REVIEW OF NATIVE TITLE ORGANISATIONS

Deloitte Access Economics
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INTERPRETATION

In this submission, unless there is something in the subject or context which is inconsistent:

“QSNTS” means Queensland South Native Title Services Ltd.
“NTA” Native Title Act 1993 (Cth)
“ILUA” Indigenous Land Use Agreement
“NTRB” Native Title Representative Body
“NTSP” Native Title Service Provider
“PBC” Prescribed Body Corporate
“ToR” Term of Reference
“FaHCSIA” the Department of Families, Housing, Community and Indigenous Affairs which is now called the Department of Social Services.
“IBA” Indigenous Business Australia
“ILC” Indigenous Land Corporation
“ORIC” Office of the Registrar of Indigenous Corporations
“PFA” Program Funding Agreement
“NNTT” National Native Title Tribunal
“NNTC” National Native Title Council
“LSC” Legal Service Commission
“QLC” Queensland Law Society
“ACNC” Australian Charities and Not-for-Profit Commission
BACKGROUND OF QSNTS

1. Queensland South Native Title Services Ltd (QSNTS) (“the Company”) is a native title service provider pursuant to s203FE of the Native Title Act 1993 (Cth) (“NTA”). The Company is limited by guarantee and is incorporated under the Corporations Act 2001. The Company comprises of five ordinary members who are also the five directors of the Company¹. The Board is appointed pursuant to specific professional qualifications and experience enshrined in the organisation’s constitution².

2. QSNTS was incorporated on 2 June 2005 as a section 203FE³ body to assume the statutory functions of the de-recognised Queensland South Representative Body (QSRB) Aboriginal Corporation. The original boundaries of QSNTS extended east to the coast from Haddon’s corner and south to the Southern Australian and New South Wales border. The original boundaries contained approximately twenty (20) claims. At the time QSNTS assumed responsibility for the region there were no native title determinations nor were there any claim-related Indigenous Land Use Agreements (ILUA). The region contained numerous overlapping claims. Attached (Appendix A) is a map of the original claim area.

3. From 2005 to 2007, QSNTS concentrated on resolving the overlap disputes. By and large that dispute resolution process proved successful. At that time the Federal Court of Australia effectively placed the overlapping claims in ‘abeyance’ to accommodate the resolution of overlapping claims.

4. On 1 July 2008, QSNTS’s operational boundaries were extended to include the entire region of Gurang Land Council Aboriginal Corporation (“Gurang Land Council”) and the majority of the Carpentaria Land Council Aboriginal Corporation (“Carpentaria Land Council”) region. This phase will be referred to in this submission as the “Amalgamation”. As at the Amalgamation, there were twenty (20) claims in the Gurang Land Council region and sixteen (16) claims in the Carpentaria Land Council region. Neither region had any native title determinations nor any claim related ILUAs. The Gurang Land Council had significant

¹ Corporations Act 2001, A Public Company Limited by Guarantee, Constitution of Queensland South Native Title Services, s5.1
² Corporations Act 2001, A Public Company Limited by Guarantee, Constitution of Queensland South Native Title Services, s5.4
³ Native Title Act 1993 (Cth)
overlapping claims. Some claims overlapped as many as 4 to 5 other claims. The Carpentaria Land Council had made significant in-roads into resolving multiple overlaps but not much work had been done on preparing connection evidence to prosecute the claims. Attached (Appendix B) is a map of claims in both regions at the time of the Amalgamation. Attached (Appendix C) is also a post Amalgamation map as at July 2008.

5. It is noteworthy that as at Amalgamation, not one native title claim group within the extended region had finalised a connection report that had been accepted by the State of Queensland as a basis to negotiate towards a consent determination. It is also noteworthy that over the period that the many claims had been filed, in one form or another, the various representative bodies had undertaken a significant amount of anthropological research. Some claims had multiple reports (some 10 or 12 reports) prepared by different anthropologists and related experts, while other claims had virtually no research undertaken despite having been on-foot for many years.

6. The reasons for the absence or lack of claim progress are very complex. Some of the factors include:
   i. multiple overlapping claims;
   ii. ill-conceived claims;
   iii. intra and inter claim group disharmony;
   iv. competing priorities between long term benefits of prosecuting a claim as against short term economic benefits of negotiating future act agreements and participating in cultural heritage activities;
   v. geographically dispersed claim groups and applicants;
   vi. lack of client capacity to understand native title and the evolving jurisprudence;
   vii. poor retention of client capacity with changes to the applicant group;
   viii. lack of strategic regional research vision or poor implementation;
   ix. difficulty in recruiting and retaining professional staff to regional areas;
   x. failure to properly conceive and strategise the claim before filing;
   xi. changes in NTRB claim teams without mechanisms to retain corporate knowledge; and
   xii. availability of competent consultant anthropologists.
7. The above list is not in any particular order and is not exhaustive, however, it is worth pointing to other factors that have an impact on claim progress but remain largely outside the control of the NTRB/NTSP. These include:
   i. cultural business – funerals and other cultural business will always occur and claim prosecution must fit in with these cultural realities;
   ii. resources are finite – there will never be enough resources so it is important to prioritise the allocation of those limited resources; and
   iii. attitude of the State and other respondents – there will always be a level of politics at play; the challenge and solution is getting beyond political positions using a compelling evidence based approach, strong stakeholder engagement and relationship building.

8. Bearing all these factors in mind, QSNTS in the immediate post-Amalgamation phase committed to the following ‘business model’:
   i. provide the full suite of statutory services to all clients requesting services;
   ii. allocate resources to all claims currently filed to ensure progress on all claims as opposed to a select few;
   iii. establish multi-disciplinary case management teams that adopt project management principles to harness finite human and financial resources to achieve clear claim objectives within designated timeframes; and
   iv. broaden the pool of consultant anthropologists who are given contracts with clear terms of reference and proactively contract managed to achieve agreed deliverables in a reasonable timeframe.

9. Shortly after the Amalgamation there were two critical proximate determinants that influenced QSNTS’s business model:
   i. unprecedented extractive industry activity, mainly associated with coal seam gas; and
   ii. the Queensland (Qld) Registry of the Federal Court of Australia adopting a more robust case management process in an effort to achieve an increased disposition rate of Queensland native title claims.

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4 Queensland South Native Title Services, Strategic Plan 2010-2013
10. The Honourable Justice Dowsett, in his paper *Native Title Case Management Arrangements, Prioritisation of Cases* articulated the imperatives from the Courts viewpoint:

“Our aim should be:

1. to dispose of all existing applications within 10 years from 1 January 2011; and
2. to dispose of all applications made after that date within 5 years of the completion of notification in the Tribunal, subject to limitations imposed by (1) above”.

11. Having regard to the sheer number of claims (most being in the early phase of prosecution), QSNTS made a conscious decision to focus limited resources on claim prosecution to meet the Federal Court imperatives. As such the suite of services offered by QSNTS had to be curtailed. That curtailment included the abolition of a designated future act unit. QSNTS still provided some future act support but only on a limited basis.

12. In this environment, QSNTS concentrated its organisational efforts in producing credible evidence to prosecute native title claims to achieve native title determinations. This organisational effort produced the following targeted outcomes:

<table>
<thead>
<tr>
<th>Date of Determination</th>
<th>Claim</th>
<th>Claim related ILUAs</th>
</tr>
</thead>
<tbody>
<tr>
<td>4 July 2011</td>
<td>QUD6010/1998 Quandamooka People #1</td>
<td>2 x State ILUAs</td>
</tr>
<tr>
<td></td>
<td>QUD6024/1999 Quandamooka People #2</td>
<td>1 x Local Government ILUA</td>
</tr>
<tr>
<td>12 December 2011</td>
<td>QUD579/2005 Kalkadoon People</td>
<td>37 x Pastoral ILUAs</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 x State ILUA</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 x Local Government ILUA</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 x Ergon ILUA</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 x Mining ILUA</td>
</tr>
<tr>
<td>22 June 2012</td>
<td>QUD6027/2001 Gunggari People</td>
<td>5 x Pastoral ILUAs</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 x Ergon ILUA</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 x Local Government ILUA</td>
</tr>
<tr>
<td>28 August 2012</td>
<td>QUD6025/1999 Pitta Pitta People</td>
<td>17 Pastoral ILUAs</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1 x Local Government ILUA</td>
</tr>
</tbody>
</table>

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6 Federal Court of Australia, Queensland District Registry, *Native Title Case Management Arrangements, Prioritization of Cases*, Justice Dowsett, 19 October 2010
7 Federal Court of Australia, Queensland District Registry, *Native Title Case Management Arrangements, Prioritization of Cases*, Justice Dowsett, 19 October 2010
8 Queensland South Native Title Services, *Annual Report 2010-2013*
Applying the same evidence-based approach to claim prosecution, QSNTS has produced a further seven (7) connection reports that have been accepted by the State and which should progress to positive native title determinations over the next twelve (12) months. There is much more claim work that needs to be done on the remaining thirty-one (31) claims in the QSNTS region. Other potential claims are being researched.

As part of QSNTS’s organisational maturation process, it became evident that Prescribed Bodies Corporate (PBCs) need NTRB/NTSP support from the foundation-laying stages until they mature into functionally independent entities.

Previously, QSNTS compartmentalised native title into pre and post native title determination work, to commit resources solely to the pre-determination phase. However, such artificial distinctions ignore that native title is a continuum that requires a comprehensive service delivery response tailored to the evolving needs of clients. Some services will be in high demand at all points along the continuum but others will be different depending on the stage.

The current and emerging challenges for all NTRB/NTSPs will be to:

i. maintain existing capabilities whilst building new ones;
ii. ensure flexible but robust decision-making on operational priorities; and
iii. encourage innovative thinking to deal with a changing complex landscape.

The rest of this submission responds to the ToR in terms of the past, present and future challenges that QSNTS (and potentially other NTRB/NTSPs) have been and will be facing, as well as some possible solutions.
TERM OF REFERENCE – 1

Examine the range of functions, both statutory and non-statutory currently performed by NTRBs and NTSPs:

17. s203B(1)⁹ states that representative bodies have the following functions:

(a) the facilitation and assistance functions referred to in section 203BB;
(b) the certification functions referred to in section 203BE;
(c) the dispute resolution functions referred to in section 203BF;
(d) the notification functions referred to in section 203BG;
(e) the agreement making function referred to in section 203BH;
(f) the internal review functions referred to in section 203BI;
(g) the functions referred to in section 203BJ and such other functions as are conferred on representative bodies by this Act”.

18. Importantly, s203B(4) states:

A representative body:

(a) must from time to time determine the priorities it will give to performing its functions under this Part; and
(b) may allocate resources in the way it thinks fit so as to be able to perform its functions efficiently;

but must give priority to the protection of the interests of native title holders

19. As stated in the Background section above, as at the time of the Amalgamation QSNTS provided the full suite of functions under s203B¹⁰. In particular, the range of services under s203BB¹¹ included:

i. research and preparation of native title applications; and
ii. legal representation, assistance and advice in relation to:
   a) Native title applications;
   b) Future Acts; and

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⁹ Native Title Act 1993 (Cth)
¹⁰ Native Title Act 1993 (Cth)
¹¹ Native Title Act 1993 (Cth)
c) Indigenous Land Use Agreements (ILUAs).

20. In addition to the above statutory functions, QSNTS undertook non-statutory functions such as:
   i. capacity development of native title groups in relation to future act activities; and
   ii. advocacy in relation to legislative and administrative reform.\textsuperscript{12}

21. While the NTA is silent on capacity development of native title groups as a function, it is submitted that capacity development is a necessarily implied function as a group’s understanding of the statutory regime and jurisprudence is critical to the efficient and effective provision of legal advice and representation and receipt of meaningful instructions.

22. Furthermore s203BJ(c) states:

   “as far as is reasonably practicable, take such action as the body considers appropriate to promote understanding, among Aboriginal people and Torres Strait Islanders living in the area, about matters relevant to the operation of this Act”.

23. The promotion of understanding is an underpinning tenet to capacity development.

24. This function is a resource-intensive activity, as building capacity must be tailored to the needs of the individual client with multiple variables that may impact upon the success of the activities including:
   i. the geographical location of the group;
   ii. access to resources (financial, physical and human);
   iii. the existing skill-sets of the group;
   iv. the ability to retain and transmit acquired capacity;
   v. leadership and cohesion of the group;
   vi. existing inappropriate/ineffectual corporate structures; and
   vii. lack of congruity between available structures and vehicles and the overarching societal mores observed by Traditional Owners.

25. From 2008 to 2011 QSNTS was able to conduct a capacity development program utilising specific project monies from the Queensland State Government\textsuperscript{13} entitled Capacity

\textsuperscript{12} Queensland South Native Title Services, Annual Report 2011-12
\textsuperscript{13} Department of Employment, Economic Development and Innovation (DEEDI), Total amount received by QSNTS of
Development Officer Program (CDOP). The program had mixed success having regard to the complex variables referred to above. Unfortunately the program was abolished when funding ceased in June 2011 and no rigorous evaluation of its effectiveness was undertaken.

26. Having regard to those constraints, QSNTS developed a brokerage model for capacity development which included the appropriate identification of:
   i. funding, programs and workshops;
   ii. training and overseeing development of training modules; and
   iii. mentoring opportunities.

27. The lesson learned from undertaking this program was that it is necessary to understand the different dimensions of capacity development and the need for an integrated approach to deal with the unique challenges associated with each dimension, as well as the linkages between them (see under ToR 5 and 6).

28. When funding for the capacity development ceased after 2010-11, QSNTS was forced to reduce its support to provision of basic information on the native title process. QSNTS, as a normal part of claim service delivery, provides information sessions for each group prior to the authorisation and filing of a claim. In conjunction with the Office of the Registrar of Indigenous Corporations (ORIC) QSNTS also undertakes capacity development work associated with the incorporation of the PBC.14

29. In relation to advocacy, whilst the NTA does not expressly state an advocacy role, the power is inferred pursuant to s203BK (1) that states:
   “A representative body has power to do all things necessary or convenient to be done for or in connection with the performance of its functions”.

30. Native title rights and interests intersect with a range of Federal and State legislation and administrative frameworks and hence advocacy to improve native title processes and outcomes is a necessary function of an NTRB/NTSP. QSNTS elects to participate in advocacy programs

$574,487.00 between 2008 - 2011

14Australian Government, Office of the Registrar of Indigenous Corporations, Training and Support
through its membership with the National Native Title Council (NNTC) as well as participating in State-wide collaborative efforts with other NTRB/NTSPs.\textsuperscript{15}

31. QSNTS continues to perform capacity development and advocacy activities. The former has been integrated and focused within normal case management of claim prosecutions whilst the latter is limited to participation in NNTC activities and working alone or in partnership with other Queensland-based NTRB/NTSPs for state-wide reforms.

32. The significant change in functions from the immediate post-Amalgamation phase to the current phase is the focusing of organisational effort to research, prepare, file and prosecute native title claims with the concentration on claim-related agreement making. This represents a ‘traditional’ approach to the litigation process in contradistinction to an \textit{ad hoc} filing of claims post Mabo.

33. As indicated earlier, the change catalyst for concentrating services on claim prosecution is responsive to the Federal Court case management approach\textsuperscript{16}. A related catalyst was the resource boom in mining and coal seam gas activity which resulted in QSNTS making the conscious decision to downsize future act representation to liberate and focus resources on claim work (recognising there were clients who had capacity to engage private agents to assist them with future act work).

34. QSNTS continues to allocate significant resources to dispute resolution processes that are largely driven by Federal Court case management and mediation processes. In fact, resources are still committed to this activity even when QSNTS is not legally representing a party. In relation to a recent three way trial between competing overlapping claims, QSNTS allocated approximately $170,000 to dispute management processes.

35. Besides claim work, the dispute resolution function remains a key priority for QSNTS\textsuperscript{17}.

36. Due to the high number of connection and other reports that necessitate amendments to the claim by the claim group, QSNTS undertakes certification activities to ensure that the

\textsuperscript{15} Queensland South Native Title Services, \textit{Annual Report 2011-12}  
\textsuperscript{16} Federal Court of Australia, Queensland District Registry, \textit{Native Title Case Management Arrangements, Prioritization of Cases}, Justice Dowsett, 19 October 2010  
\textsuperscript{17} Queensland South Native Title Services, \textit{Strategic Plan, 2013-2016}
amendments or claim-related ILUAs are properly authorised to comply with the legislative regime. During the 2012-13 financial year there were eleven (11) certifications given.

37. QSNTS commits significant organisational effort to discharging the notification function. This is due to the high volume of low impact future act activity associated with highly urbanized or rapidly developing regions. In the 2012-13 financial year 1283 s24 notices were received.

38. QSNTS has not yet undertaken any agreement making activities pursuant to s203BB (1) (b) (iii).18

39. A function that is becoming increasingly important is undertaking regional research pursuant to s203BJ (b)19 to:

“as far as reasonably practicable, identify persons who may hold native title in the area for which the body is the representative body”.

40. This function is important because of the high number of overlapping interests in certain areas or where colonisation has had a high impact upon current claim group composition and cohesion. During the 2012-13 financial year six (6) significant regional research projects have been in progress.

RECOMMENDATIONS

41. Acknowledge that native title is a continuum along which services must be tailored to meet the evolving needs of those people who hold or may hold native title;

42. The provision of adequate resources and support to maintain and develop comprehensive services including:
   i. the provision of existing Division 3 Part 11 services;
   ii. establishment of PBC specific services;
   iii. targeted advocacy that meets the needs and aspirations of native title holders and claimants; and
   iv. capacity development of native title holders and claimants.

18 Native Title Act 1993 (Cth)
19 Native Title Act 1993 (Cth)
TERM OF REFERENCE – 2

Consider whether NTRBs and NTSPs could adopt a broader role in promoting and facilitating sustainable use of benefits flowing from agreements and settlement of claims.

43. During the post Amalgamation phase, QSNTS has been preoccupied with ensuring a strong evidential basis is created for bringing, prosecuting and settling native title claims. A direct consequence of this focus has meant only very limited resources and effort being allocated to PBC support. This organisational position is driven by Court deadlines and the negotiation position adopted by key respondent parties. Whilst claim work is by necessity QSNTS’s organisational priority, PBCs are in dire need of support particularly in the period leading up to the determination and the immediate period after the determination.

44. It is QSNTS’s observation that PBC support during the establishment phase (leading up to and for a period after the determination) is critical regardless of the size of the group that comprises the PBC or the level of resources available to it. The reason for this support is that most claims have been on foot for many years. Over those years the entire focus of the claim group is on the achievement of native title and overcoming the many challenges associated with external factors such as evolving jurisprudence, changing government policies, Federal Court compliance and competing future act and cultural heritage priorities. Internal challenges include maintaining claim group cohesion, fluctuating claim group capacity and the multiple cultural responsibilities that must be met. In short, the necessary time, energy and commitment to ‘over the horizon’ PBC issues will always be challenged by the immediacy, intensity and pace of pre-determination work. It is QSNTS’s experience that NTRB/NTSPs, along with the claim group, are drawn inexorably into a vortex of pre-determination activities with the sole objective of achieving the native title determination.

45. Once the determination is achieved a common refrain from many claimants is “what do we do now?” Some PBCs have commented that this rush of activity halts virtually after the day of the determination. If the necessary planning work has not been undertaken as to how the PBC will be structured and organised, this pre-determination momentum is replaced by a hiatus of sorting out internal governance matters rather than focusing on how those recently recognised

20 Queensland South Native Title Services Strategic Plan, 2010-2013
rights and interests can be enjoyed and how the new PBC engages in a practical way with the broader community of which it is a part.

46. The NTA mandates the use of a PBC as the holder in trust of native title or as agent PBC for the common law native title holders (the native title claim group) but that legislation effectively ignores the development and support of the very vehicle it demands to be created.

47. The greatest impediment to maintaining momentum along the native title continuum is that the PBC developmental work is not undertaken sufficiently ahead of the finalisation of the claim. Contributing factors to this challenge include:

i. NTRB/NTSP organisational capability – the skillsets around service delivery in the pre-determination phase are different to those most relevant to the post-determination phase;

ii. PBC capacity - the skillsets required of native title applicants are different to those needed for effective organisational governance of the PBC:- (a point not readily discernible to claimants/native title holders);

iii. an absence of financial resources for both NTRB/NTSPs and PBCs to develop or purchase those requisite skillsets; and

iv. lack of a coordinated approach across the broader Indigenous Affairs sector ensuring capacity is built, particularly by leveraging the combined resources of the Indigenous Land Corporation (ILC), Indigenous Business Australia (IBA) and ORIC.

Organisational Capability:

48. QSNTS notes at page eighteen (18) of the Discussion Paper the types of services that a PBC requires in both the establishment and operational phases, which include legal advice, organisational development, financial services and community development\(^{21}\). There are challenges to NTRB/NTSPs acquiring organisational capability to competently traverse the spread of such services. These include the specialist legal, corporate and financial skillsets that are needed to provide these services (and by corollary the standards of care in holding oneself as possessing that expertise) and the additional resources necessary to set up an expanded professional practice. Other challenges include the change management process involved in

\(^{21}\) Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations – Discussion Paper*, Source adapted from information provided by NNTC, June 2013, pg. 18
developing internal capability to deal with post-determination issues whilst efficiently and effectively discharging responsibilities to clients in the pre-determination phase.

49. There are some skillsets such as facilitation and dispute resolution that are as equally important to a post-determination environment as they are to the claim environment; skillsets that are readily portable and indeed can be considerably enhanced by staff exposure to both environments.

PBC Capacity:

50. This challenge is a recurring theme throughout the ToRs as well as this submission. Suffice to say that the skillsets required to be an applicant in a representative class action are different to those of being a director of a corporation. Unless the distinction is appreciated and the skillsets for both roles are possessed or capable of being acquired, the PBC will not be in a position to move with the rapidly changing operating and highly regulated environment it finds itself in. Typically, this is an environment that has limited resources, high expectations by the constituency of common law holders and a complex mosaic of Federal, State and Local government legislation and policy and little support from any level of government.

Financial Resources:

51. Whilst this point has been referred to under both NTRB/NTSP capability and PBC capacity, it is an important standalone challenge. FaHCSIA data suggests that 67% of PBCs have no independent revenue stream22. This demonstrably begs the question as to how PBCs can ever build the organisational capacity to properly discharge their statutory mandate to manage and protect native title.

52. On the other hand there may well be PBCs that have an independent revenue stream but because of capacity issues prefer to contract private agents who undertake all or part of the work associated with providing governance and operational support. The Dunghutti Elders litigation23 illustrates the amounts of money that can be expended when private agents are engaged. It is estimated that $1.5 million was spent on legal costs between 2008 and 2012, with

22 Deloitte Access Economics, Review of the Roles and Functions of Native Title Organisations – Discussion Paper, June 2013, pg. 15
23 Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations [2011] FCAFC 88 (21 July 2011)
legal fees costing 62% of total income in 2009.\textsuperscript{24} QSNTS has concerns about the long-term sustainability of PBCs that engage private agents to undertake tasks that could (and ideally would) be done by the PBC. However, provided principles of free, prior and informed consent are adhered to when engaging private agents then the decision to engage these agents is ultimately a matter for the PBC.

53. Finally, PBCs are required to perform a range of statutory functions where there is no prospect of charging a fee for service. For instance there are many s24 future act notices that must be considered by PBCs. These notices are generally around town planning requirements applying State legislation. It is recommended that a realistic administration fee be levied on each statutory notice that is provided to the PBC to deal with such compliance issues.

\textbf{Sector-wide Coordination:}

54. Having regard to the inherent resource and capacity challenges referred to above, it is crucial that a concerted effort be made by Commonwealth agencies and funded bodies to work more collaboratively to target effort and resources, underpinned by an evidenced-based methodology. Regrettably government policy has not facilitated this approach. In fact, native title has been essentially consigned to a rights-based domain hermetically separate from other policies and programs associated with economic development. Common sense would suggest that Indigenous disadvantage can only be truly addressed when legal rights and interests are protected and respected, and in turn leveraged to achieve economic and social outcomes. Until very recently the policies of both the (IBA) and the (ILC) reveal a reluctance to engage with native title land and waters. This might be risk aversion whilst the jurisprudence was evolving but with a critical mass of determinations - and more predicted at an accelerating rate - decisive action must be taken to drive integration.

55. It is QSNTS’s view that the ILC ought to give top priority to all applications made by PBCs and that the IBA should prioritise its considerable organisational capability to build PBC capacity. Equally, NTRB/NTSPs have a critical role in assisting PBCs to ensure recognised legal rights and interests for current and future generations are protected and enjoyed. A

coordinated approach and common outcome by these stakeholders should be to ensure that legal rights and economic development are not mutually exclusive concepts.

**RECOMMENDATIONS**

56. NTRB/NTSPs be provided with adequate resources and support to build organisational capability to provide targeted services to native title claimants and holders.

57. The sustainable use of native title benefits is dependent upon PBC capacity being built in the key areas of community planning, corporate governance and operationally managing native title at the interface with State and Federal land and water regimes – financial and non-financial support should target these key areas.

58. Targeted policy and programme development, implementation and coordination by ILC, IBA, ORIC and ACNC to focus on building PBC capacity in partnership with PBCS and NTRB/NTSPs.

**TERM OF REFERENCE – 3**

Consider whether there is a continuing need for the recognition provisions in Part 11 of the Native Title Act, noting that 6 of the current 15 native title organisations are NTSPs and therefore outside of the recognition scheme.

59. As an NTSP, QSNTS does not have the corporate experience of undertaking the recognition process. However it can make some observations about the common and distinguishing features of both organisational models as well as provide feedback from some PBCs whose members have experience of both models.

**Common Features:**

60. From the outset it must be said that both NTRBs and NTSPs are empowered to exercise the same functions and powers and are bound by the same duties and accountabilities as prescribed in Part 11, Div3 to 7 NTA as well as the General Terms and Conditions relating to the Native Title Program Funding Agreement (‘PFA’).
61. It is also noteworthy that NTRBs and NTSPs have the same operational responsibilities when exercising Division 3 functions particularly in relation to consultation and gaining consent of native title holders and claimants. The staff members of NTRBs and NTSPs are subject to the same obligations to the Federal Court and relevant professional associations.

62. The significant differences are:
   i. NTRBs must ensure that their organisational structures promote the satisfactory representation by the body of native title holders and persons who may hold native title in the area;
   ii. NTRBs must be incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006; and
   iii. NTRBs must comply with the recognition provisions.

63. It is clear from these differences that NTRBs are subject to additional accountability measures that in essence go to the ‘representativeness’ of their structures. Clearly there would be significant compliance costs associated with these additional layers but as QSNTS is not privy to those costs the remainder of the submission will concentrate on differences in the organisational models.

Differences in organisational models:

64. NTRBs as land councils must be representative of their constituents. Whilst the election and governance processes could be complex, costly and time consuming, the benefit of such a model is that the land council can speak with greater cultural authority and legitimacy in relation to its constituents. By comparison, NTSPs as service providers are not necessarily required by their organisational constitutions to be representative of the clients they serve. Importantly though, they too must be consultative, especially when providing s203BJ services that are not necessarily request-driven like facilitation and assistance\(^{25}\) and dispute resolution functions\(^{26}\).

65. QSNTS currently has a five member Board with the directors also being the ordinary members of the corporation. Under the organisation’s constitution key skillsets and experience are

\(^{25}\) Native Title Act 1993 (Cth) ss 203BB, 203BC
\(^{26}\) Native Title Act 1993 (Cth) s 203BF
required for Board eligibility\textsuperscript{27}, with the requirement that the majority of the Board be of Aboriginal and/or Torres Strait Islander descent\textsuperscript{28}. Clearly directors are subject to the accountabilities under the NTA, the PFA and Corporations Law. A smaller Board and ordinary membership does facilitate very efficient and effective decision-making. Arguably, a greater risk to such a model is a detachment between strategic decision-making from the communities that the NTSP serves operationally.

66. Interestingly, in the course of seeking PBC feedback on this ToR, four different PBCs expressed their preference for a service provider model over a land council model, based on their experiences of receiving services from both models in the past. Those PBC representatives did emphasise the need for QSNTS to work in partnership with PBCs. They also stated that the diversity and high number of traditional owners across the extensive geographical region serviced by QSNTS militated against an effective land council model, with their preferences being for a service provider model.

**RECOMMENDATIONS**

67. The different organisational models reflect the necessary flexibility in dealing with the unique blend of constituents across the country as such; the different models should be retained to meet those needs.

68. NTRBs are subject to an additional layer of unnecessary oversight. The removal of the recognition process will dispense with a bureaucratic layer which should yield efficiencies and remove compliance costs and duplication.

**TERM OF REFERENCE – 4**

Examine the scope for rationalization of the numbers of NTRBs and NTSPs currently operating in the native title system.

\textsuperscript{27} Corporations Act 2001, A Public Company Limited by Guarantee, Constitution of Queensland South Native Title Services, s5.4

\textsuperscript{28} Corporations Act 2001, A Public Company Limited by Guarantee, Constitution of Queensland South Native Title Services, s28.3
As stated in the introduction, QSNTS was one of the NTSPs that had its operational boundaries extended on 1 July 2008 to include the entire region of the Gurang Land Council and the North West region of the Carpentaria Land Council. The key objective of the Amalgamation was to achieve economies of scale and improved service provision. From FaHCSIA’s perspective a key driver for change was the difficulty in recruiting and retaining professional staff to regional areas of Mount Isa and Bundaberg. Other arguments included the number of Queensland NTRB/NTSPs (seven at the time) compared with other States and Territories where those bodies had comparatively larger geographical areas to service. QSNTS does not seek to challenge these drivers, observations or the objective. However before we turn to whether the objective was achieved, it is important to note some of the key challenges prior to and immediately after the Amalgamation.

Pre-amalgamation challenges:

70. Around July 2007, the Government through FaHCSIA publicly stated its intention to reduce the three NTRBs and one NTSP across the current QSNTS region to only one NTSP. This amalgamation effectively covered 70% of the land mass of Queensland and roughly fifty-eight (58) claims. The change was to take effect within a 12 month timeframe. This was always going to be a very difficult change process having regard to the number of organisations and clients involved.

71. It is natural that the four affected organisations would not readily embrace the changes - changes that spelt the demise for three of them. This adversely affected the pace and efficiency of the transition. A telling observation in this change phase was the complete absence of senior executive custodianship; all three existing CEOs and one Administrator for the North West region would have their terms ending within the change period. The current CEO of QSNTS commenced employment on 1 May 2008 (two months before the start date of the Amalgamation) and the lack of progress on the Amalgamation was patent.

72. The motivation level of staff members was understandably very low, with virtually all operational work in the Gurang Land Council and North-West regions having been placed in

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abeyance during this transition period. The proposed Amalgamation drew mixed reactions from affected clients ranging from enthusiasm to despondency.

73. The biggest challenge was consulting with the various applicants to secure their written instructions to change the solicitor on the record as no meaningful planning could be undertaken until a legal file audit was conducted. This two month period proved to be frenetic for QSNTS as it prepared for the Amalgamation start date of 1 July 2008.

74. A further complication was that some pre-existing QSNTS clients were involved in overlapping claims with the Gurang Land Council claims. Acting for the Gurang Land Council clients involved sensitive discussions with pre-existing clients to obtain their consent to represent the new clients referring to s203B (4) of the NTA.

Post-amalgamation challenges:

75. With an effective planning period of two months, the transition to an amalgamated environment would not be smooth. In the months following the Amalgamation considerable organisational effort was expended in receiving and reviewing literally thousands of documents that had been accumulated over the many years that the (newly-received) claims had been on foot. (In fact, to this day, despite a prioritization process, QSNTS is still digitising client file records received from these NTRBs).

76. The Federal Court, after abiding the long delays associated with the transition period, made it clear to QSNTS that all claims must be either prosecuted or dismissed. As such, getting a handle on the legal and factual issues was a critical and threshold priority.

77. At an organisational level, QSNTS was challenged with assurances given by FaHCSIA that in the 12 months following the Amalgamation there would be no office closures; no involuntary redundancies; and no forced relocation of staff. Whilst these assurances were given for presumably compassionate reasons it delayed the inevitable and fettered the actions of the receiving organisation to implement a change plan that demanded decisive action. A satisfactory outcome was negotiated in the six months following the Amalgamation. The time expended in negotiating this outcome diverted the effort and time needed in establishing the change.
Finally, whilst the transfer of the assets from Carpentaria Land Council was smooth there were considerable negotiations involving the transfer of assets associated with Gurang Land Council. This is not a criticism of the organisations involved, rather a legacy issue of poor planning in the pre-amalgamation phase. Again these issues were resolved but demanded considerable time that should have been devoted to the new arrangements.

Were the change objectives achieved?

The change objectives were achieved from various perspectives:

i. consolidating the corporate and organisational overheads of three organisations into one centrally administered entity, has yielded the desired economies of scale;

ii. adopting a central office model based in Brisbane permitted a very targeted recruitment strategy of lawyers and researchers from a broader labour pool – this in turn gave a critical mass of professional staff that fostered collegiality and workload responsiveness and succession planning;

iii. adopting a strict evidence-based approach to prosecuting native title has resulted in five (5) native title determinations and seventy-three (73) claim-related ILUAs in the past six (6) years across an entire region that had no native title determination or ILUA in the preceding 16 years;

iv. it is noteworthy that a number of prospective native title determinations over the next twelve (12) months will be those claims inherited from the Gurang Land Council; and

v. QSNTS is in a position to take a strategic regional approach to the resolution of claims that has been informed by successes in other regions within QSNTS operational boundaries – so whilst the claims are all unique there are many common issues which can and will be resolved more efficiently and effectively by relying on acquired corporate knowledge.

The downside to the rationalisation included not being as well attuned to local politics or dynamics. Communication with the many claim groups across a large area is always difficult. QSNTS has attempted to mitigate this risk by having regular newsletters to each group as well as having a regional presence in Rockhampton and Mount Isa.
81. The objectives of the Amalgamation were achieved in spite of the many challenges outlined above. Armed with these invaluable experiences QSNTS would make the following recommendations on the concept of rationalisation:

i. QSNTS provides services to a very diverse client-base spanning over half the geographical territory of Queensland and whose traditional country covers urban, regional and remote settings. Expanding the operational boundaries to complicate an already complex Queensland operating environment would negate, or even unsettle, the positive changes associated with the 2008 Amalgamation;

ii. since the 2009 NTA amendments and the institutional reforms of 1 July 2012, the Federal Court has generated momentum in the resolution of native title claims in Queensland – any further rationalisation of NTRB/NTSPs in Queensland affecting QSNTS would cause considerable internal organisational disruption that would impede this momentum; and

iii. the case mix between pre- and post-determination matters is delicately poised as NTRB/NTSPs grapple with building capability to deal with both PBC support as well as prosecuting claims. Rationalisation in this new environment would have a deleterious effect on the important change processes all NTRB/NTSPs are currently embarking upon to effectively balance these major workloads, quite aside from dealing with second generation native title issues, such as breaches of ILUAs, s31 agreements and compensation matters.

82. QSNTS submits that the appropriate time to consider any rationalisation would be once a critical mass of claims has been resolved in a range of contiguous regions. Having regard to the current number of claims, both in and likely to enter the system, as well as current disposition rates this critical mass of resolved claims is unlikely to be within the next five (5) years. Some of the factors that would need to be considered for future rationalisation would be as follows:

i. whilst native title laws are federal laws, the day to day interface in a post-determination environment is with the State and Territory land regimes (both laws and policies) - as such any rationalisation of organisations should be aligned with
state and territory boundaries with s203BD\textsuperscript{30} MOUs for cross-border activities, with the possibility of a national coordinating body;

ii. it is envisaged that regional networks of PBCs will play an important role in the sustainability of individual PBCs as well as the overall system, any rationalisation would need to take into account the enabling and support role that NTRB/NTSPs would play in relation to such regional networks and ought to be a key consideration in structural design;

iii. it is contemplated that regional networks are likely to be defined by cultural blocs that native title holders are associated with or alternatively may be defined by sectoral interests such as mining/extractive industries or innovation such as carbon sequestration or indeed landscapes such as natural waterways – the new environment will emerge once there is a critical mass of determined claims and a level of maturity has entered the system; rationalisation ought to be an option to respond to this emerging yet nebulous environment; and

iv. any change process should be undertaken with careful and methodical planning and stakeholder consultation and as such should not be constrained by pressing timeframe challenges and unrealistic assurances.

**RECOMMENDATIONS**

83. No further rationalisation within the Queensland NTRB/NTSP system.

84. More broadly if rationalisation was to take place, it should be confined to State and Territory jurisdictions having regard to the different land and water regimes in place.

85. Rationalisation is an efficiency option that should only be considered once a critical mass of native title claims is resolved.

86. The establishment of formal and informal regional networks of PBCs to foster knowledge sharing and explore partnering opportunities.

\textsuperscript{30} Native Title Act 1993 (Cth)
87. Rationalisation processes are very complex and require adequate planning, timeframes and resources with the change agent being afforded reasonable flexibility and support to devise, consult and implement appropriate changes.

TERM OF REFERENCE – 5

Consider whether there should be legislative changes to NTRB and NTSP existing powers and functions specifically to include assistance to PBCs, where appropriate, to attain the capacity to undertake their functions in the best interests of their members and the native title group and in accordance with their legislative and governance requirements (noting that not all PBCs require such assistance).

88. The NTA requires the establishment of a PBC to perform the dual objectives of:

   i. protecting and managing the native title rights and interests according to the wishes of the native title holders; and
   ii. ensuring certainty by providing a legal entity for governments and other parties interested in accessing or regulating native title lands and waters to conduct business with the native title holders 31.

89. This model requires PBCs to be bi-cultural; that is, possess a good understanding of traditional laws and customs of the native title holders as they relate to rights and interests to their traditional land and waters but also competence in the complexities of running a highly regulated legal construct such as a corporation.

90. There is no doubt that the PBC understands the laws and customs of its members but it should not be presumed that the PBC readily understands the native title rights and interest as recognised by the Federal Court; the interface of those rights and interests with non-native title rights and interests; as well as the complexity of the future act regime. These are operational matters for a PBC that go to the very heart of protecting and managing their native title rights and interests. Moreover, it cannot be presumed that PBCs possess the necessary capacity involved with running a corporation within a heavily regulated compliance regime.

31 Native Title Act 1993 (Cth), s58
91. QSNTS would submit the three core capacity challenges that a PBC faces in the start-up phase are:
   
   i. undertaking the necessary community planning work around articulating a vision and strategies to achieve that outcome – essentially how can native title be leveraged to meet the economic, social and cultural aspirations of the native title holders;
   
   ii. acquiring a working knowledge of the native title regime so that recognised rights and interests can be protected and managed – essentially this is core business for any PBC and a sound operational knowledge of native title and its interface with other property interests, laws and policies is vital; and
   
   iii. rapidly acquiring the requisite knowledge and skills to establish and implement sound governance principles – this is to ensure that there is in fact a viable legal entity with whom governments and other parties can interact with certainty.

92. All three of these challenges are considerable, with a cumulative and compounding effect. Failure to build capacity to meet each of these challenges concurrently will leave the PBC vulnerable to meeting its statutory objectives. PBCs themselves are very much alive to these challenges. In fact, a report into the training and support needs of PBCs which was based on a survey of PBCs conducted between October 2009 and April 2010 revealed some key issues\(^{32}\):

   i. **insufficient dedicated funding, particularly start-up funding** – to put in place basic governance structures, business processes, compliance and reporting systems, training and support to build the foundations of sound corporations;
   
   ii. **lack of staff and over-reliance on volunteer directors** – this model presents enormous practical challenges to long-term sustainability as volunteer directors suffer burn-out, corporate knowledge is not systematically retained and there is no succession planning;
   
   iii. **literacy and language considerations can limit the effectiveness of training and skills development** – these obstacles are significant to meeting both operational and governance challenges; and
   
   iv. **role of the NTRB/NTSP in providing services and supports to PBCs** – the recurring theme seemed to be the lack of consistency in the types of services

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\(^{32}\) A Report Into the Training and Support Needs of Prescribed Bodies Corporate and Recommendations on Program and Service Requirements (2010). Prepared by the Aurora Project for the Department of Families, Housing, Community Services and Indigenous Affairs.
provided to PBCs – the basis being attitude (the position based on competing priorities) and/or capability (human and financial).

93. In the same report the PBCs identified the key training and support priorities as being:
   i. establishment and governance;
   ii. core business operations areas of tax, insurance and financial management, business development and operational skills (including administrative skills such as computing);
   iii. native title related training; and
   iv. business planning and economic development and sourcing funding/ preparing grant applications.

94. Since that report was prepared over three years ago, PBCs in the QSNTS region have articulated similar challenges and training needs.

95. In regard to capacity building approaches for Indigenous organisations, there has been an extensive body of inquiries and commissioned reports over the past two decades. These have highlighted the fragmented and often ad hoc nature of many programs arranged by government agencies, and the lack of an evidence base to inform better practice. Last year, the Australian National Audit Office reviewed this material, together with its own audit of the performance of major federal departments responsible for the bulk of Indigenous-specific programs supporting Indigenous service delivery. It recommended the development of a concerted strategy and implementation approach across Australian Government agencies to provide a long-term, integrated and consistent approach to capacity development for organisations involved in Indigenous service delivery, informed by best practice.

96. The newly elected Abbott Government has decided to bring all Indigenous programs under the umbrella of the Department of the Prime Minister and Cabinet. This change in the administration of programs would facilitate adoption of the course recommended by the ANAO. There would be significant advantage to the native title sector from an integrated and consistent approach – both for NTRBs/NTSPs and PBCs – that could underpin a strong return on investments of a capacity-building nature, as advocated in this submission.

97. Features which QSNTS considers important to a successful capacity building methodology include:

i. comprehension of key challenges that bear on the internal capability of organisations – such as governance, workforce (including leadership, management, relevant professional skills and cross-cultural capability); management/administrative systems; financial management; legal/regulatory compliance; building partnerships and stakeholder management; and continuous quality improvement; and

ii. a practical methodology informed by better practice that can be applied collaboratively to: identify capacity needs; build on existing strengths; address gaps; and apply targeted support sensitive to local context and cultural considerations – the aim being to support sustainable improvements in the organisation’s capacity to manage its own affairs over time.

Establishment and Capacity Building Funding

98. It is clear from the NTA that the legislature’s intent was to establish PBCs to both protect and manage native title rights and interests and be a functioning legal entity to provide the level of certainty that governments and other parties require. It is another matter entirely to presume that PBCs will be automatically endowed with the capacity to undertake these dual functions, particularly as the NTA’s Preamble itself acknowledges that:\footnote{Native Title Act 1993 (Cth)}

“...successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands. As a consequence, (they) have become, as a group, the most disadvantaged in Australian society.”

99. QSNTS submits that dedicated establishment and recurrent funding ought to be made available for each PBC for a set period to assist in building the capacity of PBCs to increase the prospect of discharging the dual objectives set out under the NTA.

100. Whilst this funding should be dedicated, there is a business case for it to be administered by the NTRB/NTSP to ensure an effective service delivery model is developed in consultation with PBCs, that maximizes very limited resources. The funding and service delivery model should
be tailored to address the three capacity challenges of community planning, ‘operationalising’
native title and corporate governance discussed above.

101. A service delivery model would reflect the needs of the PBC but there would have to be a level
of flexibility to allow the NTRB/NTSP to:

i. deliver and coordinate training and support services directly to the PBC;
ii. provide direct funding to the PBC with the NTRB/NTSP performing a mentoring
   role; and
iii. apply a brokerage model to expand the range of services available to PBCs; and
iv. adopt a coordinated approach with key stakeholders including ORIC, ILC, IBA,
   ACNC and other providers.

102. The funding needs to be dedicated, as NTRB/NTSPs have many competing priorities and
pursuant to s203B the organisation is entitled to allocate resources based on those priorities.

**Ongoing Funding**

103. Upon the expiration of the establishment and capacity-building phase there would be an
expectation that sufficient capacity across the three challenges has been built. In that scenario it
is envisaged that community plans have been implemented that are yielding economic, social
and cultural outcomes, that the PBC has an operational proficiency around managing native
title matters and has bedded down the governance structures and processes to make the PBC
sustainable. In that scenario funding would cease but the NTRB/NTSP would still continue to
provide native title advice and assistance under s203BB\(^35\).

104. However there remains the issue of ongoing funding to ensure that governments and other
parties still have the level of certainty they require when accessing or regulating native title
lands. This means that State and Territories should compensate PBCs for the administrative
burden of providing that certainty. In this regard the compliance costs associated with dealing
with s24 and s29 notices and any other notice ought to be covered in the filing and registration
fee to be collected and distributed to the relevant PBC.

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\(^35\) *Native Title Act 1993 (Cth)*
Coordination

105. Over the past 20 years since the enactment of the NTA, the native title policy program has not been meshed well with other programs within the Australian Government. In the past, native title has fallen within the rights-based arena and whilst the jurisprudence and its application have remained uncertain there has been a natural aversion to not integrate with the other programs.

106. With the advent of determinations and an increasing trend for more determinations, native title policy formulation and delivery needs to be better integrated with economic development funding programs. This includes both the ILC and IBA. Capacity cannot be established and maintained unless the need for integration and coordination is readily understood and universally embraced by government agencies. The new Australian Government’s decision to bring all Indigenous programs together with the Department of the Prime Minister and Cabinet should facilitate such a move.

107. ILC and IBA, along with ORIC, ought to be key strategic partners with NTRB/NTSPs and PBCs in ensuring that capacity is built and maintained. This could be achieved through better consultation with PBCs on program design, greater access to a wider range of innovative programs and products and sharing expertise through training and mentoring.

Legislative reform

108. QSNTS submits that there would be universal acceptance of the need for PBCs to be better funded and supported. The challenge for all NTRB/NTSPs is juggling the workload and the competing priorities. As stated above, s203B\(^{36}\) permits a NTRB/NTSP to determine its own priorities – this is appropriate having regard to the unique challenges in each of the operating environments at play. However, the downside to this discretion is that the pressure of securing native title rights and interests against a backdrop of complex litigation will invariably mean that PBC support will always be ranked a lower priority until the pressure of this workload eases.

\(^{36}\)Native Title Act 1993 (Cth)
109. Amending the legislation to expressly state that capacity development of PBCs is an integral priority consideration coupled with a dedicated funding allocation as per point 67 above, is therefore strongly supported. These steps elevate this issue to the distinctive status it deserves as indeed the integrity of the entire system is also dependent on native title holders being able to protect and manage those rights and interests after the struggle of securing them is won.

110. Finally, NTRB/NTSPs are best placed to provide this facilitation role for PBCs. Native title is a continuum. There are key capacity gateways along that continuum that are in the pre-determination phase as well as the post-determination phase. Invariably the NTRB/NTSP would be working in partnership with the native title claim group in making sure key gateways are passed and it would be a natural extension of that support to provide similar as well as different services in the post-determination environment. To establish processes outside the NTRB/NTSP system would be a retrograde step and misunderstand the nature of that continuum.

RECOMMENDATIONS

111. That the Federal Government creates a PBC Establishment and Capacity Building Fund to be administered by NTRB/NTSPs.

112. That s203B (4) be amended to expressly prioritise PBC capacity building when allocating resources.

113. Targeted policy and programme development, implementation and coordination by ILC, IBA, ORIC and ACNC to focus on building PBC capacity in partnership with PBCs and NTRB/NTSPs.

114. Support the ANAO recommendation that a concerted strategy and implementation approach across Australian Government agencies to provide long-term, integrated and consistent approach to capacity development for organisations involved in Indigenous service delivery, informed by ‘Best Practice’.

115. That a longitudinal study be undertaken into capacity development initiatives with the aim of developing ‘Best Practice’ PBC capacity development methodologies.
116. That the Federal Government negotiate with its State and Territory counterparts to incorporate as part of both Federal and State/Territory departmental application processes an administrative fee payable to PBCs for consideration of all s24 and s29 notices to assist in providing certainty on matters relating to accessing or regulating native title lands and waters.

TERM OF REFERENCE – 6

Consider the nature of NTRB and NTSP assistance for PBCs, canvassing capacity development, and direct or indirect provision of financial, legal and dispute resolution services.

117. As indicated earlier, in the immediate post-Amalgamation phase QSNTS focused its limited resources on the considerable challenge of prosecuting a high number of claims that had insufficient time and resources allocated to them in the past. In this context QSNTS began by providing the full suite of functions pursuant to s203B (1)37 but due to the number and complexity of the caseload coupled with the Federal Court’s new approach to claim resolution, QSNTS made a strategic decision to prioritise the workload by concentrating on the provision of claim research, preparation and prosecution with associated claim-related ILUA negotiations.

118. As a result of this highly specialised strategy, five (5) claims have been resolved by consent determination with the first determination being recognised on 4 July 2011 with the Quandamooka native title determination.

119. In the intervening period, QSNTS has maintained its claim resolution strategy whilst limiting services to PBCs to an *ad hoc* by request basis. Before turning to the specifics of those services, it should be noted that QSNTS has now made a key organisational decision to expand the range of services to ensure that, within very finite resource parameters and the constraints of its PFA, some PBC needs are better met. QSNTS has featured this revised commitment to PBCs as a key organisational priority with the establishment of a PBC Support Unit within its new Strategic Plan 2013-16 – details of which will also be covered below.

37 *Native Title Act 1993* (Cth)
Current PBC Support

120. As indicated above, QSNTS’s experience with PBC support is only of recent origin with the Quandamooka People’s determination being the first in the operational region. The support provided has been in the form of assisting in the establishment of the PBC under the CATSI Act as well as providing basic administrative and legal advice and support up to and including the first annual general meeting (AGM) of the PBC.

121. QSNTS has also performed the role of undertaking administrative tasks such as membership mail-outs to native title holders on behalf of the PBCs. This task is largely due to privacy provisions prohibiting the release of private information to a third person (somewhat artificially and ironically, the PBC) without the written instructions from the client. Over time this situation will be resolved with those consents being provided but until that is done this very basic but necessary facilitative role will be continued by QSNTS on behalf of the PBCs.

122. Naturally, QSNTS continued to provide s203BB request-driven assistance such as providing advice and legal representation in relation to claim resolution ILUAs.

123. Similarly, QSNTS still provides notification functions (s203BG) to PBCs but with time this service too will be reduced as stakeholders become more aware of the PBCs. A very practical problem however is when the PBC does not have resources to set up an office or mailbox facility.

124. Finally, QSNTS has in the past received expressions of interests in pursuing s61 compensation applications by PBCs. QSNTS will consider these requests as s203BB request-driven assistance and facilitation.

New Strategic Direction

125. Over the past 12 months it has become abundantly clear that PBCs in the QSNTS region are in dire need of a wide range of support to ensure their proper establishment and functioning.

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38 Native Title Act 1993 (Cth)
39 Native Title Act 1993 (Cth)
126. This need is best explained by illustration. As part of its 2013-14 funding bid, QSNTS wrote to the six PBCs within its region advising that the funding body has a specific funding program to assist with general administration of PBCs. The letter highlighted that the program had some key conditions including:

i. the PBC must demonstrate that it has exhausted all other funding avenues;\(^{40}\);  
   ii. that FaHCSIA funding is characterised as funding of “last resort”;  
   iii. that the national funding pool was very small ($2million to potentially service 105 PBCs);\(^{41}\) and  
   iv. that the funding was of a non-recurrent nature and a similar application had to be made 12 months hence.\(^{42}\)

127. QSNTS received only one inquiry and no formal applications. The process of meeting the baseline criteria in and of itself requires considerable internal capacity on the part of the PBC.

128. At a recent PBC workshop convened by QSNTS to facilitate PBC input into this Review a question was asked as to why PBCs did not avail themselves of the funding opportunity. Many of the responses were that they were deterred by the clear message that this was funding of last resort. When pressed about other applications that had been made it was clear that people were not aware of other programs that are available and the processes to access those programs.

129. At this juncture it is worth reiterating the earlier point that all of the PBC directors are volunteers with the many challenges that their colleagues in other PBCs had expressed 3 years ago in the survey discussed above. As more determinations are made, the calls for assistance and support will only increase. Further, as also discussed above, there is a strong case for laying the foundations of PBCs much earlier in the process – not waiting until a determination is achieved.

130. Informed by this recent experience and the need for action, QSNTS has resolved to establish a PBC Support Unit as part of its new strategic plan. The unit will have the following features:\(^{43}\):

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\(^{40}\) Department of Families, Housing, Community Services and Indigenous Affairs, Native Title Program, *Guidelines for Basic Support Funding for Prescribed Bodies Corporate (PBCs)*, Page 9


\(^{42}\) Department of Families, Housing, Community Services and Indigenous Affairs, Native Title Program, *Guidelines for Basic Support Funding for Prescribed Bodies Corporate (PBCs)*, Page 11
i. drawing on existing capabilities, QSNTS will provide targeted services such as basic legal, administrative and bookkeeping services (including preparing grant applications);

ii. facilitation of organisational and community meetings;

iii. where appropriate, dispute resolutions functions; and

iv. brokerage to facilitate partnering opportunities.

131. QSNTS appreciates that the establishment of this unit has to come out of its existing operational budget. Consequently, implementing the necessary internal structures, systems, policies and processes will be critical to providing an efficient and effective service without impacting on a continuing heavy claim prosecution and resolution load.

132. The support unit will be located within the corporate division of the company rather than within operations. This will ensure that the core administrative and bookkeeping services as well as the brokerage focus of the unit will target those corresponding capacity needs within the PBC. However integration with operational services such as legal advice and support on corporate and future act matters, facilitation and dispute resolution services will remain critical.

133. As stated, native title is a continuum and the PBC Support Unit will also have a role to play in the pre-determination phase to enhance the prospect of a seamless transition from a native title claim group (a non-legal entity) to a PBC comprised of native title holders with numerous legal, regulatory and cultural responsibilities. With this in mind the unit will start to work with the claim group to prepare for the establishment of the PBC. This work is best started immediately after the State accepts connection – a time when all the parties focus on the pending determination but equally critically a time when the claim group should also be thinking about life after the determination. This is easier said than done when this one event (the determination) represents the culmination of many generations of struggle. Recasting the determination as a means to an end and not the end in itself will be difficult, but a dedicated unit working in parallel with a claim team is one way of taking the necessary steps towards that transformation in conscious anticipation of, rather than frantic reaction to, the post-determination reality.
Finally, this term of reference cannot be properly considered without fully understanding the complexity of capacity building. Janet Hunt in her discussion paper titled *Capacity Development in the International Development Context* highlights the challenges. Hunt draws on an earlier paper prepared by the United Nations Development Program (UNDP) that outlines the key capacities that occur at three distinct levels:

i. the Enabling Environment;

ii. the Entity; and

iii. the Individual.

Hunt and the UNDP make the point:

“Many capacity development initiatives fail, or have not been successfully sustained, because they have not taken the broader system or environment into account. They have focussed on the individuals or the entities without sufficient consideration of their systemic context, and their relationships, and how those may affect their capacity to perform”.

QSNTS agrees with this finding. From 2009-11, QSNTS and other Queensland NTRBs received project funding from the Queensland State Government to undertake capacity development projects. QSNTS elected to focus its project on individual skill assessment and development; this was largely due to resource constraints within the project itself, bearing in mind at this time there were no PBCs in the QSNTS region.

QSNTS also adopted a brokerage model, co-opting TAFEs and volunteers with the focus being on the individual. While a number of training deliverables were met, two years after that project terminated due to cessation of funding, anecdotal evidence would suggest there is limited residual benefit of that project by way of trained individuals applying those skills.

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within existing PBCs, or in the broader native title environment. That is no reflection upon those individuals. It underscores and evidences the fundamental tenet that unless capacity development is understood in those three dimensions and programs are specifically tailored with that appreciation in mind then “many capacity development initiatives will fail, or (will not be) successfully sustained”.

138. With this international and personal experience in mind, QSNTS will focus its capacity development efforts on the PBC entity and those key individuals that can undertake the work. Importantly, there are many community-based corporations that are derived from the same traditional community that make up the PBC membership. Some communities have a plethora of trust associations, cultural heritage bodies and the like that struggle under the same resource constraints. Together these associations can make up a broader enabling environment. The challenge and opportunity lies in the coalescence of efforts and focus of those entities to become enablers. To that end, QSNTS will explore providing similar services to ‘related entities’ but that could only proceed on a cost-recovery basis having regard to PFA obligations.

139. The support unit will also provide support for regional networks of PBCs who together can explore how their respective enabling environments can complement each other\(^{47}\).

140. QSNTS appreciates that other NTRB/NTSPs around the country have been cognisant of the importance of the dimensions of capacity development and have applied “Best Practice” in their respective regions.

**RECOMMENDATIONS**

141. That NTRBs and NTSPs be provided with additional dedicated resources to facilitate support units to develop ‘Best Practice’ capacity development initiatives.

142. QSNTS repeats and relies upon all recommendations referred to in the previous ToR response.

\(^{47}\) Queensland South Native Title Services, *Strategic Plan 2013-2016*
TERM OF REFERENCE – 7

Consider the current nature of services to native title holders and claimants by non-NTRB and NTSP based professionals, and the impact on the native title system of these services.

143. This ToR seeks to examine the integrity of the native title system as it currently stands but more importantly how it may evolve to meet present and future challenges.

144. A system that countenances or fails to respond to unconscionable or unprofessional conduct précised upon disadvantaged people, even if it is only by a few upon a few, harks back to a time when institutional racism was a norm that fomented the very issues that the architects of this legislation intended to redress. Such conduct is deplorable and must be resisted by all available means.

145. The type of conduct that this submission will address is insidious; it is, at times, hard to discern amidst the cacophony of multiple competing interests. Indeed, the native title environment provides the perfect milieu for misbehaviour to evade detection and exposure until it is too late.

146. At the core of this issue lies a simple question, “Who is the client?” This simple question elicits different answers depending on the entity or person asked. A secondary fundamental is how do elements of the native title claim group interrelate? This submission will concentrate upon:
   i. who is the client?; and
   ii. what is the nature of the relationship between people constituting the client?

147. Understanding these threshold questions is fundamental to understanding how non-NTRB/NTSP service providers (‘private agents’) convert a system of rights recognition and protection into an income stream founded on a native title ‘market’ and how the behaviour of some private agents negatively impacts upon people intended to be the beneficiaries of such a system.

148. In addressing this ToR, QSNTS has had the opportunity to consider the very comprehensive submission by Mr Dan O’Gorman SC that was circulated in advance to all NTRB/NTSPs. As

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48 Dan O’Gorman S.C. September 2013, Review of Native Title Organisations, Submission to Department of Families,
senior counsel with experience in native title, QSNTS is grateful for Mr O’Gorman’s explication of the prevailing law and practice and also shares his serious concerns on this topic. Suffice it to say that the many case studies that Mr O’Gorman cites in his submission resonate very closely with QSNTS’s experience with certain private agents. Annexed to this submission are real world case studies prepared by QSNTS lawyers that illustrate similar concerns. QSNTS endorses most of the recommendations outlined in Mr O’Gorman’s submission and where appropriate supplements those recommendations with its own.

149. Like Mr O’Gorman, QSNTS wants to emphasize the aberrant behaviour referred to in this submission by no means typifies the otherwise exemplary ethical and competent behaviour of many solicitors, barristers, anthropologists, historians and other experts that work tirelessly in the native title system. Indeed, NTRB/NTSPs could not operate without these specialists and experts who operate in the private sector. Further QSNTS has excellent and ongoing relations with many private practitioners in varied disciplines. By way of example QSNTS is presently hosting a lawyer on secondment from a major private law firm with a view to this lawyer ultimately adding value to that firm.

150. Native title cases are incredibly complex and the capacity to draw upon private legal practitioners and consultant experts who have a breadth of native title experience from across the country is critical to the efficient and effective administration of the system and successful prosecution of native title determination applications.

151. Indeed, NTRB/NTSPs “compete” for the services of these reputable private agents because they are commonly accepted by the representative body system (and by the court) as competent and ethical. While QSNTS does not purport to speak for those experts contracted by it, many have expressed concerns about the same issues raised in this submission.

152. Finally on this point, QSNTS submits and accepts that any recommendations made should have universal application. That is it is QSNTS’s expectation that any recommendations that were adopted would apply equally to the representative body scheme as well as to the private sector.
Who is the client?

153. **Appendix D** of the ToR provides an accurate summary of the statutory obligations imposed upon NTRB/NTSPs.

154. NTRBs have an additional accountability to their organisational membership overseen by ORIC. NTSPs’ status exists by virtue of its funding pursuant to s203FE. In short, there are multiple obligations and accountability mechanisms that apply to representative bodies. The existence of checks and balances is expected and appropriate for the providers of services to the most disadvantaged people in this country at the expense of the public purse.

155. Other stakeholders in the system, such as the Federal Court of Australia, the National Native Title Tribunal and various Commonwealth, State/Territory departments and Local Government are similarly funded by the public purse and also have transparent oversight and accountability mechanisms. Such systems are costly, but that is the price of transparency.

156. It is clear that NTRB/NTSPs must be constantly vigilant of, and reactive to, the different obligations at play and must ensure that the various obligations are appropriately discharged having regard to the merits of each factual situation.

157. In contradistinction, private agents have comparatively few accountability mechanisms. Of course, private legal practitioners are bound by the same regulatory regime as NTRB/NTSP employed solicitors and also have an overriding duty to the court. In Queensland, complaints against legal practitioners can be made to the Legal Services Commission (LSC). However QSNTS shares Mr O’Gorman’s concerns about the effectiveness of the LSC’s investigative powers when dealing with complaints arising from this area of law. Some of the case studies attached (Appendix D) point to this concern.

158. Private consultant anthropologists (and other expert witnesses) who prepare expert reports to the Federal Court in native title proceedings are bound by a Practice Note issued by the

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49 *Native Title Act 1993* (Cth)
50 Dan O’Gorman S.C. September 2013, Review of Native Title Organisations, Submission to Department of Families, Housing, Community Services and Indigenous Affairs and Deloitte Access Economics
Court. For anthropologists, there is also a professional association, The Anthropological Society of Australia (‘ASA’).

159. The ASA publishes a code of conduct for its members, but there is no formal regulatory or disciplinary mechanism for that profession. That lacuna is a matter that has been formally raised with the society via the NNTC (see attached (Appendix E) letter). A considerable part of this submission discusses the need for professional regulation.

160. Finally, there are private agents who employ neither lawyers nor anthropologists who purport to provide native title services to native title claimants. As propriety limited companies, it is submitted that these private agents have virtually no professional regulation, accountability or transparent reporting process.

161. It is in this broader context that the threshold issue of ‘who is the client’ must be understood. QSNTS is of the firm view that its client, statutorily and ethically, is those people who hold or may hold native title. Division 3 Part 11\(^{52}\) makes this very clear. There is no reference to the ‘registered native title claimant’ or the ‘applicant’ in Division 3 part 11.

162. NTRB/NTSPs have statutory responsibility to that body of people who hold or may hold native title over particular land and waters. The term, ‘may hold native title’ is an important concept.

163. For the representative body employed legal practitioner, the native title claim group, when identified, and later, as constituted by the Form 1 filed in the Federal Court is the client.

164. As will be clear from this submission, those people who comprise the native title claim group is a malleable concept that has a temporal dimension. As with any representative action, the people who make up the litigant can change subject to the evidence.

165. However, at an organisational level, Division 3 makes it clear that an NTRB/NTSP’s obligation is to that body of people who ‘may hold native title’; a concept broader than either the Applicant (registered native title claimant) or the native title claim group as comprised at a

\(^{52}\)Native Title Act 1993 (Cth)
point in time. This distinction is not readily understood due to the overlay of multiple obligations at play.

166. This dichotomy is best explained by way of example:
   i. All 203BB\textsuperscript{53} facilitation and assistance services are request-driven;
   ii. If “X” body of people request QSNTS to research a native title claim and subsequent research reveals in fact “Y” body of people is the people who \textit{may} hold native title, QSNTS is duty bound to protect the interest of “Y” regardless of “X” initiating the request;
   iii. However from the perspective of a NTRB/NTSP employed solicitor who has entered into a solicitor/client relationship with “X” is bound by that relationship. In those circumstances, the retainer with “X” cannot be maintained as it would breach that solicitor’s duty to the court to not prosecute a claim that is not supported by credible evidence. In that event, a different employed solicitor who had no involvement with “X” would be appointed to represent “Y”.
   iv. This already complex scenario is exacerbated if, as is sometimes the case, a sub-set of group “X” is also part of “Y”.

167. NTRB/NTSPs deal with these situations as a matter of course and appropriate information barriers are put in place to ensure that confidential information pertaining to ‘X’ is not disclosed (or available) to the new lawyer.

168. A similar rationale applies to when credible research evidence confirms that “X” is in fact the people who may hold native title but the composition of “X” is different to the people who initially requested the research. Because of the consequences of invasion and subsequent historical factors (such as, dispossession relocation and cultural suppression) this happens frequently in native title matters. In this scenario both QSNTS and the employed solicitor are bound by all the prevailing obligations to make sure the claim group description is amended to accord with the evidence.

169. In this last example, it is understandably a very distressing revelation for someone’s identity to be objectively demonstrated to be different to that which they understood to be the case.

\textsuperscript{53} \textit{Native Title Act 1993} (Cth)
170. It can be financially disadvantageous as well if that person is part of the registered native title claimant (the ‘Applicant’) as this status can bring financial benefits for the individual if there is high future act and cultural heritage activity within the claim area. Moreover, the applicant can also hold the position of director on associated companies; hence there are also challenges to power bases.

171. It is at this juncture that QSNTS often observes some people’s overwhelming motivation to maintain the status quo of the claim group description so as to preserve the applicant status. This is where some private agents have identified a niche market. Attached (Appendix D) to this submission are five (5) case studies that highlight this problem.

172. Whilst the obligations are different, there is no inconsistency between the organisational duty and the employed solicitor’s duty.

173. QSNTS, so far as is possible, undertakes all relevant work internally. It will not brief out merely because there is a request to do so. Best use of QSNTS’s funding dictates that, where possible, research and legal work are undertaken by QSNTS staff. Paying external providers is not a justifiable use of funds.  

174. QSNTS will brief out a matter to a private law firm pursuant to s203BB (4) if there is a clear conflict of interest or a compelling reason to do so. In those circumstances QSNTS will seek an agreed fees structure that represents a discount to the applicable scale.

175. It is conceded that to the outside observer the change of attitude by the NTRB/NTSP toward the original “client” can be confusing. However, if the same observer understands that the NTRB/NTSP duty has always been to those people who may hold native title (albeit initially innominate), the confusion ought to be clarified. However we do note that some of our loudest critics are those who do not understand or refuse to accept our understanding of where our varied obligations lie.

54 For example the Federal Court Rules contemplates and hour rate for solicitors of up to $550.00 (see: http://www.comlaw.gov.au/Details/F2011L01551/Html/Text#_Toc297990342 )

55 Native Title Act 1993 (Cth)
176. When these statutory obligations are stripped away, as in the case of the private agents, things look far simpler and as such there is a veneer of credibility to the argument that the only client is the “registered native title claimant” for future act matters or the “applicant” for s61 native title determination applications, who of course happen to be the same people for both processes. In some circumstances, the private agent’s client may be a disaffected faction from within the native title claim group and in that circumstance the only obligation and duty is to those that are instructing the private agent; there is no overarching obligation to either the native title claim group or to those persons who may hold native title. As stated earlier, the people who seek to retain private agents are almost invariably the directors (and possibly the only members) of the associated companies receiving financial and non-financial benefits. This point is not lost on those who have an interest in preserving the status quo.

177. QSNTS has often heard private agents rely upon this anomaly in the law to justify that their ethical obligations are only to a “subset” of the people who may hold native title on the basis that the applicant’s name appears on the Form 1 and hence that is the client. However, this approach ignores the very nature of the representative action.

178. There is an urgent need for reform to at least ensure that the relationship between the applicant and the native title claim group is clearly identified and defined in the statute; which would put a greater responsibility upon private agents to advise the ostensible client, the applicant, of its responsibilities to the broader native title claim group.

179. It is submitted that this complex issue of ‘who is the client’ causes challenges to the LSC when considering complaints against private practitioners – and NTRB/NTSP practitioners for that matter.

180. QSNTS acknowledges that holding an authorisation meeting to amend the claim group description can adversely impact upon negotiations of complex ILUAs and s31 agreements that are on foot.

181. It is one thing however to defer the authorisation meeting to amend the claim until those negotiations are resolved or sufficiently advanced so the changes can be accommodated; it is another thing entirely to avoid the changes based on credible evidence to ensure that the status quo is maintained.
182. To do nothing in order to maintain the status quo in face of persuasive evidence is nothing short of an abuse of process. In this situation, QSNTS has observed a practice known as ‘anthro-shopping’; a practice designed to avoid the evidence or to confect evidence to perpetuate the status quo. There has been much judicial commentary on this practice but it is something that continues. The production of reports from multiple anthropologists is costly, time consuming and can, in the long run, cause a confused evidential picture that is difficult to reconcile. The true native title holders are the ones that ultimately suffer.

183. Mr O’Gorman’s submission refers to a number of actual case studies that highlight this ‘business model’ as applied by some private agents\textsuperscript{56}. QSNTS has also attached (Appendix D) examples and no doubt other NTRB/NTSPs will furnish other examples from around the country.

184. One concerning characteristic of these private agents is that many were previously employed or engaged within the NTRB/NTSP system. QSNTS has explored seeking injunctive relief against some of these people but in the absence of restraint of trade clauses in the terms of employment/engagement, there is very little that can be done. Actual breaches of disclosure of confidential information must be proved on the balance of probabilities which can be difficult.

185. On the other hand, private agents know the constraints that NTRB/NTSPs must operate within and use this knowledge as part of their business model. They also capitalise on the previous relationships they have struck whilst associated with the NTRB/NTSP.

186. QSNTS appreciates and acknowledges that native title is a niche area of practice where professionals rotate among stakeholder entities within the public sector as well as the private sector. This exposure to different parts of the system can indeed be a positive development that strengthens its component parts and the entire system. However, when that experience is used for private gain in the unconstrained manner that is complained of, then it impacts upon the rigour and integrity of the entire system.

\textsuperscript{56} Dan O’Gorman S.C. September 2013, Review of Native Title Organisations, Submission to Department of Families, Housing, Community Services and Indigenous Affairs and Deloitte Access Economics
187. Related to the topic of ‘who is the client’, it is important to further examine the role of the consultant anthropologist. The importance is this: the business model of some private legal practitioners is dependent upon an anthropologist’s preparedness to furnish the ‘requisite’ expert evidence to support the position adopted. An expert’s report will give the legal practitioner a ‘defensible’ position to deflect an allegation of abuse of process or wilful delay. The attached (Appendix D) case studies highlight how the use of a consultant anthropologist can be manipulated to delay judicial process and maintain an otherwise indefensible status quo.

188. From the outset, the biggest problem is when an expert characterises his or her relationship with a native title informant as a ‘practitioner/client relationship’. Nothing could be further from the truth.

189. There are senior anthropologists currently operating in the system who have a philosophical disposition to the concept that the informant is their ‘client’ and unabashedly advocates for their interests. The same individuals are then prepared to swear an affidavit purporting compliance with Practice Note CM 7\(^57\) that, inter alia, states:

> “An expert witness has an overriding duty to assist the Court...is not an advocate... (whose) paramount duty is to the Court and not to the person retaining the expert”.

190. QSNTS acknowledges that *classical anthropology* is a discipline that necessarily involves close observation of, and participation with, the community of people being studied. Naturally, done over a long period of time those professionals will build strong relationships with that community. On the other hand *native title anthropology* is done over shorter periods of time where the sole purpose of engaging an expert is to prepare evidence for court proceedings. This evidence will be based on considering ethnographic evidence, relevant expert reports and taking statements from potential lay witnesses. That is not to say that the anthropologists cannot give direct evidence on their observations drawn over a long association with native title claimants. But the Practice Note\(^58\) is very clear on the need to remain objective:


“An expert witness is not an advocate for a party even when giving testimony that is necessarily evaluative rather than inferential”.

191. Recent court cases highlight the following issues:
   i. does the person qualify as an expert witness?
   ii. does the expert comply with Practice Note 7?
   iii. does the expert opinion accord with conventional native title anthropological methodology?

192. QSNTS is concerned that consideration of these threshold questions necessary to consider the admissibility of the expert report are not considered by the Federal Court until the matter is well advanced or even on the eve of a trial.

193. This is particularly alarming if it were never the intention of the legal practitioner to rely upon the report or indeed continue to represent the native title claim group at trial. It is clear from the case studies that QSNTS has been involved in a number of interlocutory applications where the claim group description is in issue, but the admissibility of the report has not been judicially considered.

194. QSNTS is also aware of cases where native title claims have been authorised and registered on the strength of such reports when the person proffering the opinion is clearly not an expert for the purposes of court proceedings.

Does the person qualify as an expert witness?

195. This threshold issue was recently examined in an interlocutory application regarding the admissibility of evidence by an asserted expert witness in a trial involving three overlapping claim groups. In her judgment, Jagot J questioned the expert’s credentials and objectivity as a witness who authored a report supporting the existence of native title in favour of one of the claim groups. In a short ex tempore judgement by Jagot J, her Honour states: 59

59 Wyman on behalf of the Bidjara People v State of Queensland [2013] FCA 366 (5 April 2013) Jagot J
“I am satisfied that there is no material which establishes that Mr M has specialised knowledge in the field of anthropology. I am also satisfied there is no material which shows that the opinions which you have expressed are wholly or substantially based upon such specialised knowledge. In these circumstances, Mr M’s reports cannot be admitted under the exception to the opinion rule in section 79. It necessarily follows that they are inadmissible....”

196. The concern is not only that these matters were before the court on the eve of the commencement of a lengthy trial but that the lawyers had been on notice about this person’s qualifications for almost 12 months. Her Honour made the following comments:\footnote{Wyman on behalf of the Bidjara People v State of Queensland [2013] FCA 366 (5 April 2013) Jagot J}:

“One of the extremely curious aspects of having to determine this application at this time is that although the applicants were given ample opportunity to file whatever material they saw fit to support Mr M having specialised knowledge based on training, study or experience, the only affidavit they filed was from a solicitor and not from Mr M himself.

197. Her Honour goes further:\footnote{Wyman on behalf of the Bidjara People v State of Queensland [2013] FCA 366 (5 April 2013) Jagot J}:

“In any event, in this case the applicants have been on notice about the status of Mr M as an expert since May 2012. In these circumstances, it must be the case that the applicants made, whether explicitly or implicitly, a forensic decision that they would rely on the fact that Mr M could be established to be an expert, notwithstanding the foreshadowed issues about his status as an expert or not”.

The lawyers involved in this matter withdrew on the day before the trial leaving this party self-represented.

Does the expert comply with Practice Note 7?

198. In the case of a recent case of Anderson on behalf of the Numbahjing Clan v Registrar of the National Native Title Tribunal, Cowdroy J made the following comment:
“Mr Woolford’s report provides little basis for these conclusions. Mr Woolford provides citations to prior research which establishes that the Y-Bj population could be subdivided into dialect groups or clans and that each clan had a territory. However, the passage of the report which refers to a growing recognition of dialect groups as land holding groups is entirely devoid of citations. The report does not comply with r 23.12 of the Rules in this respect.

Further, a substantial portion of the report concerns Mr Woolford’s previous research (albeit without citations to that research) involving other Aboriginal groups in Australia. The report does not establish how the societal structures of other Aboriginal groups in Australia are at all relevant to determining the societal structure of the applicant’s Clan and Nation. As it currently stands, this information would not meet the relevance test as established in s 55 Evidence Act 1995 (Cth).

The report also fails to distinguish between factual findings and factual assumptions on the one hand, and opinions and conclusions based on those factual findings on the other as required by r 23.12 and Practice Note CM 7. It is difficult for the Court to discern the basis upon which the conclusions were reached”.

199. Whilst the above is a New South Wales case, the same expert has been involved in a number of contested proceedings in the QSNTS region. In fact, in one matter, an affidavit by Dr James Weiner made the following comments about Mr Woolford’s opinion:

(a) The report was a rough draft and required extensive editing;
(b) The conclusions needed to be stated more clearly and the evidence in support of the author’s conclusions required clearer explication;
(c) The author, in my opinion, needed to make his own analysis of early sources in Dr Anna Kenny’s earlier connection report… and
(d) The argument [in favour of the author’s conclusion] needed to be made more clearly and by reference to a coherent theoretical framework consistent with the requirements to establish native title.63

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62 Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal [2012] FCA 1215 (7 November 2012)
63 Affidavit of Dr James Weiner affirmed 20 October 2012.
200. Professor Nancy Williams, a senior consultant anthropologist, critiqued the same opinion as follows:\textsuperscript{64}:

\begin{quote}
“Mr Woolford’s report falls far short of the methodology and academic rigour required of an expert anthropologist ... Mr Woolford’s discussion is not just methodologically flawed, it exhibits no anthropological methodology”.
\end{quote}

201. The problem is that these types of reports are being relied upon to rebut credible evidence, to give the appearance of a legitimate contest. It is QSNTS’s submission that it is a clear abuse of process that regrettably will not be considered until a trial – at which point the expert’s opinion is unlikely to be received into evidence. This can only damage rights and interests of the true native title holders.

Does the expert opinion accord with conventional native title anthropological methodology?

202. QSNTS is aware of a small number of senior anthropologists who may well be considered to be experts but proffer expert opinions that do not accord with conventional native title anthropological methodology.

203. As indicated above there is a real concern as to whether these experts truly appreciate their obligations pursuant to Practice Direction 7.\textsuperscript{65} The problem is compounded when the native title claim group is self-represented. Again, these issues will not be properly ventilated until shortly before the trial, having serious consequences for the native title party.

When should these anthropological issues be considered?

204. Anthropological reports are heavily relied upon throughout the native title claim process. Whilst the best evidence for any native title claim is that of the traditional owners themselves, the role of the expert anthropologist is fundamental to providing insights into: the body of people who make up the land holding group at the time of sovereignty; their laws and customs;

\textsuperscript{64} Dr Nancy M Williams, ‘Sally Nerrang mother of Mary Ann Beng: An Anthropological Assessment’ (Review prepared for Queensland South Native Title Services, October 2012, p 2-3)

\textsuperscript{65} Federal Court of Australia 2013, Practice Note CM 7, 
rights and interests in land and waters; as well as issues of continuity. As such the expert’s evidence has a direct impact upon this threshold issue of “who is the client”. Consequently an expert anthropologist has a direct bearing on both substantive issues (connection evidence) but also important procedural matters.

205. In relation to procedural matters, an anthropologist will have a direct bearing on the preparation of the Form 1 that is filed in the Federal Court as well as the registration test applied by the Native Title Registrar.

206. A stark example of the role of the ‘expert’ at the start of the native title proceedings is the registration test of the Bidjara #7. In November 2012 a ‘so-called’ expert report was filed in that proceeding as evidence to support the consideration of the registration test. It is clear from the registration test decision that the Registrar’s delegate relied heavily upon the filed report in accepting the claim for registration. The author of the report is the same person who Justice Jagot found in April 2013 not to be an expert.66 This claim overlaps other registered native title claims but will remain on the register of native title claims – with all the procedural rights associated with that status – until the matter proceeds to trial, which will be a number of years in the future.

207. The examples cited also highlight how these reports are being used to resist changes to the claim group description on interlocutory applications. Again, the admissibility of these reports will not be considered until trial. As explained above, these reports are being used to resist change in order to maintain the status quo: usually to maintain the registration status of a claim or the composition of a certain group of applicants. The reason is simple: there are large amounts of money at stake. Those monies are then applied by the private agents to resist amendments to the claim. It is difficult to quantify the precise amount of public monies as well as claim group monies expended, but it would appear to run into hundreds of thousands of dollars.

208. These private agents are aware that if contrary expert evidence is adduced as to the claim group description, the Federal Court will not deal with these substantive issues on an interlocutory application, deferring such issues until the trial. This is not a criticism of the court as it is

66 Wyman on behalf of the Bidjara People v State of Queensland [2013] FCA 366 (12 April 2013)
simply a matter that is dealt with in the ordinary course of things when considering the admissibility of evidence at the trial. The modus operandi of those protecting the status quo is to protract the interlocutory application as long as possible with the ultimate view of having the matter set down for trial at some later time. Those private agents know that there will not be sufficient resources for a trial and as recent history has shown will pull out on the eve of a trial once, all of the native title claim group’s future act monies are largely, if not totally, expended.

The relationship between the people who make up the client

209. It is one thing to regulate private agents so as to provide greater accountability around their interactions with clients. But something more is needed. Greater clarity and regulation as between the native title constituents are other important areas of reform.

210. Mr O’Gorman comprehensively outlines the argument for the serious need for statutory amendments to spell out the fiduciary relationship. Justice Rares in the recent Mandandanji matter states:

“It doesn’t seem to me that the Native Title Act intended to say that the applicant who was authorised by the meeting got rights to benefit the individual members of the applicant that they weren’t accountable for as fiduciaries to the group…I haven’t had a legal argument about all this, but it strikes me as having the plainest of day fiduciary obligations sticking straight out of it…they owe their position and their rights to their status from the authorisation and the authorisation, at least in this case, didn’t allow them to benefit themselves”.

211. QSNTS respectfully agrees with His Honour’s assessment. In fact, until recently, it was commonly accepted that the relationship as between the applicant/registered native title claim group and those who hold or may hold native title had all the hallmarks of a fiduciary relationship.

67 Dan O’Gorman S.C. September 2013, Review of Native Title Organisations, Submission to Department of Families, Housing, Community Services and Indigenous Affairs and Deloitte Access Economics
68 Weribone on behalf of the Mandandanji People v State of Queensland (includes Corrigendum dated 8 May 2013) [2013] FCA 255 (25 March 2013)
212. The analogy of a constructive trust as between the trustee (the applicant) and the beneficiary (those who may hold native title) was apposite. It was believed that the applicant as the representative must always put its own interest second to the claim group and all monies received in that capacity, directly or indirectly, must be held on behalf of the beneficiary class. The various views expressed in argument before Justice Rares in Weribone on behalf of the Mandandanji People v State of Queensland,69 including the Commonwealth stance suggests it is a matter that needs urgent statutory clarification rather than costly, protracted litigation.

Conclusions

213. QSNTS has responded to this ToR by seeking to outline the underlying problems rather than specifically referring to the types of services provided by private agents. The submission focuses on the behaviour of some private agents who, when acting in concert, can cause considerable damage to the prospect of a successful resolution of the claim but also the very cohesion of the native title claim group. The submission has posed the problem in terms of two threshold questions.

214. The response to ToR 8 will expand upon the types of reforms needed and make recommendations.

TERM OF REFERENCE – 8

Consider whether there should be legislative or regulatory changes to ensure the scope and quality of services to native title holders from non-NTRB and NTSP based professionals are appropriate.

215. QSNTS submits there is a demonstrated need for both legislative and regulatory changes due to the adverse effects some private agents are having on current and prospective native title holders and the orderly prosecution of claims.

216. As stated in the response to ToR 7, it is clear that some legal practitioners and consultant anthropologists are creating problems in the prosecution of native title claims and with the

69 Weribone on behalf of the Mandandanji People v State of Queensland [2013] FCA 255
management of future act related agreements. The current regulatory regimes dealing with those professions have not kept this conduct in check, hence strengthening the case for greater regulation.

217. It is regrettable that the conduct of a relatively small number of private agents has driven this case for reform. Many ethical private agents may complain that greater regulation is tantamount to the proverbial sledgehammer being used to crack a nut. QSNTS submits that if greater regulation prevents any further incident of improper conduct then the reform has served its purpose.

218. In any event, with the number and range of private agents currently in the system and more likely to enter once claims are finalised, reforms must be put in place to stop predatory conduct by private agents who are emboldened by the success of this ‘business model’ and to prevent similar predatory conduct by others who may be tempted to replicate that ‘business model’.

219. This submission will focus on the following matters:
   
i. greater Administrative Regulation of private agents in both the legal and anthropological areas;
   
ii. statutory amendments to clarify the relationship between the applicant and the native title claim group;
   
iii. who is the appropriate regulatory body?; and
   
iv. future issues of concern.

Regulation of private agents

220. As previously stated, NTRB/NTSPs and their employees are heavily regulated. Comparatively, private agents are not subject to the same level of scrutiny and accountability. It is submitted that the aberrant behaviour is both a product of ineffectual regulation and some private agents taking advantage of the considerable constraints faced by NTRB/NTSPs.

221. Mr O’Gorman SC in his submission argues for blanket regulation of all private agents.\(^\text{70}\) QSNTS agrees that an integrated, consistent approach is needed. To regulate only lawyers and

\(^{70}\) Dan O’Gorman S.C. September 2013, Review of Native Title Organisations, *Submission to Department of Families,*
not anthropologists is to provide only half a solution as the mischief often lies in members of those professions working in concert.

222. Mr O’Gorman also states that the regulation should be for both NTRB/NTSP employees and private agents. QSNTS sees merit in this recommendation for both reasons of consistency and because NTRB/NTSPs appear to be the ‘nursery’ of the next generation of private agents. Having best practice ethical behaviour inculcated throughout the national system can only be a good thing for the consumers of those services, the native title holders across the country.

223. Private agents might argue that statutory obligations and heavy regulation are the ‘price’ paid for NTRB/NTSPs receiving public funds. QSNTS readily acknowledges the need for oversight of and accountability by organisations that are publicly funded, but there are many functions outlined in Part 11 of the NTA that NTRB/NTSPs must perform that will never be carried out by private agents for the simple reason that there is no revenue stream associated with this activity. The application of regulations on both NTRB/NTSP employees and private agents should not be seen as a ‘green light’ for direct public funding to private agents but as a remedy for an identified and pervasive mischief. Any new reforms would be designed to set in place minimum standards for claim and future act representation, advice and assistance, regardless of who provides the services.

224. QSNTS is also aware of non-lawyer private agents that provide facilitation and negotiation assistance in the area of claim and future act activity. QSNTS has made complaints to the LSC that these agents are effectively holding themselves out as being legal practitioners. The Commission has not agreed with our submission. The proposed regulation of non-lawyer agents, who are not employed by an NTRB/NTSP or a private law firm but subject to the same regulatory regime, would raise the professional standards of all service providers and address any actual or perceived loophole.

225. In relation to consultant anthropologists it is clear that there is virtually no regulation or prescription as to how a practitioner may qualify as or hold his or herself out to be an expert in the field of native title anthropology. The issue becomes one for the Federal Court itself to

_Housing, Community Services and Indigenous Affairs and Deloitte Access Economics_  
_Dan O’Gorman S.C. September 2013, Review of Native Title Organisations, Submission to Department of Families, Housing, Community Services and Indigenous Affairs and Deloitte Access Economics_  
_Native Title Act 1993 (Cth)_
assess. As illustrated earlier, it can be as late as the eve of a trial before a judge has the opportunity to assess whether a person is suitably qualified to give expert evidence. This is too late for two reasons:

i. a meritorious claim group will be prejudiced by a finding that its commissioned expert evidence is inadmissible; or

ii. an unmeritorious claim group (that is a group that is not the true native holders) would have been unjustly enriched by the rights and perquisites that flow from the status of being a registered native title claimant from the time of registration to the point of the assessment. That time can be many years later and considerable financial benefits and non-financial benefits may have accrued and been dissipated.

226. The Australian Anthropological Society (AAS) is the professional body for anthropologists. However, membership to the Society is not compulsory and the AAS Code of Ethics is not enforceable, nor is there a formal complaints process. By letter dated 20 August 2012, the Chairperson of the NNTC wrote to the President of the AAS expressing NTRB/NTSP concerns about the lack of regulation in this area. Since that letter there has been no meaningful change in the professional regulatory environment of anthropologists providing expert reports. The concerns held by NTRB/NTSPs have increased.

Statutory amendments to clarify the relationship between the applicant and the native title claim group

227. In addition to specific regulation of private agents there is a need for statutory clarity around the role of the applicant and the native title claim group.

228. A simple amendment to the NTA expressly stating that the relationship is fiduciary in nature is relatively straightforward. This simple change would increase and foster transparency and accountability and likely result in less internal conflict. Dicta of Dawson J in Hospital Products limited v United States Surgical Corporation74 is apposite:

“There is, however, the notion underlying all the cases of fiduciary obligations that inherent in the nature of relationship itself is a position of disadvantage or vulnerability on the part

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74 (1984) 156 CLR 41 at 142
of one of the parties that causes him to place reliance upon the other and requires the protection equity acting upon the conscience of the other ... From that springs the requirement that a person under a fiduciary obligation shall not put himself in a position where his interest and duty conflict or, if conflict is unavoidable, shall resolve it in favour of duty and shall not, except by special arrangement, make a profit out of his position”.

229. An amendment would entitle the ‘beneficiary’ to take action against an applicant to seek an account for the distribution of trust monies along with other remedies. It would also permit the piercing of the corporate veil where a member of the native title claim group is not a member of a corporate recipient of future act monies.

230. Finally, elevating the relationship to that of a fiduciary relationship would place a higher duty on the applicant to make sure it (and each of the individuals comprising it) is discharging those duties to the native title claim group. This in turn would place a separate duty on its legal practitioner to ensure that appropriate advice is given and followed.

231. The potentially shifting identity of the native title claim group and the attendant difficulty in conceptualising a protective regime should not be a barrier to implementing change.

232. The key issues to be addressed are:

1. That the person or persons jointly who are:
   1.1. The Applicant; or
   1.2. The registered native title claimant in exercising the powers contained in section 62A of the NTA or in undertaking any other activity arising because he, she or they is an applicant or registered native title claimant has a duty of utmost good faith to the native title claim group and the persons comprising the native title claim group.

2. To avoid doubt, the person or persons jointly who are:
   2.1. The Applicant; or
   2.2. The registered native title claimant

75 Both defined terms under the NTA
is a fiduciary of the native title claim group and owes concomitant duties and obligations to all persons comprising the native title claim group.

3. Any monetary or non-financial benefit payable to the applicant, the native title claim group or any member or members thereof or to any person or entity for or on behalf of any one or more of them, as a consequence of the operation of the:

   3.1. the *Native Title Act 1993* (Cth) (‘the Act’); or

   3.2. another legislative enactment pursuant to which benefits may be derived because:

      3.2.1. the Native Title Claim Group has a particular status by operation of the Act; or

      3.2.2. a member or members of the Native Title Claim Group has a particular status by operation of the Act,

must do all things necessary to require that the benefit is held and dealt with for the benefit of the Native Title Claim Group.

Who is the appropriate regulatory body?

233. Mr O’Gorman’s submission that the NNTT be the appropriate regulator is compelling.\(^76\) QSNTS’s experience with the LSC and the Queensland Law Society (QLS) indicate that those bodies don’t possess an adequate understanding of the complexity of native title or the environment in which it is litigated. This appears to stem from the confusion around answering the question; ‘who is the client?’ From the perspective of the regulatory bodies, the client capable of making a complaint is either the applicant, registered native title claimant or the directors of a related corporation. The broader native title claim group does not (in the perception of the regulators) fall within the solicitor/client relationship. In the absence of any clear fiduciary relationship between those persons and the native title claim group, the regulatory bodies are disinterested.

234. However the regulators’ disinterest is not limited to the relationship between the applicant and native title claim group, but extends to key stakeholders. In 2012, a private agent made serious

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76 Dan O’Gorman S.C. September 2013, Review of Native Title Organisations, *Submission to Department of Families, Housing, Community Services and Indigenous Affairs and Deloitte Access Economics*
allegations against QSNTS and the NNTT, effectively alleging that both organisations had colluded in a manner that was detrimental to the private agent’s client by preferring a QSNTS client on the application when the Registrar’s Delegate was applying the registration test. This completely baseless and untrue allegation was copied to the then Minister for FaHCSIA as well as the private agent’s client (which comprised many native title claimants). The allegation was clearly designed to make mischief. Both regulatory bodies investigated the matter and the LSC responded as follows:

“The QLS informs me that it believes on the basis of the information it obtained during the course of its investigation that while the practitioner’s conduct may amount to unsatisfactory professional conduct or professional misconduct, there is not public interest in starting disciplinary proceedings”.

235. It is hard to understand what might be considered to be in the public interest if untrue allegations published about two publicly funded entities concerning two separate court proceedings and the granting of statutory procedural rights is not considered to be so.

236. Other concerns relate to long delays in the investigation of complaints by native title claimants. As at 1 October 2013 it has taken the LSC over 16 months to investigate another serious complaint against the same law firm without any clear end in sight. It is reasonable to infer that these regulatory bodies either do not have sufficient appreciation of these matters and/or that they are not given due priority.

237. In the circumstances, having a national body such as the NNTT that understands these complexities might be the appropriate body to regulate the behaviour of those who operate within this sector. In this regard QSNTS supports Mr O’Gorman’s submission77.

238. QSNTS separately recommends for the regulation of consultant anthropologists who work in this area.

239. Based on the analysis of the referenced case studies and associated discussion, it is considered necessary to implement a framework within the Federal Court to ensure the competence and

77 Dan O’Gorman S.C. September 2013, Review of Native Title Organisations, Submission to Department of Families, Housing, Community Services and Indigenous Affairs and Deloitte Access Economics
independence of expert witnesses involved in native title matters. At present, there is no mechanism to analyse and disregard expert evidence at the claim filing stage or on interlocutory applications deferring the examination of such matters to the trial. While it is normal practice to defer such examinations in conventional litigation, there would be considerable merit in examining compliance with Practice Note 7 very early in the proceedings rather than at trial. QSNTS appreciates that there may well be a real contest between competing credible expert evidence which can only be resolved at trial. It is so-called expert evidence that does not comply with Practice Note 7 that causes long delays, considerable expense to all participants in the court proceeding, overlapping claims, internal group disharmony and procedural rights unfairly afforded to some native title groups.

240. Most importantly, it permits the type of aberrant behaviour practised by some private agents.

241. Conversely, if there was a mechanism to ensure compliance with Practice Note 7 early on in the proceedings, claims would likely be better formulated and based on credible evidence and presumably move through the court list more efficiently realising all parties’ and stakeholders’ key objective of faster resolution of native title claims.

242. QSNTS is by no means suggesting any derogation of access to justice. On the contrary, regulation of this area would facilitate that objective.

243. While the Federal Court rules deal with the form that expert evidence must take and the duty of the witness to the court, two issues that are not able to be addressed at the interlocutory stage are:

   i. the qualifications of expert witnesses; and
   ii. the methodology employed in the provision of that report.

Qualifications

244. The judgment of Jagot J78 demonstrates that not all those purporting to be expert witnesses have the necessary qualifications. In order to ensure that only those qualified as an expert are

able to provide their expert opinion in a matter, it is necessary to apply the established objective criteria for whether a person is an expert at a much earlier stage than the trial.

245. Such criteria may include the education and experience of witnesses, as well as peer recognition. The implementation of such a standard would ensure that evidence could be disregarded early within the native title process in a simple manner, without the cost and delay of lengthy trials and case management.

246. Regulation of what qualifies a person as an expert witness reduces the uncertainty and ensures a high standard of evidence that is relied on by the court, to ensure the best possible outcome.

The Methodology applied

247. While the qualifications of expert witnesses can be objectively assessed with little difficulty, it is acknowledged that the qualifications of an expert do not guarantee the quality of their research or objectivity of their conclusions.

Accreditation Body

248. The Federal Court has an accreditation mechanism in place for private agents who can conduct court-ordered mediation.\(^79\) QSNTS submits that a similar accreditation body could be set up with appropriately qualified senior anthropologists to ensure that Practice Note 7 is complied with in all respects. The matters referred to in the case studies and in this submission are clear evidence that public funds are being wasted on witnesses that provide opinions that they are simply not qualified to make. The delay in assessing the competency of those witnesses and the adherence to Practice Note 7 present a real risk of prejudice and injustice to the true native title holders.

Future issues of concern

249. As more claims are determined there appears to be a regrettable but corresponding lag that exists in building capacity within PBCs, with a corresponding risk that new private agents (for

example, financial planners) might enter the native title space. As PBCs grapple with the challenges of building an economic base, some might be attracted by the allure of surrendering native title to property developers for other (short term) benefits. Surrendering or compromising recognised native title rights and interests is a very serious matter as it involves decisions that will affect not only the present generation of traditional owners but all future generations having regard to the in rem nature of native title judgments. However this is ultimately a matter for the native title holders and provided there is free, prior and informed consent when making such decisions.

250. It is apposite to note the findings of the New South Wales Independent Commission against corruption entitled *Investigation into the conduct of officers of the Wagonga Local Aboriginal Council and others* in which it was found that inducements were offered and accepted in relation to dealing with freehold land in an Aboriginal community.\(^80\) Despite the process contemplating the appointment of a probity officer, there is no certainty that, in regions where there is a high level of mining and other economic activity, there may not be ‘churning’ of native title land at the instigation of ‘outside interests’.

**Conclusion**

251. In conclusion, QSNTS reiterates that it is only a small number of private agents that are responsible for the type of behaviour complained of, but their actions impact upon the entire system: procedurally in relation to time and expense and substantively in terms of group disharmony, and even the prospect of not having rights and interests recognised. It is our submission that greater regulation of all participants offering services to native title claimants and holders at this time would assist in the more efficient, effective and just resolution of claims while also strengthening the system for the future.

**RECOMMENDATIONS**

252. A scheme for regulation of persons and organisations providing services to native title claim groups, registered bodies corporate and other bodies corporate associated with native title claim groups be developed and implemented as a priority;

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253. The nature of the relationship between the Applicant / registered native title claimant and the native title claim group and the persons comprising the native title claim group be defined and given statutory recognition;

254. A scheme of recognition is implemented for persons preparing expert reports or being proffered as expert witnesses; and

255. The ‘expert recognition scheme’ be administered by an appropriate body.
APPENDICES

Appendix A: Map of QSNTS original claim area

Appendix B: Map of claims in both regions at the time of Amalgamation

Appendix C: Post Amalgamation Map as at 1 July 2008

Appendix D: QSNTS Case Studies

Appendix E: Letter from the National Native Title Council (NNTC) to the Australian Anthropological Society, dated 20 August 2012.