QSNTS

Queensland South Native Title Services

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Review of the Native Title Act 1993

Submission to the Australian Law Reform Commission on Discussion Paper 82

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Introduction

Queensland South Native Title Services ("QSNTS") is pleased to have this opportunity to respond to the proposals for reform outlined in Discussion Paper 82 ("Discussion Paper") by the Australian Law Reform Commission ("the Commission").

In our response to Issues Paper 45, QSNTS submitted that connection for the purposes of s 223 of the *Native Title Act 1993* (Cth) ("NTA") largely remains unnecessarily complicated, fragmented and, inconsistently interpreted and applied in practice.

The principles-based regime and proposals outlined in the Discussion Paper would go a long way towards addressing the problems highlighted in our earlier submission. If implemented, they would deliver the fairness, equality, balance and certainty that are so urgently needed to encourage:

(a) a system that is more culturally competent;
(b) more agreement-making;
(c) effective civil justice;
(d) more security of the outcomes gained; and
(e) cost savings,

whilst still holding true to the overarching objectives of the NTA including protecting the rights of Aboriginal and Torres Strait Islander peoples and other interest holders in relation to land and waters.

This is a critical opportunity for Australian laws and practice around native title to be brought into line with best practice around the world, after past / near-missed opportunities, and to remedy unanticipated problems that have impeded the effective development and implementation of an effective scheme to prevent further injustices.

QSNTS is committed to working with the Government and other stakeholders to develop a legal framework which ensures that there are effective and flexible processes in place to protect native title and non-native title interests. There are a number of proposals being put forward in this consultation process from differing representatives from stakeholders in the sector. Whilst these proposals may take differing approaches, it is acknowledged they are put forward to achieve the same outcome – to ensure there is an effective legal framework and the necessary legal incentives for service providers and interest / rights holders to work together to ensure the native title system continues to support native title holders and claimants, and that those who invest in the system or frame policies continue to invest in and produce fair and innovative solutions to meet legitimate community

concerns and expectations.

Framework for Review of the *Native Title Act*

Question 2–1

Should the proposed amendments to the Native Title Act have prospective operation only?

Nothing is more certain to cause fear and concern to lawyers than the mere mention of the word, 'retrospectivity'. Despite its negative connotations and the lack of rigor around the public debates, its use and treatment in relation to various matters simply reflect and exemplify philosophical and theoretical inconsistencies in the application of current laws to current problems. Whilst fundamental legislative principles tend to weigh against retrospectivity, arguments against it, QSNTS submits, are largely unfounded – the legislature has the power to legislate away unintended consequences.

QSNTS is of the view any proposed amendments should have prospective operation however some allowances should be made for retrospectivity. Whilst it is acknowledged there is a general presumption that legislation, whether an Act or subordinate legislation, will operate prospectively (the foundational principles being that only current law should govern current activities, that existing rights should not be prejudiced and that users of the system should have certainty of the outcomes), courts can and will override the presumption if the empowering Act contains a provision authorising retrospective operation - to that effect, the provision ought to be expressed in plain and unambiguous language. An exception to the presumption in the present context, it is submitted, should be the principle that as the NTA is beneficial legislation, it should have some retrospective allowance, e.g. in circumstances where outcomes in the process lead to unfairness and hardship. This has been done and is done in taxation matters – it should apply similarly in native title matters.

Question 2–2

Should the proposed amendments to s 223 of the Native Title Act only apply to determinations made after the date of commencement of any amendment?

QSNTS submits that they should however any retrospective application of the proposed s 223 amendments should be restricted. QSNTS suggests the following conditions with regards to any retrospective application:

(a) Retrospective application should only apply to positive approved determinations of native title, i.e. where native title was found to exist;

(b) Any variation to the determination should be made as per the process under the NTA: see ss 13, 61(1);

(c) Any variation should only be confined to the scope of native title rights and interests recognised (in particular, with respect to the taking of resources and this being *for any purpose*);

(d) Determination Areas (agreed between the parties and / or as found by the Court as a result of the process of assessing extinguishing tenures / inconsistent rights), the determination of Other Interests existing at the date of the determination on the Determination Area and the relationship between those interests and the native title rights and interests should be left undisturbed; and

(e) Reliance should be placed only on previous evidence that produced the determination, i.e. no new further evidence should be allowed to be introduced.

The principles enunciated in *Mabo and Others v Queensland* (No. 2) [1992] HCA 23 largely still stand and should continue. The system has had the benefit of over 20 years of jurisprudence. Past litigants have against that background variously made decisions with respect to their claims, e.g. to surrender native title. It is submitted those past litigants should not be allowed to re-litigate. However, past claimants or native title holders that have had a determination of native title where commercial rights had been ruled out on the basis of available jurisprudence at the time should enjoy retrospective application of the amendments to their determinations by being able to make revised determination of native title applications pursuant to s 61 of the NTA.

Traditional Laws and Customs

Proposal 5–1

The definition of native title in s 233 of the Native Title Act should be amended to make clear that traditional laws and customs may adapt, evolve or otherwise develop.

QSNTS supports this proposal and refers to its submission on Issues Paper 45 in relation to this point. As long as law and custom has its root in pre-contact times, then those laws and customs to remain vibrant must adapt, evolve and develop with the effluxion of time and circumstance.

Proposal 5–2

The definition of native title in s 223 of the Native Title Act should be amended to make clear that rights and interests may be possessed under traditional laws and customs where they have been transmitted between groups in accordance with traditional laws and customs.

Native title is transferable and alienable to other indigenous people in accordance with the laws, customs and practices of the community or society which holds the title.[1] Having regard to the nuanced expressions by the Full Federal Court of Australia on this aspect of holding rights (that is, through succession), QSNTS supports the proposal for statutory clarification but only to the extent that there is statutory acknowledgment native title can be held or a transmission of rights can occur through the process of succession.

Given that the matter involves a factual inquiry, QSNTS submits that the phenomenon might be better explored and explained from a broader or regional perspective where commonalities between cultural blocs particularly if such societies are governed by common normative systems can be identified. Transmission of rights by succession should be recognised if that is inherent to the character of the native title under consideration and in accordance with the set of laws and customs from which that character or incident is derived.

QSNTS warns that caution should be exercised however in reaching any conclusions on the matter as the process of succession is not always ever complete and might still be occurring. It is recognised that social alliances and enmities would have been continually shifting in the pre-contact area and over time after that. Sharing laws and customs certainly did not mandate concord between all members of the societies – if this were so, there would be no need for laws and customs. This is best demonstrated where rights over an area might be contested between groups. However it should be noted that evidence of conflicting claims does not necessarily demonstrate the absence of a working system or a system in decline. Even if neighbouring groups fell in and out with each other over different issues over time, there would have been at some core level stable enough patterns of intermarriage and structured engagements to allow negotiations to occur and country to be tenanted. At least where there is unity as to the normative criteria, disputation can demonstrate the vitality of the traditional system. One must be careful not to assume that a healthy traditional society is apolitical and without internal disputation.

Further to the above, intermarriages and close geographical proximity between groups in combination with their shared laws and customs make it likely that particular members of neighbouring local countries may have succeeded to deceased localities / orphaned country once there was a demographic decline in the core membership so as to prevent members from mounting viable assertions of their rights and interests over such country. Whilst law and custom would have mandated this, the ordered anarchy of traditional political authority

[1] Richard H Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 2nd ed, 2004) [13.1].

and its contextual / variable nature depending on certain purposes at certain times require a careful consideration of surrounding circumstances, the multiplex nature of connections to country and the ratification by the jural public or people of status and authority of the assertion of such rights. This negotiability and context dependency in succession arrangements has been noted by senior anthropologist, Peter Sutton, and is essential in any analysis of who holds rights over country.

It is argued that succession occurs over a long period and it is never really complete (it is only ever complete in circumstances where the group has completely died out). In most cases, there is an overlap between different interests over the same area. No doubt the issue is very complex. QSNTS argues that it requires a thorough appreciation of the anthropological and genealogical evidence and, culturally appropriate, sensitive management. It is suggested that culturally tailored alternative dispute resolution processes would need to be built around the negotiation and resolution of these matters.

Proposal 5–3

The definition of native title in s 223 of the Native Title Act should be amended to make clear that it is not necessary to establish that

(a) acknowledgment and observance of laws and customs has continued substantially uninterrupted since sovereignty; and

(b) laws and customs have been acknowledged and observed by each generation since sovereignty.

QSNTS supports these proposals, provided the post-sovereignty society is the same as the classical one and the requirements are very clear that the above are "not necessary to establish".

Proposal 5–4

The definition of native title in s 223 of the Native Title Act should be amended to make clear that it is not necessary to establish that a society united in and by its acknowledgment and observance of traditional laws and customs has continued in existence since prior to the assertion of sovereignty.

QSNTS agrees with this proposal.

Physical Occupation

Proposal 6–1

Section 62(1)(c) of the Native Title Act should be amended to remove references to 'traditional physical connection'.

Many of QSNTS's clients today live in towns and cities, go to work and school, and participate in various community activities. Their beliefs and culture are still very strongly held and important. Family is a very important part of traditional life and this has not changed. Family is the source of all knowledge about Aboriginal life and history. This knowledge is passed on to each new generation, just as it has been done for centuries. Whilst traditional owners might be physically separated from country, they remain rooted in their identity and their convictions about their connections to their traditional estates. QSNTS's clients manage to stay connected to their traditional life and land in multiple ways. Aside from maintaining traditional practices and beliefs, there is also tourism, preservation actions, government involvement and the use of symbols which maintain strong connections.

QSNTS supports the proposal to remove traditional physical connection from the prima facie requirements.

Proposal 6–2

Section 190B(7) of the Native Title Act should be amended to remove the requirement that the Registrar must be satisfied that at least one member of the native title claim group has or previously had a traditional physical connection with any part of the land or waters, or would have had such a connection if not for things done by the Crown, a statutory authority of the Crown, or any holder of a lease.

QSNTS agrees with this proposal.

The Transmission of Aboriginal and Torres Strait Islander Culture

Proposal 7–1

The definition of native title in s 223(1)(a) of the Native Title Act should be amended to remove the word 'traditional'.

The proposed re-wording, removing traditional, would provide that:

The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

> ***(a)*** *the rights and interests are possessed under the laws acknowledged, and the customs observed, by the Aboriginal peoples or Torres Strait Islanders; and*
>
> ***(b)*** *the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and*
>
> ***(c)*** *the rights and interests are recognised by the common law of Australia.*

QSNTS remains concerned about the removal of the word, 'traditional', despite its submission on Issues Paper 45 and comments in relation to Proposal 5-3. The concerns include that re-defining the parameters around this element might give "historical people" (people not traditionally associated or affiliated with the area) a 'leg up' to gain native title or a boon to those who would not have otherwise been traditionally entitled to the land. It is submitted that this is cause for the creation of conflicts within claim groups and / or lateral violence. The issue is complex and QSNTS does not support this proposal in its current form. The word, 'traditional', should be kept however it is submitted that some statutory clarification around its meaning should occur to accommodate the normative system's inherent allowances for shifts to cater for different circumstances through effluxions of time.

Question 7–1

Should a definition related to native title claim group identification and composition be included in the *Native Title Act*?

QSNTS submits that a clearer definition is required and refers the Commission to its Issues Paper 45 response.

Proposal 7–2

The definition of native title in s 223 of the Native Title Act should be further amended to provide that:

The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

> *(a) the rights and interests are possessed under the laws acknowledged, and the customs observed, by the Aboriginal peoples or Torres Strait Islanders; and*
>
> *(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a*

relationship with country that is expressed by their present connection with the land or waters; and

(c) *the rights and interests are recognised by the common law of Australia.*

In general, QSNTS is supportive of the proposal however suggests that paragraph (b) might require re-drafting so as to reduce any further complexity or varied interpretations.

Question 7–2

Should the Native Title Act be amended to provide that revitalisation of law and custom may be considered in establishing whether 'Aboriginal peoples and Torres Strait Islanders, by those laws and customs, have a connection with land and waters' under s 223(1)(b)?

QSNTS supports the proposal. It is submitted that 'revitalisation' does not necessarily suggest starting from a position where there has been a clean break or abandonment. The term simply means that something which had dissipated or lessened in some degree has intensified. It is distinct from revivalist arguments which posit that something extinct or dead is revived. QSNTS submits that as long as the community or society exists and knowledge of laws, customary or cultural practices, stories, language, arts and songs remain, there can be evidence of continuity. QSNTS acknowledges that this is a matter of evidence.

Question 7–3

Should the reasons for any displacement of Aboriginal peoples or Torres Strait Islanders be considered in the assessment of whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223(1)(b)?

QSNTS supports this proposal.

Question 7–4

If the reasons for any displacement of Aboriginal peoples or Torres Strait Islanders are to be considered in the assessment of whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223(1)(b), what should be their relevance to a decision as to whether such connection has been maintained?

QSNTS supports the principle that the States and Territories should not be able to rely on the successes of their settlement / colonisation policies to continue to deny Indigenous people's legitimate and rightful links to country. Relevant facts about Indigenous peoples' displacement, dispossession, and various government / administrative policies and practices with regards to Indigenous peoples as well as evidence about their consequences should be considered highly relevant in the assessment of whether indigenous peoples have maintained connections to country. It is suggested that where such facts can be established, as long as there is agreement on certain minimum threshold requirements (e.g. right people, right county; and acknowledgment and observance of laws relating to land and waters), connection should be accepted for the purposes of entering into substantive negotiations towards a consent determination.

Question 7–5

Should the Native Title Act be amended to include a statement in the following terms:

Unless it would not be in the interests of justice to do so, in determining whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223(1)(b):

(a) regard may be given to any reasons related to European settlement that preceded any displacement of Aboriginal peoples or Torres Strait Islanders from the traditional land or waters of those people; and

(b) undue weight should not be given to historical circumstances adverse to those Aboriginal peoples or Torres Strait Islanders.

QSNTS supports this proposal. It would indeed be a factor in the consideration of how and why traditional laws and customs have evolved and adapted. It is consistent with QSNTS's view on 'substantial interruption'.

The Nature and Content of Native Title

Proposal 8–1

Section 223(2) of the Native Title Act should be repealed and substituted with a provision that provides:

Without limiting subsection (1) but to avoid doubt, native title rights and interests in that subsection:

(a) comprise rights in relation to any purpose; and

(b) may include, but are not limited to, hunting, gathering, fishing, commercial activities and trade.

QSNTS supports this proposal however to reflect jurisprudence to date, the provision should ensure that the rights and interests are in relation to land and waters, and do not include rights in natural resources (e.g. minerals, petroleum, water) that are vested in the Crown.

Proposal 8–2

The terms 'commercial activities' and 'trade' should not be defined in the *Native Title Act*.

QSNTS agrees with this proposal. QSNTS submits they are well-understood terms.

Question 8–1

Should the indicative listing in the revised s 223(2)(b), as set out in Proposal 8–1, include the protection or exercise of cultural knowledge?

It is acknowledged current jurisprudence does not recognise indigenous intellectual property as a right or interest in relation to lands and waters. Whilst those interests are of a kind unknown to the common law, there appears to be no good reason why the NTA could not accommodate this lacuna and construe native title rights and interests as inclusive of communal indigenous intellectual property. If intellectual property rights are accommodated by the NTA, collective rights in perpetuity can be recognised, and earn protection under the NTA. Some consideration though should to be given to the kind of compensatory regime that would need to be established for any affectations on (loss, theft, diminution or impairment of) those rights as the NTA presently only accommodates a compensation regime for the effects of acts (largely attributable to government parties) done on land that affect native title. Currently, the NTA has no remedy for native title holders wishing to protect their cultural knowledge.

Aboriginal customary law as it relates to intellectual and cultural rights, it is submitted, is the longest surviving form of intellectual property law in existence today.[2] Native title rights and interests should be construed as forms of intellectual property, because a necessary condition of their existence is knowledge of traditional law and customs[3] - this knowledge includes traditional medicines, bush tucker, and aspects related to totemic or

[2] N.A. Lofgren, 'An Overview of Intellectual Property Law': (Paper presented at: *Aboriginal intellectual and Cultural Property: Definitions, Ownership and Strategies for Protection,* Daintree, November 25-27. Cairns: Rainforest Aboriginal Network, 1993) 3.

[3] Dr David H. Bennett, 'Native Title and Intellectual Property' [1996] (10) *Land, Rights, Laws: Issues of Native Title* 7.

conservation responsibilities towards natural resources - e.g. what and what not to hunt, fish or gather; when and when not to hunt, fish or gather; where and where not to hunt, fish or gather it; who should and who should not hunt, fish or gather it; and how to find it. If it has not occurred already, the risks for commercial exploitation of such knowledge without proper compensation cannot be understated.

QSNTS supports this proposal and advocates for its inclusion. It is acknowledged that this area will be problematic and complex, not the least of which its interplay with copyright and IP laws, nevertheless it is potentially a huge deal for traditional owners.

Question 8–2

Should the indicative listing in the revised s 223(2)(b), as set out in Proposal 8–1, include anything else?

No.

Promoting Claims Resolution

Question 9–1

Are current procedures for ascertaining expert evidence in native title proceedings and for connection reports, appropriate and effective? If not, what improvements might be suggested?

There does need to be consistency with the assessment of connection reports however QSNTS does not want to see a bar that is set too high. As long as protocols and transparent assessment guidelines are set clearly (preferably as policy) by government parties, the circumstances where a State respondent party moves the goal posts would likely be reduced. As the NTA is a piece of Commonwealth legislation, a level of consistency is preferred in how, in practice, connection requirements are assessed across federal and state / territory jurisdictions – provided this is done on the basis that it is the Commonwealth that is involved with the procedure. It is submitted the Commonwealth needs to be the premier model litigant and be involved with all limbs of the process on connection, given that it has already provided a certain level of delegation to, and allowed much of Pt 2, Div 2, 2A, and 2B or 3 of the NTA to be legislated via analog provisions by, the States and Territories.

Question 9–2

What procedures, if any, are required to deal appropriately with the archival material being generated through the native title connection process?

This is a serious and ongoing concern in the QSNTS workspace. It is an important issue and QSNTS acknowledges that material collected and produced through the connection process should be archived for future generational use. It is recognised that most PBCs do not possess the capacity and / or resources to look after such material securely or properly. QSNTS recognises explicitly however the value and importance of such material and strongly supports it being provided or returned to the native title holding group after claim files are closed. It is information that belongs to the group and ought to be protected.

QSNTS is of the view retention by the PBC is ideal but the capacity issues of PBCs to retain the material which requires expert handling and storage for the benefit of future generations is problematic. It is suggested that the Australian Institute of Aboriginal and Torres Strait Islander Studies ("AIATSIS") may be an appropriate repository for all the material produced. AIATSIS has the necessary expertise, statutory protection from disclosure and protocols as to how to deal with the material.

QSNTS cautions however that representative bodies should closely consult first with their traditional owner clients on this issue before making decisions as to who should hold. Information is power and traditional owners should not be deprived of being the holders of that power. The native title claim or holding group or PBC, properly advised, should decide the matter (preferably at the beginning of the information collection or preparation process) as issues of consent with respect to access or use, and privacy, will be critical. It is submitted representative bodies and / or service providers arguably come within the definition of an 'agency' under s 6 of the Privacy Act 1988 (Cth) and need to ensure that reasonable steps are taken to maintain the security of personal information relating to their clients. In this regard, it is noted that new privacy laws which came into force on 12 March 2014 have given the Australian Privacy Commissioner ("Privacy Commissioner") additional powers and remedies. From that date, the Privacy Commissioner would be able to obtain enforceable undertakings from organisations and, in the case of serious or repeated breaches seek civil penalties. The following privacy principle is particularly noted:

Australian Privacy Principle 11 – security of personal information

11.1 If an APP entity holds personal information, the entity must take such steps as are reasonable in the circumstances to protect the information:

(a) from misuse, interference and loss; and

(b) from unauthorised access, modification or disclosure.

11.2 If:

(a) an APP entity holds personal information about an individual; and

(b) the entity no longer needs the information for any purpose for which the information may be used or disclosed by the entity under this Schedule; and

(c) the information is not contained in a Commonwealth record; and

(d) the entity is not required by or under an Australian law, or a court/tribunal order, to retain the information;

the entity must take such steps as are reasonable in the circumstances to destroy the information or to ensure that the information is de-identified.

Question 9–3

What processes, if any, should be introduced to encourage concurrence in the sequence between the bringing of evidence to establish connection and tenure searches conducted by governments?

QSNTS submits that tenure searches and the preliminary tenure analysis exercise should occur as soon as connection is accepted and substantive negotiations for a consent determination commence. Whilst there is some preference for this to occur upfront before connection is prepared (so as to tailor the preparation of evidence to those areas where there is extant native title), QSNTS acknowledges that this might not necessarily be a priority and an effective use of limited resources for the States / Territories. Concurrence however ought not to give rise to the State adopting an inflexible position which would be inconsistent with its responsibilities as a model litigant.

It is suggested that closer liaison at relevant officer level or appropriate licensing arrangements being in place between the representative bodies and States / Territories for representative bodies to access historical and / or current tenure data themselves might assist in processes occuring concurrently and delays being avoided.

Question 9–4

Should the Australian Government develop a connection policy setting out the Commonwealth's responsibilities and interests in relation to consent determinations?

The Commonwealth is the funder. It is the custodian of the legislation and should be an active participant. QSNTS supports this proposal.

Question 9–5

Should the Australian Government, in consultation with state and territory governments and Aboriginal and Torres Strait Islander representative bodies, develop nationally-consistent, best practice principles to guide the assessment of connection in respect of consent determinations?

Yes, QSNTS supports this occurring.

Question 9–6

Should a system for the training and certification of legal professionals who act in native title matters be developed, in consultation with relevant organisations such as the Law Council of Australia and Aboriginal and Torres Strait Islander representative bodies?

The Commission is referred to QSNTS's submissions in the Deloitte Review of Roles & Functions of Native Title Organisations. An area of regulation is indeed needed including in the post-determination area. The NTA is beneficial legislation, there is a disadvantaged litigant group (the native title claim group represented by its authorised applicant), and it is incumbent upon all parties to ensure in order for the sector to operate effectively that legal practitioners operate at and maintain a reasonable standard of competence and diligence, including a level of expertise congruent with being a content specialist in the area. QSNTS supports the proposal.

Question 9–7

Would increased use of native title application inquiries be beneficial and appropriate?

QSNTS notes and acknowledges the improvements in the system since the change in institutional arrangements. It submits that it would be counter-productive to blur the very clear demarcation that has caused stakeholder confusion in the past. With the Federal Court having greater control in this area, there is no need to have a parallel process. The preference is to keep the NNTT out of the claim process noting that the Native Title Registrar - as opposed to the Tribunal - has important administrative functions around registration testing and notification of native title determination applications that need to be retained.

Question 9–8

Section 138B(2)(b) of the Native Title Act requires that the applicant in relation to any application that is affected by a proposed native title application inquiry must agree to participate in the inquiry. Should the requirement for the applicant to agree to participate be removed?

No. Provisions should not be arbitrary in their application. A successful inquiry process can only occur where parties are invested in the process and outcome. Given the conciliation objects of the NTA and the importance of consensual decision-making in the workspace, no party should be compelled to participate if they do not wish to.

Question 9–9

In a native title application inquiry, should the National Native Title Tribunal have the power to summon a person to appear before it?

As above.

Question 9–10

Should potential claimants, who are not parties to proceedings, be able to request the Court to direct the National Native Title Tribunal to hold a native title application inquiry? If so, how could this occur?

As above.

Question 9–11

What other reforms, if any, would lead to increased use of the native title application inquiry process?

QSNTS has no comment.

Authorisation

Proposal 10–1

Section 251B of the Native Title Act should be amended to allow the claim group, when authorising an application, to use a decision-making process agreed on and adopted by the group.

QSNTS supports this proposal.

Proposal 10–2

The Australian Government should consider amending s 251A of the *Native Title Act* to similar effect.

QSNTS supports this proposal.

Proposal 10–3

The *Native Title Act* should be amended to clarify that the claim group may define the scope of the authority of the applicant.

QSNTS supports this proposal. QSNTS believes there is a fiduciary relationship between the Applicant and the claim group – refer to submissions QSNTS made in the Deloitte review.

Question 10–1

Should the Native Title Act include a non-exhaustive list of ways in which the claim group might define the scope of the authority of the applicant? For example:

(a) requiring the applicant to seek claim group approval before doing certain acts (discontinuing a claim, changing legal representation, entering into an agreement with a third party, appointing an agent);

(b) requiring the applicant to account for all monies received and to deposit them in a specified account; and

(c) appointing an agent (other than the applicant) to negotiate agreements with third parties.

QSNTS submits that its response in relation to Proposal 10-3 above does enough – there is no real need to include a "non-exhaustive" list.

Question 10–2

What remedy, if any, should the Native Title Act contain, apart from replacement of the applicant, for a breach of a condition of authorisation?

The only mechanism now for enforcing a breach is to bring on a s 66B application. Indemnity should be available to the Applicant for those things they did that were within the scope of their authority. In those circumstances where the Applicant acts outside of the scope of their authority, they should be held accountable.

Proposal 10–4

The Native Title Act should provide that, if the claim group limits the authority of the applicant with regard to entering agreements with third parties, those limits must be placed on a public register.

Subject to the nature and scope of authority an Applicant is authorised to have, the Applicant pursuant to s62A of the NTA generally may deal with all matters arising under the NTA in relation to the native title determination application it is authorised to make. Where the native title claim group enumerates the particular matters the Applicant is authorised to deal with and places conditions or limitations on how the Applicant exercises its powers / authority, QSNTS regards the proposal to include these on a public register a prudent and timely reform measure. QSNTS suggests that the Register of Native Title Claims ("Register") would be the most appropriate register for the purpose. The entry of those details on the Register, it is argued, will serve as notice to the world at large (including all members of the claim group) and particularly those parties wishing to have dealings on the land, about the precise matters the Applicant is in fact authorised to deal with. It is a check on the Applicant not to proceed beyond its authority on any dealings and on rogue operators who may want to get around the system. Further, it provides certainty to third parties that not only are they dealing with the appropriate party but also that the registered native title claimant has the authority and mandate to deal with a matter – this ensures security of any outcomes.

Proposal 10–5

The Native Title Act should be amended to provide that the applicant may act by majority, unless the terms of the authorisation provide otherwise.

QSNTS supports this proposal.

Proposal 10–6

Section 66B of the Native Title Act should provide that, where a member of the applicant is no longer willing or able to act, the remaining members of the applicant may continue to act without reauthorisation, unless the terms of the authorisation provide otherwise. The person may be removed as a member of the applicant by filing a notice with the court.

QSNTS supports the proposal subject to natural justice and procedural fairness processes being adhered to by incumbent members of the Applicant group and the application being supported by evidence that the outgoing member of the Applicant is unwilling, unable or incapable of acting or deemed to be so (for example, in

circumstances where a condition of the appointment of the Applicant has a self-executing effect, that is, where it provides that if an Applicant misses three Applicant meetings consecutively, they are deemed to be unwilling, unable or incapable of acting as a member of the Applicant group).

QSNTS also suggests the establishment of an "opt-out" model similar to that utilised in Australian class actions for class members, although in the context presently discussed it applies to members of the Applicant group who indicate positively that they are unwilling, unable or incapable of continuing in their role as Applicant and who will still be bound by any determination of the Court of the principal proceedings. It is suggested the option should be made subject to the condition that those Applicants exercising the "opt-out" option do not pursue the same claim in separate overlapping proceedings. It is submitted the measures will promote efficiencies in the prosecution and running of native title claims particularly in reducing the number of interlocutory proceedings or costly multiple causes of action.

Proposal 10–7

Section 66B of the Native Title Act should provide that a person may be authorised on the basis that, if that person becomes unwilling or unable to act, a designated person may take their place. The designated person may take their place by filing a notice with the court.

QSNTS supports this proposal. For representative bodies, the organising and holding of authorisation meetings, e.g for the purposes of s 66B, involve the expenditure of huge resources (time, human, and capital). Proposal 10-7 ensures that this process is made efficient with the provision of a 'one-stop-shop' authorisation process that deals with all reasonably foreseeable contingencies in the future such as that presently proposed. Whilst it is recognised that the native title claim group is of course free to decide what decision-making process will be followed to make the above decisions, an example as to how the current proposal may operate might be where a claim group authorises individuals to comprise the Applicant on the basis of constituent family groups within the claim group each having a member representative on the Applicant group. At the same time, each family group would authorise a "back-up" replacement representative in the event that if their original representative dies, or becomes unwilling or unable to act, the replacement takes their place without the need to hold another authorisation meeting. The proposal ensures that costs and the number of interlocutory proceedings are kept to a minimum.

Joinder

Question 11–1

Should s 84(3)(a)(iii) of the Native Title Act be amended to allow only those persons with a legal or equitable estate or interest in the land or waters claimed, to become parties to a proceeding under s 84(3)?

QSNTS generally agrees with the proposal.

From a principled perspective, native title is fundamentally the resolution of rights and interests relating to three legal systems – Indigenous,(including overlapping interests) State/Territories and the Commonwealth. As such, the mandatory parties should be confined to those three catergories of parties, with the NTRB/NTSPs possessing an automatic right of joinder on the basis that they have a statutory responsiblity to those constituents that hold or may hold native title in the claim area whose interests may not fall within the claim as filed.

In this regard, QSNTS agrees that the State party does act in the capacity of *parens patriae* as outlined in the Discussion Paper. Besides, it is trite that all native title rights and interests are read down in favour of the non-indigenous interest holder where there is an inconsistency between those respective rights and interest. Furthermore, the NTA provides certainty through the validation of past and intermediate acts and prescribes a comprehensive future act regime with a heirarchy of procedural rights. The proliferation of third party respondents unnecessarily compounds the complexity of extant factual issues with the evidential burden falling squarely on the shoulders of a disadvantaged litigant – the native title claim group through its authorised applicant.

QSNTS is of the view that the Federal Court can make an *in rem* judgment with the proposed limited number of parties, allowing meaningful ILUA and other agreement making – as opposed to litigation posturing - to take place with other interest holders after the determination with the benefit of interest holders negotiating with recognised native title holders as opposed to claimants.

Possibly, the NNTT has a more proactive role to play in post-determination agreement-making and arbitration liberating the costs and time spent on these peripheral issues being ventilated or underpinning a position in the court process.

Question 11–2

Should ss 66(3) and 84(3) of the Native Title Act be amended to provide that Local Aboriginal Land Councils under the Aboriginal Land Rights Act 1983 (NSW) must be notified by the Registrar of a native title application and may become parties to the proceedings if they satisfy the requirements of s 84(3)?

QSNTS does not agree with this proposal.

Proposal 11–1

The Native Title Act should be amended to allow persons who are notified under s 66(3) and who fulfil notification requirements to elect to become parties under s 84(3) in respect of s 225(c) and (d) only.

QSNTS agrees with this proposal. Currently in Queensland parties, other than the pastoralists, the State and Commonwealth, normally elect not to assess connection. It is suggested that the Regulations be amended to provide for an election provision on the Form 5 where parties wishing to join positively indicate from the outset whether they would be involved in the whole claims process including connection assessment or only for the purposes of ss 225(c)-(d). Such details could assist in the culling of the party list by the Court in its case management of the claim once interests that ought to be in the Other Interests schedule of any determination have been identified and extinguishment issues have been resolved between the parties. Culling might not even be necessary if parties voluntarily file an application withdrawing as a party once agreement-in-principle has been reached on the precise interests which will be in existence on the day of the determination that are to be included in the determination of native title and the extinguishing effect, if any, of those interests on native title. Note some interests, e.g s 24LA permits, will not exist at the precise moment a determination recognising native title is made, i.e. they cease to exist upon the determination.

We are in support of the proposal except to say that many parties, particularly those who hold a proprietary interest listed on a public register (i.e., those parties contemplated by s66(3)(a)(iv) of the NTA) do not need to be parties in the first place. This is because the interest (or interests) they hold is likely to prevail over native title if any inconsistency exists between their interest and native title. The interest would therefore not be affected by a determination of native title as per s84(3)(a)(iii). We note that s84(3)(a)(i) provides a statutory right of such parties to join during the notification period. However, the Court is empowered by s84(8) and (9)(b) to make an order dismissing parties who never had, or no longer have, interests that may be affected by a determination in the proceedings.

Proposal 11–2

Section 84(5) of the *Native Title Act* should be amended to clarify that:

> *(a) a claimant or potential claimant has an interest that may be affected by the determination in the proceedings; and*
>
> *(b) when determining if it is in the interests of justice to join a claimant or potential claimant, the Federal Court should consider whether they can demonstrate a clear and legitimate objective to be achieved by joinder to the proceedings.*

QSNTS does not agree with this proposal. It is presumed that the term 'claimant' refers to a person or group of persons who have lodged a (current) overlapping native title claim. If this is the case, then the present jurisprudence makes it clear that they have an interest that may be affected by a determination in the proceedings and section 67 provides for the overlapping matters to be dealt with in the same proceeding.

The inclusion of 'potential claimant' in the proposed amended s84(5) is more problematic in QSNTS's view. Section 84(3)(a)(ii) lists as 'affected persons' those who 'claim to hold native title'. In practice, the Federal Court has allowed persons who merely assert that they have traditional interests in a claim area to become parties under section 84(3) (by filing a 'Form 5' notice). Contrary to the proposed amendment at 11-2 which would allow a 'potential claimant' to become a party to a proceeding, if at all, the Act should be amended make it clear that only those Indigenous people (or groups of people) who have filed a properly authorised native title claim in the Federal Court (which overlaps the application) have sufficient standing to become parties.

While QSNTS understands the ALRC's concerns related to access to justice for potential claimants who may not have sufficient resources to authorise and lodge a claim, we consider that Proposal 11-2 will only lead to proliferation of Indigenous respondent parties whose 'claims' to native title are incapable of being determined by the Court (see *Bonner on behalf of the Jagera People #2 v State of Queensland* [2011] FCA 321 (6 April 2011) [19]-[20] per Reeves J). In our view, joining a party who merely asserts an interest does little to create an avenue for any real resolution of the party's claims.

The likely prejudice to the Applicant in a proceeding where a 'potential claimant' is given standing (and the ability to stymie a consent determination) greatly outweighs any prejudice to the rights of a potential claimant, particularly when a statutory pathway (ie, the lodging of a competing native title claim) is readily available.

However, this situation should not apply to Indigenous persons who seek joinder on the basis that their ancestor has been improperly excluded or included as an apical in a claim group description. In such cases, the Court is capable of making a determination in relation to their assertions.

In light of the above, QSNTS submits that the matter is best left to the discretion of the Federal Court. Having regard to the arguments regarding access to justice and various decisions of the Courts on the issue, it is submitted that there be no amendments to ensure that the common law continues to develop further principles regarding indigenous party joinder.

Proposal 11–3

The Native Title Act should be amended to allow organisations that represent persons, whose 'interest may be affected by the determination' in relation to land or waters in the claim area, to become parties under s 84(3) or to be joined under s 84(5) or (5A).

QSNTS does not support this proposal. This proposal includes representative bodies who are already contemplated as parties pursuant to ss 84(3)(a)(i) and 66(3)(a)(iii). The NTA is beneficial legislation and NTRBs are representing disadvantaged clients – it's a class action on behalf of indigenous people. The proliferation of parties and their potential representation by non-indigenous representative organisations is absurd. QSNTS is staunchly against any suggestion that lobbying bodies should have automatic rights to be joined – they do not have an interest in land and do not need to be involved in the proceedings. Representative bodies have statutory functions to, amongst other things, assist, facilitate and protect the rights and interests of constituents within NTRB areas. Other non-government organisations do not have those functions.

Proposal 11–4

The Native Title Act should be amended to clarify that the Federal Court's power to dismiss a party (other than the applicant) under s 84(8) is not limited to the circumstances contained in s 84(9).

QSNTS supports this proposal.

Proposal 11–5

Section 24(1AA) of the Federal Court of Australia Act 1976 (Cth) should be amended to allow an appeal, with the leave of the Court, from a decision of the Federal Court to join, or not to join, a party under s 84(5) or (5A) of the Native Title Act.

QSNTS does not support this provision. The question is posed – why make a difference for native title proceedings? It is a Federal Court rule that has universal application and there should not be any distinguishing

in relation to native title matters. In that sense, the potential proliferation of litigation around interlocutory issues is stopped.

Proposal 11–6

Section 24(1AA) of the Federal Court of Australia Act 1976 (Cth) should be amended to allow an appeal, with the leave of the Court, from a decision of the Federal Court to dismiss, or not to dismiss, a party under s 84(8) of the Native Title Act.

As above

Proposal 11–7

The Australian Government should consider developing principles governing the circumstances in which the Commonwealth should either:

(a) become a party to a native title proceeding under s 84; or

(b) seek intervener status under s 84A.

QSNTS supports this proposal. The Commonwealth A-G is the custodian of the NTA and should be actively involved. QSNTS believes that it is prudent to develop principles and set practice standards around the assessment of connection and how parties should negotiate in good faith. QSNTS welcomes the opportunity to contribute to that process.