



Guidelines for providing NNTT assistance

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1. Overview

1.1 Types of assistance

Under the *Native Title Act 1993 (Cth)* (“the Act”), assistance may be provided by the National Native Title Tribunal (“NNTT”)¹ in relation to the following:

- **preparation of applications that may be brought under Part 3 of the Act²** (including native title determination applications, revised native title determination applications and compensation applications)

Assistance may include:

- provision of general information about how to make an application and the correct form in which to make it
- searches of the NNTT’s registers or of other records of current or former interests in land or waters
- preparation of maps of claimed areas, and written descriptions of such areas
- preparation of maps and analysis of current tenures within claimed areas
- spatial searches against a spatial view of the NNTT’s registers; and
- written preliminary assessment of a draft or filed native title determination application against the conditions of the registration test³.

- **preparation of applications for registration of indigenous land use agreements (“ILUAs”)⁴**

Assistance may include:

- provision of general information about how to make an application and the correct form in which to make it
- searches of the NNTT’s registers or of other records of current or former interests in land or waters
- preparation of maps of areas to be covered by ILUAs, and written descriptions of such areas; and
- provision of written comments on a draft or lodged application to register an ILUA.⁵

¹ The term “NNTT” is used in these Guidelines to refer to the National Native Title Tribunal as a whole and encompasses the President and members and/or the Registrar and employees as appropriate having regard to relevant sections of the Act. All references to section numbers are to sections of the Act unless otherwise indicated.

² s 78(1)(a)

³ For detailed information about the conditions of the registration test and the registration process, see *Native title claimant applications: a guide to understanding the requirements of the registration test and Registration test procedures* available on the NNTT’s website.

⁴ ss 24BG(3), 24CG(4) and 24DH(3)

⁵ For detailed information about ILUA registration, see the NNTT’s website under ‘Indigenous Land Use Agreements’.

➤ **matters related to the proceeding arising from such applications, at any stage of a proceeding⁶**

Assistance may include:

- provision of information about native title processes and status of applications
- on-going geo-spatial support; and
- searches of the NNTT's registers or of other records of current or former interests in land or waters.

➤ **the negotiation of ILUAs not related to a native title claims mediation, including the withdrawal of objections to the registration of certain types of ILUAs⁷**

Assistance may include:

- negotiation design and management of negotiations
- project management
- geospatial support including preparation of maps and analysis of current tenures within areas to be covered by an agreement
- meeting facilitation
- conflict resolution; and
- development of agreements.

➤ **the negotiation of statutory access agreements⁸**

Assistance may include:

- negotiation design and management of negotiations
- meeting facilitation
- geospatial support including preparation of maps; and
- development of agreements.

➤ **the mediation of a dispute about rights of access for traditional activities⁹**

Assistance may include:

- mediation design and management of negotiations
- geospatial support including preparation of maps; and
- dispute resolution.

➤ **the dispute resolution functions of representative bodies¹⁰**

Assistance may include:

- negotiation design and management of negotiations
- project management

⁶ ss 78(1)(a) and (b)

⁷ ss 24BF, 24CF, 24CI, 24DG, 24DJ

⁸ s 44B(4)

⁹ s 44F(1)

¹⁰ s 203BK

- meeting facilitation
 - searches of the NNTT's registers or of other records of current or former interests in land or waters
 - geo-spatial services including preparation of maps, analysis of current tenures within areas to be covered by an application or an agreement and identification of spatial overlaps
 - dispute resolution; and
 - development of agreements.
- **ancillary assistance activities that are incidental or conducive to the exercise of the NNTT's statutory functions** (such as catering and venue and equipment hire for negotiation meetings).

For more information about the above assistance categories, see below at 2.

Note: Future act mediation assistance

Requests for mediation assistance to parties negotiating about whether certain future acts may be done¹¹ (the grant of mining tenements and certain compulsory acquisitions of native title rights and interests) are not covered by these guidelines. Such requests are covered on the Tribunal's website under Future act mediation.

1.2 Guiding principles

- There must be a statutory basis for providing assistance.¹²
- There must be sufficient resources available within the NNTT to provide the assistance requested.
- In making recommendations or decisions about the provision of assistance, NNTT members and employees must be free from bias and apply the processes and principles outlined in these guidelines.
- Principles of procedural fairness may apply to assistance decisions. As a general principle¹³, when making decisions affecting a person's interests, decision-makers should give the person an opportunity to make submissions in relation to the matter. Decisions about the provision of assistance under the Act may be reviewable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ("AD(JR) Act")¹⁴. The outcome of any decision and the reasons for the decision must be documented.

¹¹ s 31(3)

¹² Although note that assistance may be provided where it is incidental or ancillary to the exercise of the NNTT's express powers and functions. Note also that the NNTT may provide general information about the native title system and the NNTT's practices and procedures.

¹³ Unless excluded by statute, either expressly or by necessary implication.

¹⁴ And in effect under s 39B of the *Judiciary Act 1903* (Cth).

1.3 Limits on assistance

There are certain types of assistance that the NNTT cannot provide in any circumstances. These are:

- financial assistance; and
- legal advice.

Other constraints that may apply to particular forms of assistance are set out at paragraphs 2.1.3 (applications and proceedings); 2.2.3 (ILUAs); 2.3.3 (other negotiation) and 2.4.2 (ancillary assistance).

In all cases the NNTT will have regard to the factors listed at paragraph 1.5 below, when considering requests for assistance.

1.4 Form of request for assistance

Requests for assistance should be made in writing to the Regional Co-ordinator or Senior Co-ordinator for the relevant state or territory. The request should include the following information:

- the requestor's name and address for correspondence
- the nature of the assistance sought (what it is the requestor wants the NNTT to do)
- the reason for seeking assistance
- if possible, the expected time frame for the provision of assistance
- the attempts (if any) that have been made to seek the assistance from another organisation e.g. from a representative body; and
- where assistance has been sought from a representative body, the response of the representative body to that request, including any reasons given for declining the request.

1.5 Decision on assistance

In deciding whether or not to approve a request for assistance, the NNTT will have regard to one or more of the following matters as appropriate:

- whether the assistance is essential for the conduct of further negotiations, the progress of mediations, or will increase the likelihood of an agreement being made or other outcomes being achieved
- the costs to the NNTT of providing such assistance and the resources required (e.g. the number of geospatial or other employees needed and for how long)
- the time frame within which the assistance could be provided
- the level of resources previously allocated to the matter
- the resources available to the NNTT from which the assistance may be provided
- other resources that may be available to the requestor – whether assistance can be provided by other bodies or organisations (for example, representative bodies or the Commonwealth Attorney-General) and whether such assistance has already been sought and/or obtained
- whether other parties to the negotiations would support the assistance being provided and the scope and nature of the assistance

- whether the provision of assistance will create a precedent and whether the NNTT has the capacity to offer similar assistance to other parties in similar situations
- whether s 109 would be breached by granting or declining the assistance (that is the obligation on the NNTT to carry out its functions in a fair, just, economical, informal and prompt way e.g. whether providing the assistance would create a conflict of interest or a perception of bias in relation to other work of the NNTT)
- whether the results of the assistance could be made available to other parties in similar situations and therefore support other agreement-making processes
- whether, in all the circumstances, it is appropriate to provide the assistance; and
- any other relevant factor.

1.5.1 Assistance that overlaps with representative body functions

Where the assistance sought falls within a function of a representative body, the NNTT may ascertain whether that representative body has already been approached for the assistance and how it responded, if that information has not already been provided to the NNTT by the requestor (see 'Decision on assistance', above). Before contacting the representative body, the NNTT will seek the consent of the requestor to do so. Failure of the requestor to provide such consent may be a sufficient basis for the request to be declined.

The requestor will be given a reasonable opportunity to respond in writing to any information provided by the representative body that adversely affects the NNTT's decision to grant assistance and this response will be taken into account by the NNTT when deciding whether to grant or decline the assistance requested.

1.5.2 Requests for assistance from the Federal Court

Where the Federal Court requests assistance, the NNTT may also consider:

- the purpose for which the assistance is requested (e.g. whether the assistance would support and progress mediation);
- whether the Court is requesting assistance on behalf of the applicant or a party to the proceeding; and
- the protocol agreed between the NNTT and the Federal Court¹⁵ (as amended from time to time or replaced) regarding provision of geospatial information (such as mapping, current land tenure and descriptive claim overlap analysis) and background research reports¹⁶.

1.6 Review of decision to grant or decline assistance

The requestor must be advised of the decision to grant or decline the assistance in writing. If the request for assistance is declined, the letter must include the reasons for the decision.

If the requestor is unhappy with a decision to decline assistance, the requestor may write to the NNTT asking for an internal review of the decision. Correspondence should be directed to the Regional Co-ordinator or Senior Co-ordinator for the relevant state or territory.

¹⁵ *The Protocol as to the Administrative Relationship between the Federal Court of Australia and the NNTT* (October 2013).

¹⁶ Refer to *Procedure for Responding to Requests for Copies of Research Reports* (Dec. 2014) on Practice & Procedures Library

Decisions that the NNTT makes about whether or not to provide assistance, where it has been requested, may also be reviewable under the AD(JR) Act.

1.7 Costs

The NNTT does not charge for work that falls under a specific statutory function, unless there is a statutory requirement to do so. This is the case in relation to assistance provided under s 203BK where the NNTT may assist a representative body in performing its dispute resolution functions only if the representative body and the NNTT have entered into an agreement under which the representative body must pay the NNTT for the assistance.

The NNTT may charge a fee for work that is ancillary to a statutory function, that is an assistance activity incidental or conducive to the carrying out of a power or function. If charges are applicable, they will be either on a full commercial price or cost recovery basis¹⁷. The President or Registrar will determine the rates or costs.

1.8 Terminating assistance

If during the course of providing requested assistance, circumstances arise, which impact negatively on the prospect of the assistance fulfilling its intended purpose, the NNTT member or employee overseeing the request may terminate the assistance. One or more of the parties may also request that the assistance be terminated.

Where a member or employee is contemplating terminating assistance, the member or employee should consult with all of the parties involved to seek their views about the prospects of the assistance achieving its aims.

Where the assistance is being provided to a representative body under s 203BK (Appendix 1), the member or employee should consult with the representative body. The way in which assistance under s 203BK may be terminated may be provided for in the agreement. This would need to be considered and the agreed process followed.

Where the member or employee directs that assistance be terminated, all parties involved must be advised in writing that the assistance has ceased and why it was terminated.

1.9 Delegation to employees

The NNTT's statutory assistance functions and powers, including the power to approve or decline assistance and to provide assistance, under the Act may be delegated by the Registrar to NNTT employees. The President may also give employees duties, powers and functions in relation to providing assistance.¹⁸

¹⁷ Cost-sharing may also be an option.

¹⁸ s 130(5)

1.10 Other laws that may apply

Assistance that the NNTT provides is subject to other relevant laws, including the *Privacy Act 1978* (Cth), the *Freedom of Information Act 1982* (Cth) and the AD(JR) Act.

Provision of NNTT assistance must also comply with the framework created by the Australian Government's *Public Governance, Performance and Accountability Act 2013* (Cth)¹⁹

This legislation provides that Commonwealth agencies' appropriations must be expended in a way that promotes the efficient, effective, economical and ethical use of Commonwealth resources.

¹⁹ Replacing the *Financial Management and Accountability Act 1977* (Cth)

2. Categories of assistance

2.1 Applications and proceedings

The NNTT may give such assistance as considered reasonable to:

- help people prepare applications and accompanying material²⁰
- help such people (applicants), at any stage of a proceeding, in matters related to the proceeding²¹; and
- help other people, at any stage of a proceeding, in matters related to the proceeding²².

2.1.1 *Types of applications*

The types of applications that the NNTT can help people to prepare are as follows:

2.1.1.1 Applications made to Federal Court

- native title determination (claimant/non-claimant), revised native title determination and compensation applications²³
- application to be joined as a party to any of the above application types²⁴
- application to replace an applicant²⁵
- application to review a decision of the Registrar not to accept a claim for registration²⁶
- application to remove an agreement from the Register of Indigenous Land Use Agreements²⁷
- application for the transfer of records from a former representative body²⁸.

2.1.1.2 Applications made to the NNTT

- application objecting to the expedited procedure in the right to negotiate scheme²⁹
- application for a determination in relation to a future act³⁰
- application for registration of an ILUA³¹; and
- application objecting to the registration of certain ILUAs³².

²⁰ s 78(1)(a)

²¹ s 78(1)(a)

²² s 78(1)(b)

²³ s 61

²⁴ ss 66(10)(c) and 84(5)

²⁵ s 66B

²⁶ ss 69 and 190F(1)

²⁷ ss 69 and 199C(2)

²⁸ ss 69 and 203FC(4)

²⁹ ss 60A, 75 and 32(3)

³⁰ ss 60A, 75 and 35

³¹ ss 24BG, 24CG and 24DH. Note that in the case of ILUA registration applications, assistance in preparing the application is provided to *parties* to the agreement

³² ss 60A, 24DJ(1) and 77A

2.1.2 Forms of assistance that may be provided

2.1.2.1 Preliminary assessments - registration testing of claimant applications³³

Upon written request from an applicant or prospective applicant, the NNTT may provide a preliminary assessment of a draft or filed claimant application against the conditions of the registration test.

In deciding whether to provide a preliminary assessment, the following matters will be considered:

- whether a registration test delegate is reasonably available to undertake the preliminary assessment, having regard to NNTT resources
- whether a preliminary assessment has previously been provided to the applicant in respect of an application pertaining to the same land and/or waters (or part thereof)
- whether the application is complete
- whether there are reasons why the registration test should be applied to the application within a particular timeframe (for instance, where a future act notice has been issued over the application area)
- any other matter the NNTT considers to be relevant and appropriate.

As a matter of policy, assistance will not be provided to determine whether or not the registration test should be applied to an amended application.³⁴ Nor will a preliminary assessment be provided as part of the reconsideration of a claim in an application under s 190E.

2.1.2.2 Preliminary comments on ILUA registration applications

The NNTT may provide preliminary comments in relation to a lodged or draft application to register an ILUA. In making a decision about the provision of comments, the decision-maker must consider whether sufficient information has been provided to enable the delegate to make useful comments. If the information provided is not sufficient, the requestor should provide further information or the request will be refused.

2.1.2.3 Library services

As from 1 July 2012, library services are accessed through the Federal Court of Australia Library.

2.1.2.4 Search services

The NNTT may provide assistance in the form of searches³⁵:

- of registers, including the NNTT's own registers of determinations, ILUAs and claimant applications; and
- of other records of interests in land or waters.

³³ See also the *Registration Test Procedures* available on the Tribunal's website.

³⁴ ss 190A(1A) and 190A(6A)

³⁵ s 78(2)(b)

2.1.2.5 Geo-spatial services

The NNTT may provide geo-spatial services in relation to applications and proceedings.

Examples include:

- preparation of maps of claimed areas and compilation of written descriptions of such areas
- preparation of maps providing a national, State/Territory or regional perspective of native title matters
- identification of spatial overlaps and provision of spatial relationship information
- preparation of maps and analysis of current tenures within claimed areas
- conducting spatial searches against a geospatial view of the NNTT's Registers and/or Schedule.

The NNTT's free online visualisation, mapping and query tool (Native Title Vision) and spatial datasets can be accessed via the NNTT's website.

2.1.2.6 General information relating to applications and proceedings

The NNTT may provide general information about how to make an application, the correct form in which to make an application, what information is required and the nature of native title processes. Where assistance is sought with the authorisation of an area agreement ILUA or a claimant application³⁶ the NNTT may provide information that assists with understanding the decision-making requirements of the relevant provisions.

2.1.3 Limits on provision of assistance

The NNTT may give assistance that is considered **reasonable** and will have regard to the kinds of factors set out at paragraph 1.5 in coming to that view.

Where assistance is sought 'in matters related to the proceeding,' the assistance must concern a matter related to an **active** proceeding. Assistance cannot continue to be provided once an application is finalised in some way, such as being fully determined, withdrawn, dismissed or discontinued. A determination recognising the existence of native title does not finalise an application until a prescribed body corporate (PBC) is determined under ss 56 or 57.

Assistance cannot be granted to **potential respondents** to a proposed claimant application. For example if a person is seeking assistance because it is known that a native title determination application will be made at some time in the future, assistance cannot be granted until the application has been filed in the Federal Court and the parties have been identified.

Assistance provided should not give rise to any expectations as to the likely outcome of any application that may be made. Independent legal advice must be sought by persons approaching the NNTT for this kind of assistance. The NNTT will be particularly cautious if the request for assistance amounts to a potential respondent seeking to find out whether they have an interest that may be affected by a determination in the proceedings for the purpose of applying to the Federal Court to become a party under s 84. This may occur where the request for assistance is to

³⁶ ss 251A, 251B

identify a spatial overlap of areas over which apparently claimed rights and interests may be exercised, or identifying whether rights and interests may co-exist or impact on each other in a legal sense.

Assistance cannot be given to the Commonwealth or a state or territory government to search its own registers or other records unless the NNTT considers there are special reasons for doing so.³⁷

The NNTT may assist with identifying the correct form in which to make an application, or explaining the type of information required by an application, but may not give legal advice or draft applications for a potential applicant, or fill out an application on behalf of an applicant.

Where an applicant seeks help with the authorisation of a claimant application or of an area agreement ILUA, the NNTT must not become involved in the actual decision-making process, including as facilitator, other than in exceptional circumstances that have been considered by the President in person and canvassed with the relevant Regional or Senior Co-ordinator and representative body or bodies.

2.2 Indigenous Land Use Agreements

2.2.1 *Types of ILUA assistance*

Any person who wants to make an ILUA may ask the NNTT to assist in negotiating the agreement where the negotiations are not related to a native title claim mediation.³⁸

Where an objection to the registration of an area agreement ILUA or an alternative procedure agreement ILUA is made within time, the parties to the agreement may request assistance from the NNTT in negotiating with the objector with a view to having the objection withdrawn.³⁹

2.2.2 *Forms of assistance that may be provided*

The form of assistance provided depends upon the type of agreement the parties wish to negotiate and the stage at which assistance is sought.

2.2.2.1 **Negotiation and agreement-making services**

The NNTT may provide a range of negotiation services including:

- negotiation design
- meeting facilitation
- party capacity building
- management of negotiations
- conflict resolution and mediation expertise
- project management
- development of agreements; and
- ancillary services such as provision of technical support, whiteboards etc.

³⁷ s 78(3).

³⁸ ss 24BF, 24CF and s 24DG

³⁹ ss 24CI and 24DJ

2.2.2.2 Search services

The NNTT can conduct searches of registers, including the NNTT's own registers of determinations, ILUAs and claimant applications and of other records of current interests in land or waters.

2.2.2.3 Geo-spatial services

The NNTT may provide geo-spatial assistance services in relation to negotiating ILUAs or negotiating the withdrawal of objections. Examples include:

- preparation of maps of areas subject to the (proposed) agreement and compilation of written descriptions of such areas
- identification of spatial overlaps and provision of spatial relationship information
- preparation of maps and analysis of current tenures within areas subject to the (proposed) area; and
- conducting spatial searches of the NNTT's Registers and/or Schedule.

The NNTT's free online visualisation, mapping and query tool (Native Title Vision) and spatial datasets can be accessed via the NNTT's website.

2.2.3 *Limits on provision of assistance*

The NNTT will not provide negotiation assistance where the ILUA negotiations are related to native title claim mediation. This kind of assistance will only be provided where the negotiations concern a 'stand-alone' ILUA unrelated to the resolution of a claim.

Assistance provided should not give rise to any expectations as to the likely outcome of any application that might be made arising out of the ILUA negotiations. While the NNTT may assist in the development of agreements, it cannot provide legal advice to the negotiation parties about the impact of the agreement on their legal rights and interests. Independent legal advice must be sought by persons approaching the NNTT for this kind of assistance at any time.

Where a negotiation party seeks help with the authorisation of an area agreement ILUA, the NNTT must not become involved in the actual decision-making process, including as facilitator, other than in exceptional circumstances that have been considered by the President in person.

2.3 Other negotiation assistance

2.3.1 *Types of assistance*

Any persons wishing to make a statutory access agreement regarding registered claimants carrying out traditional activities on non-exclusive agricultural or pastoral leases may request the NNTT to assist with negotiating the agreement.⁴⁰

⁴⁰ s 44B(4)

Note that where such a request is received, the requestor may be asked to consider negotiating an ILUA instead given the more enduring nature of such agreements

The NNTT may assist a representative body in performing its s 203BF dispute resolution functions in certain circumstances (see *Limits on provision of assistance* below).⁴¹

2.3.2 Forms of assistance that may be provided

Refer to ILUA assistance at paragraph 2.2.2 for an overview of the forms of assistance that may be provided.

2.3.3 Limits on provision of assistance

The NNTT may only assist a representative body in performing its dispute resolution functions where the representative body and the NNTT have entered into an agreement under which the representative body is liable to pay the NNTT for the assistance.⁴²

Assistance provided should not give rise to any expectations as to the likely outcome of any application that might be made arising out of the agreement negotiations. While the NNTT may assist in the development of agreements, it cannot provide legal advice to the negotiation parties about the impact of the agreement on their legal rights and interests. Independent legal advice must be sought by persons approaching the NNTT for this kind of assistance.

2.4 Ancillary assistance

The NNTT may provide assistance that is incidental to the exercise or performance of its powers or functions. Ancillary assistance is assistance that facilitates the performance of the NNTT's general activities.

2.4.1 Forms of assistance that may be provided

2.4.1.1 NNTT assistance incidental to negotiation

Assistance that is ancillary to the negotiation functions may include:

- providing catering to participants during the course of negotiation meetings
- hiring a venue for a negotiation meeting
- providing transport to parties to go to and from a negotiation meeting
- providing equipment to support the conduct of a negotiation, such as overhead projectors, microphones, whiteboards and lap top computers.

2.4.1.2 Capacity-building

Capacity-building assistance includes activities that seek to influence the broader agreement-making environment, whether in relation to ILUAs or future acts or in an environment where at least at the outset no ILUAs or other applications have been made.

This kind of assistance is directed to helping people or organisations participate more effectively in the native title system. Assistance provided must promote native title and related outcomes by

⁴¹ s 203BK

⁴² ss 203BK, 108(1B)(b)

adding to the effectiveness of the interaction between the NNTT and the parties and between parties themselves.

The NNTT may consider providing capacity-building assistance aimed at:

- increasing the agreement-making capability of parties to effectively participate in NNTT processes
- making the agreement-making environment more conducive to achieving outcomes acceptable to the parties
- increasing the capability of parties to participate effectively in arbitral processes (including providing information about future act processes); and
- increasing the capability of native title parties to set up prescribed bodies corporate by providing information about the processes involved (especially where this is an issue delaying a consent determination).

Capacity-building assistance may include, for example:

- facilitating training sessions aimed at sharing specialist knowledge and resources.

2.4.1.3 Other

The NNTT may also prepare and deliver speeches and papers at external conferences or for publication.

2.4.2 *Limits on provision of assistance*

Assistance provided should not give rise to any expectations as to the likely outcome of any application that might be made arising out of capacity-building assistance. While the NNTT may assist in the development of agreement-making capacity, it cannot provide legal advice to parties about the impact of any agreement on their legal rights and interests. Independent legal advice must be sought by persons approaching the NNTT for this kind of assistance.

Costs *may* be charged for ancillary assistance.

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Appendix: Version history

Version no.	Primary author(s)	Description of version	Approved by	Approved	Next Review
1	Operations Section Fiona Emmett	Original version	Executive	04/10/2012	Dec 2013
2	Trish Arndt	Editorial update	Manager, Operations Section	16/12/2014	Feb 2015