



National
Native Title
Tribunal

Native title claimant applications

*A guide to understanding the requirements
of the registration test*

Disclaimer

This information is provided by the National Native Title Tribunal as general information only. It is made available on the understanding that neither the National Native Title Tribunal and its staff and officers nor the Commonwealth are providing professional advice.

As the delegates of the Native Title Registrar are independent administrative decision makers, they cannot be bound to follow the approaches set out in this guide. Using the examples in this guide will not necessarily mean that a claim will be registered. The information in this guide and its use does not give rise to a legitimate expectation as to the conduct of the Registrar or the Registrar's delegates in a particular case. In particular, formulaic statements, without regard to the particular circumstances, should not be used in an application.

As this information also relates to an application which commences proceedings in the Federal Court of Australia, applicants should seek independent legal advice before making an application.



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Introduction



NATIVE TITLE ACT 1993

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Reprint 5

Introduction

This guide is for Indigenous Australians who want information about the registration test. The registration test is a series of conditions outlined in the *Native Title Act 1993* which are applied to applications for a determination of native title. The guide is designed to assist in preparing a new application for a determination of native title (a claimant application), or amending an existing application, so that it has the best chance of meeting the conditions of the test. The Native Title Act was changed in 2007 and some of the conditions relating to the registration of claims were altered.

This guide is not legal advice. It is up to those who make an application for a determination of native title to get independent legal advice. No employee or officer of the National Native Title Tribunal is able to provide legal advice.

Things to remember when you read this guide

An application for a determination of native title claim is a legal action in the Federal Court of Australia. Before you make such an application, you should have the resources to progress the claim or be sure that you will get those resources within an appropriate time frame.

This information is only a guide to what you could put in your application. It does not cover everything that is required for making a native title determination application to the Federal Court. It is not meant to be a complete analysis of the law about the registration test.

If you want to make a claimant application, you should contact the native title representative body or native title service provider responsible for the area of your native title application because they are funded to assist native title claimants to properly prepare and file their applications. Each of these organisations has its own policy regarding the funding of claimant applications. For contact details, see page nine.

You can get assistance to prepare your application from the Registrar or staff of the Tribunal. This can include information to help you understand the requirements of the registration test, as well as help to prepare a map and written description of the area you are claiming. The Registrar can also help with searches of registers or other records of interests in the area you are claiming or want to claim. However, neither the Registrar nor the staff of the Tribunal can provide any legal advice.

The examples given in the guide should not be copied—you should give information that reflects your claim group's particular circumstances.

Your application should properly describe the claim that you want to prove to a judge of the Federal Court, rather than be aimed only at gaining registration. If you aim only at meeting the conditions of the registration test, your claim may be at risk of being struck out or dismissed by the court.

It is up to you to set out the native title rights and interests you are claiming and the facts that support your claim.

The registration test

The registration test is a set of 12 conditions found in the *Native Title Act 1993* that must be applied to all new claimant applications and to most amended claimant applications. The Native Title Registrar, or a delegate appointed by the Registrar, applies the test.

If the claim passes all 12 conditions, then the Registrar must record the details of the claim on the Register of Native Title Claims. In other words, it becomes a 'registered claim'. Information about claims on the Register of Native Title Claims is available from the Tribunal website.

If a claim is registered, then the native title claim group gets some important rights, like the right to negotiate with others about the grant of some mining tenements in relation to the area covered by the application and certain other procedural rights while their claim is pending. In South Australia, state laws apply and give similar rights.

This is one of the reasons why it is important to make sure that the information needed to meet each condition of the registration test is provided. If a claimant application does not meet all 12 conditions of the registration test, it must not be registered.

Making a claim for native title

If you want to make a native title claim, then you can make an application under the Native Title Act. Native title claims must be made by or on behalf of a 'native title claim group' – that is, by all the persons who claim to hold native title in a particular area – rather than just by individuals on their own behalf. This is because native title is said to be held by a community or group or society, and the point of the claim is to resolve who holds native title once and for all.

Your native title claim group must apply for a determination of native title from the Federal Court of Australia, using what is called a 'Form 1 Native Title Determination Application (Claimant Application)'.

The application is made by an applicant, which can be one or more persons, who make the claim on behalf of the native title claim group of which they are a member or members. The person or persons who make up the applicant must be authorised by the native title claim group to make the application.

The Native Title Act refers to Form 1 as the 'prescribed' form, and so it is the only form that can be used. In South Australia, it is also possible to make a claim for a determination of native title through the Environment, Resources and Development Court.

The applicant must also file an affidavit giving the court certain information. This is sometimes called a 'section 62 affidavit' because that is the section of the Native Title Act that sets out what the affidavit must cover. The form that must be used for the section 62 affidavit is called Form 20.

Other affidavits to support the information contained in Form 1 may also be presented together with the section 62 affidavits.

Blank copies of Form 1 and Form 20 are available from the Federal Court's website at www.fedcourt.gov.au, through Federal Court registries and the National Native Title Tribunal.

Once the forms have been filled out properly, you need to provide them to the court. This is called ‘filing the documents’. Filing the documents can be done by taking the documents to the court in person or by posting, faxing or sending them to the court over the internet.

A filing fee applies to all native title applications filed with the court, although fees can be waived under certain circumstances. If you cannot afford to pay this fee, then you can ask the court for an exemption from paying it. Some people are automatically exempt (i.e. not required to pay the fee because they have been granted legal aid or hold a health care card). The Federal Court requires an application for exemption to be completed, and that form is available from the court’s website.

The Federal Court has registries in all Australian capital cities and staff who can assist with procedural information about filing a claimant application. Federal Court staff cannot provide any legal advice.

After the application has been made (or filed), the court sends a copy of it to the Native Title Registrar at the Tribunal. For reference purposes it will be given both a Federal Court number and a Tribunal number.

The Native Title Registrar (or the Registrar’s delegate) must then apply the registration test to the application.

Assistance for applicants before the registration test is applied

The Native Title Registrar can provide a written ‘preliminary assessment’ of your application before you file it in the court. However, the Registrar will only give a preliminary assessment if all sections of the draft Form 1 have been completed.

A preliminary assessment will point out the parts of your draft application that might not meet particular conditions of the registration test. This will give you an opportunity to make changes to your application prior to filing it in the court.

If you file a new application without asking for a preliminary assessment first, the Registrar will automatically give you a preliminary assessment if it looks like your application might not pass all of the conditions of the test. You may then choose to amend your claim before it is tested.

The Registrar has posted information about preliminary assessments on the Tribunal’s website at www.nntt.gov.au. You can also get this information over the counter at any registry of the Tribunal.

The Registrar can also assist in other ways, for example, by helping to produce a map and technical description of the area you want to claim or by providing other information you might need in order to fill out Form 1. Requests for assistance should be made to the Registrar in the Tribunal’s registry servicing your area. More information about assistance provided by the Tribunal is available from the Tribunal website.

Amending (changing) an application

If you or your claim group already have a native title claim in the court, and the claim group want to change some of the details of your claim, then you have to amend the application to make those changes. This is done by filing a notice of motion in the court asking for the court’s consent to make the amendments (known as seeking leave in the court) along with an affidavit that explains why you want to amend your application. A Minute of Proposed Amended Native Title Determination Application setting out the proposed amended Form 1 should also be filed. You add information about amendments you want to make to Schedule S of the draft amended application (see page 45 of this booklet).

The Native Title Act does not allow you to make an amendment that increases the area you have claimed. If you want to increase the area you are claiming, you usually have to make a new application over the new area. However, if you originally claimed a larger area and then amended your application to claim a smaller area, you can make a further amendment to your application so that the area it covers reverts back to the area your group originally claimed. If you want to do this, please check with the Tribunal first.

The Federal Court has staff who can assist with procedural information about filing amended applications. Federal Court staff cannot provide any legal advice.

Which claims are tested?

The registration test is applied to all new claimant applications. The test is also applied to some claims when they are amended, even if the application passed the registration test before it was amended. That is because the claim has been changed and it is a legal requirement that it be tested again.

An example of an amendment to a claim that will trigger the application of the registration test again is a change to the claim group description.

In certain circumstances, the Registrar does not have to apply the registration test to amended applications that have already passed the registration test and are on the register when amendments are made. See below for the kinds of amendments that can be made to applications without triggering the registration test.

Amendments that do not trigger the registration test

If your claim has already passed the registration test and is registered, then there are some amendments you can make without triggering the test. Those amendments are:

- when you reduce the area covered by the application, so long as the description and the map of the area covered by the application are clear enough for it to be said with reasonable certainty whether native title rights and interests are being claimed in relation to particular land or waters
- when you remove rights and interests from those claimed in your original application
- when you change the name of the representative body for all or part of the area for the application
- when you change the address for service of the applicant (the person or persons making the claim)
- when the court makes a determination of native title under section 87A of the Native Title Act.

Actions you can take if your application cannot be registered

If your application cannot be registered, you will receive a letter from the Native Title Registrar that includes a copy of the reasons for the decision not to register your claim. The letter will also let you know what your options are for having that decision looked at again, either by a member of the Tribunal or by a judge of the Federal Court.

If your application does not meet the conditions of the registration test, you may have three options.

1. You could amend your application through the Federal Court with a view to satisfying the conditions of the registration test (see page seven).
2. You can apply to the President of the Tribunal for a reconsideration of the claim made in your application.
3. You can apply to the Federal Court to review the decision of the Registrar.

Reconsideration of the claim by the President

The Tribunal can only reconsider claims in applications which were made or amended on or after 1 September 2007 and then had the test applied to them by the Registrar.

If the President decides that your claim should be reconsidered, it is done at no cost to the applicant, i.e. there are no fees payable.

Reconsideration is done by a member of the Tribunal, not by a delegate of the Registrar. When looking at the application, the member of the Tribunal must have regard to the same information considered by the Registrar's delegate during the original registration test. The member may also take into account any other information he or she thinks is appropriate. If the member decides that the claim meets the registration conditions, then the Registrar must register it.

To apply for reconsideration by a Tribunal member, you must write to the Senior National Registration Delegate, GPO Box 9973, Sydney 2001, telephone (02) 9227 4000 within 42 days of being given notice that your claim has not been accepted for registration, giving reasons for the basis on which you are seeking reconsideration.

Applying to the Federal Court for a review of a decision of the Registrar

You can apply to the Federal Court to review the decision of the Registrar. The Federal Court has staff who can assist with procedural information about filing an application to have a judge review a registration test decision. Federal Court staff cannot provide any legal advice.

If your claim cannot be registered, the application may be dismissed by the court

The Registrar is required to inform the Federal Court whenever a claim fails to satisfy all of the conditions of the registration test.

If your claim fails to meet the merit conditions of the test (the ones found in section 190B of the Native Title Act), the Federal Court may decide to dismiss your application if it is:

- satisfied that you have not amended the application since it was tested and the application is not likely to be amended in a way that would lead the claim to be accepted for registration and
- of the opinion there is no other reason why the application should not be dismissed.

If the Federal Court is considering whether or not to dismiss your application for any of the reasons set out above, you will get a chance to explain why your application should not be dismissed before any decision is made.

Where to get more information

If you need more information about the registration test after reading this guide, ask at the nearest office of the Tribunal, or go to the registration test information on the Tribunal's website www.nntt.gov.au.

The Tribunal has offices in Brisbane, Cairns, Melbourne, Perth and Sydney. For Tasmanian native title matters, contact the Victorian Registry. For native title matters in the ACT, contact the NSW Registry. Contact details are printed inside the back cover of this booklet.

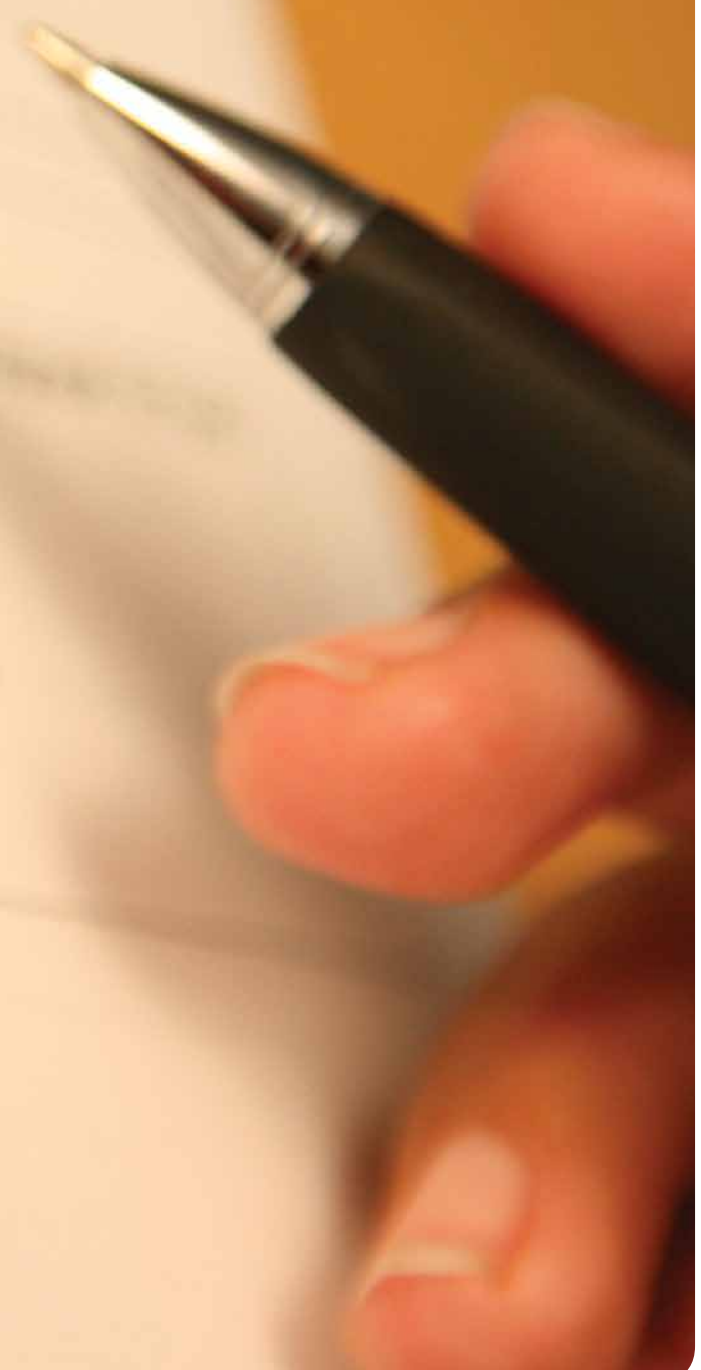
For queries related to any information in this booklet, contact the Senior National Registration Delegate, National Native Title Tribunal, GPO Box 9973, Sydney 2001, telephone (02) 9227 4000 or freecall 1800 640 501.

Contact details for the Federal Court are available at www.fedcourt.gov.au.

Contact details for native title representative bodies or service providers are available from www.ntrb.net.

Form 1: native title determination claimant application

Form 1
Native Title Act 1993
Title Determination Application
Claimant Application

A close-up photograph of a person's hand holding a black pen with a silver tip, poised to write on a document. The document is a form titled 'Form 1: native title determination claimant application'. The text on the form is slightly blurred but legible. The background is a warm, orange-brown color.

Form 1: native title determination claimant application

This guide is structured in the same way as a Form 1 application. Each section of this guide looks at a section of Form 1.

A Form 1 application has two parts: Part A and Part B.

Part A has a number of sections, called schedules, that ask you to give certain information about your native title claim. There are 20 schedules (Schedule A to Schedule T). If you do not have enough room to include all your information in Form 1, you can add further information as attachments to Form 1.

Part B of the form asks for your contact details and what is known as your 'address for service', where people, including the Federal Court and the Tribunal, can contact you, or your legal representative, about your application.

Form 1 is structured in the following way:

Name of Applicant

Part A

1. Details of the claim
2. Authorisation
3. Schedules to this application contain the following information:

Schedule A	Native title claim group
Schedule B	Identification of boundaries
Schedule C	Maps
Schedule D	Searches
Schedule E	Description of native title rights and interests
Schedule F	General description of native title rights and interests claimed
Schedule G	Activities
Schedule H	Details of any other applications
Schedule HA	Details of any notices under section 24MD
Schedule I	Details of any section 29 notices
Schedule J	Draft order
Schedule K	Native title representative bodies
Schedule L	Tenure and land use issues
Schedule M	Traditional physical connection
Schedule N	Prevention of access
Schedule O	Membership of any other native title groups
Schedule P	Claims for exclusive possession of offshore places
Schedule Q	Claims to any resources owned by the Crown
Schedule R	Certification or authorisation
Schedule S	Amended applications
Schedule T	Any other relevant information

Part B

Filing and service

Affidavits

Some of these schedules, such as J and K, are not subject to the registration test.

This guide gives you things to remember and checklists for Form 1. It also gives you some examples of the kinds of things your application needs to cover. Do not copy these examples in your application, as they are only a guide. The information you give in your native title application should reflect your claim group's particular circumstances.

1. Name of the applicant

The applicant is the person who is, or the persons who are, authorised by all of the people in the native title claim group to make the native title application.

All of the people your native title claim group authorised to make the application must put their names in the box provided on page two of the Form 1 application. They can also give their traditional language name if they use one.

A native title claim must be made on behalf of all of the traditional people for the claim area. If you are an individual, or a small family-based group, please consider if you are actually part of a larger group which holds native title rights and interests. If you are part of a larger group, you will need to ensure that the larger group has authorised you to make the application. For more on the native title claim group, see page 14.

Note: if your claim group is considering replacing the applicant for an existing claim, you should read details about the process for doing this. See the question 'What happens if the claim group wishes to replace the applicant?' on page 44.

Remember

List the names of all those people who are 'the applicant' (they must each be a member of the native title claim group AND be authorised by the native title claim group to make the application).

Include the affidavit required by section 62(1)(a) of the Native Title Act for each of these people. Make sure that each affidavit required by section 62(1)(a) contains the four required statements described in paragraphs (i) to (iv) (see page 46).

Make sure each affidavit also sets out the details of the process of decision-making used in authorising the applicant to make the application and to deal with matters arising in relation to it (as required by subparagraph 62(1)(a)(v)).

Make sure each person authorised to make the application has signed and dated their affidavit (on each page) and their signature has been witnessed by a qualified person such as a Justice of the Peace or a solicitor.

Refer to 'section 62 affidavit' on page 46 for examples of the information you might put in the affidavits of the applicants.

Refer to Schedule R on page 40 for more information about authorisation.

2. Details of the claim

The first part of this section of Form 1 has been completed for you and consists of one sentence only:

The applicant applies for a determination of native title under subsection 61(1) of the *Native Title Act 1993*.

You do not need to add anything here.

On page two of Form 1, there needs to be a statement explaining why the applicant is entitled to make the application. The only people entitled to make the application are those who have been authorised by the native title claim group. So, for example, at this part of Form 1 you could write:

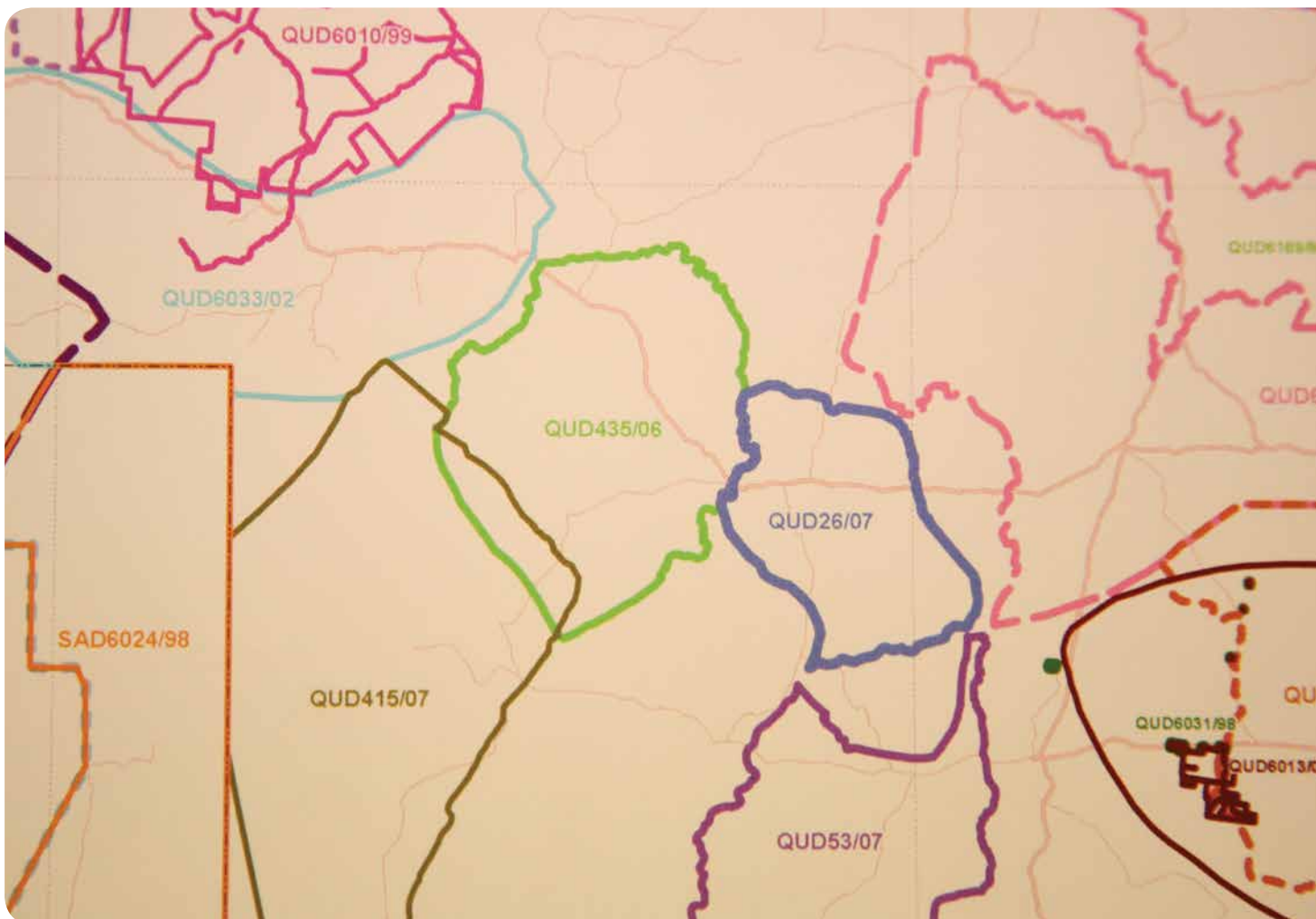
The applicant is entitled to make this application as a person (or persons) authorised by the native title claim group to make the native title determination application.

This is one of the three parts of the application where information about authorisation must be given. The other two parts are:

- in the affidavits that must be filed with Form 1
- in Schedule R.

For more information about authorisation, see the notes under Schedule R on page 40.

Form 1 then reads: 'The schedules to this application contain the following information'.



Once registered, claim areas are mapped by the Tribunal.

3. The native title claim group (Schedule A of Form 1)

You need to describe clearly who is in your 'native title claim group'. You need to include all the people who, according to your traditional law and custom, hold the common or group rights and interests that make up the particular native title you are claiming. This means you have to identify all of the people who, under your traditional laws and customs, have rights and responsibilities over the area your claim covers.

The Native Title Act outlines two possible ways you can identify the members of your native title claim group.

1. Give a complete list

One way is to give a complete list of the names of all the people in your native title claim group. If you choose this way, then make sure you write in the box under Schedule A that it is a complete list of all of the people in your native title claim group, which means that everyone who should be listed has been listed.

2. Describe your native title claim group

The other way is to give a description of your native title claim group. The description must be sufficiently clear to allow someone who is outside of your claim group, like the Registrar, to work out just from looking at the description of the claim group in Form 1, whether any particular person is a member of your claim group or not. In other words, there must be an objective way of working out who is, and who is not, a member of your native title claim group just by looking at what is said in your Form 1.

Possible ways to describe your claim group are outlined below.

Description 1

You can describe your native title claim group as being made up of all of the descendants of particular, named ancestors. This can be a good way to do things because it may be possible for other people, like the Registrar, to work out whether a person is descended from one of these ancestors. These ancestors, when they go back as far as can be traced, are sometimes called 'apical ancestors'.

Description 2

A family tree or genealogical chart can be attached to your application. There is no requirement that you include a family tree but, if you do, then it is useful to show which of the people in the family tree are living and which people have children. It is also helpful if you give the full names of the people in the family tree and their birth dates (if you know these).

Remember

Whichever way you choose to describe your native title claim group, the Registrar has to be satisfied that your description in Form 1 could be used to figure out whether any particular person belongs in your claim group or not. In other words, there should be some objective way of verifying who is, and who is not, a member of your claim group.

Example: Schedule A of Form 1

The native title claim group

This is an example of the kind of information you might put in Schedule A if you choose not to list every person in the claim group. Remember, this is a guide only and it is not legal advice.

1. The native title claim group consists of the people known as the X People, being those Aboriginal people whose traditional land and waters are situated generally in the district of Y in the State of Queensland.
2. The individuals who comprise the X People's native title claim group are the biological descendants of the following apical ancestors:
 - Dan Jones
 - Alice Lee
 - Nellie Lee
 - Pat Jones
 - Tommy Jackson
 - Felicity Smith
 - Nola Smith
 - Esther Pitt

Questions and answers

Can people be members of my claim group through adoption?

Yes, although you should specify whether you mean adoption under Australian laws or under the traditional laws and customs of your claim group.

If adoption occurs through the traditional laws and customs of your claim group you should explain:

- how a person gets adopted into your claim group
- what traditional laws and customs there are about adoption
- the factors used to decide whether a person has been adopted into your claim group.

You can explain how adoption works by including things like:

- statements in the application itself, including as attachments to Schedule A
- affidavits from members of the claim group or an anthropologist that explain how adoption works under your claim group's traditional laws and traditional customs. If you use affidavits or an anthropological report, make sure you attach them to your application.

If membership of your native title claim group includes membership by adoption, make sure you say this in Schedule A.

Example

If adoption is relevant, you might include something like this in the claim group description at Schedule A so long as it properly describes what happens in your group:

The individuals who comprise the X People's native title claim group include people who have been adopted in accordance with the traditional laws and customs of the X People.

A child is adopted in accordance with those traditional laws and customs if that child was 'grown up' by a person who is or was a descendent of one of the apical ancestors named above.

What if there are other criteria for membership?

If membership of your claim group depends on something other than descent from a named ancestor or adoption under traditional law and custom, then you will need to describe what this other way, or criterion, is and how individuals become a part of the claim group that way. But you will need to ensure that it is explained clearly enough to still allow someone else, like the Registrar, to work out from what is said in an application whether or not a particular person is a member of your native title claim group.

Can we leave out people from the claim group and still pass the registration test?

You might be able to exclude people from your claim group description and still pass the registration test. But this will depend on why they have been left out. You cannot leave people out of your claim group just to pass the registration test. Also, people should not be excluded just because of personal differences.

Your native title claim group must include *all* of the people who, under your traditional laws and customs, have rights and responsibilities over the area your claim covers. In other words, everyone who, according to your traditional laws and customs, holds the common or group rights and interests comprising the native title claimed in the application must be included in the native title claim group.

If there are valid reasons why particular people are not included in your claim group, this should be explained in Form 1.

For example, if you describe your claim group as being the biological descendants of named ancestors, subject to traditional laws and customs, a person who is a biological descendant of one of those ancestors may not be part of your claim group because they belong to their mother's/father's country and so do not have rights and interests in your claim area according to the traditional laws and customs of your claim group. In that case, you may be able to expressly exclude that person from your claim group so long as you properly explain why (i.e. under traditional law and custom) they are not included in your native title claim group. You should put any explanation about who has been excluded from your native title claim group, and why, in the box at Schedule A.

Checklist for Schedule A

Schedule A requires that you either:

- name all of the members of your native title claim group or
- provide a description that is clear enough to let someone outside of your claim group work out whether or not a particular person is a member of that group.

If you have listed the names of all of the members of your native title claim group, make sure you have listed everyone who has rights and responsibilities under your traditional laws and customs for the area you are claiming.

If you are giving a description of the claim group instead, make sure that the description is clear enough so that someone outside of your claim group (like the Registrar) would be able to work out whether or not a particular person is a member of your native title claim group. Explain in Schedule A, or (if you need to) in an attachment you can refer to as 'Attachment A', what factors would help an outside person work out whether someone belongs to your claim group or not. For example:

- (if relevant) explain how individuals are adopted into your claim group
- (if relevant) explain why certain people are not included in your claim group
- refer in the box at Schedule A to any extra information you give (e.g. 'see Attachment A').

4. Identifying the boundaries of the area claimed (Schedule B of Form 1)

Describing the area you are claiming

Schedule B of Form 1 asks you for two things. It asks you to:

- describe the outer boundaries of the area covered by the application
- identify the areas within those boundaries that are not covered by the application.

This is required for three reasons:

1. Governments and other people and organisations with interests in the land or waters need to know what area has been claimed.
2. Native title claims can only be made over certain types of land or waters.
3. The Federal Court will need to know what area is being claimed when making a determination of native title.

Getting help

The Registrar can help you with the map and written description of the area your application covers. If you need help, contact the nearest Tribunal registry in your state or territory and ask for assistance.

There is also information about providing a description of the application area on the Tribunal's website www.nntt.gov.au.

Description of the boundaries of the area covered by the application

You have to put the description of the boundaries of the area you claim in the application itself at Schedule B in the box provided.

If you need extra space to include all of the description of the claim area, you can put your description in an attachment and refer to it as 'Attachment B'.

The boundaries of the area your claim covers can be described by:

- listing each area, or parcel of land, you are claiming, described by reference to Lot or Plan numbers (sometimes called a lot-specific claim) or
- giving the latitude and longitude coordinates of the boundaries of your application area (sometimes called a country claim) or
- using geographical features, such as rivers or mountain ranges, shorelines or the sea to describe the boundaries but, if you do use this type of description, it will need to be very precise.

Remember

Suppose you want the northern boundary of the area you claim to follow the course of a river. You need to state whether the area you claim includes both banks of the river, whether the boundary of your application area follows (for instance) the north bank of the river, or whether it should follow the mid-line (middle) of the river.

If you claim sea in your application area, you need to be clear about how far out to sea your claim goes. If you are claiming to the shoreline, you should state clearly whether you intend to claim to the mean low-water mark or the mean high-water mark.

Areas you are not claiming

Schedule B of your application must contain a description of any areas that you are not including in your claim. There are some areas that the Native Title Act says must not be claimed and, as a consequence, those areas must be excluded from the area your application covers.

Areas where native title cannot be claimed

The Native Title Act does not allow native title to be claimed over areas where what is called a 'previous exclusive possession act' (PEPA) has been done. PEPAs are certain things done before 24 December 1996, including the creation of:

- residential freehold
- farms held in freehold
- pastoral or agricultural leases that grant exclusive possession
- residential, commercial or community purpose leases
- public works, e.g. roads, schools or hospitals.

Any other area where native title has been completely extinguished should also be excluded from your application.

You must also make sure that none of the area you are claiming is covered by an approved determination of native title.

How to exclude areas from the claim area

There are two ways you can exclude areas from your claim area:

1. You can exclude specific parcels of land or waters, or
2. You may be able to make a statement that excludes all of those kinds of areas from the area your application covers (sometimes called a general exclusion clause).

If you know the lot numbers of the areas you are not claiming, or have any details of that kind, you should state in Schedule B that you are excluding those areas from the application area by referring to their lot or plan number.

For example, if you know that particular lots of land are 'freehold' land, you should write the lot/plan numbers of these lots in Schedule B of your application and say they are excluded from the area you claim. If the state or territory government has given you a tenure report and that report says that certain areas cannot be claimed, then you ought to identify those areas in your application and exclude them unless you disagree with that assessment and think that you can claim those areas.

If you want to use a general exclusion clause (an example of a general exclusion clause is provided on page 19), you can do this if you do not have any specific information about areas that cannot be claimed or you disagree with the validity of acts which the government argues extinguish native title. What a general exclusion clause says is that, if any areas within the boundaries of the area you are claiming turn out to be the kind of areas you are not allowed to claim, then these will be excluded from the area covered by your application.

Example: Schedule B of Form 1

Identifying the boundaries of the area claimed

Here are some examples of the kinds of information you might put in Schedule B. Remember, this is a guide only. It is not legal advice.

Example of the boundaries of the area covered by a lot-specific or 'polygon' claim

1. The boundaries of the area of land and waters covered by the application are as shown on the map at Attachment C and are comprised of the boundaries of:
 - Lot 1 on Plan 123
 - Lot 2 on Plan 234
 - Lot 3 on Plan 345
 - Lot 4 on Plan 456

or

Example of the boundaries of the area covered by a country claim

1. The boundaries of the area of land and waters covered by the application are shown on the map attached and marked as Attachment C and are as described in the document entitled 'Description of Boundaries' which is annexed as Attachment B.

Example of general exclusion clauses that can be used for all claims

Description of areas within those boundaries that are not covered by the application

2. Subject to (3) and (4) below, the areas of land and waters within the boundaries referred to in (1) above that are not covered by the application are:
 - a Any area that is, or was, subject to any of the following acts as defined in the *Native Title Act 1993* (Cwlth) or the [insert relevant state/territory legislation]*:
 - i Category A past act
 - ii Category A intermediate period act
 - iii Category B past act that is wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests
 - iv Category B intermediate period act that is wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests
 - v previous exclusive possession act**
 - b Any other area in relation to which native title rights and interest have otherwise been wholly extinguished
 - c Any area for which there is an approved determination of native title, as defined in the *Native Title Act*.
3. Notwithstanding anything contained elsewhere in this application, the area covered by the application includes any area in relation to which the non-extinguishment principle (as defined in section 238 of the *Native Title Act*) applies, including any area to which section 47, 47A or 47B of the *Native Title Act* applies. Particulars of these areas will be provided prior to the hearing but any area as may be listed in Schedule L is included in the area covered by the application.
4. Where there is any discrepancy between the map provided at Attachment C and the written description contained in this schedule and in Attachment B, the latter prevail.

* For each state or territory, there will be a different state/territory Act you should refer to:

Western Australia	<i>Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA)</i>
Victoria	<i>Land Titles Validation Act 1994 (Vic)</i>
New South Wales	<i>Native Title (New South Wales) Act 1994 (NSW)</i>
South Australia	<i>Native Title (South Australia) Act 1994 (SA)</i>
Northern Territory	<i>Validation (Native Title) Act 1994 (NT)</i>
Queensland	<i>Native Title (Queensland) Act 1993 (Qld)</i>
Tasmania	<i>Native Title (Tasmania) Act 1994 (Tas)</i>

** In Western Australia, you would need to exclude all areas in relation to which a 'relevant act', as defined in section 12I of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995 (WA)*, has been done or a 'previous exclusive possession act' under section 23B(7) of the *Native Title Act* has been done and the act is attributable to the State of Western Australia.
In South Australia, you would need to exclude all areas in relation to which a previous exclusive possession act has been done, other than an act that is an 'excepted act' as defined in the *Native Title (South Australia) Act 1994 (SA)*.

Checklist for Schedule B

Schedule B requires you to do two things. It asks you to:

- identify the boundaries of the area covered by your application and
- identify any areas within those boundaries that are not covered by the application.

Remember

Give a written description of the boundaries of the area you are claiming and of the areas within those boundaries that you are not claiming. Your description should include a list of the areas not included in the application.

Make sure the written description you give is consistent with the map you include with the application (in other words, do these match up with each other?):

- have you requested assistance from the nearest Tribunal registry to you with the preparation of a description you can use with your application?
- if you are describing your application according to geographic features, is your description precise?

Refer in the boxes at Schedule B and Schedule C to any extra information you give (e.g. 'see Attachment C').

5. Map (Schedule C of Form 1)

Your application must have a map of the boundaries of the area you claim. Your map should be labelled 'Attachment C' and be attached to the application. In Schedule C, you can say 'Refer to Attachment C'.

Remember

The map of the boundaries of the area you are claiming is an important part of your native title application; therefore it must be more than an outline on a map in pen. The map will usually need to contain the following features:

- a North point
- a scale-bar
- what 'datum' has been used to compile the map
- the result of any tenure searches conducted (by means of a legend or otherwise).

The Tribunal can help you with the map and written description of the application area. If you need help, contact the nearest Tribunal registry in your state or territory for assistance.

Remember

File a map with your application. You can attach this to the application form and call it 'Attachment C'.

Check that the map is consistent with the written description of the boundaries of the claim area.

6. Searches (Schedule D of Form 1)

Schedule D of Form 1 asks you to give details and results of any searches carried out by or on behalf of the claim group that have been done to find out whether there are non-native title rights and interests in the area you are claiming. A non-native title right or interest is any other interest held by someone else in your claim area, e.g. a pastoral lease or mining tenement.

There is no requirement for you to do such searches. However, if you have done any, these should be included.

Checklist for Schedule D

Make sure that, if any searches were carried out by or on behalf of your claim group, the details and results of these searches are included in the application.

Searches may include tenure documents, a tenure history report, an index or a spreadsheet showing what non-native title rights and interests exist over the area covered by your application, or a map with a legend that shows in detail the type of tenure identified.

Refer in the box at Schedule D to any extra information you give (e.g. 'see Attachment D').

7. Description of native title rights and interests you are claiming (Schedule E of Form 1)

At Schedule E of Form 1, you have to describe the native title rights and interests you are claiming in the area covered by your application. At Schedule F, you must provide the facts that support your claim to have the rights and interests that you list at Schedule E.

What are native title rights and interests?

Native title is like a bundle of rights and interests in relation to land or waters. The content of the bundle of rights will depend on the native title holders' traditional laws and customs and on the capacity of Australian law to recognise the rights and interests they hold under those laws and customs.

The bundle of rights may include the right to possess and occupy an area to the exclusion of all others (often called a right of exclusive possession or exclusive native title). This includes the right to control access to, and use of, that area. This right can only be recognised over certain, limited areas, such as unallocated or vacant Crown land and some areas already held by, or for, Indigenous Australians.

Over other areas, the bundle of rights is most likely to be a set of non-exclusive rights (which means there is no native title right to control access to, and use of, the area). These may include the right to:

- live on the area
- access the area for traditional purposes, like camping or to do ceremonies
- visit and protect important places and sites
- hunt, fish and gather food or traditional resources like water, wood and ochre
- teach law and custom on country.

Describing the rights and interests you are claiming

There are three things to remember here:

1. You must describe your group's native title rights and interests in the application.
 - You cannot just make a claim for 'all' the native title rights that might exist or that have not been extinguished.
 - One good way to describe your native title rights and interests is to list them.
2. For registration, the native title rights and interests you claim must be 'readily identifiable'.
 - The rights you claim must be set out clearly, and must be capable of being easily understood. If your description is not clear, or if it is confusing, your application may fail this condition of the registration test.
 - One way to make your description clear is to list the rights you claim separately (particularly where you cannot claim exclusive possession).
 - It does not matter how many rights and interests you claim.
3. The Registrar (or the Registrar's delegate) must decide whether at face value at least one of the native title rights and interests you claim can be established.
 - This means that there must be some information in the application or accompanying materials which provides some facts to support your claim to hold the native title rights and interests you have listed in Schedule E. If so, your application will pass this particular condition of the test.

What native title rights and interests cannot be registered?

The courts have said that some rights cannot be claimed (and, therefore, cannot be registered). This is because they do not meet the definition of 'native title rights and interests' in the Native Title Act, even though they are rights your claim group might have according to your traditional laws and customs.

Some examples of rights and interests that the court has said are not native title rights and interests and so cannot be registered include:

- exclusive rights to fish offshore or in tidal waters
- native title rights to exclusive possession of offshore or tidal areas
- rights to ownership of minerals and petroleum, as defined in Western Australia, Queensland, South Australia and the Northern Territory legislation
- the right to control the use of cultural knowledge that goes beyond the right to control access to land or waters.

What is the best way to write this part of the application?

The kinds of native title rights and interests you can claim depend on whether you can establish that you can claim exclusive possession in an area or not. That means that it may be better if you separate the kinds of native title rights and interests you are claiming into two parts:

- native title rights and interests over areas where a claim to exclusive possession can be claimed
- native title rights and interests over areas where a claim to exclusive possession cannot be claimed.

Exclusive possession

If you give enough evidence to support your claim, a claim to 'a right to possession, occupation, use, and enjoyment of the application area as against the whole world' or 'to the exclusion of all others' in these areas might be registered (assuming all the other conditions of the test are met). This is sometimes called 'exclusive native title' or 'exclusive possession'.

Where may I claim exclusive possession?

You can claim exclusive possession over areas where:

- native title has not been extinguished or
- the non-extinguishment principle in s. 238 of the Act applies, including areas where section 47, 47A or 47B applies.

This probably means you are able to claim 'exclusive' native title only over:

- some vacant or unallocated Crown land
- certain areas set aside for Indigenous Australians, like reserves for the use and benefit of Indigenous Australians
- certain pastoral leases held by, or on behalf of, any members of the native title claim group.

What native title rights and interests can I claim over areas where exclusive possession cannot be asserted?

If you cannot claim exclusive native title, then the High Court of Australia has said that it is unlikely that you can claim a non-exclusive 'right to possession, occupation, use and enjoyment of lands or waters' or a non-exclusive right to 'occupy, use and enjoy' the lands and waters. This probably means that you also cannot claim the right to 'possess' or 'own' these areas either.

One way to describe your native title rights over areas where exclusive possession cannot be asserted is to list them by referring to things you have the right to do in the area according to your traditional laws and customs.

Over areas where you cannot claim exclusive native title, the 'bundle' of non-exclusive rights you claim might include the right to:

- access the area
- camp
- erect shelters
- live on the area
- hunt
- fish
- conduct ceremonies
- protect places of importance.

Material to support the rights you are claiming in Schedule E

One of the conditions of the registration test requires the Registrar to be satisfied that at least one of the rights and interests you are claiming in Schedule E can, at face value, be established. To help the Registrar make this decision it is a good idea to include enough material to meet this condition.

For example, if you are claiming a native title right to hunt, you could get a member of your claim group to swear an affidavit which talks about how they hunt or used to hunt in the area, how their ancestors (or a relative) hunted in the area and how members of the claim group have a native title right to hunt there according to the traditional laws and customs of your people.

Additionally, if you have an anthropological report that talks about this right, or any other rights you are claiming, include that report and tell the delegate what page or paragraph contains that information.

If you have conducted research into the past and you know that there is a history of the area you are claiming, such as the history of a pastoral station, in which your ancestors are named and their customs described, this is evidence that could support your claimed rights and interests.

You can give these affidavits and reports to the Registrar any time before the application is tested, but it may help you to organise your application better if you prepare these early.

Remember

The Registrar cannot register the rights and interests you claim unless you provide information to support that you have that right. Schedule E should contain a list of the rights and interests claimed and Schedule F should contain some facts that support your claim that those rights and interests existed before British sovereignty was asserted and still exist now. See the example on the next page.

Example: Schedule E of Form 1

Description of native title rights and interests

Here is an example of the kind of information you might put in Schedule E. Remember, this is a guide only; it is not legal advice. It is not an exhaustive list of all of the rights and interests which could be claimed. The rights and interests claimed by a group should be the ones that the members of that group have under their traditional laws and customs.

1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s. 238 applies), the X People claim the right to possess, occupy, use and enjoy the lands and waters covered by the application (the application area) as against the whole world.
2. Over areas where a claim to exclusive possession cannot be recognised, the X People claim the following rights and interests:
 - a the right to access the application area
 - b the right to camp on the application area
 - c the right to erect shelters on the application area
 - d the right to live on the application area
 - e the right to move about the application area
 - f the right to hold meetings on the application area
 - g the right to hunt on the application area
 - h the right to fish on the application area
 - i the right to conduct ceremonies on the application area
 - j the right to participate in cultural activities on the application area
 - k the right to maintain and protect places of importance under traditional laws, customs and practices in the application area
 - l the right to control access to, and use of, the application area by other Aboriginal People or Torres Strait Islanders who seek access to or use of the lands and waters in accordance with traditional laws and customs.
3. The native title rights are subject to:
 - a the valid laws of the State of New South Wales and the Commonwealth of Australia
 - b the rights (past or present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State
 - c the traditional laws and customs of the native title claim group.

Changes to the rights and interests claimed

If a native title claim group already has a native title claim that is registered, it is possible for them to amend the claim to remove rights and interests previously claimed without having to go through the registration test again.

This applies only where rights that have previously been claimed are removed from your application, e.g. deleted from Schedule E. It does not apply where changes are made to the wording of the rights that are claimed in Schedule E or elsewhere in your application. If changes are made to the wording of rights you are claiming, the application will need to go through the registration test again.

For more information about amendments that can be made to a registered claim that do not trigger the registration test to be applied again, see page 8.

Remember

Include a description of your claimed native title rights and interests in the application at Schedule E. If these details are not in your application, then you will have to amend your application or it will not pass the registration test.

Make sure that for the rights you claim in Schedule E, you give information, either in the application or accompanying documents (e.g. in an affidavit from a member of the native title claim group or an anthropological report) that supports your claim to hold those rights.

At Schedule E put in a cross-reference to any relevant attachments/affidavits which support your claimed rights and interests.

The rights and interests that you claim must relate to your country. They must have been held by your ancestors before European settlement and been passed on in a traditional way to your claim group.

8. General description of native title rights and interests claimed (Schedule F of Form 1)

At Schedule F, you need to give a general description of the facts that you say support your claim to have the native title rights and interests you claim in Schedule E. This is the factual basis which shows the Registrar that you have facts that underpin your claim. See the examples on pages 30–31.

You will need to make the following three assertions and provide a factual basis to support each of them:

- that your native title claim group has an association with the application area and that the predecessors of your claim group had an association with the application area
- that there are traditional laws and customs acknowledged by and observed by your claim group that give rise to the native title rights and interests you claim
- that your claim group has continued to hold native title in accordance with those traditional laws and customs.

Your claim group's association with the area

You will need to provide some facts to support the assertion that your native title claim group has, and the predecessors of your claim group had, an association with your application area.

If you want your claim to be registered, the facts you give must provide support for your claim group, as a whole, having an association with the area. It is not enough to just provide facts that support one or two members of your claim group having an association with the area.

The facts you give must also support your claim that the predecessors of your claim group had an association with the area at the time of sovereignty or, if you are unable to show this, at least at the time Europeans arrived in the area (first contact). They must be sufficient to support your claim group's assertion that its predecessors had an association that continued through each generation of native title holders, as a group, from at least the time of first contact right up until the present.

It is not a requirement that all members of your native title claim group had an association with the area at all times, but enough evidence must be provided to support your claim that your native title claim group, as a whole, has, and the predecessors of that group had, an association with the area from sovereignty (or first contact) until the present.

The traditional laws and customs that give rise to your claim to native title

If you want your claim to be registered, the facts you give must support your claim that, in relation to the area covered by the application:

- there are traditional laws and customs acknowledged by and observed by your claim group that give rise to the native title rights and interests you claim
- your claim group has continued to hold native title in accordance with those traditional laws and customs.

In other words, the facts you provide must be sufficient to support the assertions that:

- there are 'traditional' laws and customs in existence
- they are acknowledged and observed by your native title claim group as a whole and
- they give rise to your group's claim to hold native title rights and interests.

The High Court has said that laws and customs are only 'traditional' when they can be shown to be based in the laws and customs of the Indigenous society that had native title when the British first asserted sovereignty over the claim area. The court also said that this society must have continuously existed from the date of sovereignty until the present day, with the body of laws and customs of that society having been acknowledged and observed and traditionally passed on from generation to generation through to the current claim group without any substantial interruption.

The body of laws and customs must also be 'normative', because the High Court has said that 'society', in the context of the Native Title Act, means a body of people bound by a body of laws and customs that are 'norms' (or standards of conduct).

A native title claim is a means of seeking recognition from the Australian legal system that these 'traditional' laws and customs, as that word is understood by the Australian courts, continue to exist.

You will need to provide some facts in support of your claim that a normative society continues to exist today and has done so since at least first contact.

What if you have described your claim group using apical ancestors?

On page 14, it was explained that one of the ways you can describe your native title claim group is by providing a list of 'apical ancestors' from whom the members of your claim group are descended.

If you use a claim group description like this, then you will need to explain the link between these apical ancestors and the society that existed at the time of sovereignty (or, at least, at first contact). It is not necessary that the apical ancestors you have listed comprised a society all on their own, but it is necessary to explain the link between them and the claim area by linking those ancestors to the native title-holding society that existed before British sovereignty (or, at least, at first contact).

If your claim group is limited to the descendants of only a few apical ancestors, then you may also need to explain, by reference to the traditional laws and customs that your claim group currently acknowledges and observes, why the claim group is limited to the descendants of the apical ancestors you have identified.

Your claim group continues to hold native title in accordance with your traditional laws and customs

You will need to provide facts that support your claim that the native title claim group continues to hold native title rights and interests in accordance with the traditional laws and customs of your native title claim group. What this means is that if there is information which shows that, at any time and for any reason, your claim group stopped acknowledging traditional laws and observing traditional customs, then the laws and customs you have now are not considered 'traditional' in a native title context.

As was mentioned above, there must not have been any 'substantial interruption' in the way these laws and customs have been acknowledged and observed.

This does not mean that the laws and customs of your claim group can not have changed or evolved since the time of the assertion of British sovereignty (e.g. members of your claim group may now hunt with rifles or use a dinghy with an outboard motor).

What level of information do you need to provide?

Schedule F asks you to provide a factual basis (or some information) about each of the elements outlined on pages 27–28. If you do not include information about each one of these elements or if you do not provide sufficient material to satisfy the Registrar or his delegate that each one of these elements is addressed, then your application cannot be registered.

You cannot just copy out the three statements that already appear in Schedule F of Form 1. You have to provide a factual basis that is relevant to your native title claim group.

Remember that if you need more space to talk about these things, you can attach a separate piece of paper to the application which can be referred to as Schedule F (e.g. by writing ‘See Attachment F’ in the box at Schedule F).

You may give the Registrar other documents which talk about your connection to country and how the ancestors of your claim group had a traditional connection with that country. This information can take many forms:

- affidavit(s) from members of your native title claim group
- an anthropological report
- historical documents or reports.

This information can either be attached to your application or you can provide it separately to the Registrar.

It is not sufficient to give formulaic statements about Aboriginal or Torres Strait Islander traditions or culture generally. The information you give must relate directly to your claim group. General statements which could apply to any part of the country are not helpful.

If you are providing affidavits from members of your claim group as facts in support of your claims, it is not sufficient for these to be limited to information about their personal connections to the area and those of their immediate predecessors. All of the elements set out above need to be supported by some facts.

If you are providing an expert’s report, such as an anthropological or historical report, statements made by the expert need to contain more than just opinions. The report will need to contain the facts which the expert uses to support his or her opinion.

The Federal Court has said that it is your responsibility to give the delegate information about your traditional connection to country, and the laws and customs which give rise to your native title rights and interests. The delegate is not required to search for this information.

Example: Schedule F of Form 1

General description of native title rights and interests claimed

Do not copy the example below. Instead, use specific information about your claim group. Formulaic statements that could apply to any claim group in Australia are not sufficient to meet the requirements of this condition of the registration test.

In order to meet this requirement of the registration test, you may need to provide additional facts which support the claims you make in Schedule F.

These additional facts can either be attached to the application (as in the example below) or they can be provided separately to the Registrar. You will need to provide some facts which support each of the elements which are set out above.

Remember, this is a guide only; this is not legal advice.

The native title rights and interests claimed are set out in Schedule E and are possessed under the traditional laws and customs of the claim group, based on the following facts.

Association of the X People with the application area

- a The X People have, and predecessors of the X People had, an association with the claim area. The association of the X People with the lands and waters of the application area has been recorded from the early nineteenth century. These records consist of correspondence, early reports and accounts of explorers such as A, B and C (see copy of account of B at Attachment F6).
- b The X People continue to have a close association with the lands and waters of the application area and to use the application area for traditional activities, such as hunting, fishing and conducting ceremonies. Details are contained in the affidavits of Mr Des Lee (Attachment F2), Ms Jane Smith (Attachment F4), Mr Andrew Jones (Attachment F5), being senior members of the claim group.
- c Details of the pre-sovereignty society of the X People and their acknowledgement and observation of laws and customs are contained in Attachment F1 (being an anthropological report prepared by Dr Z) and Attachment F3 (being an affidavit of Dr Z).
- d Details of the traditional association of the X People with the application area are contained in Attachment F1 and in the affidavits of Mr Des Lee (Attachment F2), Ms Jane Smith (Attachment F4), Mr Andrew Jones (Attachment F5), being senior members of the claim group.

Traditional laws and customs of the X People

- e The traditional laws and customs of the X People that give rise to native title rights and interests claimed at Schedule E include:
 - recognition of common ancestors
 - a traditional system of communal title to lands and waters through connection with certain ancestral beings and stories
 - transmission of native title rights and interests according to traditional laws and customs
 - recognition of individual's connection to land and waters through their place of birth and through their mother's, father's and grandparent's place of birth.
- f Further information with regards to these issues can be found in the anthropological report of Dr Z at Attachment F1 and in the affidavit of Mr Des Lee at Attachment F2. In addition, the table at Attachment F3 provides a summary of the factual basis for the claimed native title and sets out prima facie evidence (published history and diary) in support of the native title rights and interests claimed at Schedule E.

Continuity of traditional laws and customs

- g The X People are a distinct Aboriginal society who continue to exercise a body of traditional laws and customs which have been passed down to them from generation to generation by their forebears and arise from the laws and customs acknowledged and observed by the X People prior to sovereignty. These traditional laws and customs include caring for country, controlling access to country and the holding of ceremonies on country. These traditions and customs apply to the claim area because the claim area is part of the traditional country of the X People and those laws and customs have continued to be passed on traditionally to members of the claim group.
- h Further information with regards to these issues can be found in the anthropological report of Dr Z at Attachment F1 and in the affidavit of Mr Des Lee (a senior member of the native title claim group) at Attachment F2 and the affidavit of Dr Z at Attachment F3.

A good way to present the information for the Registrar is to make a table which sets out:

- each of the rights you claim
- how traditional laws and customs give your group that right
- what evidence you have provided to show you have the right.

This can be attached to your application as part of Attachment F:

Native title right	Traditional laws and customs which give rise to that right	Prima facie evidence for right
(m) the right to maintain and protect places of importance under traditional laws, customs and practices in the application area.	Under traditional laws and customs, members of the claim group have rights and responsibilities over land.	<ul style="list-style-type: none"> – Affidavit of Des Lee, dated 24 Feb 2003, para. 12 – Anthropological report of Dr Z, Attachment F1, pp. 7–8
	These rights and responsibilities are acquired principally by descent from ancestors and reflect a communal system of land ownership.	<ul style="list-style-type: none"> – Affidavit of Des Lee, paras 14–16 – Affidavit of Dr Z, dated 25 Feb 2003, paras. 18–20
	The laws that govern the protection of sites place the responsibility for the care and protection of those places on those who have knowledge of the sites handed down to them by elders.	<ul style="list-style-type: none"> – History of the Big Rock Pool written by Dr Joe Smith, published in 1915, p. 39 mentions a conversation he had with [name of ancestor] about how he protected areas x and y.
	There are also rules which govern who are permitted to visit these places.	<ul style="list-style-type: none"> – Faraday 's diary of 1850 records on p. 21 the details of an incident between two rival groups of Aborigines [the A group and the X group] regarding access to Big Rock Pool for fishing.

Remember

Provide information about how the claim group, as a whole, has an association with the claim area:

- talk about how the ancestors of the members of the claim group had a traditional connection to the area
- provide information about the society that existed prior to sovereignty (or at least at first contact) and how it was defined by acknowledgement and observation of a body of laws and customs and how that body of law and custom has been maintained from generation to generation.

Talk about the laws and customs that give your claim group the right to do the things claimed in Schedule E (e.g. the right to hunt):

- include information about how your claim group still observes traditional laws and customs and how they do this
- explain how the laws and customs your claim group still observes arise from those which were observed by the society which existed before sovereignty.

Give as much factual information about these things as possible.

Make sure that for every native title right and interest you claim, you have given information in the application or accompanying the application (for example, in an affidavit) which supports that particular claim.

Refer in the box at Schedule F to any extra information you give such as affidavits or anthropological reports (e.g. 'see Attachment F').

9. Activities (Schedule G of Form 1)

This schedule asks you to give details of any activities you and other members of your claim group do on the application area according to traditional laws and customs. Repeat any of the activities you have already included at Schedule E and Schedule F.

Remember

Include a list of the activities that you and other members of the native title claim group do on the area in the application.

Refer in the box at Schedule G to any extra information you give (e.g. 'see Attachment G').

10. Details of any other applications (Schedule H of Form 1)

This schedule asks you to provide details of any other native title applications you know about that have been made to the High Court, the Federal Court or to a recognised state or territory body in relation to any part of the area you claim. The Registrar can assist you to identify these. Contact details for Tribunal registries are printed inside the back cover of this booklet.

Remember

Include details of other applications which relate to the area in the application. If these details are not in your application, then you will have to amend your application or your application will not pass the registration test.

Refer in the box at Schedule H to any extra information you give (e.g. 'see Attachment H').



11. Details of section 24MD and 29 notices (Schedule HA and Schedule I of Form 1)

The Native Title Act (or any corresponding state Act, as in South Australia) requires you to give details of any notices issued under section 24MD and section 29 of the Native Title Act that relate to any part of the area you claim and which you knew about when the application was made or amended.

A section 29 notice is a particular kind of notice made by a government to say that it intends to let certain things happen on land, such as when it intends to grant a mining lease. The notice is made according to section 29 of the Native Title Act.

The reason why this information is required is because, where a claim is made in response to a section 29 notice, or where a new section 29 notice is issued over an area where there is an existing claim which is about to go through the registration test, the Registrar has an obligation to use best endeavours to apply the registration conditions by the end of four months after the notification is given.

A section 24MD notice is a particular kind of notice relating to the compulsory acquisition of native title rights and interests by the Commonwealth, a state or territory or a local government authority.

Similarly to a section 29 notice, the reason why this information is required is because, where a claim is made in response to a section 24MD notice, or a new section 24MD notice is issued over an existing claim which is about to go through the registration test, the Registrar must use best endeavours to apply the registration test to the claim by the end of two months after the notification day specified in the notice.

Remember

Include details of any section 29 or section 24MD notices you know about in the application. If these details are not in your application, then you will have to amend your application or your application will not pass the registration test.

Refer in the box at Schedule HA and Schedule I to any extra information you give if it does not fit in the space provided (e.g. 'see Attachment HA').

Note: If your claim was made before 1 September 2007, and you are amending your application, you are not required to include details at Schedule HA.

12. Draft order (Schedule J of Form 1)

This schedule asks you to write down (or draft) how you would like the court to describe your native title in a determination if your application is unopposed.

Some applicants choose to write 'This application is not unopposed' in Schedule J because, in practice, the relevant state or territory government will automatically become a party to the application when it is made.

This schedule is not tested as part of the registration test.

Remember

Include a draft of the words you want the court to use in its order if your application for native title determination is successful.

Make sure the order is consistent with the claims you make in your application at Schedule E (whether those claimed rights and interests are registered or not) and are the kinds of orders a court can make under the Native Title Act.

13. Native title representative bodies (Schedule K of Form 1)

This schedule asks you to give the name of each representative Aboriginal/Torres Strait Islander body (native title representative body) for the area covered by your application. The Registrar can give you this information if you do not know it.

Following changes to the Native Title Act in 2007, it is now possible to amend this part of an application without triggering the reapplication of the registration test. For more information on amendments which do not trigger the registration test, see page eight.



14. Tenure and land issues (Schedule L of Form 1)

This schedule asks you to give details of any areas for which you claim the benefit of section 47, 47A or 47B of the Native Title Act. If any of these sections of the Act apply to a particular area, then most extinguishment of native title that has previously taken place must be disregarded (ignored).

The summary below assists you to understand when you might be able to claim the benefit of these sections.

Section 47 applies if, when you made your application a pastoral lease was held over the area of your application by:

- any member of your native title claim group
- by a trustee for any member of your claim group or
- a company whose only shareholders are members of your claim group.

Section 47A applies if, when you made your application:

- an area it covered was subject to a grant or vesting under land rights legislation or was an area set aside expressly for the benefit of Aboriginal peoples or Torres Strait Islanders
- that area was occupied by one or more members of the claim group.

Section 47B applies to any area that, when you made your application, was:

- not covered by any of the kinds of interests mentioned in sections 47B(1)(b)(ii) and (iii) i.e. essentially, areas of vacant (or unallocated) Crown land and
- occupied by one or more members of the claim group.

Remember

If relevant provide details of any areas over which you are claiming the benefit of section 47, 47A or 47B.

Refer in the box at Schedule L to any extra information you give (e.g. 'see Attachment L').

15. Traditional physical connection (Schedule M of Form 1)

This schedule asks you to write down details of the 'traditional physical connection' one or more members of your claim group has with any of the land or waters in the application area. It is not sufficient to show that you have current physical connection to the area on its own—the connection you demonstrate must be traditional. This means your current practices on the land must arise from the traditional practices which existed before sovereignty (or at least, at first contact) and which were handed down through traditional law and custom. For examples of traditional physical connection, see page 24 and section 8.

Remember

Give details of the 'traditional physical connection' one or more members of your claim group has with any of the land or waters in the application area. A good way to do this is to include an affidavit from one of the members of your claim group with your application which talks about their connection to country.

Refer in the box at Schedule M to any extra information you give (e.g. 'see Attachment M').

16. Prevention of access (Schedule N of Form 1)

This schedule asks you to say if you or any member of your claim group has ever been stopped from going onto any part of the application area. If you want to mention this, you can write about this in the box provided at Schedule N. However, you do not have to write anything here.

17. Membership of any other native title claim group (Schedule O of Form 1)

This schedule asks you to say whether any member of your native title claim group is also a member of any other native title claim group that has made an application over all or part of your application area.

This is because the Registrar has to be satisfied that no one who is included in your claim group is also a member of another claim group that had an overlapping application that passed the registration test and was registered when you made your application.

If there is an overlapping claim, your application cannot be registered if the Registrar is satisfied that:

- a person included in the claim group for your application is a member of a claim group for an application that overlaps, in whole or in part, the area covered by your application and
- that overlapping application was on the Register of Native Title Claims (i.e. it was registered) when your application was made and
- the previous application was on the register, or was not removed from the register, because it had passed the registration test conditions.

Questions and answers

Can my claim be registered if it overlaps with another claim, but no one in my claim is a member of the other claim?

Yes, provided that it meets all of the other conditions of the registration test.

How will the Registrar know if there are any people who are in my claim who are also included on a previous registered claim?

The Registrar cannot just take the information contained in Schedule O of your application at face value. The delegate will need to look at the descriptions for each claim group noted in Schedule B and consider whether he or she is satisfied that there are no members common to each claim group. He or she will also need to take statements that each group makes at Schedule O into account.

18. Claims for exclusive possession of offshore places (Schedule P of Form 1)

This schedule asks you to provide details of any claim by your native title claim group to exclusive possession of an offshore place.

One of the conditions of the registration test says that a claimant application cannot be registered if it contains a claim to native title rights and interests in relation to waters in offshore places that exclude all other rights and interests. In other words, if you claim exclusive possession of offshore places, your application will fail the registration test. For this reason, it is good if you say clearly at Schedule P that you are not claiming this kind of interest if you want to get your claim registered.

The term 'offshore place' is defined in the Native Title Act. An 'offshore place' is any land or water that is not within the limits of a state or territory (e.g. waters which are beyond the territorial sea).

If your claim does not include any offshore waters (i.e. it is an inland claim), you may wish to write 'not applicable' in this schedule.

Example

Here is an example of the kind of information you might put in this schedule. Remember, this is a guide only; this is not legal advice.

The X People do not claim exclusive possession of all or part of any waters in an offshore place.

Remember

Clearly state that the native title claim group makes no claim to exclusive possession of an 'offshore place' at Schedule P.

Make sure that your application and any other attached documents do not show that you are claiming exclusive possession of offshore places.

19. Claims to any resources owned by the Crown (Schedule Q of Form 1)

This schedule asks you to give details of any claim by your native title claim group to ownership of minerals, petroleum or gas wholly owned by the Crown.

One of the conditions of the registration test says that a native title claim group is not able to claim ownership of minerals, petroleum or gas wholly owned by the Crown (the Commonwealth, state or territory governments) if they want to pass the registration test. If you claim these kinds of rights and interests, your application will fail the test. For this reason, it is good if you clearly say at Schedule Q that you are not claiming this kind of interest if you want your claim to be registered.

Example

Here is an example of the kind of information you might put in this schedule. Remember, this is a guide only; this is not legal advice.

The X People do not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

Remember

Clearly state that your group does not claim minerals, petroleum or gas wholly owned by the Crown at Schedule Q if you want your claim to be registered.

Make sure that your application and any other documents that belong with your application do not show that you are claiming minerals, petroleum or gas wholly owned by the Crown.



20. Certification and authorisation (Schedule R of Form 1)

This schedule asks you to provide information about whether:

- your application is certified by a native title representative body for the area covered by your application or
- if your application is not certified, how the people listed as ‘the applicant’ in Form 1 are authorised by the members of the native title claim group to make the application and deal with matters arising in relation to it.

Proper authorisation is one of the most important sections of the application and is central to whether or not a claim will pass the registration test. It is aimed at testing whether the applicant has the authority to make the application on behalf of the claim group.

Certification of the application by the representative body

The representative body for the area covered by the application may certify your application. Native title services are now also able to certify applications, provided they are funded to perform all the functions of a representative body. If there is more than one, each of those organisations needs to certify your application.

Before a representative body or a native title service can certify an application, it must be satisfied that:

- the applicant has been authorised to make the application by all the members of the native title claim group and act on their behalf in relation to the application
- all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the members of the native title claim group.

In the certificate, the representative body must say that it is of the opinion that these requirements are met and give brief reasons why it holds that opinion.

If your application is certified, you should say so at Schedule R. A copy of the certificate should be attached to the application and called ‘Attachment R’.

Authorisation

If the representative body or native title service provider does not certify your application, then you need to include in Schedule R a statement that the person, or the people, who are listed as the applicant in your application:

- is a member, or are members, of the native title claim group and
- is, or are, authorised to make the application by the native title claim group and act on their behalf in relation to the application.

You must also include a statement of the reasons why the Registrar should be satisfied that these statements are correct.

If you want your application to get registered, it is a good idea to include as much information about the authorisation process as you can. If there is not enough room in the box at Schedule R of the form, you can always attach a separate piece of paper with the added information on it. Then write a note in your application which refers to that attachment; for example write ‘see Attachment R’ in the box and then write ‘Attachment R’ on your sheet of paper. This is important because it means the Registrar or his delegate knows where to go to find the information needed for the registration test.

Remember

All the people who are listed as the applicant in Schedule A must be authorised by the native title claim group.

Questions and answers

Where else do I talk about authorisation?

There are two other places where information about authorisation will be required. These include:

- in the affidavit required by section 62 that must be filed along with Form 1 (see page 46) and
- at Part A2 of the application (see page 13).

Who must be in the native title claim group?

All those persons who, under the native title claim group's traditional laws and customs, hold native title rights and interests in the claim area. You cannot exclude people from the native title claim group simply because they do not agree with what you are doing. You also cannot exclude people who should be in your group because they are also in another claim group for an application which overlaps your claim area. Note that this issue may affect whether the claim is registered or not— see Schedule O at page 37 and Schedule A on page 14.

How is the applicant authorised?

The Native Title Act describes two different ways that decisions can be made to authorise the applicant to make the application.

1. Mandatory decision-making process under the traditional laws and customs of the group

This is where the native title claim group has a process of decision-making under its traditional laws and customs that must be followed for authorising things of this kind (i.e. a decision-making process that must be followed for doing things like authorising people to make a native title claim). If your group has such a process, then that process must be used.

2. No mandatory decision-making process

If the native title claim group does not have a traditional decision-making process that must be followed when making decisions of this kind, then the native title claim group will need to agree on, adopt and use a process for making the decision about who to authorise to make the application on the native title claim group's behalf.

All members of the native title claim group have to authorise the applicant 'to make the application, and deal with matters arising in relation to it'. This does not necessarily mean that each and every person in your claim group has to authorise the applicant. Whether or not this is required will depend upon the process that is used for making the decision about authorisation of the applicant.

What information can I include in the application about authorisation?

The application needs to show:

- that each person who makes up 'the applicant' is a member of the native title claim group
- that each person who makes up 'the applicant' is authorised by all the persons in the native title claim group 'to make the application and to deal with matters arising in relation to it'
- which decision-making process was used, i.e. mandatory traditional or agreed and adopted
- why the Registrar should be satisfied that the applicant has been authorised by the claim group to make the application and do things in relation to it.

Remember

If there is a process under traditional law and custom where a group of elders must make the decision for the native title claim group, then the applicant will be authorised if that group of elders make the decision to authorise the applicant.

If you use a process like this, it does not matter that not all of the other members of the group have given their authority but it would need to be clear to the Registrar or the delegate:

- who makes up the group of elders who must give authority to the applicant
- that they have authority under your claim group's traditional laws and customs to bind the rest of the native title claim group when making decisions of this kind and
- that they have, in fact, made the decision to authorise the applicant for the claim.

It also needs to be clear how the decision by the elders is made. Is it by consensus or some other method? Do all the elders need to be involved in the process? What happens if one or more elders disagree—will the decision still be binding on the claim group?

Remember

If there is no traditional decision-making process that must be followed, then the claim group needs to agree on the process of decision-making and use it to authorise the applicant to make the application. This may require making an effort to get all the members of the claim group together to agree on a process and to use that process to decide who to authorise to be the applicant.

Getting everyone together is not always that easy, particularly if the members of the claim group live in different places. In some cases, it will involve calling a meeting by putting advertisements in newspapers where the claim group members will see them that set out the agenda for the meeting and who should attend. It might also mean contacting people by letter or in person.

If your claim group used a decision-making process that it had agreed to and adopted to authorise the applicant, you may like to consider including information about the following matters in Schedule R:

- how did you make sure that everyone who may have native title rights and interests in the area according to the traditional laws and customs of the native title claim group found out about the authorisation meeting? Was it by word of mouth? Letter? Advertisements in local newspapers? You can attach copies of any advertisements or notices of the meeting
- when did the authorisation meeting(s) take place?
- where did the authorisation meeting(s) take place?
- who attended the authorisation meeting(s) and how do you know that the persons were members of the claim group?
- how was the applicant authorised? What decision-making process was used?
- did representatives of all major family or descent groups in the native title claim group attend the authorisation meeting?

You should seek advice either from the representative body or native title service for the area or obtain independent legal advice on how to organise and run an authorisation meeting.

Example: Schedule R of Form 1
Certification and authorisation

Here is an example of the kind of information you might put in this schedule. Remember, this is a guide only; this is not legal advice.

Doris Jones, Paul Smith and Alan Jackson are direct biological descendants of a person named as an apical ancestor of the native title claim group in Schedule A.

Doris Jones, Paul Smith and Alan Jackson are members of the X People native title claim group.

The basis upon which the Native Title Registrar should be satisfied that the requirements of section 190C(4) have been met is detailed below, in the affidavits of Doris Jones, Paul Smith and Alan Jackson attached and labelled R1-R3 respectively, and in the affidavit of Des Lee attached and labelled Attachment F2.

There is no traditional decision-making process which must be complied with in relation to authorising things of this kind.

On 1 April 2003, an advertisement was placed in the local community newspaper inviting all those people who believed they had native title rights and interests in the land and waters of the application area under the traditional laws and customs of the X People to attend an authorisation meeting for the making of a native title determination application (see a copy of the advertisement at Attachment R4). Information about this meeting was also sent to members of the X People by letter where we had an address for them and passed around by word of mouth. This advertisement included a description of the claim group.

On 1 May 2003, this authorisation meeting was held at Town Y. Two hundred and fifty people attended this meeting. They were all members of the claim group as they were descended from the named ancestors. A record of who attended the meeting was kept and is available if needed. By the agreement of everyone attending, Paul Smith chaired the meeting. During this meeting, senior elders of the X People (who are) discussed the making of the application including how membership of the native title claim group was to be described and the types of native title rights and interests which were to be claimed.

The process agreed on by the group was to make decisions by consensus following a discussion in which anyone who is a member of the group can speak. In making a decision, everyone takes their lead from the senior elders of the group. Consensus means that when the matter is raised for decision most people indicate that they support the decision and no one says they do not support the decision. Once a decision is made in this way it binds all the members of the group.

Following discussion, three members of the X People who are senior elders of the group were authorised to make this application and to deal with all matters arising in relation to it in accordance with the consensus decision-making process set out above.

Those persons were Doris Jones, Paul Smith and Alan Jackson. Minutes of the meeting were kept by Paul Smith and are available if required.

Remember

Include the statements about authorisation in the affidavits of each person who makes up 'the applicant' (this applies whether your application is certified or authorised).

Make sure that there is information in the application or in the section 62 affidavit of each person who makes up 'the applicant' which says that each of these people is a member of the claim group.

Give details about how authorisation of each of the people who make up 'the applicant' occurred.

If your application was certified by the representative body, attach a copy of the certification from the representative body to your application.

Refer in the box at Schedule R to any extra information you give (e.g. 'see Attachment R').

Questions and answers

What happens if the claim group wishes to replace the applicant?

In 2007, the Native Title Act was changed so that the only way provided for by the Native Title Act to replace (change) the applicant is by using the mechanism found in section 66B. (In some circumstances, the court may use the Federal Court Rules to replace the applicant.) This change to the Native Title Act means it will no longer be possible to replace an applicant simply by amending an existing application to change those named as the applicant and providing an accompanying affidavit sworn by the new applicant.

Under the section 66B process, one or more members of the claim group can apply to the Federal Court for an order that the member (or members) replace the current applicant where:

- the person consents to being replaced
- the person has died or become incapacitated
- the person is no longer authorised by the claim group
- the person has exceeded the authority that was given to them by the claim group.

Anyone who makes a section 66B application to the court must be authorised by the native title claim group to make the application and to deal with matters arising in relation to it.

21. Amended applications (Schedule S of Form 1)

If you amend your original application, you will need to give details about what changes you have made to the application in this schedule.

Remember

Include the following information, if you have become aware of it since you filed your original application:

- details and results of any searches carried out to determine the existence of any non-native title rights and interests in the application area, whether you carried out these searches or are aware that someone else carried out such searches (Schedule D)
- details of any other applications that have been made in relation to all or part of the application area (Schedule H)
- details of any section 29 notices affecting the application area (Schedule I)
- details of any section 24MD notices affecting the application area (Schedule HA).

Note: following changes to the Native Title Act in 2007, some amendments to an application will no longer trigger the registration test. For a summary of these go to page eight.

Changes you make to the wording of Schedule S will not be treated by the Registrar as an amendment requiring the registration test to be applied again.

22. Any other relevant information (Schedule T of Form 1)

In this schedule, you can give any other information that you think is relevant to your application. You do not have to provide any information under this schedule.

23. Part B

Filing and service

'Filing your application in the Federal Court' means giving it to the court for filing.

Each of the people who make up the applicant must give their name and their 'address for service' in Part B of Form 1. This is the address people should use to contact you about the application. (The people who make up 'the applicant' can share an 'address for service' if they wish to).

If the people who make up 'the applicant' have a legal representative, the address for service should be the legal representative's contact details.

Correct documentation

The following documents must be filed in the Federal Court:

- completed Form 1 (with all attachments, including a map of the boundaries of the application area)
- an affidavit under section 62 sworn by each person who is 'the applicant'.

Section 62 affidavit

An affidavit is a written statement made by a person who has sworn, or affirmed, in front of a qualified person that the contents of the statement are true.

Although there may be a number of people authorised to make the application, these people are known together as 'the applicant'.

Each person who makes up 'the applicant' has to swear an affidavit that addresses the things set out in section 62 of the Native Title Act.

In the affidavits, each person who makes up 'the applicant' must make four particular statements:

- that he or she believes that the native title rights and interests claimed by the native title group have not been extinguished in relation to any part of the area covered by the application and
- that he or she believes that none of the area covered by the application is also covered by an approved determination of native title and
- that he or she believes that all of the statements made in the application are true and
- that he or she is authorised by all the person in the native title claim group to make the application and to deal with matters arising in relation to it.

There is also a fifth matter that the affidavit must cover. The person swearing the affidavit must set out the details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it. The details would include things like:

- when the authorisation meeting(s) was held
- where that authorisation meeting was held
- how the people named as the applicant were authorised by the native title claim group
- any other details about the kind of authorisation process that was used.

These affidavits must be filed in the Federal Court usually at the same time that you file the application itself. They must be in the proper form, which is called Form 20, and comply with the Federal Court Rules.



List of terms



NATIVE TITLE ACT 1993

List of terms

The list of terms below is to assist you in understanding the requirements of Form 1. It is not a complete list. Please ensure you seek legal advice. A more comprehensive list of native title terms is available from the Tribunal's website glossary at www.nntt.gov.au.

approved determination of native title

A decision by the Federal Court or the High Court of Australia or a recognised body that native title either does or does not exist in relation to a particular area of land or waters (sections 13 and 225 Native Title Act). To date the only bodies recognised under section 207A of the Native Title Act are the Supreme Court of South Australia and the Environment, Resources and Development Court of South Australia.

claimant application/claim

An application made by Aboriginal people or Torres Strait Islanders under the Native Title Act for a determination that native title exists over a particular area of land or waters (section 61(1) Native Title Act).

Claimant applications under the Native Title Act are often also referred to as 'native title claims' or 'native title determination applications'. They are filed in the Federal Court.

extinguishment

This term is used when Australian law does not recognise native title rights and interests because some things governments did, or allowed others to do, in the past have made recognition legally impossible. These things include the passing of laws or the grant of other interests inconsistent with the continued enjoyment of native title.

Native title is a bundle of rights. Complete extinguishment is when the whole bundle of rights is extinguished. Partial extinguishment is when one or more specific rights are extinguished.

As a general rule, once they are extinguished, native title rights can never be recognised again under Australian law. However, in certain circumstances, the Native Title Act allows the courts to ignore the effect of extinguishment. Generally, this may happen if, at the time the application is made, the relevant area is:

- vacant Crown land or unallocated State land (and not subject to reservation etc. for a particular or public purpose)
- a pastoral lease held by, or for, the claimants or
- specifically set aside for, or held for the benefit of, Aboriginal people or Torres Strait Islanders (for example, under land rights legislation or as a reserve for the use and benefit of Indigenous Australians).

native title

The communal, group or individual rights and interests of Aboriginal peoples and Torres Strait Islanders in relation to land and waters, possessed under traditional law and custom, by which those people have a connection with an area which is recognised under Australian law (section 223 Native Title Act). Native title can be refused recognition, see 'extinguishment'.

Native Title Act

The Commonwealth *Native Title Act 1993*.

registered native title claimant/s

A person or persons whose name(s) appear on the Register of Native Title Claims as 'the applicant' in relation to a claim to hold native title in the area (section 253 Native Title Act).

registration test

A set of conditions applied to each claimant application. If an application meets all the conditions, it must be included in the Register of Native Title Claims. As long as the application remains registered, the native title claimants have certain procedural rights, including the right to negotiate (sections 190A to 190C Native Title Act).



National Native Title Tribunal

For more information about native title and services of the Tribunal please contact the National Native Title Tribunal, GPO Box 9973 in your capital city on **freecall 1800 640 501**. A wide range of information is also available online at **www.nntt.gov.au** .

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