QSNTS
Queensland South Native Title Services

28 November 2019

Queensland South Native Title Services Ltd
Submission to the Senate Legal and Constitutional Affairs Committee

Native Title Legislation Amendment Bill 2019

1. Queensland South Native Title Services Limited (**QSNTS**) welcomes the opportunity to provide comment and submissions on the *Native Title Legislation Amendment Bill 2019* (the **Bill**).

About QSNTS

2. QSNTS is a native title service provider funded by the Australian Government through the National Indigenous Australians Agency under section 203FE of the *Native Title Act 1993 (Cth.)* (the **Act**) to exercise the functions of a native title representative body set out at Part 11 of the Act for the Southern and Western Queensland Region.

3. Since funding was made available to QSNTS from 2005, QSNTS has assisted 15 native title claim groups to have their native title rights recognised through 20 positive determinations. It is anticipated that in the 2019 calendar year, one other claim groups assisted by QSNTS will have their native title recognised through consent determinations. Currently, QSNTS:

    3.1. Is assisting 18 claim groups in the prosecution of their native title determination applications (**NTDA**)
    3.2. Is assisting 8 Prescribed Bodies Corporate (**PBC**s) including by holding PBC basic support funding
    3.3. Is a respondent to one NTDA
    3.4. Is a respondent to one non-claimant applicant
    3.5. Has applied to become a respondent to two non-claimant applications
    3.6. Is assisting an Indigenous respondent in a NTDA
    3.7. Is undertaking 10 research projects under its s203BJ(b) function to identify people for country and the basis for their association with that country with a view to recommending the authorisation of NTDAs over areas that are not presently subject to claims.

Overview

4. QSNTS welcomes and supports the amendments sought in the Bill but says that further revision of the Act would increase its fitness for purpose and better achieve the ideals laid down in the Preamble to the Act.

In that regard, QSNTS notes that successive governments have failed to deliver on the promise and intent of the Preamble and that for Indigenous Australians who cannot meet the post-Yorta Yorta[1] jurisprudential test to achieve a determination of native title the recognition and relief promised by the Act remains illusory.

Despite political rhetoric and the language of reconciliation and treaty that is currently in vogue, objectively; all levels of government remain reluctant to wholeheartedly engage in native title as part of their realpolitik.

5. This note engages with the broad thematic amendments proposed by the Bill and does not discuss or otherwise critique the consequential 'machinery' provisions that support the implementation of the substantive amendments.

   This note generally follows the schema adopted in the Explanatory Memorandum.

6. QSNTS as a member of the National Native Title Council (**NNTC**) supports its submissions unless otherwise stated in the submissions that follow.

Schedule 1 – Role of the Applicant

7. With reference to the comments provided below QSNTS welcomes the proposed amendments in Schedule 1, Parts 1, 2 and 3.

Part 1 - Authorisation

8. The proposed amended s 251BA confirms that the claim group may place limits on the very broad general agency acknowledged by s 62A of the Act, reflecting a common practice of claim groups assisted by QSNTS.

9. Requirements that place constraints on an Applicant by its Principal (the corpus of the Native Title Claim Group (**NTCG**)) be publicly available provide transparency and certainty for persons transacting business with the NTCG.

   The requirement that any limits or conditions on the authority of the Applicant have been complied with be part of a Native Title Representative Body's (**NTRB**) certification provides an additional layer of certainty for persons transacting business with the NTCG.

10. Statutory confirmation that the Applicant is a fiduciary of the claim group puts beyond doubt a long-held view within the NTRB sector as to the relationship between the Applicant and the NTCG that was first formally recognised by Greenwood J's decision in *Gebadi*[2].

[1] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58

[2] *Gebadi v Woosup (No 2)* [2017] FCA 1467

Part 2 – Applicant Decision Making

11. The proposed provisions allow certainty that an Applicant may operate by majority decision making. While the positive statement at [51] of the Explanatory Memorandum accepts a current requirement for joint or unanimous decision making that position is open to debate and certainly most groups assisted by QSNTS have been including provision for the Applicant to make decisions by majority.

12. The provisions that require decisions made other than by majority to be published to the NTCG within a reasonable time promotes communication and transparency.

Part 3 – Replacement of the Applicant

13. Statutory recognition that a NTCG may implement succession planning processes to allow for the replacement of individual members of the Applicant without the cost and inconvenience of an authorisation process are welcome.

14. Confirmation that an Applicant may continue to act despite the death or incapacity of one (or more) of its authorised members is welcome. This provision formalises what has been a widely used 'term of appointment' of the NTCG's Applicant within the QSNTS Region.

Schedule 2 – Indigenous Land Use Agreements

Part 1 – Body corporate agreements and area agreements.

15. The proposed amendments to Schedule 2 Part 2 are supported upon the basis that the legislation include exceptions in relation to the validity of future acts upon de-registration of ILUAs, similar to the indefeasibility of registered title under the Torrens system, where those acts have been done through fraud, undue influence or duress.

16. The proposed amendments to s 24BC of the Act are sensible and practical.

17. The proposed amendment to s 24CH addresses a flaw in the Act and is uncontroversial.

Part 2 – Deregistration and amendment

18. The proposed amendment of s 24ED overcomes an expensive and potentially difficult process to effect minor changes to an Indigenous Land Use Agreement (**ILUA**).

19. Making minor amendments to agreements currently requires the authorisation of a new agreement. That is onerous for all involved.

20. The limited circumstances in which the procedure may be accessed ensures, so far as possible, that the process will not be abused.

Schedule 3 – Historical extinguishment

21. QSNTS welcomes the possibility of extending the circumstances in which historical extinguishment can be disregarded in relation to national park areas and pastoral leases controlled or owned by native title corporations.

Part 1 – Park Areas

22. In parts of the QSNTS Region there are significant areas of historical extinguishment through the grant of freehold or exclusive leasehold tenures. National parks (which potentially were formerly freehold or exclusive leasehold and therefore contain no claimable land or waters) represent an opportunity for the Indigenous Estate to be enhanced. For some NTCGs recognition of their native title over a national park may represent the only opportunity for the common law holders to engage their native title rights in a comparatively unexploited and non-degraded landscape.

Part 2 – Pastoral leases held by native title claimants

23. The inclusion of subparagraph 47(1)(b)(iii) reflects the reality that, historically, some groups have used a vehicle such as an incorporated association to acquire the lease of a pastoral property. The expansion of the type of corporations that may hold leases effected by the proposed amendment is welcomed.

Schedule 4 – Allowing a registered native title body corporate to bring a compensation application

24. Some difficulties related to the commencement of compensation application inherent in the Act as drafted have only become apparent in the post-*Griffith*[3] space.

25. The proposal to allow a registered native title body corporate (**RNTBC**) to bring a compensation application that includes land or waters that were not part of the original determination (usually because of extinguishment) means that there will no longer be the existing cumbersome (and potentially expensive) process of compensation claims for contiguous lots being brought by both a compensation claim group and a RNTBC.

Schedule 5 – Interventions and consent determinations

Part 1 – Intervention in proceedings

26. QSNTS has no comment on these amendments.

Part 2 – Consent determinations

27. The clarification provided by the proposed amendments to ss 87 and 87A is welcomed.

[3] *Northern Territory of Australia v Griffiths* [2017] FCAFC 106

Schedule 6 – Other procedural changes

Part 1 – Objections

28. QSNTS supports the proposed amendment to s 24MD(6B)(f) which provides that there is an 8 month time period within which an objection to a proposal for a compulsory acquisition of native title rights and interests for the benefit of a third party must be heard, where the current s 24MD(6B)(f) does not specify a time period.

Part 2 – Section 31 agreements

29. As negotiations that give rise to s 31 agreements sometimes do not directly affect the Government party, provision for less involvement by the government party is appropriate.

30. It is appropriate that a register of s 31 agreements is established.

Schedule 7 – National Native Title Tribunal

31. The importance of the role of the National Native Title Tribunal (**NNTT**) and the corporate knowledge held by the NNTT cannot be overestimated.

32. QSNTS believes that disputation within RNTBCs and between RNTBCs and common law native title holders will continue to be a feature of the post-determination landscape and have the capacity to cause serious detriment to the capacity of individual RNTBCs to properly execute their role.

33. In its submission during the consultation phase that gave rise to the Bill, QSNTS advocated that the NNTT be given an expanded role allowing for a 'one-stop-shop' dispute resolution service (which could include an arbitral function) in relation to disputes involving RNTBCs. That role should include the possibility of imposed binding outcomes made in a relatively informal forum (similar to a small claims tribunal). In part, this was because it is not appropriate for the Office of the Registrar of Indigenous Corporations (**ORIC**) to hold a dual function as regulator and adjudicator. The other available dispute resolution body as an alternative to ORIC is the Federal Court. The Federal Court is not an optimal forum for the airing of relatively low-level disputes due to the cost and complexity of accessing outcomes in the court. QSNTS maintains that position.

34. QSNTS questions the utility of proposed s 60AAA(3) in circumstances where seeking to access the process are often impoverished. It is possible that this provision acts as a bar to accessing the services offered by the NNTT.

Schedule 8 – Registered native title bodies corporate – *Corporations (Aboriginal and Torres Strait Islander) Act 2006*

Part 1 – Requirements for constitutions

35. QSNTS supports the two year transition period proposed in Item 19 as a sufficient period of time for RNTBC's to take the necessary steps to amend their constitutions in alignment with the proposed amendments in Schedule 8, Part 1.

Part 2 – Refusal of membership

36. The proposed amendments to prevent a PBC from capriciously or otherwise without proper cause excluding an eligible common law holder from membership is welcomed. Similarly, provisions to prevent a PBC constitution form being amended to effectively disenfranchise a class of members are necessary and appropriate.

37. QSNTS contends that *prima facie* a common law holder who meets eligibility criteria (which should have textual alignment with the determination) should be admitted to membership.

Part 3 – Registrar oversight

38. QSNTS opposes an amendment that seeks to increase the powers of the Registrar to intervene in an RNTBC's obligations under Native Title legislation, as potentially intervening in the rights of self-determination of native title holders.

Part 4 – Courts

39. While it accepts, and agrees, that the Federal Court is the appropriate forum for dealing with civil matters arising from the CATSI Act that relate to an RNTBC, QSNTS repeats its comments at [30] that the NNTT has skills and sector knowledge to provide a proper forum for the resolution of 'lower level' disputes.

Schedule 9 – Just terms compensation and validation

40. The proposed amendments to validate s 31 agreements that may be affected by the *McGlade* decision[4] is essential. QSNTS supports the amendment.

[4] *McGlade v Native Title Registrar* [2017] FCAFC 10