans for governing New South Wales, 1786–1787', *Australian Historical Studies*, vol 24 no 94 (1990), pp. 22–40; F W S Cumbrae-Stewart, *Australian Boundaries*. A paper read before the Australian and New Zealand Society of International Law, at Sydney, on 20th August 1933 (Brisbane: Government Printer, 1934); Bill Gammage, 'Early Boundaries of New South Wales', *Historical Studies*, vol 19 no 77 (1981), pp.

524–31; and R D Lumb, 'The Maritime Boundaries of Queensland and New South Wales', *University of Queensland Faculty of Law papers*, vol 1 no 4 (1964).

<sup>2</sup> 'Governor Darling's commission, 16 July 1825', *Historical Records of Australia*, ser 1, vol 12: June 1825–December 1826 (Melbourne: Library Committee of the Commonwealth Parliament, 1919), pp. 99–107. The western limit of New South Wales situated at the 129th meridian of east longitude would become the eastern boundary of Western Australia in 1829.

<sup>3</sup> M H McLelland, 'Colonial and State Boundaries in Australia', *Australian Law Journal*, vol 45 (1971), pp. 671–79. British sovereignty was established over New Zealand in 1839 and the territory was annexed to New South Wales. New Zealand was established as a separate colony in 1841. McLelland, 'Colonial and State Boundaries in Australia', p. 673; Lumb, *Maritime Boundaries of Queensland and New South Wales*, p. 5. For a more detailed discussion of the annexation of New Zealand see E J Tapp, *Early New Zealand: a dependency of New South Wales, 1788–1841* (Melbourne: Melbourne University Press, 1958).

<sup>4</sup> 'Letters-Patent erecting Moreton Bay into a Colony under the name of Queensland and appointing Sir George Bowen as Governor, 6 June 1859', *New South Wales Government Gazette*, 1 December 1859, pp. [2639]–42; *Queensland Government Gazette* hereafter cited as QGG], 10 December 1859, pp. [1]–3. The Letters-Patent were issued pursuant to the *New South Wales Government Act* (Imp) (18 & 19 Vic c44) (1855), s.7 (Annexure to Secretary of State for the Colonies to the Governor-General, 20 July 1855 published in 'Assent to the New Constitution Act of 1853', *Votes and proceedings of the Legislative Council of New South Wales*, 1855, vol 1, pp. 608–09). See also McLelland, 'Colonial and State Boundaries in Australia', pp. 678–79, F W S Cumbrae-Stewart, *The Boundaries of Queensland with special reference to the maritime boundary and the "Territorial Waters Jurisdiction Act, 1878"*. A paper read before the Australasian Association for the Advancement of Science, Section E – History, at Brisbane, 29th May 1930 (Brisbane: Government Printer, 1930).

<sup>5</sup> Letters-Patent, 6 June 1859, QGG, 10 December 1859, p. 2; Cumbrae-Stewart, *Boundaries of Queensland*, pp. 6–7.

<sup>6</sup> Letters-Patent extending the western boundary of the Colony of Queensland, 12 March 1862, QGG, 23 June 1862, p. [295]–296; Cumbrae-Stewart, *Boundaries of Queensland*, p. 7–8. The Letters-Patent were issued under the *Australian Colonies Act* (Imp) (24 & 25 Vic c.44), *Supplement to the Queensland Government Gazette*, 23 October 1861, pp. 714– 15.

<sup>7</sup> Cumbrae-Stewart, *Boundaries of Queensland*, p. 4.

<sup>8</sup> Cumbrae-Stewart, *Boundaries of Queensland*, p. 8; R D Lumb, 'The Torres Strait Islands: some questions relating to their annexation and status', *Federal Law Review*, vol 19 (1990), p. 156.

<sup>9</sup> 'The Governor-General's commission and instructions (under the new constitution)', *Votes and proceedings of the Legislative Council of New South Wales*, 1855, vol 1, p. 636, Lumb, *Maritime Boundaries*, p. 6.

<sup>10</sup> The nearest meridian to the eastern coastline.

<sup>11</sup> Lumb, *Torres Strait Islands*, pp. 156–57. V

<sup>12</sup> Lumb, *Maritime Boundaries*, p. 6.

<sup>13</sup> Lumb, *Torres Strait Islands*, p. 155.

<sup>14</sup> Letters-Patent, 13 March 1862, QGG, 23 June 1862, p. 296; Lumb, *Maritime Boundaries*, p. [1]

<sup>15</sup> Lumb, *Maritime Boundaries*, p. 9. Lumb (*Torres Strait Islands*, p. 157) considers the Imperial Law Officers, advising the Colonial Office in 1863, accepted that the Wellesley Island were included within the boundaries of New South Wales in 1855.

<sup>16</sup> Lumb, *Torres Strait Islands*, p. 158.

<sup>17</sup> Lumb, *Maritime Boundaries*, p. 7; Lumb, *Torres Strait Islands*, pp. 155–56.

<sup>18</sup> Lumb, *Maritime Boundaries*, p. 7; Lumb, *Torres Strait Islands*, pp. 158–59. See also Secretary of State for the Colonies to the Governor of Queensland, 5 June 1872 in Letters Patent appointing the Governor of the Colony of Queensland to be Governor of all islands within 60 miles from the coast of Queensland, and authorising the annexation of the aforesaid islands to that colony (Despatch respecting), *Votes and proceedings of the Legislative Assembly of Queensland*, 1872, p. 537.

<sup>19</sup> Letters-Patent, 30 May 1872 as an enclosure to Secretary of State for the Colonies to the Governor of Queensland, 5 June 1872 in *Supplement to the Queensland Government Gazette*, 17 August 1872, pp. [1269]–71; Lumb, *Maritime Boundaries*, p. 6–8; Cumbrae-Stewart, *Boundaries of Queensland*, pp. 7–11.

<sup>20</sup> Lumb, *Torres Strait Islands*, p. 160.

<sup>21</sup> Lumb, *Maritime Boundaries*, pp. 7–8.

<sup>22</sup> Lumb, *Maritime Boundaries*, pp. 7–8; Lumb, *Torres Strait Islands*, pp. 160–63. For a more detailed discussion of the annexation in 1872 in the Torres Strait see Steve Mullins, *Torres Strait: a history of colonial occupation and culture contact 1864–1897* (Rockhampton: Central Queensland University Press, 1994), Chapter 4: The 1872 annexation, pp. 76–96. R D Lumb has considered the legal implications of the 1872 annexation in his *Torres Strait Islands*.

<sup>23</sup> Marjorie G Jacobs, 'The Colonial Office and New Guinea, 1874–1884', *Historical Studies Australia and New Zealand*, vol 5 no. 18 (1952), pp. 106–08.

<sup>24</sup> QGG, 23 March 1878, p. 753; Lumb, *Torres Strait Islands*, p. 162. Chester's appointment from the Western Pacific High Commission lapsed after the annexation of 1879.

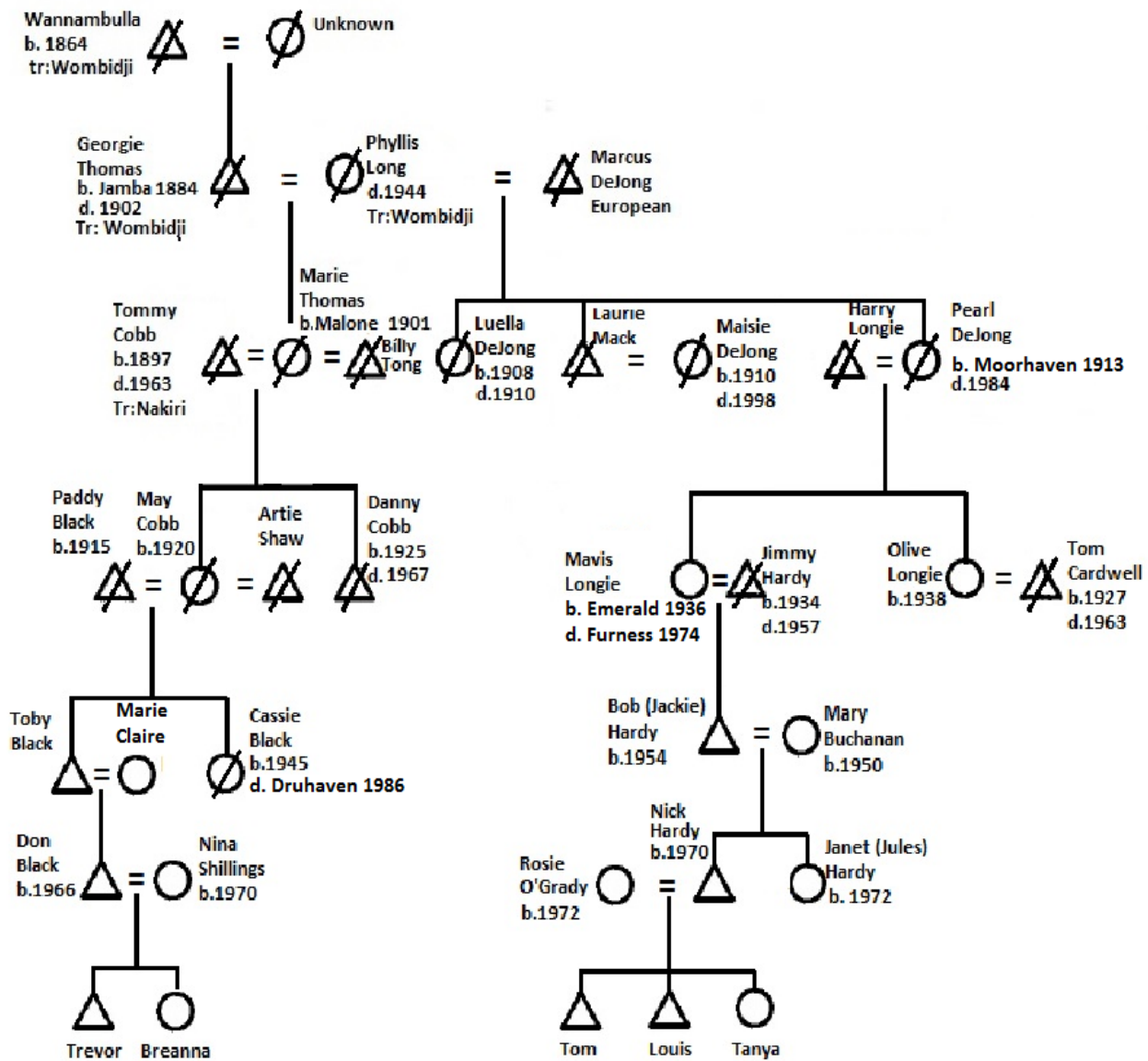
<sup>25</sup> Letters Patent, 10 October 1879 Cumbrae-Stewart, *Boundaries of Queensland*, p. 12.

<sup>26</sup> *Queensland Coast Islands Act* (43 Vic no. 1), *Supplement to the Queensland Government Gazette*, 21 June 1879, pp. (1379)–80; Cumbrae-Stewart, *Boundaries of Queensland*, pp. 11–12. For a more detailed discussion of the 1879 annexation, see Mullins, *Torres Strait*, Chapter 7: The 1879 annexation, (pp. 139–61).

<sup>27</sup> Lumb, *Maritime Boundaries*, p. 8.

<sup>28</sup> QGG, 28 September 1895, [p. 729]; Lumb, *Torres Strait Islands*, pp. 164–66.

## Annexure C: Sample Genealogy



## Annexure D: Guideline questions for Affidavits

These questions are not exhaustive or prescriptive. They are a guideline to the sort of questions that could be asked and may have to be modified according to cultural sensitivities.

### 1) **Group Identity and Membership**

- a) Where were you born and when?
- b) Where did you spend your early life and working career?
- c) Which group or groups are you a member of?
- d) What are your parents' backgrounds?
- e) Who do you trace back to and through which line of family (father's / mother's)?
- f) (apical ancestry / genealogy)
- g) How far back can you trace your ancestry?
- h) How do people become ... (group's name)?
- i) How is the group defined? – by language, clan, descent, family name, place of birth, etc.
- j) How does the group regulate its membership?
- k) Can people be adopted into the group? Can people be expelled?
- l) How does the group make decisions?
- m) How does the group settle internal disputes?
- n) What are the laws that underpin group identity and membership?
- o) Have you noticed any changes to group identity and membership during your lifetime or compared to past generations?
- p) How did you learn about group identity and membership?
- q) Have you passed this knowledge on to younger generations?

### 2) **Places and stories**

- a) Are there any significant places on country and if so, are any stories, ancestral beings or spirits associated with those places?
- b) Are there any prohibitions or access rules that apply to these places?
- c) Tell me some of the stories (if you can)?
- d) Have you received any knowledge of stories or sites that is restricted in nature?
- e) Do you have any responsibilities to maintain or look after your country in any way?
- f) What are the laws that underpin your knowledge (and maintenance, if applicable) of places and stories?
- g) Have you noticed any changes to this during your lifetime or compared to past generations?
- h) How did you learn about these places and stories?
- i) Have you passed this knowledge on to younger generations?

3) **Skins and totems**

- a) Do you remember having a skin (section name) or totem?
- b) Does anyone you know have a skin or totem?
- c) Were there any special rules about your totem or skin?
- d) Do you know how the skin system works?
- e) Do you have any special prohibitions on marriage?
- f) Do you, or does anyone you know still use the skin system or the marriage rules?
- g) What are the laws that underpin the skin / totem system?
- h) Have you noticed any changes to this during your lifetime or compared to past generations?
- i) How did you learn about skins / totems?
- j) Have you passed this knowledge on to younger generations?

4) **Hunting and gathering**

- a) Did you ever hunt, fish, gather bush foods or do bush cooking?
- b) Do you continue to hunt, fish, gather bush foods and do bush cooking?
- c) Are there specific hunting and fishing practices you have learned (eg tracking, trapping, killing)?
- d) Were there any special practices that had to be observed when you were hunting, fishing or collecting bush foods? (e.g. contacting spirits or ancestral beings, sharing systems, preparing animals and food in a traditional way)
- e) Do you observe rules about what you can take and what you must leave?
- f) Are there any foods that are taboo?
- g) Is there a traditional way of cooking?
- h) What are the laws that underpin hunting and gathering?
- i) Have you noticed any changes to these practices during your lifetime or compared to past generations?
- j) How did you learn about hunting and gathering?
- k) Have you passed this knowledge on to younger generations?

5) **Bush medicine**

- a) Did your parents, grandparents or relatives ever use bush medicine?
- b) What kind of bush medicines do you remember?
- c) What are they, how are they prepared and what are they used for?
- d) Do you use any of these medicines today?
- e) What are the laws that underpin the gathering and use of bush medicine?
- f) Have you noticed any changes to these practices during your lifetime or compared to past generations?
- g) How did you learn about bush medicines?

h) Have you passed this knowledge on to younger generations?

6) **Traditional tools**

- a) Did you or anyone you know ever learn to make traditional tools (i.e. spears, nets, fighting sticks, boomerangs, woomeras, digging sticks, stone axes, didgeridoos, string, etc.)?
- b) Were there any special products you needed to make these traditional tools (e.g. wax, spinifex resin, particular types of wood, grasses, fat, etc.)?
- c) Do you, or does anyone you know make any of these traditional tools today?
- d) What are the laws that underpin the making and use of traditional tools?
- e) Have you noticed any changes to these practices during your lifetime or compared to past generations?
- f) How did you learn about traditional tools?
- g) Have you passed this knowledge on to younger generations?

7) **Language**

- a) Did you ever have a bush name and if so what is it? Who gave it to you and have you continued to pass bush names on to your children?
- b) Were you ever taught language ('lingo')?
- c) Do you still retain any of it?
- d) Do you know anyone who is good at language?
- e) Do you or anyone you know still use language even if it is just the retention of some names for things, bush foods or sites?
- f) Is your language embedded in the claim area through the names of sites, plants or animals?
- g) What are the laws that underpin the use of language?
- h) Have you noticed any changes to this during your lifetime or compared to past generations?
- i) How did you learn about language?
- j) Have you passed this knowledge on to younger generations?

8) **Ceremonies**

- a) Do you remember taking part in any ceremonies or dances when you were younger? (e.g. corroborees, initiations, smoking ceremonies, mourning rituals)
- b) Do you know anyone else who took part in ceremonies or dances?
- c) Do you, or does anyone you know, take part in ceremonies or dances today?
- d) Are there any ceremonies that were forbidden to you or any other members of the group?
- e) Does your group hold meetings? How do these meetings run?
- f) What are the laws that underpin the knowledge and practice of ceremonies?
- g) Have you noticed any changes to this during your lifetime or compared to past generations?
- h) How did you learn about ceremonies?
- i) Have you passed this knowledge on to younger generations?

9) **Extent of country**

- a) What do you believe is the extent of your country? What are the boundaries?
- b) Who are your neighbours?
- c) Are there any areas that people disagree about?
- d) What part of country do you or your family speak for?
- e) Do you, or anyone you know still go out on country today?
- f) Do you have to talk to country when you go out on it?
- g) What are the laws that underpin the relationship of your group to its country and the country's boundaries?
- h) Have you noticed any changes to this during your lifetime or compared to past generations?
- i) How did you learn about where your country is?
- j) Have you passed this knowledge on to younger generations?

10) **Trespass and permission**

- a) What rules are observed if you travel on to someone else's country?
- b) What is expected if someone wants to travel on to your country?
- c) Are there any parts of your claim area where you are not allowed to go, or for which you would need to ask permission to access?
- d) Are there parts of the claim area that belong to specific members or subgroups of the claim group more than others?
- e) What are the laws that underpin the trespass and permission system?
- f) Have you noticed any changes to this during your lifetime or compared to past generations?
- g) How did you learn about the trespass and permission system?
- h) Have you passed this knowledge on to younger generations?

11) **Trade**

- a) Did your group used to conduct trade of foods, tools, objects and / or ceremonies with other groups?
- b) What specifically did they trade?
- c) How would this occur – through a gathering or ceremony?
- d) Were there specific trade routes that you know of?
- e) Do you or anyone you know conduct trade of food, tools, objects and / or ceremonies with other groups today?
- f) What are the laws that underpin trade?
- g) Have you noticed any changes to this during your lifetime or compared to past generations?
- h) How did you learn about trade?
- i) Have you passed this knowledge on to younger generations?

## Annexure E:

# EXPERT EVIDENCE PRACTICE NOTES (GPN-EXPT)

## General Practice Note

### 1. INTRODUCTION

1.1 This practice note, including the *Harmonised Expert Witness Code of Conduct* (“**Code**”) (see [Annexure A](#)) and the *Concurrent Expert Evidence Guidelines* (“**Concurrent Evidence Guidelines**”) (see [Annexure B](#)), applies to any proceeding involving the use of expert evidence and must be read together with:

- (a) the [Central Practice Note \(CPN-1\)](#), which sets out the fundamental principles concerning the National Court Framework (“**NCF**”) of the Federal Court and key principles of case management procedure;
- (b) the [Federal Court of Australia Act 1976 \(Cth\)](#) (“**Federal Court Act**”);
- (c) the [Evidence Act 1995 \(Cth\)](#) (“**Evidence Act**”), including Part 3.3 of the Evidence Act;
- (d) Part 23 of the [Federal Court Rules 2011 \(Cth\)](#) (“**Federal Court Rules**”); and
- (e) where applicable, the [Survey Evidence Practice Note \(GPN-SURV\)](#).

1.2 This practice note takes effect from the date it is issued and, to the extent practicable, applies to proceedings whether filed before, or after, the date of issuing.

### 2. APPROACH TO EXPERT EVIDENCE

2.1 An expert witness may be retained to give opinion evidence in the proceeding, or, in certain circumstances, to express an opinion that may be relied upon in alternative dispute resolution procedures such as mediation or a conference of experts. In some circumstances an expert may be appointed as an independent adviser to the Court.

2.2 The purpose of the use of expert evidence in proceedings, often in relation to complex subject matter, is for the Court to receive the benefit of the objective and impartial assessment of an issue from a witness with specialised knowledge (based on training, study or experience - see generally s 79 of the [Evidence Act](#)).

2.3 However, the use or admissibility of expert evidence remains subject to the overriding requirements that:

- (a) to be admissible in a proceeding, any such evidence must be relevant (s 56 of the [Evidence Act](#)); and
- (b) even if relevant, any such evidence, may be refused to be admitted by the Court if its probative value is outweighed by other considerations such as the evidence being unfairly



prejudicial, misleading or will result in an undue waste of time (s 135 of the [Evidence Act](#)).

- 2.4 An expert witness' opinion evidence may have little or no value unless the assumptions adopted by the expert (ie. the facts or grounds relied upon) and his or her reasoning are expressly stated in any written report or oral evidence given.
- 2.5 The Court will ensure that, in the interests of justice, parties are given a reasonable opportunity to adduce and test relevant expert opinion evidence. However, the Court expects parties and any legal representatives acting on their behalf, when dealing with expert witnesses and expert evidence, to at all times comply with their duties associated with the overarching purpose in the [Federal Court Act](#) (see ss 37M and 37N).

### 3. INTERACTION WITH EXPERT WITNESSES

- 3.1 Parties and their legal representatives should never view an expert witness retained (or partly retained) by them as that party's advocate or "hired gun". Equally, they should never attempt to pressure or influence an expert into conforming his or her views with the party's interests.
- 3.2 A party or legal representative should be cautious not to have inappropriate communications when retaining or instructing an independent expert, or assisting an independent expert in the preparation of his or her evidence. However, it is important to note that there is no principle of law or practice and there is nothing in this practice note that obliges a party to embark on the costly task of engaging a "consulting expert" in order to avoid "contamination" of the expert who will give evidence. Indeed the Court would generally discourage such costly duplication.
- 3.3 Any witness retained by a party for the purpose of preparing a report or giving evidence in a proceeding as to an opinion held by the witness that is wholly or substantially based in the specialised knowledge of the witness<sup>1</sup> should, at the earliest opportunity, be provided with:
  - (a) a copy of this practice note, including the Code (see [Annexure A](#)); and
  - (b) all relevant information (whether helpful or harmful to that party's case) so as to enable the expert to prepare a report of a truly independent nature.
- 3.4 Any questions or assumptions provided to an expert should be provided in an unbiased manner and in such a way that the expert is not confined to addressing selective, irrelevant or immaterial issues.

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<sup>1</sup> Such a witness includes a "Court expert" as defined in r 23.01 of the [Federal Court Rules](#). For the definition of "expert", "expert evidence" and "expert report" see the Dictionary, in Schedule 1 of the Federal Court Rules.

#### 4. ROLE AND DUTIES OF THE EXPERT WITNESS

- 4.1 The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.
- 4.2 It should be emphasised that there is nothing inherently wrong with experts disagreeing or failing to reach the same conclusion. The Court will, with the assistance of the evidence of the experts, reach its own conclusion.
- 4.3 However, experts should willingly be prepared to change their opinion or make concessions when it is necessary or appropriate to do so, even if doing so would be contrary to any previously held or expressed view of that expert.

##### 8.1.1.1 Harmonised Expert Witness Code of Conduct

- 4.4 Every expert witness giving evidence in this Court must read the *Harmonised Expert Witness Code of Conduct* (attached in [Annexure A](#)) and agree to be bound by it.
- 4.5 The Code is not intended to address all aspects of an expert witness' duties, but is intended to facilitate the admission of opinion evidence, and to assist experts to understand in general terms what the Court expects of them. Additionally, it is expected that compliance with the Code will assist individual expert witnesses to avoid criticism (rightly or wrongly) that they lack objectivity or are partisan.

#### 5. CONTENTS OF AN EXPERT'S REPORT AND RELATED MATERIAL

- 5.1 The contents of an expert's report must conform with the requirements set out in the Code (including clauses 3 to 5 of the Code).
- 5.2 In addition, the contents of such a report must also comply with r 23.13 of the [Federal Court Rules](#). Given that the requirements of that rule significantly overlap with the requirements in the Code, an expert, unless otherwise directed by the Court, will be taken to have complied with the requirements of r 23.13 if that expert has complied with the requirements in the Code and has complied with the additional following requirements. The expert shall:
  - (a) acknowledge in the report that:
    - (i) the expert has read and complied with this practice note and agrees to be bound by it; and
    - (ii) the expert's opinions are based wholly or substantially on specialised knowledge arising from the expert's training, study or experience;
  - (b) identify in the report the questions that the expert was asked to address;
  - (c) sign the report and attach or exhibit to it copies of:
    - (i) documents that record any instructions given to the expert; and
    - (ii) documents and other materials that the expert has been instructed to consider.

5.3 Where an expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the other parties at the same time as the expert's report.

## 6. CASE MANAGEMENT CONSIDERATIONS

6.1 Parties intending to rely on expert evidence at trial are expected to consider between them and inform the Court at the earliest opportunity of their views on the following:

- (a) whether a party should adduce evidence from more than one expert in any single discipline;
- (b) whether a common expert is appropriate for all or any part of the evidence;
- (c) the nature and extent of expert reports, including any in reply;
- (d) the identity of each expert witness that a party intends to call, their area(s) of expertise and availability during the proposed hearing;
- (e) the issues that it is proposed each expert will address;
- (f) the arrangements for a conference of experts to prepare a joint-report (see Part 7 of this practice note);
- (g) whether the evidence is to be given concurrently and, if so, how (see Part 8 of this practice note); and
- (h) whether any of the evidence in chief can be given orally.

6.2 It will often be desirable, before any expert is retained, for the parties to attempt to agree on the question or questions proposed to be the subject of expert evidence as well as the relevant facts and assumptions. The Court may make orders to that effect where it considers it appropriate to do so.

## 7. CONFERENCE OF EXPERTS AND JOINT-REPORT

7.1 Parties, their legal representatives and experts should be familiar with aspects of the Code relating to conferences of experts and joint-reports (see clauses 6 and 7 of the Code attached in [Annexure A](#)).

7.2 In order to facilitate the proper understanding of issues arising in expert evidence and to manage expert evidence in accordance with the overarching purpose, the Court may require experts who are to give evidence or who have produced reports to meet for the purpose of identifying and addressing the issues not agreed between them with a view to reaching agreement where this is possible ("**conference of experts**"). In an appropriate case, the Court may appoint a registrar of the Court or some other suitably qualified person ("**Conference Facilitator**") to act as a facilitator at the conference of experts.

7.3 It is expected that where expert evidence may be relied on in any proceeding, at the earliest opportunity, parties will discuss and then inform the Court whether a conference of experts and/or

a joint-report by the experts may be desirable to assist with or simplify the giving of expert evidence in the proceeding. The parties should discuss the necessary arrangements for any conference and/or joint-report. The arrangements discussed between the parties should address:

- (a) who should prepare any joint-report;
- (b) whether a list of issues is needed to assist the experts in the conference and, if so, whether the Court, the parties or the experts should assist in preparing such a list;
- (c) the agenda for the conference of experts; and
- (d) arrangements for the provision, to the parties and the Court, of any joint-report or any other report as to the outcomes of the conference (“**conference report**”).

### ***Conference of Experts***

- 7.4 The purpose of the conference of experts is for the experts to have a comprehensive discussion of issues relating to their field of expertise, with a view to identifying matters and issues in a proceeding about which the experts agree, partly agree or disagree and why. For this reason the conference is attended only by the experts and any Conference Facilitator. Unless the Court orders otherwise, the parties' lawyers will not attend the conference but will be provided with a copy of any conference report.
- 7.5 The Court may order that a conference of experts occur in a variety of circumstances, depending on the views of the judge and the parties and the needs of the case, including:
- (a) while a case is in mediation. When this occurs the Court may also order that the outcome of the conference or any document disclosing or summarising the experts' opinions be confidential to the parties while the mediation is occurring;
  - (b) before the experts have reached a final opinion on a relevant question or the facts involved in a case. When this occurs the Court may order that the parties exchange draft expert reports and that a conference report be prepared for the use of the experts in finalising their reports;
  - (c) after the experts' reports have been provided to the Court but before the hearing of the experts' evidence. When this occurs the Court may also order that a conference report be prepared (jointly or otherwise) to ensure the efficient hearing of the experts' evidence.
- 7.6 Subject to any other order or direction of the Court, the parties and their lawyers must not involve themselves in the conference of experts process. In particular, they must not seek to encourage an expert not to agree with another expert or otherwise seek to influence the outcome of the conference of experts. The experts should raise any queries they may have in relation to the process with the Conference Facilitator (if one has been appointed) or in accordance with a protocol agreed between the lawyers prior to the conference of experts taking place (if no Conference Facilitator has been appointed).
- 7.7 Any list of issues prepared for the consideration of the experts as part of the conference of experts process should be prepared using non-tendentious language.

- 7.8 The timing and location of the conference of experts will be decided by the judge or a registrar who will take into account the location and availability of the experts and the Court's case management timetable. The conference may take place at the Court and will usually be conducted in-person. However, if not considered a hindrance to the process, the conference may also be conducted with the assistance of visual or audio technology (such as via the internet, video link and/or by telephone).
- 7.9 Experts should prepare for a conference of experts by ensuring that they are familiar with all of the material upon which they base their opinions. Where expert reports in draft or final form have been exchanged prior to the conference, experts should attend the conference familiar with the reports of the other experts. Prior to the conference, experts should also consider where they believe the differences of opinion lie between them and what processes and discussions may assist to identify and refine those areas of difference.

### ***Joint-report***

- 7.10 At the conclusion of the conference of experts, unless the Court considers it unnecessary to do so, it is expected that the experts will have narrowed the issues in respect of which they agree, partly agree or disagree in a joint-report. The joint-report should be clear, plain and concise and should summarise the views of the experts on the identified issues, including a succinct explanation for any differences of opinion, and otherwise be structured in the manner requested by the judge or registrar.
- 7.11 In some cases (and most particularly in some native title cases), depending on the nature, volume and complexity of the expert evidence a judge may direct a registrar to draft part, or all, of a conference report. If so, the registrar will usually provide the draft conference report to the relevant experts and seek their confirmation that the conference report accurately reflects the opinions of the experts expressed at the conference. Once that confirmation has been received the registrar will finalise the conference report and provide it to the intended recipient(s).

## **8. CONCURRENT EXPERT EVIDENCE**

- 8.1 The Court may determine that it is appropriate, depending on the nature of the expert evidence and the proceeding generally, for experts to give some or all of their evidence concurrently at the final (or other) hearing.
- 8.2 Parties should familiarise themselves with the *Concurrent Expert Evidence Guidelines* (attached in [Annexure B](#)). The Concurrent Evidence Guidelines are not intended to be exhaustive but indicate the circumstances when the Court might consider it appropriate for concurrent expert evidence to take place, outline how that process may be undertaken, and assist experts to understand in general terms what the Court expects of them.
- 8.3 If an order is made for concurrent expert evidence to be given at a hearing, any expert to give such evidence should be provided with the Concurrent Evidence Guidelines well in advance of the hearing and should be familiar with those guidelines before giving evidence.

## 9. FURTHER PRACTICE INFORMATION AND RESOURCES

- 9.1 Further information regarding [Expert Evidence and Expert Witnesses](#) is available on the Court's website.
- 9.2 Further [information to assist litigants](#), including a range of helpful [guides](#), is also available on the Court's website. This information may be particularly helpful for litigants who are representing themselves.

J L B ALLSOP  
Chief Justice

25 October 2016

## **Annexure A**

### ***HARMONISED EXPERT WITNESS CODE OF CONDUCT<sup>2</sup>***

#### **APPLICATION OF CODE**

1. This Code of Conduct applies to any expert witness engaged or appointed:
  - (a) to provide an expert's report for use as evidence in proceedings or proposed proceedings; or
  - (b) to give opinion evidence in proceedings or proposed proceedings.

#### **GENERAL DUTIES TO THE COURT**

2. An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the party to the proceedings or other person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

#### **CONTENT OF REPORT**

3. Every report prepared by an expert witness for use in Court shall clearly state the opinion or opinions of the expert and shall state, specify or provide:
  - (a) the name and address of the expert;
  - (b) an acknowledgment that the expert has read this code and agrees to be bound by it;
  - (c) the qualifications of the expert to prepare the report;
  - (d) the assumptions and material facts on which each opinion expressed in the report is based [a letter of instructions may be annexed];
  - (e) the reasons for and any literature or other materials utilised in support of such opinion;
  - (f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise;
  - (g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications;
  - (h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person;
  - (i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the

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<sup>2</sup> Approved by the Council of Chief Justices' Rules Harmonisation Committee

report), and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld from the Court;

- (j) any qualifications on an opinion expressed in the report without which the report is or may be incomplete or inaccurate;
- (k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason; and
- (l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

#### **SUPPLEMENTARY REPORT FOLLOWING CHANGE OF OPINION**

- 4. Where an expert witness has provided to a party (or that party's legal representative) a report for use in Court, and the expert thereafter changes his or her opinion on a material matter, the expert shall forthwith provide to the party (or that party's legal representative) a supplementary report which shall state, specify or provide the information referred to in paragraphs (a), (d), (e), (g), (h), (i), (j), (k) and (l) of clause 3 of this code and, if applicable, paragraph (f) of that clause.
- 5. In any subsequent report (whether prepared in accordance with clause 4 or not) the expert may refer to material contained in the earlier report without repeating it.

#### **DUTY TO COMPLY WITH THE COURT'S DIRECTIONS**

- 6. If directed to do so by the Court, an expert witness shall:
  - (a) confer with any other expert witness;
  - (b) provide the Court with a joint-report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing; and
  - (c) abide in a timely way by any direction of the Court.

#### **CONFERENCE OF EXPERTS**

- 7. Each expert witness shall:
  - (a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the Court and in relation to each report thereafter provided, and shall not act on any instruction or request to withhold or avoid agreement; and
  - (b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.



## ANNEXURE B

# CONCURRENT EXPERT EVIDENCE GUIDELINES

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### APPLICATION OF THE COURT'S GUIDELINES

1. The Court's Concurrent Expert Evidence Guidelines ("**Concurrent Evidence Guidelines**") are intended to inform parties, practitioners and experts of the Court's general approach to concurrent expert evidence, the circumstances in which the Court might consider expert witnesses giving evidence concurrently and, if so, the procedures by which their evidence may be taken.

### OBJECTIVES OF CONCURRENT EXPERT EVIDENCE TECHNIQUE

2. The use of concurrent evidence for the giving of expert evidence at hearings as a case management technique<sup>3</sup> will be utilised by the Court in appropriate circumstances (see r 23.15 of the [Federal Court Rules 2011 \(Cth\)](#)). Not all cases will suit the process. For instance, in some patent cases, where the entire case revolves around conflicts within fields of expertise, concurrent evidence may not assist a judge. However, patent cases should not be excluded from concurrent expert evidence processes.
3. In many cases the use of concurrent expert evidence is a technique that can reduce the partisan or confrontational nature of conventional hearing processes and minimises the risk that experts become "opposing experts" rather than independent experts assisting the Court. It can elicit more precise and accurate expert evidence with greater input and assistance from the experts themselves.
4. When properly and flexibly applied, with efficiency and discipline during the hearing process, the technique may also allow the experts to more effectively focus on the critical points of disagreement between them, identify or resolve those issues more quickly, and narrow the issues in dispute. This can also allow for the key evidence to be given at the same time (rather than being spread across many days of hearing); permit the judge to assess an expert more readily, whilst allowing each party a genuine opportunity to put and test expert evidence. This can reduce the chance of the experts, lawyers and the judge misunderstanding the opinions being expressed by the experts.
5. It is essential that such a process has the full cooperation and support of all of the individuals involved, including the experts and counsel involved in the questioning process. Without that cooperation and support the process may fail in its objectives and even hinder the case management process.

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<sup>3</sup> Also known as the "hot tub" or as "expert panels".

## **CASE MANAGEMENT**

6. Parties should expect that, the Court will give careful consideration to whether concurrent evidence is appropriate in circumstances where there is more than one expert witness having the same expertise who is to give evidence on the same or related topics. Whether experts should give evidence concurrently is a matter for the Court, and will depend on the circumstances of each individual case, including the character of the proceeding, the nature of the expert evidence, and the views of the parties.
7. Although this consideration may take place at any time, including the commencement of the hearing, if not raised earlier, parties should raise the issue of concurrent evidence at the first appropriate case management hearing, and no later than any pre-trial case management hearing, so that orders can be made in advance, if necessary. To that end, prior to the hearing at which expert evidence may be given concurrently, parties and their lawyers should confer and give general consideration as to:
  - (a) the agenda;
  - (b) the order and manner in which questions will be asked; and
  - (c) whether cross-examination will take place within the context of the concurrent evidence or after its conclusion.
8. At the same time, and before any hearing date is fixed, the identity of all experts proposed to be called and their areas of expertise is to be notified to the Court by all parties.
9. The lack of any concurrent evidence orders does not mean that the Court will not consider using concurrent evidence without prior notice to the parties, if appropriate.

## **CONFERENCE OF EXPERTS & JOINT-REPORT OR LIST OF ISSUES**

10. The process of giving concurrent evidence at hearings may be assisted by the preparation of a joint-report or list of issues prepared as part of a conference of experts.
11. Parties should expect that, where concurrent evidence is appropriate, the Court may make orders requiring a conference of experts to take place or for documents such as a joint-report to be prepared to facilitate the concurrent expert evidence process at a hearing (see Part 7 of the Expert Evidence Practice Note).

## **PROCEDURE AT HEARING**

12. Concurrent expert evidence may be taken at any convenient time during the hearing, although it will often occur at the conclusion of both parties' lay evidence.
13. At the hearing itself, the way in which concurrent expert evidence is taken must be applied flexibly and having regard to the characteristics of the case and the nature of the evidence to be given.

14. Without intending to be prescriptive of the procedure, parties should expect that, when evidence is given by experts in concurrent session:
  - (a) the judge will explain to the experts the procedure that will be followed and that the nature of the process may be different to their previous experiences of giving expert evidence;
  - (b) the experts will be grouped and called to give evidence together in their respective fields of expertise;
  - (c) the experts will take the oath or affirmation together, as appropriate;
  - (d) the experts will sit together with convenient access to their materials for their ease of reference, either in the witness box or in some other location in the courtroom, including (if necessary) at the bar table;
  - (e) each expert may be given the opportunity to provide a summary overview of their current opinions and explain what they consider to be the principal issues of disagreement between the experts, as they see them, in their own words;
  - (f) the judge will guide the process by which evidence is given, including, where appropriate:
    - (i) using any joint-report or list of issues as a guide for all the experts to be asked questions by the judge and counsel, about each issue on an issue-by-issue basis;
    - (ii) ensuring that each expert is given an adequate opportunity to deal with each issue and the exposition given by other experts including, where considered appropriate, each expert asking questions of other experts or supplementing the evidence given by other experts;
    - (iii) inviting legal representatives to identify the topics upon which they will cross-examine;
    - (iv) ensuring that legal representatives have an adequate opportunity to ask all experts questions about each issue. Legal representatives may also seek responses or contributions from one or more experts in response to the evidence given by a different expert; and
    - (v) allowing the experts an opportunity to summarise their views at the end of the process where opinions may have been changed or clarifications are needed.
15. The fact that the experts may have been provided with a list of issues for consideration does not confine the scope of any cross-examination of any expert. The process of cross-examination remains subject to the overall control of the judge.
16. The concurrent session should allow for a sensible and orderly series of exchanges between expert and expert, and between expert and lawyer. Where appropriate, the

judge may allow for more traditional cross-examination to be pursued by a legal representative on a particular issue exclusively with one expert. Where that occurs, other experts may be asked to comment on the evidence given.

17. Where any issue involves only one expert, the party wishing to ask questions about that issue should let the judge know in advance so that consideration can be given to whether arrangements should be made for that issue to be dealt with after the completion of the concurrent session. Otherwise, as far as practicable, questions (including in the form of cross-examination) will usually be dealt with in the concurrent session.
18. Throughout the concurrent evidence process the judge will ensure that the process is fair and effective (for the parties and the experts), balanced (including not permitting one expert to overwhelm or overshadow any other expert), and does not become a protracted or inefficient process.