

Our ref: Record Number

Native Title Unit
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

by email only to: native.title@ag.gov.au

28 February 2018

**Proposed Reforms to the *Native Title Act 1993 (Cth.)*
Response to Options Paper of November 2017**

Thank you for the opportunity to provide comment and feedback in relation to your options paper relating to proposed reform of, and amendment to, the *Native Title Act 1993 (Cth.)* ('NTA').

Queensland South Native Title Services Limited ('QSNTS') holds recognition from the Australian Government to perform the functions of a native title representative body for the Sothern and Western Queensland Region pursuant to part 11 of the NTA.

In preparing is response to the Options Paper, QSNTS has had the benefit of referring to the submissions of the National Native Title Council ('NNTC') and First Nations Legal and Research Services ('FNLRS'). QSNTS acknowledges the work undertaken by those entities in preparing responses and providing those responses to other in the sector.

As a general proposition QSNTS agrees with, adopts, and endorses the positions taken by the NNTC and FNLRS.

As foreshadowed and anticipated in the NNTC response, QSNTS does have some divergent views and these are addressed below. QSNTS also take this opportunity to add some additional comments where there are areas of agreement.

Authorisation of the Applicant - Scope of Authority of the Applicant

It has been the practice of QSNTS Legal Officers for a number of years to suggest to their client claim groups that the authorisation of their applicant be subject to 'Terms of Appointment'.

Those draft terms are typically circulated to the members of the claim group or putative claim group well ahead of the relevant authorisation meeting to allow discussion to occur with the group or within families comprising the group.

Typically, those terms will address (among other things):

- the extent to which the Applicant may make decisions about the claim area, withdrawing the claim and resolving the claim without further authorisation from, or consultation with, the claim group;
- the way in which the Applicant may make decisions (by majority at a properly convened meeting);
- the quorum for a valid meeting of the Applicant.

Some groups have included terms of appointment based upon orders [2] – [13] (inclusive) made by Rares J in *Weribone on behalf of the Mandandanji People v State of Queensland* [\[2013\] FCA 255](#) .

Indigenous Decision Making

QSNTS supports the proposed amendment to aspects of ss 251A and 251B relating to the way decisions are made relating to authorisation and under Reg. 8 of the *Native Title (Prescribed Body Corporate) Regulations 1999 (Cth.)* ('PBC Regs').

Despite a literal reading of the relevant extant provisions favouring an interpretation allowing an election as to the type of decision making used by the native title claimants or native title holders, QSNTS favours a statutory acknowledgment that claimant groups and native title holders have choice and flexibility around their decision making process or processes.

QSNTS considers that the cohort(s) of native title holders and native title claimants ought not be subject to a prescribed process and should be afforded flexibility to identify and implement a decision making process that:

- (a) suits the relevant cohort and the families and individuals comprising it; and
- (b) suits the particular circumstances of the cohort making the decision; and
- (c) is suitable having regard to subject matter of the decision to be made

It is QSNTS's experience that groups as a corpus or clans or families within a native title claim group often elect to incorporate elements of traditional decision making into their agreed and adopted processes.

The proposal allows a native title claim group (or sections within it) or the cohort of native title holders to be responsive and sensitive to its own internal needs and circumstances.

Post-Determination Dispute Management

QSNTS favours an expanded role for the National Native Title Tribunal ('NNTT') in resolving and, if necessary, adjudicating disputes.

The role of the Office of the Registrar of Indigenous Corporation ('ORIC') ought to be limited to administration of *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth.)* ('CATSIA') and providing assistance in relation to compliance with that Act and Regulations made under it and assistance with corporate governance.

ORIC ought not be placed in the positions of regulator and adjudicator.

The NNTC favours proposals to give the Federal Court of Australia exclusive jurisdiction with respect to disputes arising under the PBC Regs. It is QSNTS's position that the Federal Court, whilst having vast

corporate knowledge and experience in relation to native title and the NTA provides a somewhat daunting, expensive and overly legalistic forum to hear and decide what may be fairly minor disputes.

Many disputes referred to ORIC relate to eligibility of persons for admission to membership of a Prescribed Body Corporate ('PBC') or Registered Native Title Body Corporate ('RNTBC') or to the admission of a person to membership or the rejection of a person's application for admission to membership.

At [68] the NNTC supports the creation of a system delivering low cost and final resolution of disputes between members of the native title group and the PBC.

QSNTS submits that role could be devolved to the NNTT in an expansion of its current role but so as to provide a forum and process that is simpler, more accessible, less expensive and less legalistic than the Federal Court. This could be based on a structure and processes similar to those used by the Queensland Civil and Administrative Tribunal.

I trust that these brief observations are of assistance and invite you to contact me if you require any clarification or further comment.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'Tim Wishart', with a stylized flourish at the end.

Tim Wishart
Principal Legal Officer