

24 July 2025

The Honourable Justice Mordecai Bromberg
President
Australian Law Reform Commission

Via: nativetitle@alrc.gov.au

Dear Justice Bromberg,

We refer to the Review of the Future Acts Regime (the **Review**), referred to the Australian Law Reform Commission (**ALRC**) by the Commonwealth Attorney-General on 4 June 2024.

We wish to make submissions in response to the Discussion Paper published by the ALRC as part of the Review (**Discussion Paper**).

Queensland South Native Title Services (**QSNTS**) is a native title representative body with statutory functions under s 203B of the *Native Title Act 1993* (Cth) (**NTA**).

In this submission, we refer to **QSNTS constituents**, who include:

- a. **Native Title Parties**, comprising
 - i. **Native title holders**, represented by Registered Prescribed Bodies Corporate (**RNTBCs**), or
 - ii. **Native title claim groups**, represented by Applicants who have made a Federal Court application to have their native title rights and interests recognised, and
- b. **Aboriginal and Torres Strait Islander people** who have not yet made a claim or been determined to hold native title rights and interests by the Federal Court but who nevertheless have rights and responsibilities under their traditional laws and customs.

For simplicity throughout this submission, we also refer to all departments of the Commonwealth and the Queensland governments that exercise powers to issue rights and interests in land and waters as **Government Issuing Authorities**. We refer to all parties who propose future acts, including private and public entities, as **Proponents**.

This submission draws on the observations, concerns and experiences of our constituents and of QSNTS' staff in carrying out QSNTS' functions under s 203B of the NTA. This submission steps through QSNTS' observations and comments in response to each numbered Question and Proposal in the order they are set out in the ALRC Discussion Paper.

Question 6: Should the *Native Title Act 1993* (Cth) be amended to enable Prescribed Bodies Corporate to develop management plans (subject to a registration process) that provide alternative procedures for how future acts can be validated in the relevant determined area?

QSNTS' view of this proposal is largely positive. We agree that Native Title Management Plans (**NTMPs**) could create procedural efficiencies, "process certainty", and clear, certain signals to the market. QSNTS also sees the registration process outlined at paragraphs 64-65 of the Discussion Paper as reasonable and constructive.

However, there are risks to consider with the NTMP proposal.

Firstly, if the details of NTMPs are published onto a publicly accessible register, that publication of NTMPs could itself lead to competition between Native Title Parties. This could lead to Native Title Parties agreeing to NTMPs designed to undercut competition with commercial terms that may be more favourable to Proponents, and/or Proponents using the more favourable terms of other NTMPs as leverage in negotiations.

Secondly, the content and effect of the registration criteria would be key to the NTMP being an effective vehicle for promoting and upholding the RNTBC's interests in, and preferences and aspirations for the management of land over which they hold or manage native title. Criteria that are vague or allow for state or territory governments to challenge NTMP registration on the basis of "public interest" or commercial interests are likely to result in unfavourable outcomes for RNTBCs similar to those wrought by current Future Act Determination Applications and objections to the application of the Expedited Procedure.

Thirdly, there is little benefit for groups to establish NTMPs only to be challenged by proponent and Government Issuing Authorities where the NTMPs have more robust processes or provide for withholding of consent. There is a need to ensure that NTMPs can only be challenged on sturdy grounds. There are two further questions arising from this: funding to assist PBCs to develop NTMPs, and the capacity of the National Native Title Tribunal (**NNTT**) to deal with increased workload.

Lastly, QSNTS submits that the views of the RNTBC must form part of the matters that the Registrar **must** take into account in making their decision to register a NTMP. Giving such a voice to the RNTBC affords it meaningful leverage in negotiations and promotes genuine self-determination.

Question 7: Should the *Native Title Act 1993* (Cth) be amended to provide for mandatory conduct standards applicable to negotiations and content standards for agreements, and if so, what should those standards be?

QSNTS is generally supportive of this proposal provided that mandatory standards for conducting negotiations and agreement content were developed in consultation with Aboriginal and Torres Strait Islander people, and Native Title Parties in particular. The possibility of an Expert Technical Advisory Group to assist with the development of standards should be considered as a means of achieving genuine consultation and achieving broad consensus.

QSNTS would be concerned if mandatory negotiation conduct and content standards were to constitute the bare minimum similar to the notorious Native Title Protection Conditions which operate in Queensland. Those bare minimum conditions give little leverage to Native Title Parties and do not provide proper protection to their native title rights and interests in land and waters. As such, they set an undesirably low standard for Proponents, to the detriment of how negotiations are conducted with Native Title Parties, and of benefits that genuinely negotiated outcomes may yield for the latter.

On the other hand, QSNTS is supportive of prohibiting:

- clauses that limit Native Title Parties from accessing protections or remedies under cultural heritage or other laws;
- clauses that restrict Native Title Parties seeking injunctive relief;
- clauses that seek to amend or override the standards in any way, including by lowering the standard of procedural rights afforded under the NTA; and

- terms that limit how Native Title Parties expend, administer or manage compensation or other payments.

QSNTS supports standards that universally apply the non-extinguishment principle to future acts and that set criteria for Proponents to demonstrate they are engaging in “good faith” negotiations.

Including certification of compliance with the standards as mandatory criteria for agreement registration may give Native Title Parties greater leverage to seek meaningful engagement and negotiated outcomes, and encourage earlier planning and bona fide negotiations by Proponents.

Empowering the NNTT to deal with disputes over these standards would underpin their effectiveness.

How does the ALRC envisage that mandatory conduct mandatory negotiation and content standards would relate to conduct standards imposed by Government Issuing Authorities? Would State and Territory legislation, legislative instruments and permit conditions be required to comply with and implement these standards? Does this require development of Commonwealth legislative provisions that have the intention of ‘covering the field’ in relation to negotiations with Native Title Parties?

Proposal 1: The *Native Title Act 1993* (Cth) and *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) should be amended to allow for the expanded use of standing instructions given by common law holders to Prescribed Bodies Corporate for certain purposes.

QSNTS is generally supportive of this proposal, however that support is conditional on RNTBCs being sufficiently resourced to; consider, seek appropriate professional advice (which might be multi-disciplinary), formulate their standing instructions on future acts of particular classes or in particular locations within the determination area, and seek the consent of the Native Title Holders.

RNTBCs may wish or need to conduct workshops to explain the contexts, options and recommendations in order to obtain genuinely Free, Prior and Informed Consent of its native title holders to the adoption of standing instructions. This process would be critical to minimising the risk of misunderstanding, dissatisfaction, or dispute over how the standing instructions are implemented over time. Failing to properly resource this process would undermine the key benefits of the proposal, including that measures to uphold Native Title Parties’ procedural rights are clear, swift, reliable and meaningful. Noting that recent amendments to the NTA permit the imposition of terms of appointment on an Applicant in a native title determination application (**NTDA**), QSNTS considers that this approach could also be beneficial for Applicants and Native Title claim groups.

However, the NTA should prescribe limited terms or extendable sunset clauses, for any standing instructions provided in this proposal, to prevent Native Title Parties being subject to them in perpetuity, allow for younger generations to set the terms on which they wish their procedural rights to be upheld, and to take advantage of changes in market conditions at later dates.

Question 8: Should the *Native Title Act 1993* (Cth) expressly regulate ancillary agreements and other common law contracts as part of agreement-making frameworks under the future acts regime?

QSNTS supports the application of the mandatory negotiation conduct and content standards outlined in Question 7 to ancillary and common law contracts that manifest, facilitate or are linked to a future act agreement or Native Title Decision.

Proposal 2: The *Native Title Act 1993* (Cth) should be amended to provide that:

- a. the Prescribed Body Corporate for a determined area has an automatic right to access all registered agreements involving any part of the relevant determination area; and
- b. when a native title claim is determined, the Native Title Registrar is required to identify registered agreements involving any part of the relevant determination area and provide copies to the Prescribed Body Corporate.

QSNTS supports measures to ensure that there are no unnecessary barriers to RNTBCs accessing agreements that relate to their determination areas and believes that this could be useful for RNTBCs that are endeavouring to rehabilitate from administrative dysfunction, mismanagement or disputes.

Particular situations may require the Registrar to use some mechanism to ascertain whether a RNTBC has a right to access particular agreements, for example in circumstances where the agreement negotiated was for a sub-group of the claim area or some restrictions were put in the agreements.

Further, if the registered agreement relates to a claim that was dismissed before the current claim, the NNTT should assess whether that agreement is still extant and whether it is appropriate to provide it to the later claim group or RNTBC, which may not be comprised of the same people.

Question 9: Should the *Native Title Act 1993* (Cth) be amended to provide a mechanism for the assignment of agreements entered into before a positive native title determination is made and which do not contain an express clause relating to succession and assignment?

QSNTS sees merit in this proposal.

This measure could address legacy agreements under which the “wrong people for country” may ordinarily remain a party if excluded from the description of native title holders in the determination. Effecting succession through legislation rather than requiring a variation of the agreement would reduce friction for the Native Title Holders in dealing with the likely disappointed if not disgruntled people who are not longer able to enjoy the benefits under the agreement: they can simply “blame the legislation” rather than having to engage in the controversial variation of agreements or disputes with people who are not determined to be Native Title Holders.

Proposal 3: Section 199C of the *Native Title Act 1993* (Cth) should be amended to provide that, unless an Indigenous Land Use Agreement specifies otherwise, the agreement should be removed from the Register of Indigenous Land Use Agreements when:

- a. the relevant interest in property has expired or been surrendered;
- b. the agreement has expired or been terminated; or
- c. the agreement otherwise comes to an end.

In QSNTS’ view, ILUAs should never be removed from the NNTT’s Register as it provides a useful and accessible archive of historical and current ILUAs for Native Title Holders, RNTBCs and Native Title claim groups to browse and search through.

However, QSNTS would agree with the NNTT classing or identifying agreements that are no longer extant as “terminated”, “expired” or “retired”.

It is QSNTS’ view that the NTA should empower the NNTT Registrar to retire ILUAs that are no longer extant on learning that:

- a. a Proponent no longer exists;
- b. the act to which the ILUA pertains is no longer on foot or ceases to affect the relevant native title rights and interests; or

- c. other circumstances exist that render the ILUA void, ineffective or meaningless.

This may occur by application from the Native Title Party, as a result of a periodic review of the ILUAs, or according to other triggers such as notice of a Proponent's winding up or significant breach of the ILUA.

ILUAs should 'run with the land' that is; if a pastoralist sells the property or lease, the incoming owner should be bound as if they were an original party to the agreement.

Proposal 4: The Native Title Act 1993 (Cth) should be amended to require the Native Title Registrar to periodically audit the Register of Indigenous Land Use Agreements and remove agreements that have expired from the Register.

See QSNTS' response to Proposal 3, above.

Question 10: Should the *Native Title Act 1993* (Cth) be amended to allow parties to agreements to negotiate specified amendments without needing to undergo the registration process again, and if so, what types of amendments should be permissible?

QSNTS sees merit in providing for that certain kinds of amendments to ILUAs do not require authorisation by the Native Title Holders or Native Title claim group. Changing the party, changing or adding the purpose of the ILUA, changing or adding to the area to which the ILUA related (unless it is reduced within the original boundaries under the ILUA), and changes that reduce the commercial terms for Native Title Party should not be allowed unless the Native Title Holders or Native Title claim group provided specific standing instructions to that effect.

Proposal 5: The *Native Title Act 1993* (Cth) should be amended to provide that the parties to an existing agreement may, by consent, seek a binding determination from the National Native Title Tribunal in relation to disputes arising under the agreement.

Question 11: Should the *Native Title Act 1993* (Cth) be amended to provide that new agreements must contain a dispute resolution clause by which the parties agree to utilise the National Native Title Tribunal's dispute resolution services, including mediation and binding arbitration, in relation to disputes arising under the agreement?

In QSNTS' view, this dispute resolution mechanism could work well, particularly where the disputes relate to questions of bona fide compliance with agreed terms, ancillary, side, or common law agreements relating to future act agreements and where good faith participation in mediation is mandated prior to the engagement of arbitration procedures.

Such a function would require the NNTT to be properly resourced. This would include a sufficient number of NNTT Members to hear these disputes along with the other work of NNTT Members, and the ability to draw on input from other disciplines.

QSNTS sees is a real advantage enabling the NNTT to engage relevant subject matter experts, such as engineers, economics, environmental scientists, anthropologists, town planners, and geographers to participate in the mediation and arbitration of disputes under future act agreements. Empowering and resourcing the NNTT to engage experts in the mediation and arbitration of disputes could lead to well-informed, practical, efficient, and meaningful outcomes for all parties.

Question 12: Should some terms of native title agreements be published on a publicly accessible opt-in register, with the option to redact and de-identify certain details?

In QSNTS' view, this could assist some Native Title Parties by providing a sense of the future act "market" and could provide or undermine negotiation leverage, depending on the risk of competition between Native Title Parties. Potential competition of this kind is perhaps a matter that could be further explored through research.

Any such publication should be operated on an entirely opt-in basis and the names of all parties to the agreements, and any identifying details, should be redacted from the published materials.

Question 13: What reforms, if any, should be made in respect of agreements entered into before a native title determination is made, in recognition of the possibility that the ultimately determined native title holders may be different to the native title parties to a pre-determination agreement?

See QSNTS' response to Question 9, above.

Question 14: Should Part 2 Division 3 Subdivisions G–N of the *Native Title Act 1993* (Cth) be repealed and replaced with a revised system for identifying the rights and obligations of all parties in relation to all future acts, which:

- a. categorises future acts according to the impact of a future act on native title rights and interests;
- b. applies to all renewals, extensions, re-grants, and the re-making of future acts;
- c. requires that multiple future acts relating to a common project be notified as a single project;
- d. provides that the categorisation determines the rights that must be afforded to native title parties and the obligations of government parties or proponents that must be discharged for the future act to be done validly; and
- e. provides an accessible avenue for native title parties to challenge the categorisation of a future act, and for such challenge to be determined by the National Native Title Tribunal?

QSNTS supports wholesale changes to Part 2 Div 3, up to and including its complete replacement. In QSNTS' view, the impact-based model would only work to benefit Native Title Parties if the NTA provided a mechanism for challenging the State's categorisation of the act. When assessing impact, there must be clear provisions for the State to consider either any relevant management plans, and/or the views of the relevant native title holders/ claim group. On the triggering of these mechanisms, it would be imperative that the NTA impose a stay on the doing of the future act until such time as the challenge is resolved.

QSNTS submits that the NNTT should be satisfied that all criteria for Category A have been met for a proposed future act to trigger Category A procedural rights. The only exception to this would be the duration of the proposed act, as there may be little utility or interest in requiring that a proponent uphold the Native Title Party's Category B procedural rights for a low-impact act that may last a long time. A non-intrusive research permit for 10 years is an example of this kind of act.

Without mechanism in place to regulate the State's decision making around "impact", QSNTS is concerned that the impact-based model may replicate the current problem created by the State determining the relevant impact category of a proposed act without sufficiently gathering information about the effect that it will have on the relevant native title rights and interests or the native title claimants or native title holders.

Definitions here are important. Clear definitions for "substantial" and "small scale" would be necessary for this proposal to be effective.

Further, QSNTS sees merit in devising additional categories such as a 'Category AA' where the right to consultation coupled with the imposition of conditions by the Government Issuing Authorities would provide a middle ground

where procedures beyond consultation must occur. For example, some future acts may fall within the Category B when assessed but the act itself does not warrant entering into a right to negotiate process. In this circumstance, the Government Issuing Authorities could impose conditions on the future acts. Such conditions could impose on the proponent a requirement to report on the consultation and engagement with native title holders once the future act is granted. For example, establishing a communication tower in a remote area fall within a Category B assessment. However, it may be better dealt with by imposing conditions requiring some further engagement once the future act is granted and prior to the construction of the tower.

In addition, QSNTS proposes the inclusion of a further “Category C”. This additional category could be applied to categorise acts that would affect sites or areas of significant cultural heritage value on application and evidence from a Native Title Party. This might include a rebuttable presumption that Aboriginals and Torres Strait Islanders are the subject experts on their cultural heritage and if cultural heritage is asserted to be in need of protection that is accepted. Procedural rights under Category C would allow the Native Title Party to quarantine certain sites or areas of significance from a proposed future act or the effects thereof.

Question 15: If an impact-based model contemplated by Question 14 were implemented, should there be exclusions from that model to provide tailored provisions and specific procedural requirements in relation to:

- a. infrastructure and facilities for the public (such as those presently specified in s 24KA(2) of the Native Title Act 1993 (Cth));
- b. future acts involving the compulsory acquisition of all or part of any native title rights and interests;
- c. exclusions that may currently be permitted under ss 26A–26D of the Native Title Act 1993 (Cth); and
- d. future acts proposed to be done by, or for, native title holders in their determination area?

QSNTS responds as follow:

- a. No
- b. Compulsory acquisition should be treated as a separate process to all other forms of future acts. It requires the highest level of engagement with the native title parties and negotiations through ILUAs
- c. No
- d. Perhaps subject to a Management Plan with all the protective measures discussed above.

Question 16: Should the *Native Title Act 1993 (Cth)* be amended to account for the impacts that future acts may have on native title rights and interests in areas outside of the immediate footprint of the future act?

Yes. A good example of the way that a future act can affect native title rights and interests outside the immediate footprint of the future act is where a future act that affects one location affects or “breaks” a songline.

Future acts can have environmental effects beyond the footprint of their proposed area. For example, permits to take water can have an impact on the flora, fauna and landscapes of dependent watercourses, not only in terms of the quantity available to support their health and sustainability, but the resulting quality as well.

Question 17: Should the *Native Title Act 1993 (Cth)* be amended to:

- a. exclude legislative acts that are future acts from an impact-based model as contemplated by Question 14, and apply tailored provisions and specific procedural requirements instead; and

- b. clarify that planning activities conducted under legislation (such as those related to water management) can constitute future acts?**

QSNTS sees merit in creating the following categories of future acts to facilitate suitable procedural rights.

Category A1 – low impact legislative acts for which governments must take the Native Title Party's view into account when creating the legislation or legislative instrument.

Category B1 – high impact legislative acts for which governments must consult with the Native Title Party's position in the creation of the legislation or legislative instrument. Any permits issued under Category B1 acts are Category B future acts and require proponents to negotiate an agreement with the Native Title Party.

Proposal 6: The provisions of Part 2 Division 3 Subdivision P of the *Native Title Act 1993* (Cth) that comprise the right to negotiate should be amended to create a process which operates as follows:

- a. As soon as practicable, and no later than two months after a future act attracting the right to negotiate is notified to a native title party, a proponent must provide the native title party with certain information about the proposed future act.**
- b. Native title parties would be entitled to withhold their consent to the future act and communicate their objection to the doing of the future act to the government party and proponent within six months of being notified. From the time of notification, the parties must negotiate in accordance with negotiation conduct standards (see Question 7).**
The requirement to negotiate would be suspended if the native title party objects to the doing of the future act.
- c. If the native title party objects to the doing of the future act, the government party or proponent may apply to the National Native Title Tribunal for a determination as to whether the future act can be done (see Question 18).**
- d. If the National Native Title Tribunal determines that the future act cannot be done, the native title party would not be obliged to negotiate in response to any notice of the same or a substantially similar future act in the same location until five years after the Tribunal's determination.**
- e. If the National Native Title Tribunal determines that the future act can be done, the Tribunal may:**
 - require the parties to continue negotiating in accordance with the negotiation conduct standards to seek agreement about conditions that should attach to the doing of the future act;**
 - at the parties' joint request, proceed to determine the conditions (if any) that should attach to the doing of the future act; or**
 - if the Tribunal is of the opinion that it would be inappropriate or futile for the parties to continue negotiating, after taking into account the parties' views, proceed to determine the conditions (if any) that should attach to the doing of the future act.**
- f. At any stage, the parties may jointly seek a binding determination from the National Native Title Tribunal on issues referred to the Tribunal during negotiations (see Proposal 7). The parties may also access National Native Title Tribunal facilitation services throughout agreement negotiations.**
- g. If the parties reach agreement, the agreement would be formalised in the same manner as agreements presently made under s 31 of the *Native Title Act 1993* (Cth).**
- h. If the parties do not reach agreement within 18 months of the future act being notified, or within nine months of the National Native Title Tribunal determining that a future act can be done following an objection, any party may apply to the National Native Title Tribunal for a determination of the conditions that should apply to the doing of the future act (see Question 19). The parties may make a joint application to the Tribunal for a determination of conditions at any time.**

All information relevant to the project, including work plan should be provided to the Native Title Party by the Proponent and / or the Government Issuing Authority. This would include the work plan for the future act as well as historical information related to the future act and/or the area of the future act.

Information relevant to the Proponent's history in projects of the type contemplated and its performance in relation to any conditions on the projects it has undertaken, compliance with environmental protection measures, and site rehabilitation must be provided to the Native Title Party

The involvement of the NNTT only really helps if there are prescribed comprehensive criteria to which the NNTT must give consideration when assessing the grounds of objection. The Proponent and the Government Issuing Authorities must bear the evidentiary burden and onus of proof to show that the future act will not affect or have a limited effect on the native title holders and their country. The *Briginshaw*¹ Principle should apply.

Grounds for the objecting to the future act

Establishing the grounds for objection should entail greater consultation with the Native Title Party. The grounds for objection could replicate the current criteria of objections to the expedited procedure as well as including additional criteria:

- The act can be undertaken elsewhere other than in the culturally sensitive area that it may affect.
- The act will irreversibly disturb, harm or destroy environmental values or cultural heritage that are essential to the exercise or enjoyment of native title rights and interests.
- The act is likely to interfere with areas or sites of particular significance, in accordance with the Native Title Holders' traditions.
- The act will affect the native title rights and interests of neighbouring Native Title Holders.

While the grounds for objections are expanded, the NNTT must consider when making the determination:

- The views of the Native Title Holders on the impact of the project on the nearby communities;
- The direct effects of the act on communities and the environment outside the future act footprint.
- The act is likely to involve major disturbance to any land or waters concerned or create rights whose exercise is likely to involve major disturbance to any land or waters concerned. Major disturbance should be defined in consultation with Native Title Parties.

Reversing the onus of proof and expanding the grounds for objections / consideration for determination would encourage Proponents into early and good faith negotiation with the Native Title Party as Proponents would need to engage with the Native Title Party to plan and evidence how their project would not comprise grounds for objection and would not, or would in a limited capacity, affect the Native Title Holders or their country.

QSNTS notes that six months is a reasonable period of time for an objection to be made.

QSNTS supports the five-year moratorium on applications after an objection is upheld.

Proposal 7: The Native Title Act 1993 (Cth) should be amended to empower the National Native Title Tribunal to determine issues referred to it by agreement of the negotiation parties.

QSNTS supports this proposal, however it is our view that the NNTT would enjoy enhanced effectiveness where it is able to draw on subject matter experts as arbitrators or independent advisors to the NNTT Members. See QSNTS response to Question 11, above.

¹ *Briginshaw v Briginshaw* 60 CLR 336; [1938] HCA 34

Similarly to other sectors, QSNTS sees benefit in providing for the parties to negotiate agreement on the appointment of any relevant expert to assist the NNTT, with the NNTT having the discretion to appoint a relevant expert should the parties fail to agree.

Question 18: What test should be applied by the National Native Title Tribunal when determining whether a future act can be done if a native title party objects to the doing of the future act?

See QSNTS' response to Question [proposal 6], above.

Question 19: What criteria should guide the National Native Title Tribunal when determining the conditions (if any) that attach to the doing of a future act?

First and foremost, the *bona fide* position of the Native Title Holders/ Claim Group.

Any conditions that have been negotiated and agreed to date between the parties should form the basis of part of the conditions imposed.

Standards for agreement making must be met in negotiated agreements.

The NNTT should consider whether the parties have been negotiating in good faith and impose any requirements that would support the good faith implementation of the conditions where required. Not negotiating in good faith includes scenarios in which key aspects of the notified future act are varied after the NNTT decision or after the start of negotiations.

The NNTT should be able to reverse their decision that the future act can be done if the Proponent doesn't negotiate in good faith.

Proposal 8: Section 38(2) of the *Native Title Act 1993* (Cth) should be repealed or amended to empower the National Native Title Tribunal to impose conditions on the doing of a future act which have the effect that a native title party is entitled to payments calculated by reference to the royalties, profits, or other income generated as a result of the future act.

QSNTS supports this proposal, subject to the NNTT engaging expert Members or independent expert advisors agreed on by the parties or by the NNTT in its discretion.

Proposal 9: Section 32 of the *Native Title Act 1993* (Cth) should be repealed.

QSNTS strongly agrees with this proposal and refers to its previous submissions in relation to the Expedited Procedure.

Question 20: Should a reformed future acts regime retain the ability for states and territories to legislate alternative procedures, subject to approval by the Commonwealth Minister, as currently permitted by ss 43 and 43A of the *Native Title Act 1993* (Cth)?

The diversity of approaches across different jurisdictions in relation to similar types of acts may overlay complicate and confuse Proponents, and fuel a view of native title procedural rights as opaque or obstructive "red tape".

However QSNTS sees merits in a proposal where alternative processes could be used for example in circumstances where there was a negotiated negative determination.

Question 21: Should Part 2 Division 3 Subdivision F of the *Native Title Act 1993* (Cth) be amended:

- a. to provide that non-claimant applications can only be made where they are made by, or for the benefit of, Aboriginal or Torres Strait Islander peoples;
- b. for non-claimant applications made by a government party or proponent, to extend to 12 months the timeframe in which a native title claimant application can be lodged in response;
- c. for non-claimant applications in which the future act proposed to be done would extinguish native title, to require the government party or proponent to establish that, on the balance of probabilities, there are no native title holders; or
- d. in some other way?

QSNTS is unable to see how a negative determination resulting from a non-claimant application, preventing any future positive native title outcomes or ability to claim compensation has any “work around” and considers that the non-claimant applications are not consistent with the preamble to the NTA.

The right to compensation should be preserved following a successful non-claimant application in circumstances where a subsequent successful NTDA surrounds the negatively determined area in that circumstance, compensation should be paid by the Proponent or property owner (including successors in title to the successful non-claimant applicant).

Proposal 10: The *Native Title Act 1993* (Cth) should be amended to expressly provide that a government party's or proponent's compliance with procedural requirements is necessary for a future act to be valid.

QSNTS strongly supports this measure along with the publication of reasons for any decision made by Government Issuing Authorities in order that decisions can be the subject to judicial review.

Question 22: If the *Native Title Act 1993* (Cth) is amended to expressly provide that non-compliance with procedural obligations would result in a future act being invalid, should the Act expressly address the consequences of invalidity?

QSNTS suggests a right to seek punitive compensation for acts that cannot be undone or otherwise, grounds for the NNTT to decide that they cannot be done.

Question 23: Should the *Native Title Act 1993* (Cth), or the *Native Title (Notices) Determination 2024* (Cth), be amended to prescribe in more detail the information that should be included in a future act notice, and if so, what information or what additional information should be prescribed?

Eg s 24HA (management of water and airspace) - Some of the current notices cover a large area (for example; notification for the whole of Queensland or the whole of the Great Barrier Reef area) and / or an unqualified number of permits (up to 100) for a various of topics (scientific and tourism). In this case, there is no specific location / certainty on the number of permits to be issued for a particular area / type of permits.

This does not assist with the details of the notice. Unfortunately, because Government Issuing Authorities have been permitted to do this, it has become the norm that despite there being a paucity of information in the notice, the notice is ‘valid’.

It should be mandatory that more details as to **how** the activities will be conducted and the impact of the activities on native title – the impact of the activities on the land is usually the most important.

Some notices are invalidly issued under the current regime (in QSNTS' view) and there is no recourse other than to litigate for declarations as to the validity of the notice.

Information to be provided:

- (i) The correct section of the legislation to which the future act relates and giving right to issue notice – timeframe to question the validity of the notice (if low or high impact or category)
- (ii) Location
- (iii) Impact of activity on NT
- (iv) Timeframe as to the activity (particularly if it is a short project eg updating weather station facilities)
- (v) Proponent if the Native Title Parties have to deal with them directly, for example under Category B future acts.
- (vi) Role of the Government Issuing Authorities and recourse available to the Native Title Party if the proponent is not complying with the NTA or conditions of permits.

Proposal 11: All future act notices should be required to be lodged with the National Native Title Tribunal. The Tribunal should be empowered to maintain a public register of notices containing specified information about each notified future act.

QSNTS supports this proposal.

Question 24: Should the *Native Title Act 1993* (Cth) be amended to provide that for specified future acts, an amount which may be known as a 'future act payment' is payable to the relevant native title party prior to or contemporaneously with the doing of a future act:

- a. as agreed between the native title party and relevant government party or proponent;
- b. in accordance with a determination of the National Native Title Tribunal where a matter is before the Tribunal;
- c. in accordance with an amount or formula prescribed by regulations made under the *Native Title Act 1993* (Cth); or
- d. in accordance with an alternative method?

Question 25: How should 'future act payments' interact with compensation that is payable under Part 2 Division 5 of the *Native Title Act 1993* (Cth)?

QSNTS agrees with the proposal under Question 24. Future act payments as described under Question 24 should be considered separate to consideration provided in return for the Native Title Party's agreement to the future act or any entitlement to native title compensation. It is simply a fee that must be paid as a requirement for validity as licence fee.

Proposal 12: Sections 24EB and 24EBA of the *Native Title Act 1993* (Cth) should be amended to provide that compensation payable under an agreement is full and final for future acts that are the subject of the agreement only where the agreement expressly provides as such, and where the amounts payable under the agreement are in fact paid.

Section 24EB(5) has created a great deal of hesitation in recommending ILUAs to QSNTS constituents. While the measures put forward in proposal 12 go some way to addressing this concern, a broader ability for the parties to agree to the terms of the full and final nature of any compensation provided for in an ILUA is necessary. For

example, parties should be able to agree that the compensation in an ILUA may be in full and final satisfaction of the agreed economic loss associated with the doing of an act but that parties agree to negotiate further on a cultural loss complement. As currently drafted, s 24ED(5) would prevent the parties from doing so.

Question 26: Should the *Native Title Act 1993* (Cth) be amended to provide for a form of agreement, which is not an Indigenous Land Use Agreement, capable of recording the terms of, and basis for, a future act payment and compensation payment for future acts?

If the benefit of this alternative agreement is to provide flexibility, allow for variations and not have a party bound by a full or final clause, then QSNTS sees some merit in this.

Proposal 13: The *Native Title Act 1993* (Cth) should be amended to provide a statutory entitlement to compensation for invalid future acts.

QSNTS strongly supports this proposal.

Proposal 14: The *Native Title Act 1993* (Cth) should be amended to provide for and establish a perpetual capital fund, overseen by the Australian Future Fund Board of Guardians, for the purposes of providing core operations funding to Prescribed Bodies Corporate.

QSNTS supports this proposal. Along these lines, QSNTS also sees a role for the fund manager or trustee to act as a trustee to hold the revenues paid to Native Title Claim Groups under future act agreements until such time as their prescribed body corporate and associated bank account is established.

Proposal 15: Native Title Representative Bodies and Native Title Service Providers should be permitted to use a portion of the funding disbursed by the National Indigenous Australians Agency to support Prescribed Bodies Corporate in responding to future act notices and participating in future acts processes.

QSNTS strongly supports this proposal.

Proposal 16: The Australian Government should adequately fund the National Native Title Tribunal to fulfil the functions contemplated by the reforms in this Discussion Paper, and to provide greater facilitation and mediation support to users of the native title system.

QSNTS strongly supports this proposal.

Proposal 17: Section 60AB of the *Native Title Act 1993* (Cth) should be amended to:

- a. entitle registered native title claimants to charge fees for costs incurred for any of the purposes referred to in s 60AB of the Act;
- b. enable delegated legislation to prescribe a minimum scale of costs that native title parties can charge under s 60AB of the Act;
- c. prohibit the imposition of a cap on costs below this scale;
- d. impose an express obligation on a party liable to pay costs to a native title party under s 60AB of the Act to pay the fees owed to the native title party; and

- e. specify that fees charged by a native title party under s 60AB can be charged to the government party doing the future act, subject to the government party being able to pass through the liability to a proponent (if any).

QSNTS responds as follow:

- a. Yes.
- b. Yes.
- c. Yes.
- d. Yes.
- e. Yes.

Question 27: Should the Native Title Act 1993 (Cth) be amended to expressly address the awarding of costs in Federal Court of Australia proceedings relating to the future acts regime, and if so, how?

Generally, there should be no adverse costs against a Native Title Party unless that party has brought the matter in what would amount to an abuse of process or has conducted the litigation of the matter in an unreasonable way so as to increase the costs burden on the counter parties.

However, costs should be borne by an unsuccessful Proponent. In that circumstance it should be clear that costs are recoverable by a Native Title Party that is supported by public funding (see: *Oil Basins Limited v Watson* [2017] FCAFC 103).

Proposal 18: The Australian Government should establish a specifically resourced First Nations advisory group to advise on implementing reforms to the *Native Title Act 1993 (Cth)*. Question 28

QSNTS supports this proposal, subject to the group comprising several members with professional and lived experience of the native title system.

Question 28: Should the Native Title Act 1993 (Cth) be amended to provide for requirements and processes to manage the impacts of future acts on Aboriginal and Torres Strait Islander cultural heritage, and if so, how?

The current separation of future act procedural rights and the protection of cultural heritage is confusing and difficult to manage for, not only our client groups but also those that legally represent them. QSNTS urges the ALRC to consider the possible links between suggested reforms in the EPBC space suggested by the First Nations Heritage Protection Alliance and the enhanced the proposed enhanced role native title parties will have under the proposals presented in the discussion paper.