

2 October 2020

**Queensland South Native Title Services Ltd
Submission to Australia Government, National Indigenous Australians Agency**

CATSI Act Review

1. Queensland South Native Title Services Limited (**QSNTS**) is native title service provider funded by the National Indigenous Australians Agency under s.203FE of the *Native Title Act 1993* (Cth.) (**NTA**) to perform the functions of a native title representative body for the Southern and Western Queensland Region.
2. QSNTS welcomes the opportunity to comment on the CATSI Act Review Draft Report of 31 July 2020 (**Draft Report**).
3. QSNTS has assisted with the incorporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth.) (**CATSI Act**) of a number of corporations. Principally those corporations are incorporated to fill the role of a Registered Native Title Body Corporate for the purposes of [s.56](#) and [s.57](#) of the NTA.
4. This submission is written with a bias towards discussing and seeking legislative change in relation to the role and functions of Registered Native Title Bodies Corporate rather than 'CATSI corporations' generally.
5. QSNTS is a member of the National Native Title Council (**NNTC**) and substantially agrees with and adopts the NNTC's response to the Draft Report. Where QSNTS's position differs from those contained in the NNTC response, this paper explains and expands on those positions.

Objects of the CATSI Act

Unique provisions of the CATSI Act

6. QSNTS agrees that the CATSI Act continues to fulfil an important role as a special measure.
7. The *Native Title Act 1993* (Cth.) (**NTA**) mandates that a corporation incorporated under the CATSI Act is nominated as the vehicle through which native title is held or managed for the common law native title holders. Unless and until the NTA mandates an alternate scheme for native title to be held or managed and a process for transitioning existing registered native title bodies corporate to that alternate scheme there will be an ongoing need for the CATSI Act.
8. QSNTS supports ongoing regular reviews of the legislation to ensure that it develops to respond to identified needs and appropriately serves the particular requirements of Indigenous Australians.

Support for corporations

9. QSNTS supports and encourages the formal development and recognition of mechanisms to enable CATSI corporations to operate and conduct business more efficiently with concomitant cost savings.
10. Encouragement of increased use of technology-based options has particular resonance in the context of RNTBCs that often have large memberships scattered throughout the country. Recent experience in operating in an environment impacted by restrictions associated with the COVID-19 pandemic have shown a willingness on the part of the QSNTS constituents to adopt technology for meetings. The new realities arising from COVID restrictions have resulted in a greater awareness and acceptance of technology based platforms. Solutions that allow real time virtual meetings with real time voting are becoming more efficient and accessible.
11. That is not to say that technology based meeting solutions are suitable for all CATSI corporations. Where technology options, or a blend of technology and other meeting/voting options, are suitable and appropriate, the legislation (potentially by Regulation) should endorse the use of them.

Further ideas

12. QSNTS strongly supports the development of a separate chapter or division of the CATSI Act dealing with the unique needs of, and challenges facing, RNTBCs.
13. Chapter 6 of the DLA Piper 2017 technical review is devoted to the special status and needs of RNTBCs. That chapter made 21 RNTBC-specific recommendations. QSNTS submits that the number and scope of those recommendations supports the establishment of a separate division of the CATSI Act (and potentially a 'customised' category of CATSI corporations) to better service this growing and important sector.
14. Making provision for Registered Native Title Bodies Corporate as a distinct category of CATSI corporations would allow for better regulation and oversight of issues relevant to RNTBCs that may not be applicable to other categories of CATSI corporations. Those issues include:
 - 14.1. entitlement to membership
 - 14.1.1. membership should be open to all common law native title holders (subject to any reasonable minimum age requirement) and should not be numerically limited
 - 14.1.2. whether persons other than determined common law native title holders may be accepted as members of the corporation
 - 14.1.3. whether persons who are determined common law native title holders may not (without more) be refused admission as members.
 - 14.1.4. QSNTS notes that this issue is substantially taken up in the *Native Title Legislation Amendment Bill 2019* that is presently before the Australian Parliament.
 - 14.2. specific reference to compliance with the *Native Title (Prescribed Body Corporate) Regulations 1999* (Cth.) with a view to the Registrar of Indigenous Corporations having a role in monitoring and ensuring compliance with those Regulations.

- 14.3. provision for the formal records of consultation around native title decisions and outcomes of decision-making processes associated with native title decisions.
 - 14.4. clarity around the capacity of RNTBCs to charge a fee for service in relation to receipt, processing and responding to notices issued under the NTA and the basis for calculating and charging that fee.
 - 14.5. dealing with native title benefits
 - 14.5.1. transparency and accountability in dealing with what is essentially trust money ought to be mandated
 - 14.5.2. the obligation of transparency and accountability ought to extend beyond the members of an RNTBC and should include common law native title holders and those advising them.
15. The creation of a RNTBC chapter or division within the CATSI Act may also provide a convenient basis for any future developments that might allow native title to be held or managed through an alternate vehicle to the presently mandated PBC model. Changes to the current structure mandating CATSI corporations as the RNTBC vehicle should be explored and a range of options developed.

Native title can recognise both shared and differentiated rights across a determination area and a corporate structure that accommodates those unique characteristics may well recommend and facilitate a harmonisation between corporate and community governance; the current absence of which may well be contributing to the proportionally higher levels of disputation within RNTBC and other CATSI corporations. (see [7.8] of the Draft Report).

Those options would be readily incorporated in the RNTBC division / chapter of the CATSI Act.

16. Presently, PBC members or common law native title holders have limited options to ventilate concerns about the performance of their RNTBC. If the aggrieved person is unable to persuade the Registrar of Indigenous Corporations that there should be an intervention, that person is left to making an application to the Federal Court. That can be an expensive, legalistic and long process. QSNTS contends that a RNTBC division or chapter of the CATSI Act could identify the National Native Title Tribunal as a suitable 'one stop shop' to provide a range of interventions or options for the resolution of grievances. These options could range from dispute resolution including an option for a mediation/arbitration model to arbitration.

Referrals to the NNTT should be streamlined and, so far as possible, conducted on a self-help basis. That is, there should be provision for interested parties to have the matter dealt with without lawyers being involved. Protagonists in more complex matters should have an option of formal representation.

Powers and functions of the Registrar

17. An expanded but 'cascading' range of regulatory powers aimed at encouraging compliance before punitive or high level interventionist measures are imposed would be an appropriate addition to the Registrar's suite of options.

Governance

18. QSNTS considers that while it is necessary for corporations to maintain complete and up to date records of member (and in the case of RNTBCs, there ought to be a separate mandated Register of common law native title holders) it is not necessary that personal contact details are available on a publically accessible version of the relevant Register.

19. Membership approval – RNTBCs

19.1. In relation to RNTBCs (or CATSI corporations incorporated for the purpose of becoming a RNTBC) QSNTS submits that provisions relating to membership approval require amendment. The first principle is that a common law native title holder (subject to any reasonable eligibility rule relating to age) is entitled to membership.

19.2. The content of [19.1] is not intended to suggest that a RNTBC could never exclude a common law native title holder who had breached the rules or otherwise misbehaved in the context of the corporation's business. Those circumstances could be taken up in the design of the Rule Book.

19.3.

19.3.1. While noting, and accepting, that members of RNTBCs should ordinarily be natural persons because common law holders can only be natural persons, consideration could be given to developing provisions for inclusion into a RNTBC chapter/division of the CATSI Act allowing an RNTBC to comprise only of members that are other CATSI corporations. For example, where those constituent corporations represented groups with discrete responsibilities within the relevant Determination area. The starting point would then be that each of those constituent member CATSI corporations would have as members relevant common law native title holders and each of the constituent corporations would nominate directors to the overarching RNTBC. The broad proposition in [19.1] would apply to those constituent corporations.

19.3.2. Native title is sui generis and determinations are in rem. QSNTS submits that there needs for flexibility in corporate models for RNTBCs (see also [15]) to meet the objective need for corporate vehicles that accommodate the unique characteristics of native title and the challenges that do, and are likely to continue to, confront RNTBCs.

19.3.3. RNTBCs as currently mandated are essentially a western construct imposed on common law native title holders to hold or manage the fruits of them having preserved their traditional law and custom in the face of ongoing colonisation.

19.3.4. Amendments to the PBC regulations would be required to complement any adoption of these suggestions.

- 19.4. Memberships should be considered in a timely way. A timeframe mandated by regulation could be appropriate. QSNST submits that a board's consideration and determination of a membership application should not be deferred beyond the meeting following the meeting before which the application is received.

Officers of corporations

20. QSNST considers that there is benefit to members having visibility to what is paid to key personnel of their CATSI corporation and any related entities (whether CATSI or Corps Law). This is in keeping with concepts of accountability and transparency. QSNST considers that this is a matter between members and their corporation and is not the business of the public at large.
21. Despite [20], QSNST considers that there is benefit to the sector in corporations reporting details of their directors', CEOs' and other senior managers' salary packages to the registrar on a confidential basis. QSNST considers that the publication of that information as salary bands and on the basis that it is de-identified and linked to corporations of like size and turnover would be useful in benchmarking and recruitment.
22. In relation to the section in the draft report on 'executive performance', QSNST considers that there is merit in the names of senior managers of CATSI corporations being mandated for reporting. QSNST considers that publication of managers' addresses is not necessary; publication of a date and place of birth ought to be sufficient for identification purposes.

Related party transactions

23. QSNST acknowledges that there needs to be some loosening of constraints on related party transactions but submits that some boundaries and oversight is required to ensure that capacity to engage in a related party transaction is not abused.
24. It is critical to RNTBCs to protect land, culture and people. Some RNTBCs may need to engage in tasks at short notice and have limited human capital with which to complete those tasks. In those circumstances, provided that defined value limits for payments are not exceeded and there is not systematic preferment of suppliers (where substantially similar alternatives are available) arrangements that may offend the current regime ought to be condoned.
25. A Register of related party transactions should be established and maintained and details included in the Annual report and reporting to ORIC.

Registered Native Title Bodies Corporate

26. Much of the comment in this submission has, as foreshadowed at the beginning relates to RNTBCs.
27. Many of the issues and complaints about the governance and management of RNTBCs that come to QSNST's attention relate to admission of members and management of money.
28. Transparency and accountability around the management of money and other benefits must be paramount. The Draft Report posits that that a register of Trust Deeds could be created, while this is sensible, it seems to presuppose that all benefits were deployed through a structure

of that sort. The costs of establishing and maintaining a trust structure could, for some RNTBCs, not be cost effective – for others it should be mandatory.

29. It is essential that receipt and expenditure of all native title benefits (money or other types) is recorded and reported. Mandatory reporting of receipt and expenditure of native title benefits should extend to subsidiaries and related bodies corporate.
30. QSNTS submits that dealings with native title monies should be regarded as native title decisions. To avoid the need to convene frequent native title holders' meetings to consider decisions of this kind, provision could be made by way of a standing consent to dealing with money up to a defined amount.
31. QSNTS considers that a register of native title decisions should be mandated for RNTBCs and that those decisions form part of the annual reporting regime.
32. It is desirable that the registrar has the capacity to have an audit conducted of those decisions to monitor compliance with PBC Regulations. Increased and improved education around the PBC Regulations and methods of compliance with those Regulations would also be a useful initiative.
33.
 - 33.1. As noted at [16] QSNTS considers that the NNTT should be given a dispute resolution and adjudication function in relation to disputes between:
 - 33.1.1. Directors of RNTBCs
 - 33.1.2. Member(s) of a RNTBC and the Board
 - 33.1.3. common law holders and the RNTBC
 - 33.1.4. applicants for membership and the RNTBC (or Board) (this being a sub-set of [33.1.3]).

That function would be invoked by agreement between disputants and would be in addition to the option of taking a dispute to the Federal Court at first instance.
 - 33.2. Disputes are inevitable in the RNTBC space. The draft report at [7.8] notes that while RNTBCs account for 6.5% of CATSI corporations they generate 22% of complaints to ORIC.
 - 33.3. QSNTS submits that an accessible and costs effective mechanism needs to be created to allow disputes between the persons identified at [33.1] to be managed and resolved quickly and, where necessary, in a culturally appropriate way.
 - 33.4. The NNTT has particular knowledge of and expertise in the native title space and, subject to appropriate staffing and funding, would be well placed to assume this role.
 - 33.5. The NNTT has the benefit of being the keeper of relevant Registers, having access to experienced geo-spatial practitioners and having had significant research experience and capacity as well as having skilled dispute practitioners on staff and otherwise available to it.

- 33.6. Noting the constraints arising from *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245, an ascending hierarchy of interventions should be established and available to the NNTT to engage in resolving disputes.

Disputes before the NNTT must be as informal and streamlined as is possible. However, QSNTS recognises that there will be matters where assistance from lawyers would expedite the process.

The NNTT already has an inquiry function available to it that could be expanded to include referrals from the ORIC Registrar or direct requests from disputants.

- 33.7. QSNTS emphasises that exercise of the NNTT function would be through the consent of the parties and would not be mandated. It would, and should, always be open for disputants to bring their proceedings in a Court.

34. QSNTS suggests that ORIC ought not take formal dispute resolution and adjudicative role as it is the regulator of the corporations and ought to remain removed from resolving disputes *intra partes*.