



**Queensland South Native Title Services**

ABN: 88 114 581 556

Head Office  
Level 4, 370 Queen Street  
**PO Box 10832**  
Adelaide Street  
BRISBANE QLD 4000

**Ph:** (07) 3224 1200  
**Fax:** (07) 3229 9880  
**Free-call:** 1800 663 693

[admin@qsnts.com.au](mailto:admin@qsnts.com.au)  
[www.qsnts.com.au](http://www.qsnts.com.au)

## **DRAFT GUIDELINES FOR BEST PRACTICE FLEXIBLE AND SUSTAINABLE AGREEMENT MAKING**

**Submission from Queensland South Native Title Services Limited**

**July 2009**

### Introduction

Queensland South Native Title Services Ltd ('QSNTS') welcomes the opportunity to make submissions on the Guidelines for Best Practice Flexible and Sustainable Agreement Making developed by the Joint Working Group on Indigenous Land Settlements ('the Guidelines').

This submission is divided into three parts that correspond to the distinct phases of broader land settlement negotiations identified in the Guidelines. Generally, QSNTS is of the view that the Guidelines represent a positive step towards a more flexible and less technical approach to agreement making. We are satisfied with most of the points contained in the Guidelines.

However, the sections below raise a number of questions and concerns about particular issues that QSNTS would like the Joint Working Group to consider prior to the upcoming Native Title Ministers Meeting. In addition to these questions and concerns about the content of the Guidelines, we believe that there is a risk that unless steps are taken to guarantee their adoption, the Guidelines could be viewed as nothing more than an ineffective set of aspirational statements. The last section of this submission will suggest a number of timeframes, reporting mechanisms and incentives that ought to be put in place to guarantee real outcomes for traditional owners.

## Early Negotiation

### **Authorisation to Commence Negotiations**

The Guidelines state that prior to the commencement of negotiations, government parties should endeavour to ensure all parties are authorised to commence negotiations. QSNTS believes that this point requires significant clarification. The Guidelines suggest that all traditional owners need to have to get a seat at the negotiating table is to be 'authorised'. If this is the case, then it needs to be clarified whether this means authorisation under Section 251B of the *Native Title Act 1993* (Cth) ('NTA') (ie, authorising the making of applications), s 251A (ie, authorising the making of indigenous land use agreements), or some other method of authorisation.

If authorisation of traditional owner parties to the negotiation is a threshold requirement, QSNTS submits that a similar requirement must also be applied to government parties. State parties to negotiations must have substantive political authority that emanates from at least a Ministerial level. Such authorisation should be specific to the particular claim and not just an authority to explore prospects of settlement which may or may not be subject to later ministerial endorsement.

Government parties should also need to demonstrate that their interests are substantive rather than relying on the fact that they are entitled to participate simply because they are the first respondent to all claims.

### **Necessary Research**

The Guidelines state that prior to the commencement of negotiations, government parties should endeavour to identify and complete necessary research. QSNTS would like some clarification on what constitutes 'necessary research'. Does this include, for example, a pre-condition that the right people for right country are identified? What sort of timeframes will the States work within for identifying and completing their research? At what point will the government parties be willing to share their research with the traditional owners?

## **Right People for Right Country**

The Guidelines state that government parties need to be satisfied they are dealing with the right people for country before commencing negotiations. QSNTS agrees with this fundamental criterion. However, QSNTS has some concerns with the factors given in the Guideline for establishing this criterion. Firstly, we disagree that the existence of a registered claim or ILUA with no overlaps can, without more, establish the right people for right country. The ILUA registration process is not based upon identifying right people for right country and different considerations are taken into account including the desirability of minimising delays and objection to infrastructure projects.

We also disagree that having a registered claim should be an indicator. This is because the registration process is administrative in nature and very little forensic consideration has in the past been applied to the evidence produced by Applicants to obtain registration.

If indeed the claims process is to be relied upon to establish the 'right people for right country' it needs to be made clear that registration is a pre-condition to entering into substantive negotiations. A related issue is whether there has to be a native title claim on foot before substantive negotiations can be entered into, and at what stage must the proceedings have reached.

Recognition by the relevant NTRB that the group comprises the 'right people' is listed as a further factor. QSNTS accepts this as a useful factor; however we submit that recognition must be predicated upon credible independent anthropological and genealogical evidence.

## **Resolving Overlaps**

QSNTS would like the Joint Working Group to consider the ways in which governments can proactively engage to resolve overlaps as part of the Guidelines. It is our experience within our own jurisdiction

that the State will not engage in substantive negotiations in a claims resolution context unless these issues have been resolved between Indigenous groups.

We submit that the Guidelines should set out specifics on how government parties can engage, including an obligation to provide the disputants with historical tenure material over the disputed area. In addition, the Guidelines should state that other government material and information held by the state party regarding the disputed area at effective contact or sovereignty must be made available without cost.

Where land summits and regional summits are contemplated, the Guidelines should state who is responsible for covering the significant costs of holding such fora.

### **Sustainable Benefits**

QSNTS agrees with the list of sustainable benefits noted in the Guidelines. However, we would add the following:

- management and use of water resources including, but not limited to:
  - water sharing plans;
  - Aboriginal cultural licenses to allow communities to access water for vital cultural purposes;
  - Provision of commercial licenses, subject to caps and other protection measures in times of drought, to become involved in water-related business.
- access to land to conduct cultural activities;
- a framework for agreements to be reached with landholders allowing traditional owners ongoing access to land to protect Aboriginal cultural heritage; and
- right to negotiate with non-Government parties with respect to future activities and projects on land.

We note that the latter point above may be covered under point 'g' in the sustainable benefits list (ie, ongoing commitment to collaborate on future projects), but we submit that this benefit ought to extend to giving traditional owners more substantial involvement in determining the nature and extent of future activities on their traditional lands. An alternative future act regime must be created where native title proceedings have been discontinued as a result of an alternative settlement.

In relation to point 28(g) – co-operative management arrangements, for example, of a national park – QSNTS makes the following observations based on our experience within our own jurisdiction. Our clients' aspirations to co-manage national parks have been consistently raised in negotiations over many years. However, in the absence of a native title determination, such aspirations have not been supported by our Government to date. We are concerned that, unless there is a fundamental shift in our Government's policy position on co-management, the Guidelines are likely to mislead our clients. What assurance can be made that the Guidelines accurately reflect either current or future policies of state governments?

### **Cross-Jurisdictional Approach**

QSNTS agrees that parties should consider engaging in regional settlements from the outset where appropriate. However, we submit that negotiations for regional settlements must involve the co-ordination of government approaches where the aspirations of the traditional owner party extend beyond a State border. Government parties should adopt a consistent approach to agreement making across borders. This will ensure that where traditional owners can reach consensus with the government party on one side of a border (eg, where a claim area includes a mountain range that divides two states), they are not prevented from achieving their aspirations because the other government party chooses to adopt a different approach.

## Substantive Negotiation

### **Interested Based Approach**

QSNTS agrees that parties must adopt an interest based approach to negotiations and avoid technical or positional bargaining. We consider this a central part of the Guidelines. However, we have concerns over the willingness and/or the ability of government parties to step away from employing narrow or technical definitions of what may constitute native title rights and interests.

Our experience is that negotiations with government parties have become bogged down with artificial arguments about what was the traditional society, at what level of that society native title rights and interests were exercised and what were the relevant laws and customs of that traditional society relating to the use and access of land. Most commonly, we have found that the answer to these questions is not readily ascertainable.

We submit that government parties should not insist on the Applicant establishing that traditional laws and customs are uniformly observed, without exception, by the contemporary claim group. Nor should they insist that the Applicant establish continuity of observance of traditional laws and customs since sovereignty before being prepared to engage in substantive negotiations.

Once a Traditional Owner group has established that they are the right people for the right country, the focus should shift to ascertaining what the traditional owner group is seeking and whether it is possible to accommodate those goals.

The Guidelines should confirm that Government Parties will not require definitions that indigenous Parties address technical and definitional issues before entering substantive mediation. Reliance on these sorts of technical thresholds and requirements has the potential to draw out or curtail the agreement making process.

While QSNTS agrees that government parties must adopt a less narrow and technical approach, we believe that for alternative settlements to be successful, they must deliver enduring benefits that are equivalent to those currently being derived from the procedural rights afforded under the NTA.

## Implementation

QSNTS agrees that government parties should ensure there are adequate resources so that longer term commitments are met under broader land settlement agreements. We agree with all of the implementation measures identified under the Guidelines.

However, QSNTS submits that unless governments are prepared to take certain steps to ensure that the Guidelines are adhered to, then they will be of little or no use. The following are some suggestions that we believe will ensure that the Guidelines will be utilised effectively, leading to real outcomes for all parties involved in the process.

### **Timeframes and KPIs for Resolution of Claims**

QSNTS submits that there must be an overarching commitment to timeframes for resolution of native title claims. Government parties must be prepared to set and meet key performance indicators ('KPIs') that establish realistic targets for the number of claims to be resolved and broader land settlements reached within a set time period. The Guidelines will thus act as a road map and tool for achieving these targets.

Furthermore, we submit that the performance of the Director General in each jurisdiction should be assessed by reference to the KPI targets. This incentive will enhance the ability of the Guidelines to deliver real and tangible benefits to traditional owners in the shortest timeframe that is realistically possible.

### **Reporting Mechanism**

QSNTS submits that State governments must agree to a mechanism for independent reporting on the use and effectiveness of the Guidelines. At minimum, a bi-annual review should be undertaken and a report produced and provided to each State and the Commonwealth government, as well as traditional owner groups and NTRBs. The report should focus on whether government parties have followed the

Guidelines and the effectiveness of the guidelines in leading to broader land settlements or other tangible outcomes for traditional owners.

## Conclusion

QSNTS welcomes the Guidelines as a broad policy statement and we support them, subject to the points made above. However, we note that the Guidelines certainly do not reflect the current or past negotiating position being taken by the State government in our own jurisdiction and we have grave doubts that they will change the established culture of procrastination and delay that we have experienced. In fact, the position presently being taken in some negotiations could be described as obstinate and unduly technical. The very development of the Guidelines appears to highlight this.

In fact, we view the existence of the Guidelines as a concession by state parties that their past conduct has not assisted to deliver mutually acceptable outcomes for all parties within a reasonable timeframe. We are encouraged by the steps being taken by the Joint Working Group in this regard.

However, we believe that the Guidelines will not be worth the paper they are printed on unless positive measures are taken, such as the establishment of timeframes, reporting mechanisms and incentives in parallel with the Guidelines which will help guarantee real outcomes for traditional owners.

QSNTS hopes that the Joint Working Group finds this submission useful. We are available to address or clarify particular points in this submission so please contact us if necessary.