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CHA Review
Department of Aboriginal and Torres Strait Islander Partnerships

16 August 2019

Queensland South Native Title Services - Submission on the Review of Cultural Heritage Acts

Queensland South Native Title Services Ltd (QSNTS) welcomes the opportunity to provide this submission on the review of the *Aboriginal Cultural Heritage Act 2003* (QLD) (**the ACHA**), noting that it has been advocating for amendments to, and a 'root and branch' review of, the ACHA for many years.

The format of these submissions adopt that used in the *Consultation Paper – Review of Cultural Heritage Acts*. QSNTS has provided a response to each of the questions raised in the Consultation Paper.

Is there a need to revisit the definitions of cultural heritage - if yes, what definitions should be considered? What additional assessment and management processes should be considered?

The starting point and end point for defining Aboriginal cultural heritage should be that Aboriginal cultural heritage is what Aboriginal People say it is.

QSNTS considers this a threshold issue, particularly where the Aboriginal party is a prescribed body corporate (PBC) for a positive native title determination area.

It is our submission that where a PBC requests that information be placed on the Register, there ought to be a rebuttable presumption that the material provided by the PBC in support of its request is correct. The principle that underlies this is that, as judicially determined native title holders, the Traditional Owners are experts in their own culture.

Allowing a determined native title holding group to define and determine what Aboriginal cultural heritage is in their determination area, gives real effect to the current purpose of the ACHA, namely, that protection and conservation of Aboriginal cultural heritage be based on respect for Aboriginal knowledge, culture and traditional practices; and that Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage

Defining Aboriginal cultural heritage with reference to the views of the Aboriginal party will necessarily have flow on effects for the way in which the ACHA operates, as Aboriginal involvement, knowledge and expertise will be required in each stage of the protection process including in

- Assessing whether an activity is likely to impact on Aboriginal cultural heritage
- The identification of a 'find'
- The management of identified Aboriginal cultural heritage

Is there a need to revisit the 'last claim standing' provision – if yes, what alternatives should be considered?

Is there a need to revisit the identification of Aboriginal and Torres Strait Islander parties – if yes, who should be involved and what roles, responsibilities and powers should they have?

Should there be a process for Aboriginal and Torres Strait Islander parties to apply to be a 'Registered Cultural Heritage Body' to replace the current native title reliant model?

QSNTS has been advocating for a change in the last claim standing provisions for the past 8 years. Most recently, QSNTS made written and oral submissions on clause 95 of the **Revenue and Other Legislation Amendment Bill 2018** urging the Department to amend the ACHA to resolve the problems and cultural offence arising from the last claim standing provisions.

QNSTS submits that in considering the operation of Part 4 of the ACHA, the Department must have regard to the decision of the Supreme Court of Queensland in *Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships*¹ (*Nuga Nuga*). The particular issue addressed by the Supreme Court was that which is referred to commonly as the 'last claim standing' provision.

QSNTS has been arguing that the last claim standing provision is, in certain circumstances, culturally inappropriate and an affront to Indigenous people. The most glaring example of this are circumstances where certain persons, being part of a Registered Native Title Claimant, are the subject of judicial findings that they do not have the requisite 'people for country' connection to land and waters to be part of the persons who may assert native title in relation to that land and those waters. To use blunt language, the Federal Court of Australia (**Court**) has found that those individuals are not 'right' for that country.

There are two particular examples of this occurring within the region for which QSNTS holds responsibility as a native title service provider pursuant to the *Native Title Act 1993* (Cth) (**NTA**). One of those examples was the litigation from which the *Nuga Nuga* Supreme Court action had its genesis². The other was the unsuccessful native title claim that included the Brisbane CBD³. Each of those matters involved overlapping native title claims. Each went to trial and was opposed by the State of Queensland. Each was unsuccessful and resulted in findings by the court that native title did not exist within the area claimed.

A striking feature of each of those two matters was that persons who were part of the Registered Native Title Claimant were found to have no traditional association with the claim area. Despite that, those persons are able to exercise significant influence in relation to the area that had been subject to the failed claim because of the status they were afforded by sections 34 and 35 of the ACHA. The *Nuga Nuga* decision held that the interpretation of sections 34 and 35 of the ACHA as applied by DATSIP could not be sustained.

While the *Nuga Nuga* decision caused some consternation and inconvenience to developers and others who sought to obtain an assessment of Aboriginal cultural heritage for proposed projects, the decision had the effect of taking persons who were not, and never could be, native title holders for the area out of the cultural heritage assessment equation.

¹ [\[2017\] QSC 321](#)

² *Wyman on behalf of the Bidjara People v State of Queensland (No 2)* [\[2013\] FCA 1229](#)

³ *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [\[2015\] FCA 15](#)

The amendments made to the ACHA in the *Revenue and Other Legislation Amendment Bill 2018* did nothing to address the issues raised in the Nuga Nuga litigation. Instead the amendments entrenched, the previous interpretation adopted by DATSIP which have the effect of permitting persons who had been found by the Court to have no traditional association with the relevant place to be the 'go to' person in relation to cultural heritage for that place.

Further, Aboriginal people who have been found, in an *in rem* judgment to have traditional association with places (albeit they may not have been able to reach the high bar required to achieve a native title determination) are deprived of the opportunity and responsibility to care for their traditional country. The last claim standing rule means those opportunities and that responsibility are devolved upon people simply by virtue of those people being identified in a particular document (the National Native Title Tribunal's Register of Native Title Claims) at a particular time even though an *in rem* judgment of a superior court of records finds those persons are not 'right'.

QSNTS submits that a proponent negotiating with a s 34(1)(b)(i) native title party cannot properly satisfy their statutory duty of care if the native title party (or a person comprising part of it) has been found not to be a traditional owner of the country they claim.

In terms of what this means for the identification of an Aboriginal party and the role of Aboriginal Cultural Heritage Bodies, QSNTS maintains that the provisions of the ACHA relating to the identification of Aboriginal parties sensibly relies upon the provisions of the NTA because identification of Aboriginal persons who have the particular knowledge about traditions, observances, customs or beliefs associated with an area, and who has responsibility under Aboriginal tradition for an area, involves largely the same enquiry required for the identification of native title holders.

However, the ACHA relies upon the wrong mechanism of the NTA for identifying Aboriginal parties for an area. In our submission the best mechanism found in the NTA are the NTRB/SPs whose statutory functions make us ideally suited to play a role in identifying Aboriginal parties within the meaning of 35(7) of the ACHA. In fact, NTRB/SPs are the only bodies with both the statutory duty and ability to undertake the research demanded by section 35(7).

NTRB/SPs have statutory functions under the (NTA) to, as far as is reasonably practicable, identify persons who may hold native title in the area for which the body is the representative body⁴ and to make reasonable efforts to minimise the number of overlapping native title claims⁵.

These and other statutory mandates require RNTBC/SPs to undertake particular functions under Part 11 NTA. Relevantly these are:

SECT 203BB

Facilitation and assistance functions

General

(1) The facilitation and assistance functions of a representative body are:

(a) to research and prepare native title applications, and to facilitate research into, preparation of and making of native title applications ...

⁴ NTA; s. 203BJ(b)

⁵ NTA; s. 203BE(3)

SECT 203BC

How facilitation and assistance functions are to be performed

General

(1) In performing its facilitation and assistance functions in relation to any matter, a representative body must:

(a) consult with, and have regard to the interests of, any registered native title bodies corporate, native title holders or persons who may hold native title who are affected by the matter ...

SECT 203BJ

Other functions

In addition to the functions referred to in sections 203BB to 203BI, a representative body must:

(a) as far as is reasonably practicable, enter into written arrangements with other representative bodies so that the representative body can exercise its facilitation and assistance functions in relation to a matter of a kind referred to in paragraph 203BD(a) or (b); and

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

In performing their statutory functions, NTRB/SPs are required to maintain organisational structures and administrative processes that promote the satisfactory representation of and consultation with its constituents in a fair manner⁶. Under section 203BF of the NTA, NTRB/SPs also have a statutory function to undertake dispute resolution between constituents and in that capacity are acutely aware of the causes of such disputes, which in many cases involve cultural heritage disputes.

The performance of RNTBC/SPs is overseen by the Australian Government through the National Indigenous Australians Agency. That oversight includes periodic reviews by external consultants into the performance of individual RNTBC/SPs. In those circumstances there can be a high degree of confidence about the competence and probity of RNTBC/SPs in paying an advisory role in the identification of Aboriginal Parties for ACHA purposes.

While QSNTS maintains that NTRB/SPs ought to have a role in assisting the Department to identify Aboriginal parties for an area, we do not suggest that such bodies usurp the authority of the Federal Court to determine the rightful native title holders for an area. There are currently 135 positive determinations within Queensland, the native title holders for which are represented by 84 Registered Native Title Bodies Corporate ('RNTBCs').

The Federal Court is rapidly resolving claims and the number of RNTBCs will grow considerably over the coming years. The Department needs to work collaboratively with this growing body of RNTBCs and the ACHA should reflect that.

QSNTS submits that where a RNTBC exists, that body corporate is the *only* appropriate entity to be registered pursuant to section 36 of the ACHA as an Aboriginal Cultural Heritage Body for the area within the external boundary of the claim area under the successful native title determination application. Registration of a RNTBC (or its nominee corporation), rather than some other body, will avoid the proliferation of Indigenous corporations within Queensland that seek to undertake the same work.

⁶ NTA; s. 203BA(2)

Where a RNTBC does not exist for an area, then the expertise and resources of NTRB/SPs should be utilised to assist the Department with:

- 1) the identification of Aboriginal parties where required (i.e., where no Aboriginal cultural heritage body exists); and
- 2) determination (and certification by the NTRB/SP) of whether a corporation that has applied to be registered as an Aboriginal cultural heritage body for an area under section 36 of the ACHA is an appropriate body to identify Aboriginal parties for the area.

QSNTS is concerned that the Department does not possess the objective research or resources to properly undertake either of the above. Our concerns are amplified in circumstances where overlapping assertions of native title may exist.

By contrast, if the Department were to engage with NTRB/SPs QSNTS is confident that through the utilisation of their skills, experience and research resources NTRB/SPs can provide credible, evidence-based and reliable identification of Aboriginal parties for areas within their respective representative body areas in a fair and accountable manner. Further, NTRB/SPs can play a useful role in the certification of appropriate corporations to be registered as Aboriginal cultural heritage bodies.

Several scenarios must be considered in discussing who the Aboriginal Party is for an area. The current regime bases itself on the Register of Native Title Claims maintained by the National Native Title Tribunal. That has provided an expedient and temporally authoritative means of identifying the Registered Native Title Claimant (RNTC) as the appropriate Aboriginal Party for a place but the Register is not necessarily a final point of truth.

Native Title Claim on foot – pre-Determination

While a native title claim is before the Court identifying the RNTC as the Aboriginal Party at the time a cultural heritage matter needs to be considered is reasonable.

However, it must be understood that it is common during the life of a native title claim that research into the claim and particularly 'people for country' is ongoing. This can result in claim group descriptors (typically identified apical ancestors) being added to or removed from the claim group description with a concomitant change to the composition of the native title claim group and, potentially, the RNTC. Further it is often the case that members of the Registered Native Title Claimant die during the proceedings. There have been cases in which all of the members of the RNTC have passed. In that situation the 'catch-all' currently used in s. 34(2):

(2) If a person would be a native title party under subsection (1) (b) but the person is no longer alive, the native title party is instead taken to be the native title claim group who, under the Commonwealth Native Title Act, authorised the person to make the relevant native title determination application.

All of that means that there can be a disjunct between a native title determination application as originally filed and the final determination. Reliance on the Registers maintained by the NNTT must be reflective of this.

Native Title Claim Determined

Positive determination

Where a native title claim has been determined positively the Registered Native Title Body Corporate (RNTBC) should be the Aboriginal Party for all of the land and waters within the external boundary of the Determination Area.

Provision should be made for a RNTBC to nominate a subsidiary to perform the role of Aboriginal Party. That subsidiary should, ideally, be a subsidiary of the RNTBC incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth.)* but should not be a proprietary limited company (which makes it difficult for interested persons to 'pierce the corporate veil').

If a nominee is to be considered as a registered Cultural heritage Body, a review of its foundational documents should be undertaken to ensure that the corporation has been established to the wider community of native title holders and not a particular family or faction.

Negative determination

A negative determination will often be the outcome of the claim group not being able to satisfy the State (in the case of a consent determination) or the Court (in a litigated matter) that continuity of connection to country has been maintained. In such circumstances the Court's decision will often have a discernible 'but for' element. That is; the *x people* were in occupation of the claim area at the time of effective sovereignty but due to the colonisation pressures were unable to maintain that connection during the pastoral period. In that case identification of the appropriate persons to be the Aboriginal Party should be possible from the text of the decision and should follow that decision. In such circumstances a regime similar to the last claim standing concept is appropriate.

However the above proposition does not follow if the ancestor of one or more of the persons comprising the RNTC or, having regard to the s. 34(2) concept, the claim group have been found to have had no traditional association with the claim area. In that circumstance there must be a textual alignment between the finding of the Court and the identification of the Aboriginal Party and the persons with no traditional ancestral connection to the country can have no role as an Aboriginal Party. It must be mandated that persons found to have no traditional association with the area may not be the Aboriginal Party or part of it. In this case regard should also be had to the submissions the State made at trial. Currently there is a disjunct between what the State argued at trial and what the State does with the outcome of the trial in the context of the 'last claim standing' schema.

If no clear picture of the appropriate Aboriginal Party emerges from the published reasons for, evidence led, and submissions made in an unsuccessful NTDA, enquiries should be made of the relevant NTRB/SP for an evidence based appreciation of people with traditional association with the area. If the NTRB/SP is unable to provide a response then, and only then, should resort be had to individuals with an historical connection to the place. Conceivably, that could include a member of RNTC who was found to not have traditional association with the place.

No native title determination application / discontinued or withdrawn native title determination application

In the above circumstances, enquiries should be made of the relevant NTRB/SP for an evidence based appreciation of people with traditional association with the area. If the NTRB/SP is unable to provide a response then, and only then, should resort be had to individuals with an historical connection to the place.

In circumstances where there is an 'old' claim that was withdrawn, discontinued or otherwise terminated without a determination, resulting in a 'last claim standing' Aboriginal Party, it will often be the case that significant research has taken place that may clarify who ought properly be the Aboriginal Party in preference to the 'last claim standing Aboriginal Party'.

In those circumstances enquiries should be made of the persons holding the research before decisions are made as to the identity of the Aboriginal Party.

Summary

Scenario	Aboriginal Party	Status
Positive native title determination	RNTBC or an appropriate non - Pty Ltd nominee	Mandatory
Negative native title determination (Right People Right Country but for connection)	Registered Native Title Claimant (RNTC) and judgment	Mandatory
Negative native title determination (not Right People Right Country)	judgment and consult with NTRB/SP have regard to the position of the State and Commonwealth at trial	Discretionary
Historical connection only	consult with NTRB/SP have regard to the position of the State and Commonwealth at trial – potentially RNTC	Discretionary
No claim or previous claim not prosecuted to final judgment	consult with NTRB/SP have regard to the position of the State and Commonwealth at trial – potentially RNTC	Discretionary

Is there a need to bolster the oversight mechanisms for self-assessment and voluntary processes – if yes, what should this entail?

An overarching issue is one of enforcement of compliance by land users with the Guidelines and the ACHA.

This continues to be a concern for our Traditional Owner constituents across the board when they are dealing with various land users, particularly resource proponents. Continuing to allow land users to make self-assessments of the impact of their activities and placing reliance on ill-informed and, sometimes, ill-willed land user in relation to Cultural Heritage Finds has not been an objective or culturally appropriate method of protecting our constituents' cultural heritage.

Underpinning any amendments to the duties of landholders should be a theme that all country is, in the sense of cultural heritage protection, shared. Traditional owner involvement in the assessment of their cultural heritage, necessary flows from this theme.

At present, there is a view amongst our constituents that the Duty of Care Guidelines seek to bypass Aboriginal parties in order to allow land users to expeditiously complete activities without proper and knowledgeable consultation or assessment.

For example, the provisions of the Guidelines related to Cultural Heritage Finds are premised on an assumption that a land user is capable of identifying those objects or areas that are cultural heritage. Identification is, of course, a precursor to the land user being able to alert the Aboriginal Party and work with the Aboriginal Party to develop a course of action to prevent harm to the cultural heritage. That is, the first step of the process does not involve an Aboriginal party and the effectiveness of this first step relies solely on the land user's honesty and willingness to protect Aboriginal cultural heritage.

In our experience, even where a land user is prepared to act in good faith, it is often the case that they are unable to accurately identify cultural heritage features, or that they even possess a level of knowledge preliminary to identifying cultural heritage.

It follows that, in all cases where disturbance of greenfield sites or dormant sites is contemplated there should be proper and adequate consultation and negotiation before any potentially destructive activity occurs.

It is also necessary to acknowledge that an assumption that previously disturbed land does not have any surviving cultural heritage is simply incorrect. Despite the previous use (including physical disturbance) of the land, physical cultural heritage may remain on the site.

In addition to increased involvement of Aboriginal people in the identification of Aboriginal cultural heritage, DATSIP must assist land users to meet their duty of care through education and training.

Therefore QSNTS submits that:

- there is a need to remove any proponent based subjectivity from the definitions that trigger the need for a land holder to take action.
- any amendments to the CHA guidelines include photographs or depictions to assist land users with a better understanding of what these significant features may look like (noting that many non-Indigenous persons have no or scant knowledge of these matters). For instance, photographs of different ceremonial places, scarred trees and the types of artefacts commonly located at occupation sites.
- DATSIP develop a range of educational tools that are actively distributed to land users and which are also available on the DATSIP website which also contain the types of information referred to above, but particularly focusing on using visual examples so that when land users are

undertaking activities, they more easily be able to identify, or at least query whether, certain features may be considered a 'Cultural Heritage Find' by the Traditional Owners.

These developments must be undertaken with the assistance of Traditional Owners. In the event that a level of self-assessment is retained, land holders must be accountable for their self-assessment of risk to cultural heritage. QSNTS suggests that the self-assessment be documented and that this documentation be provided to the Aboriginal party prior to the proposed act occurring. This encourages scrutiny of the self-assessment and gives the Aboriginal party the opportunity to dispute the categorising or assessment of risk before any cultural heritage is put at risk.

Is there a need for dispute resolution assistance for parties negotiating voluntary agreements – if yes, who should provide these services and what parameters should be put around the process?

QSNTS' preference is for the expansion of the Queensland Land Court's Cultural Heritage Division's role to provide mediation services in these circumstances.

Critical to the success of such a service is that it is provided in a non-formal setting that encourages parties to engage without the need for legal representation if they so elect. Such an approach would ensure that the mediation process is entirely independent from the Department and, therefore, is likely to be perceived as being an unbiased dispute resolution mechanism.

Further, if either party to the matter later required the utilisation of the Land Court's functions under Part 6 and/or Part 7 of the ACHA, the Court would already have an insight into the relationship between the parties and difficulties already faced.

Is there a need to reconsider the threshold for formal cultural heritage assessments– if yes, what assessment and management processes should be considered?

Yes. As stated above, definitions that trigger formal processes should not be subjective. Instructional definitions are required, and a list of activities that trigger formal assessment, with clear examples is supported by QSNTS. Any development of defined activities or categories, must be done in consultation with Aboriginal people who, are the content experts on cultural heritage

QSNTS is, of course, happy to expand on these submissions or assist further in any way that may be useful to the development of a more fit for purpose legislative regime.

Yours faithfully,



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