



Native Title Services Victoria Ltd

ABN 27 105 885 149  
Level 2 642 Queensberry Street (PO Box 431) North Melbourne VIC 3051  
ph (03) 9321 5300 fax (03) 9326 4075 www.ntsv.com.au

**POLICIES AND PROCEDURES MANUAL**

**SECTION J - GUIDELINES FOR NTSV ASSISTANCE  
TO NATIVE TITLE GROUPS**

**NATIVE TITLE SERVICES VICTORIA**  
**POLICIES AND PROCEDURES MANUAL**  
**SECTION J - GUIDELINES FOR NTSV ASSISTANCE**  
**TO NATIVE TITLE GROUPS**

**1. INTRODUCTION**

**1.1 Purpose of the Guidelines**

1.1.1 These guidelines set out the policies and procedures whereby Native Title Services Victoria (NTSV) will determine:

- (a) whether or not to provide assistance to a native title group in relation to a matter;
- (b) what type and level of assistance should be provided to a native title group in relation to a matter; and
- (c) what terms and conditions should apply to the grant of assistance.

1.1.2 These guidelines have been developed by NTSV in order to assist NTSV allocate the funds it receives from Office of Indigenous Policy Coordination (OIPC) to facilitate native title matters in its area in a manner which:

- (a) advances the interests of traditional owners in accordance with NTSV's Operational Plan;
- (b) enables NTSV to manage the provision of assistance to native title groups effectively;
- (c) accords with the principles of procedural fairness;
- (d) complies with OIPC's funding terms and conditions; and
- (e) complies with the *Native Title Act 1993* (Cth).

1.1.3 The Guidelines acknowledge that the funding provided by OIPC to NTSV is not sufficient to allow NTSV to assist all native title groups to undertake the full range of activities for which these groups may seek assistance.

1.1.4 NTSV is committed to ensuring that its structures and processes operate in a fair manner and will endeavour to ensure that grants of assistance are made in an independent and unbiased way, including:

- (a) delegating responsibility for assessment and review of assistance to officers of NTSV or consultants who have no conflict of interest in relation to the relevant assistance; and
- (b) where possible, requiring that members of the Board who are members of the native title group or who have any interest in the land or waters the subject of the application for assistance or review declare their interest and absent themselves from any meeting where the application or review is discussed.

## **1.2 Avenues of appeal outside NTSV**

In any of the circumstances set out in these Guidelines in which it is specified that a decision by NTSV regarding assistance is deemed to be final, the native title group is to be informed in writing that:

- (a) its rights to an internal review are exhausted; and
- (b) it has the right to seek judicial review of the decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) as well as a review by OIPC under s203FB of the NTA.

## **2. APPLYING FOR ASSISTANCE**

### **2.1 How to make an application for Assistance**

2.1.1 Where a native title group requires assistance in relation to a native title matter, the native title group must apply in writing to NTSV for such assistance. NTSV's application pro forma is available and its use is optional (refer attached Application for Assistance Form).

2.1.2 The native title group shall endeavour to provide NTSV with as much information in relation to the native title matter as is possible in order to assist NTSV to assess whether the application is an application that should be granted assistance.

For example, the information provided should include details of the composition of the group (size and membership) and of the process leading to the request for assistance.

### **2.2 Assistance for costs already incurred by Applicant Group**

NTSV will not reimburse native title groups for work already undertaken or costs incurred prior to the application, unless express written approval for the work was given prior to such work being undertaken.

## **3. Ascertaining the Facts Surrounding the Application**

### **3.1 Further Information**

NTSV may seek further information from the native title group at any time during the assessment of the application by NTSV.

### **3.2 Seeking external consultation**

NTSV reserves the right at any stage during the assessment of the application to seek information on matters pertaining to the application from people or bodies outside the native title group if it considers that those persons or bodies may have information relevant to the consideration of the application.

## **4. Assessment of the Application by NTSV**

### **4.1 Assessment of the merits of the application**

NTSV will assess the application for assistance by applying such of the General Criteria as are relevant to the facts.

## **4.2 Minute of Decision**

NTSV's Chief Executive Officer will then prepare a Minute of Decision including:

- 4.2.1 a brief summary of the factual background to the application for assistance, including where appropriate and possible:
  - (a) the identity of the applicant group;
  - (b) the nature of the assistance sought;
  - (c) if the assistance sought relates to the lodging of an application for a native title determination, the details of the area claimed or to be claimed and its significance;
  - (d) the rights claimed or to be claimed or the negotiations or agreements being pursued; and
  - (e) the objectives of the applicant group in requesting assistance.
- 4.2.2 the General Criteria which NTSV considers relevant and has taken into account in assessing the application;
- 4.2.3 where the matter relates to an area which overlaps another representative body area, a comment as to whether the other representative body is willing to enter into a written arrangement authorizing NTSV to provide assistance, and whether the other representative body is prepared to contribute any assistance;
- 4.2.4 NTSV's decision in relation to the application for assistance.
- 4.2.5 The Minute of Decision will be provided to the native title group by NTSV.

## **5. INTERNAL REVIEW OF NTSV DECISION**

### **5.1 Review by the Board of NTSV**

- 5.1.1 The native title group may in writing seek a review of the decision contained in the Minute of Decision. The review will be conducted by the Board of NTSV.
- 5.1.2 In conducting the review the Board may:
  - provide an opportunity for the primary decision maker and representatives of the affected native title group to be heard;
  - consider all documents considered when the original decision was made and any other relevant documents, provided that any other documents that are relied upon are provided to the native title group seeking the review with an opportunity to comment;
  - obtain independent legal or other professional advice.
- 5.1.3 The native title group will be notified of the decision of the Board and provided with a brief statement of reasons. They will also be notified of further review rights.

## **5.2 Review of the Board's decision**

5.2.1 The native title group may seek a review of the decision of the Board of NTSV. The grounds on which a group may apply for review of the Board's decision are limited to the following:

- (a) that a breach of the rules of natural justice occurred in connection with the making of the decision or that the procedures adopted were otherwise unfair;
- (b) that procedures set out in these Guidelines were not observed;
- (c) that the making of the decision was an improper exercise of power conferred upon the assessing officer under these Guidelines;
- (d) that there was no evidence or other material to justify the making of the decision; or
- (e) that the decision was otherwise contrary to law or was subject to error that would entitle the group to judicial review of the decision.

5.2.2 The native title group must inform NTSV in writing that it requires review of the decision within 30 days of the group being advised of the decision and the group must provide written particulars of the grounds and written reasons why the group believes that the decision should be internally reviewed based on those grounds.

5.2.3 NTSV will as soon as practicable forward a copy of the Minute of Decision, the Board's decision and statement of reasons and all the material relating to the application which was before NTSV to an independent external lawyer (the "Assessor").

## **5.3 Review by Assessor**

5.3.1 The Assessor shall review the decision in order to ascertain whether any of the grounds are made out or whether there is a real likelihood that one or more of the grounds could be made out if the matter were further investigated.

5.3.2 The Assessor will conduct his or her assessment within a reasonable time and will then provide a written report of his or her assessment to NTSV. The Assessor's report shall state whether, in the Assessor's opinion:

- (a) any of the grounds have been made out; or
- (b) there is a real likelihood that one or more of the grounds could be made out if the making of the decision were further investigated.

5.3.3 The Assessor should set out brief reasons for his or her decision in the written report.

## **5.4 Consequences flowing from Assessor's decision**

5.4.1 If the Assessor confirms that:

- (a) none of the grounds have been made out; or
- (b) none of the grounds would be likely to be made out if the making of the decision were further investigated,

then the decision will be deemed to be final.

5.4.2 If the Assessor decides that:

- (a) at least one of the grounds has been made out; or
- (b) there is a real likelihood that one or more of the grounds could be made out if the making of the decision were further investigated, the Assessor will remit the decision to the NTSV with recommendations to ensure that the decision is remade in accordance with the proper application of the Guidelines. Any subsequent determination by the assessing officer will be final.

## **6. REVIEW OF ASSISTANCE**

### **6.1 Right of NTSV to Review**

In order to ensure that it is always utilizing its resources optimally, NTSV reserves the right to conduct a review of any or all assistance at any time.

### **6.2 Procedure for review**

6.2.1 In conducting such a review, NTSV shall give written notice of its intention to conduct a review to the relevant group(s) and shall invite the relevant group(s) to make submissions in relation to the review. Any submissions must be provided to NTSV within 30 days of provision of notice of the proposed review from NTSV.

6.2.2 Having provided the native title group with such notice and, where applicable, having reviewed the submissions, NTSV may then conduct a review following which it may reach a decision that:

- (a) assistance to the group should be maintained at its existing level; or
- (b) assistance should be varied on such terms as NTSV sees fit, including by ceasing altogether.

6.2.3 Any review conducted by NTSV under this guideline should be carried out in the same manner in which new applications for assistance are assessed and determined under these Guidelines.

## **7. STANDARD TERMS AND CONDITIONS OF ASSISTANCE**

### **7.1 No guarantee of ongoing Assistance**

NTSV's decision to provide assistance of a specified nature and level to a native title group does not bind NTSV to provide assistance of a similar nature or at a similar level in future, or even to continue to provide any assistance at all.

### **7.2 Briefing out work**

Where legal assistance has been approved, NTSV may decide to allocate the matter to a private legal representative where:

- 7.2.1 NTSV does not have sufficient in house resources to undertake the work required;
- 7.2.2 NTSV has a conflict of interest in relation to the work; or
- 7.2.3 NTSV considers it to be appropriate for any other reason in the circumstances.

Where research assistance has been approved, NTSV may decide to allocate the matter to an external researcher where:

- 7.2.4 NTSV does not have sufficient in house resources to undertake the work required;
- 7.2.5 NTSV considers it to be appropriate for any other reason in the circumstances.

### **7.3 Instructions**

Representative members of an assisted group shall attend and participate in consultations to provide instructions. The attendance and participation at consultation meetings may vary from time to time, but the native title group must maintain the ability to consistently provide authoritative instructions in the assisted matter.

### **7.4 Reimbursement of NTSV Assistance**

- 7.4.1 If a group is awarded costs in relation to any native title matter in which it received assistance from NTSV, the group shall repay the costs recovered by it to NTSV. (In this regard adherence to OIPC conditions of funding will be necessary).
- 7.4.2 If an assisted group receives financial assistance from a third party in relation to a particular native title matter in respect of which it has already received assistance from NTSV, the group shall repay to NTSV the amount originally provided to it by the third party.

### **7.5 Confidentiality**

- 7.5.1 NTSV undertakes that all information provided to it by native title groups for the purpose of seeking assistance will be held in confidence by NTSV.
- 7.5.2 Such information may, however, be used for the purpose of assessing an application for assistance, conducting a review, developing NTSV's Operational Plan and annual budget or providing assistance to that group, as necessary and appropriate.

## **GENERAL CRITERIA**

### **A. Compatibility of the native title matter with the Operational Plan of NTSV**

The extent to which NTSV is prepared to provide Assistance to a native title group will be primarily dependent upon NTSV's priorities as contained in NTSV's Operational Plan or any other relevant document.

### **B. Potential strength of the claim**

The potential strength of a particular native title claim is an important consideration in the decision as to whether to provide assistance. The potential legal strength of the native title group's claim will depend on a number of factors, including the following:

- (a) the extent to which the research or other information which is of evidentiary value supports the conclusion that the native title group constitutes an identifiable Aboriginal people, clan or group;
- (b) the extent to which the research or other information which is of evidentiary value supports the conclusion that a native title group continues to enjoy a connection with the area claimed through the acknowledgement of traditional laws and the observance of traditional customs of the native title group;
- (c) the extent to which the research or other information which is of evidentiary material supports the boundaries of the proposed claim area; and
- (d) the existence of any known legal impediments to the claim, such as the grant of interests inconsistent with the continuing existence of native title.

Where sufficient research or other evidentiary material is not available to the applicants or NTSV to reach the conclusions required by paragraphs (a) to (d), NTSV may grant assistance for the sole purpose of conducting this research. However NTSV will not grant assistance to any group to lodge a new native title claim in the Federal Court unless it is satisfied that there is research or other evidentiary material that supports the proposed claim group description, native title rights and interests and boundaries.

### **C. Coherence**

#### **Coherence of the native title group**

NTSV will not generally agree to support an activity in relation to a native title matter where it is not clear whether:

- (a) an application by or the activity of a native title group represents the wishes of the relevant native title group as a whole including where the application is made by a sub-group of a native title group; or
- (b) the native title group is capable of consistently providing instructions in accordance with the authorised decision making process of the native title group.

Where NTSV considers that the Native title group's lack of coherence is caused by the vexatious behaviour of a particular individual or sub-group and that the majority of the native

title group is supportive of the application, assistance may be found to be appropriate. In cases where a native title group clearly displays an inability to act in a cohesive manner NTSV will not provide substantive assistance to that group, although NTSV may offer assistance in the form of research and mediation assistance.

#### **D. Existence of overlapping claims**

Where native title rights and interests in relation to a particular area are claimed by more than one native title group or sub-group of a native title group, NTSV will normally not agree to provide any group with substantive assistance (for example, assistance in making a claim). Any offer of assistance in such circumstances will usually be limited to mediation and dispute resolution services or research. However, in particular circumstances NTSV may consider that particular factors make it appropriate for assistance to be provided to a particular native title group, even where there is an overlapping claim. Factors which may affect NTSV's decision to provide assistance to a native title group in these circumstances include whether:

- (a) the extent of the overlap between the native title groups is minimal;
- (b) there is a need for urgency in undertaking work on the matter as a result of future act activity or other matters;
- (c) one of the overlapping claims in the matter(s) is not well founded in comparison to the other(s); or
- (d) the native title group(s) concerned have made all reasonable efforts to resolve the overlap.

#### **E. Cost**

Cost will be a weighty consideration in any assessment of whether NTSV will provide assistance to a native title group in relation to a particular native title matter. In particular where the size and complexity of a native title matter is such that it demands a large proportion of NTSV's budget; it may be that NTSV does not have the necessary resources to commit to that matter.

#### **F. Benefits**

Where NTSV considers that the reasonably achievable outcomes are modest in the benefit they will bestow on the Applicant Group, particularly having regard to the likely financial and strategic costs, an application is unlikely to receive priority.

#### **G. Current state of preparation of the native title matter**

The state of preparation of a matter at any given point in time will be taken into account as a relevant consideration in determining whether assistance is granted. In applying this criterion the native title group will not be penalised by any delay or omission on the part of NTSV in relation to the preparation of any matter.

#### **H. Timing**

Time frames may be imposed or arise from:

- (a) impending legislative change;

- (b) statutory periods;
- (c) court orders; or
- (d) the need to gather vital evidence from ageing witnesses.

These factors are considerations to be taken into account although none of them are determinative.

#### **I. External resources**

The likelihood that a native title group will receive substantial external assistance, for example from proponents of development, will be taken into account in considering the native title group's application for assistance or the provision of ongoing assistance to a native title group.

#### **J. Particular matters**

The following particular matters may also be considered in deciding whether to provide initial or ongoing assistance to a native title group. The matters listed below do not constitute an exhaustive list, nor do they have greater weight than the general categories set out above because of their particularisation here:

- (a) the number of indigenous people likely to benefit from the provision of the assistance;
- (b) whether the native title group is part of a larger group already receiving assistance;
- (c) other intra-indigenous issues;
- (d) in relation to compensation, the effect this will have on native title in the area in general;
- (e) in relation to mediation between native title groups, whether the respective group has acted in good faith.

#### **K. Other matters**

This Schedule does not set out an exhaustive list of the matters to be taken into account by NTSV in the assessment of an application for assistance or the review of assistance being provided to native title groups and NTSV reserves the right to take into account any other matter which it considers relevant to the provision of assistance to a particular native title group.

## **Native Title Services Victoria Application for Assistance Form**

---

Before assistance can be provided to Indigenous groups, NTSV must assess the potential for any assistance provided to contribute directly to the recognition and protection of native title in Victoria.

This assessment will depend on a number of factors, including evidence for:

- the likelihood that assistance will lead to an outcome for native title claimants
- the strength of proof that those seeking assistance are connected to the claim area in question through traditional law and custom
- the breadth of support within the group for the claim.

In cases where there is not enough evidence on these matters, NTSV may offer assistance in the form of research or, in the case of disputes, some mediation may be offered.

NTSV also assists traditional owners in negotiations with other parties who want to make use of land subject to native title interests (legally called 'future acts').

NTSV considers applications in relation to available resources and to its approved Operational Plan.

### ***Details of People making the Application***

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_

Name of the group you are representing:

---

Please list the names of people in your group who support your application:

---

---

---

---

Please give brief details of your connection to the country in question.

---

---

---

---

Please describe in a few words the outcome you want to achieve with any NTSV assistance.

---

---

---

---

**Nature of Assistance**

What type of assistance do you think you need at this stage?

---

---

---

---

Have you, or your group, had any assistance on native title matters from any other source?

---

---

The applicant group certifies that the information contained in this application is, to the best of its knowledge, complete, true and correct.

Signed : \_\_\_\_\_ Full Name : \_\_\_\_\_

Signed : \_\_\_\_\_ Full Name : \_\_\_\_\_

Date : \_\_\_\_\_

**Please add any other information that you think may be relevant to this application.**