Even As the Crow Flies it is Still a Long Way: ***Implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan***

Introduction and Background

In Southern Queensland, every Aboriginal person was affected by the removals policy. Those who were taken from their lands to missions such as Barambah, Woorabinda, Taroom and Palm Island suffered the heartache and debilitating loss of being removed from their country. But those who were left behind equally suffered the loss of their family and communities and although they had the benefit of remaining on their country they only enjoyed that benefit in isolation and in many cases clandestinely in a land now populated by the *migaloo* and their beasts and their fences.

In 1992 when the Mabo[1] decision was handed down, there were still a small number of people who lived on their country but the majority either lived in Brisbane, Cherbourg or Woorabinda. Many of these people saw the Mabo decision as their opportunity to achieve some recognition of their rightful place as the true owners of the lands and waters, and perhaps some reckoning of all the wrongs which had taken place in the past.

As the legislation unfolded it became clear to the lawyers and politicos that getting recognition would not be easy and that native title would not provide any reckoning. Aboriginal people didn't understand that the Mabo decision did not mean recognition and reckoning. Many still don't.

In 1993 the Native Title Act was passed and "representative bodies" were established. In the Queensland South region two representative bodies were recognised. The Foundation for Aboriginal and Islander Research Action (FAIRA) was already a well established organisation when it first received funding to represent Aboriginal people in the native title process. Goolburri Land Council Aboriginal Corporation was established specifically for the purpose of being a representative body.

In 2000 Goolburri became the Queensland South Native Title Representative Body under the scheme introduced in the 1998 amendments. Under that scheme as designed by the Federal Government, ostensibly triggered by the decision in the Wik Peoples v the State of Queensland and Others[2], a process by which some semblance of order would be brought claim making procedure was introduced. You will recall that prior to the 1998 amendments individuals were able to make applications to the National Native Title Tribunal claiming to hold native title rights and interests in their own right. In 1998 the threshold test was introduced and one of the procedural threshold matters was the introduction of this notion that native title claims needed to be made on behalf of the native title claim group.

There were, and still are, two ways in which a native title applicant can demonstrate that he, she or they or duly authorised in accordance with the NTA. Either there is an authorisation process or the native title representative bodies "certify" that the claim has been properly authorised by all those who hold native title.

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[1] Mabo and Others v the State of Queensland and Others (No. 2) (1992) 180 CLR 1
[2] Wik Peoples v State of Queensland (1996) 187 CLR 1

The bodies which had taken on the role of being the representatives of the traditional owners of Australia were given the irreconcilable role of being gatekeepers as well as legal representatives. They were and still are asked to faithfully represent conflicting interests and yet determine which group gets “certified” and further still which groups get funded.

The traditional owners of southern Queensland, who simply want recognition and some reckoning were left with in the unenviable position of having to seek representation from a NTRB and perhaps get some funding allocated to the progression of their claim but run the risk that some other adjoining or overlapping claim will get priority over their claim and their claim will not be progressed.

The alternative was to obtain private legal assistance if they have income from future act or cultural heritage business. It is offensive that some claimants end up having to spend money that they have received in compensation for having their land and sites destroyed to pay experts to help them chase native title recognition.

Nevertheless, the traditional owners in southern Queensland did not have any substantive legal work delivered to them during the 11 year period between 1994 and 2005, apart from some early evidence taken in the far southwest and in the central part of the region.

By mid 2004, 29 of the 30 native title claims wholly or partially in the Queensland South native title region were subject to overlap with at least one other claim, the State of Queensland was not prepared to give any overlapping claims priority in the allocation of its resources. The Federal Court of Australia was expressing serious concern at the lack of progress in the region and more than one Justice of that Court had threatened to set matters down for hearing if meaningful mediation could not be achieved.

In October 2004, the Federal Court called a regional case conference at which the three Registrars of that Court having carriage of matters in the region sat jointly to call through all the matters. QSRBAC which was then still in operation, but only had one legal officer, no anthropological expert and had a financial controller appointed, presented a “Draft Legal Services Strategic Plan”. The Draft LSSP set out the way in which QSRBAC would go about delivering services to the Queensland South region. (Attachment A)

The QSRBAC had its funding withdrawn on 22 June 2005. On 28 June 2005 the Minister for Immigration, Multicultural and Indigenous Affairs funded the QSNTS as a s 203FE NTA body. The QSNTS, like Native Title Services Victoria and NSW Native Title Services is a company limited by guarantee.

On 25 October 2005 the QSNTS adopted the QSNTS Legal Services Strategic Plan. The document had undergone further development since the draft that was presented to the Court in October 2004. An integral component of the preparation of the LSSP was the consultation with the other peak bodies in the arena including the NNTT.

Native Title Claims in the Queensland South Region			
Claim	**Date**	**Active**	**Registered**

The Legal Services Strategic Plan

First and foremost, the objective of the LSSP was for QSNTS to set out a pathway for traditional owners to follow which would get them to the end or the native title process. It was and remains unforgivable that they should have been involved in this process for what was then 11 years without any advancement of their claims.
The most substantial hurdle QSNTS has faced and continues to face is the resistance of the traditional owners, and every other person and body involved with the former QSRBAC, to the notion that the strategic plan will be adhered to. From the moment the draft was unveiled in the Federal Court on 5 October 2005, first it was DDR Robson expressing scepticism, then the lawyers standing at the bar table, and finally a number of unrepresented claimants speaking from the gallery. The initial cynicism was understandable and expected.

With this in mind the QSNTS set about articulating the primary objectives the LSSP was designed to achieve. The LSSP states as follows at paragraph 18

> *The primary objectives of QSNTS in adopting this policy are to:*
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> *i. work with the Traditional Owners of southern Queensland to achieve the best results possible within the existing legislative framework and the available resources;*

ii. *ensure that the available resources are allocated between claim groups in a fair and equitable manner;*

iii. *ensure that QSNTS service delivery process is transparent;*

iv. *ensure that the Traditional Owners of southern Queensland are aware of the policies upon which decisions regarding the management of Native Title will be made by QSNTS;*

v. *ensure that the Traditional Owners of southern Queensland have access to information and understand their obligations and responsibilities arising from their participation in the Native Title process; and*

vi. *work with the Traditional Owners of southern Queensland to ensure any social infrastructure flowing from the Native Title process is complementary to the Traditional Owners' broader aspirations.*

The process issues of fairness, equity and transparency have to a large degree been met. The provision of information to traditional owners about the QSNTS policies and the claim groups obligations arising from the native title process are largely satisfied in that the applicants and the all those people who have attended authorisation meetings convened by the QSNTS have been bombarded with information regarding those matters. The results have yet to come and the work with the claim groups to develop systems and processes which are consistent with and complementary to their broader aspirations is ongoing.

However, with a revised edition of the LSSP comes a responsibility to keep the traditional owners up to date with the applicable policies.

In its current form the LSSP does a number of things, most of which are not new, a couple of which are. Of the things that the LSSP does that are not new are the creation of administrative sub regions (Western, Central and Eastern), the introduction of progressive stages of preparation and action, the introduction of services agreements, the allocation of funds on the basis of claim group strength and claim merit.

The things the LSSP does which are new and will be the focus of some discussion are the requirement for anthropologists to provide baseline reports on an objective basis on behalf of the QSNTS with no promise and in many cases little likelihood of receiving the substantive brief, the highly structured nature of the QSNTS sub-regional land summits, the public distribution of the LSSP including exhibition on the Federal Court website, the requirement that each claim group have an incorporated body whose membership which reflects the claim group description.

I. The Role of Anthropologists

In Stage 1 of the QSNTS LSSP the whole of each subregion is assessed to determine a baseline level of anthropological evidence to disclose the families and claim groups who have the strongest possibility of proving native title rights and interests in each of the subject areas.

While the baseline anthropological reports for the Western Subregion were prepared by a single anthropologist, Dr Paul Gorecki, who understood the need for the process there were a number anthropologists who were uncomfortable about this shift in loyalties. For in the anthropological profession, the development of some relationship and trust with the claim group is seen to be essential to the process of being given access to closely guarded information. To then write a report that disputed the information received would destroy that trust relationship, so it was thought. The issue however, from QSNTS perspective, was that it was judged to be an absolute certainty that if 29 anthropologists were engaged to provide a report with respect to 29 overlapping native title applications, then the only result would be that the overlapping claims to rights and interests in those areas would be further entrenched.

In the QSNTS case however, each of the anthropologists, because they were engaged to advise the QSNTS, were also given access to the anthropological information and evidence obtained from each of the neighbouring groups and were asked to reconcile the conflicting evidence. The results were, in almost all cases, that the recommendations from each of the anthropologists were consistent with the neighbouring claim boundaries and claim group descriptions. It is also important to note that unless there was some evidence that areas were "shared country" then this could not form part of the recommendations.

This is to be contrasted with the position of anthropologists in preparation of connection reports on behalf of the native title claimants which are governed by the rules applicable to expert evidence in the Federal Court and the Evidence Act.

INSERT DISCUSSION OF JANGO AND THE REQUIREMENTS OF THE GUIDELINES ON CONNECTION REPORTS – ANNEXE MODEL TERMS OF REFERENCE

This approach causes claimant heartache for a number of reasons. None of the reasons are peculiar to the Queensland South Region but are worth setting out.

In southern Queensland, because many of the claimants have not lived on country for a more than a generation, they must rely upon the stories told to them by their parents and grandparents for their assertion of connection to their country. Often those parents and grandparents are deceased and therefore there is no capacity for the current claimant to question the information they have. Nor do they have much in the way of their own independent knowledge of the landscape. They often feel that to adjust their claim in a way which is inconsistent to with the information they have received in being disrespectful to their deceased elders.

Because there parents were often moved off country before being moved to Cherbourg or Woorabinda, there is reference to people being born at or coming from particular stations. Many claimants claim country by reference to the stations on which their parents or grandparents were born or lived. This of course is misleading because, as is well documented, by the latter part of the 19th century people many Aboriginal people were moving around the countryside seeking work or alternatively escaping from frontier brutality and genocide. It is then no easy task for an claimant who has been involved in a native title claim for ten years and identified to all and

sundry as a member of that nation to be told that their grandmother may have been born on the country the subject of the claim but her mother's country was in fact 300 miles up the road. But these are the realities of the native title process in southern Queensland where the removals were so pervasive.

INSERT REFERENCES AND COMMENTARY ON THE REMOVALS PROCESSES IN SOUTHERN QUEENSLAND

II. Highly Structured and Closely Managed Land Summits

Purposes of the Land Summits

The purposes of the QSNTS land summits were threefold. Firstly, the land summits would be used as an opportunity to inform applicants of the matters of which they need to be aware in order to make some decisions about their claims. Secondly, the land summits would provide applicants with the chance to have focussed and informed discussions with their neighbours. Thirdly, the land summits would provide the applicants with the occasion on which to give instructions to QSNTS about the way in which they wanted their claim to be progressed.

It was thought that the following information would be of particular use to the Applicants:

- A detailed explanation of the LSSP;
- A clear explanation from the Federal Court of its view of the process and the status of the claims;
- Information from the NNTT about the process and its view of the requirements at law to prove the existence of native title rights and interests, and detailed information as to the extent of extinguishment throughout the region (based on current tenures);
- Advice from QSNTS on the appropriate claim group descriptions and boundaries given the known evidence;
- Access to legal and anthropological advisors;
- Hard copies of maps showing current boundaries and recommended boundaries as well as digital mapping tools and expertise.

In the first round of land summits there was no way of escaping the plain fact that the failure to resolve the boundary disputes would result in matters being struck out. As those in the business would know, the process follows the familiar path of the matter being taken out of mediation, and programming orders made, sometimes with guillotine orders. In such circumstances the NTRB has withdrawn or did not act for the Applicants in the first place and the Applicants are incapable of meeting the orders of the Court regarding preparation of the matter for hearing, thus allowing the Court to strike the matter out of its own volition.

The above scenario poses a number of problems. Firstly, and most relevant to this paper, it becomes clear that the LSSP and the land summit become a stepping stones from which claims locked in unreconciled overlaps will eventually be struck out. This was not an unanticipated outcome for QSNTS, and indeed it was made clear to

Applicants at the land summits that dismissal of their application was a likely result of their failure to resolve their boundary disputes.

It must be remembered however that the seemingly immovable pillar in this whirlpool of law and policy is the State's position that it will not negotiate with claim groups in which there are unresolved overlapping claims to native title rights and interests. The State does not have a stated policy to this effect because it must be prepared to negotiate settlement of any litigation to which it is party. When pressed, the State of Queensland will produce its vague and very informal policy position that it does not give priority in the application of its resources to claims which were the subject overlapping claims. This is a position which may have arguably had some legislative basis for the NTA did not, at that time, accommodate determinations over part of the claimed area. That argument was however very weak as it is common for native title determination applications to be amended prior to determination to exclude areas from the claim for a range of reasons including the desire to removed contested matters from the determination. The position taken by the State is now even less sustainable in that the NTA has been amended to specifically provide for part determinations.

Therefore, if the State can be satisfied that the claim group are the descendants of the original inhabitants of at least the uncontested area, and assuming it can be satisfied the case for connection is reasonably arguable, then it should be able to settle the matter by consent determination over the uncontested part of the claim, leaving the Indigenous parties to resolve that which is contested at some later point. The existence of overlaps can no longer be used by the State as a basis for denying a native title party access to properly resourced negotiations.

The conclusion which must then follow is that NTRBs should not use the failure to resolve overlaps as a basis determining priority in funding. While QSNTS was aware of the artificial nature of the State's position when drafting the LSSP, it was considered that given that the extent of the overlapping claims in the QS area and demands of the Court for some real and immediate "progress", a campaign to rectify the State's native title policy in respect of this issue could not be entertained.

A further problem which arises from the above scenario is the entirely unsatisfactory position where the Court is required to dismiss Applications of its own volition. While native title proceedings have taken on a very distinct set of procedural conventions, such proceedings are still litigation. The primary parties to native title litigation are the applicants and the State. If an application is taken out of mediation and the there is a subsequent failure to comply with programming orders then the State should be the party making the application for dismissal for want of prosecution, rather than leaving the matter to the Court. Similarly, where there are claims which have flaws in terms of the procedural requirements for making claims then it ought to be the State that brings the application to strike the matter out on the basis that the claim is fatally floored, not the native title representative body. A legitimate question may be asked as to whether an NTRB is acting within power when it brings a strike out application against a native title claim group.

The final problem with the scenario arises from the assumption that removal of claims in which applicants fail to expeditiously mediate so as to resolve overlaps is

something the applicants will necessarily resist or be opposed to. This may indeed be the case in a number of areas and regions but is not uniformly the case. In some areas applicants are not unhappy for their applications to be struck out because they recognise that they can maintain their cultural heritage rights as a formerly registered native title claimant whose claim has been unsuccessful. The ousted applicant merely then has to ensure that no other claim is registered over the area.

Preparation for the Land Summits

In preparation for each of the Land Summits, QSNTS had reviewed all research materials pertaining to each of the NTDAs within the region. Using the state's connection requirements as a guide, recommendations were developed to ensure anthropological materials were firstly relevant and secondly sufficient. The action needed from this research formed the basis for the legal and anthropological recommendations. These recommendations were drafted and reviewed before being provided to facilitators for discussion with Applicants and claim group members at the Summit.

At the time, it was difficult to secure a venue for the summit in any small town in Western Queensland. Finally, Mitchell Sports Complex was chosen as it was a venue with lots of space, facilities and in particular break-out areas. QSNTS thought it important to bring groups together but to also have areas where groups could meet separately with lawyers, anthropologists, facilitators, administrators, staff and family members to discuss claim matters.

Catering proved interesting. QSNTS' policy to pay travel allowance for authorized Applicants only, was accompanied by the strong message that everyone was welcome and if they came they would be fed. Around 45 Applicants were expected but some 120 people were fed (according to the cook who washed all of the plates).

The collection of all Applicants' bank account details and calculation and payment of travel allowance had to be done carefully and correctly. As the payments were processed in Canberra, this proved to be an issue which required a great deal of attention. Particularly since the timing of the payments was critical and taking into account some banking institutions took longer than others and some people had long distances to travel.

Given this was QSNTS' first meeting of such a nature, and noting the history with the former organisation, there was much confusion, scepticism and criticism coming from all quarters, not just from within the Aboriginal community. Leaving small country towns 'in tact' after huge meetings was of particular importance to QSNTS at this time. Given we were bringing some 200 people to these towns at one time, it was important for the organization to be seen to be acting responsibly.

To this end, QSNTS engaged the services of an Indigenous security firm who contacted local police and remained on 24 hour call to ensure people were cared for and transport provided if needed. Although a number of people raised concerns about the presence of the security guards, after 3 days and 4 nights there were no incidents or arrests and QSNTS are now welcomed back to these towns. And, as anyone who had attended some of the meetings previously held by the QSRBAC in south western Queensland, the odds were against such an outcome.

The local Murri Health Service was contacted prior to the summit to request their attendance and offered to provide health checks for the many Traditional Owners arriving from out of town. In this way people were able to easily access health care services, access medications if necessary.

The Court and the NNTT were present and their assistance proved extremely valuable in breaking down the Native Title processes so that QSNTS staff and Traditional Owners could discuss what needed to be done to progress claims.

After a comprehensive briefing on QSNTS' LSSP, the various groups of Applicants were introduced to their Facilitator.

Facilitators

Early in the development and design of the land summits QSNTS realised that there was a lot of information the Applicants were going to have to digest and a lot of work that they had to get through over the course of the three days. It became apparent that each group of Applicants would need the assistance of someone who understood the LSSP and had some understanding of the native title process to assist them in gathering the information they needed, making arrangements for negotiations with their neighbours, and recording their responses to the QSNTS recommendations.

The facilitators were hand picked to work with particular groups. Some of the facilitators were lawyers but others included former NTRB officers, traditional owners from other country, and anthropologists. Facilitators were brought from Sydney, Darwin, Bourke and Brisbane to assist the Applicants. They were all provided with comprehensive briefings in preparation for discussion and distribution amongst the Applicants.

Facilitators presented and discussed recommendations with Applicants. This created a difficult tension for the facilitators which as it turned out didn't affect their capacity to perform their tasks. The tension existed between their role as the assistant to and advocate for their assigned Applicant group and their role as messenger on behalf of QSNTS delivering very difficult messages in many circumstance. QSNTS must admit to being somewhat surprised at the ease with which the Applicants were able to accept that the facilitators were in fact only messengers of the QSNTS recommendations and then get on with putting each of their facilitators to work for them. They can be no doubt that every person who has worked at a QSNTS land summit has well and truly earned their keep.

Having individual facilitators for each group may be seen as an extravagance by some people. However, QSNTS has come to the conclusion that the land summits would not work without highly skilled facilitators on hand to assist each group of Applicants. In particular, it was during the negotiations between neighbouring groups that the skill of the facilitators really came to the fore. At those times the facilitators were able to make sure the real and often underlying issues were identified and also ensured that the political prowess of individual applicants did not overwhelm the negotiations and result in a skewed outcome.

Applicants were then given the option taking the recommendations away and consulting with their claim groups before responding to the recommendations. Many signed at the Summit, however, and were keen to progress their claim.

One of the many lesson learned from the first Land Summit, was to ensure it is held on 'uncontested' country so that there is not a disagreement about 'welcome to country'. The importance of serving good food to people while they are making these decisions in a venue that is comfortable, accessible and without distractions cannot be disregarded.

At the Second Land Summit, we ensured we selected and briefed many of the same Indigenous facilitators wherever possible with many younger graduates fulfilling this role extremely well. Having the researchers/anthropologists present for people to discuss and or provide technical information, together with the Court, NNTT and mapping experts was invaluable. The ability to alter boundaries and easily print fresh maps off was also was very helpful to facilitators and Applicants alike. Good clear precise maps with layers marking pastoral properties and towns are also a valuable tool in assisting the overlap mediation discussions. The facilitators who had been engaged for the first land summit realised the value of the digital mapping tools projected onto a large screen and at the second and third land summits all booked themselves in for sessions with the mapping experts as early in the weekend as possible.

Finally and most importantly, there are never get enough T-shirts printed and caps made – but, that is not an insurmountable problem.

In summary, a few of the things that helped make the land summits successful for Applicants were:

- Holding over weekends;
- Chose suitable venue;
- Good food in large supply;
- Clear consistent payments policy;
- Good quality Indigenous facilitators (pay them well so you can use them again and again);
- Health Services for the duration;
- Indigenous Security;
- Maps are imperative;
- Involvement of Court and NNTT;
- High quality legal and anthropological advice.

MAY INSERT BRIEF DISCUSSION REGARDING RECOMMENDAITON REVIEW PROCESS

III. Public Distribution of the LSSP

One of the key elements of the QSNTS LSSP and its subsidiary processes is the adherence to the principles of transparency in decision making. The QSNTS has found that once the process set out in the LSSP has been explained to the applicants at the sub regional Land Summits there has generally been satisfaction with the process.

QSNTS has given copies of the LSSP to each of the applicants in each of the claims in the Queensland South area on numerous occasions. Not surprisingly we have found that very few applicants had read the LSSP before coming to the sub regional Land Summit. However, after a comprehensive briefing about the document and the processes it details, and the Applicants questions have all been asked and answered, the Applicants all understand at least the central pieces of the policy.

The QSNTS experience has been that they are generally three types of applicants, who are sometimes all applicants in the same claim, but most often not. There are the older people who have had limited education and had limited or no involvement in the board or management of Aboriginal organisations. These people have generally been happy to see that something is being done to progress their native title claim, won't fully understand the detail of the policy, and will wait until QSNTS asks them to do something to progress the claim. Then there are another group who have limited education but have been exposed to a range of community politics and developed "street sense" that equips them, to varying degrees, to get the most out of the native title processes. This type of applicant often vigorously resists the QSNTS LSSP processes because it means the existing system that they have already sorted out will change. This group can be further subdivided into those who figure how they can work with the program and maintain some of the influence or control they had under the previous regime, and then there are those that engage private lawyers, call their own authorisation meetings and generally use all of their considerable skill maintaining a state of war with QSNTS. Finally, there are those applicants who are reasonably well educated and often younger who analyse the LSSP seeking to find arguments as to how they can best manipulate the system in their own or their claim group's favour. This group is combative but generally progressive.

Working with and supporting such a variety of capacity and skill levels within the one group of claimants is often demanding and sometimes confronting. But the immeasurable and undeniable value of the LSSP and its public circulation is to immediately rule out any argument of favouritism or bias. There is no room for bias. The existence of the LSSP allows the QSNTS to place the onus back onto the claimants to get their house in order and will provide them with assistance to do it, regardless of whether the claimants have any current or past conflicts with the QSNTS, QSRBAC, Goolburri or FAIRA.

It is at this point that those who have interests that may not necessarily coincide with the expeditious resolution of the native title claim attempt to go around the QSNTS by approaching the Court or the Office of Indigenous Policy Co-ordination. Both of these bodies have, to their credit and to the best knowledge of QSNTS, redirected all concerns back to the QSNTS to be dealt with according to policy.

An interesting aspect of the public nature of the document has been the position of the State of Queensland. All those involved in the representation of native title applicants during 2003 through to 2005 would have heard the officers of the State say, on many occasions, words to the effect that "as long as we have the right people for the right country we can do a deal". The types of deals that were being promoted during this period were "non-native title" outcomes. That is, outcomes in which native title claims were resolved without the recognition of any native title rights and interests.

The QSNTS decided that if the State was putting such offers on the table then claimants would be offered the option of pursuing "non-native title" outcomes.

The State was not consulted about the content of the LSSP but was provided with a copy of the public version two (2) days after its adoption by QSNTS, when senior officers of the State arrived at the first QSNTS land summit in Roma in October 2005. QSNTS management and advisors were shocked to see that they had the temerity to attend such a meeting when they had not been invited. They were shocked to see that what they had been saying over the course of a number of years about "non-native title" outcomes had been committed to writing in a formal document. They didn't stay at the Land Summit for long but the most senior of the officers was heard to say that QSNTS and the State would have to talk about the development of some State policy to "catch up" with the LSSP.

It was with some surprise that approximately five (5) months later a letter was received from the same officer of the State firstly complaining that the LSSP had been placed on the Federal Court website, then denying that the State ever had any policy relating to non-native title outcomes and requesting that the LSSP be amended to remove the offending portion of the document. The QSNTS agreed to consider the State's position at the next review of the document which was due to occur in October 2007 or following amendment to the NTA.

The absurdity of the situation aside, the exchange highlighted a further example of the policy vacuum within the State of Queensland which results in an absolutely fictional and opaque mediation process. As it currently stands, negotiations cannot commence with the State of Queensland unless a native title claim is on foot, or so a senior officer of the State has told us. This is regardless of the fact that the work may have been done to identify all the traditional owners and the extent of their country, and they have been informed of the native title process and would rather settle the matter in a way which did not require commencement of native title proceedings. It would seem that in such circumstances a letter setting out the details of the offer to settle and inviting negotiations might have some impact, for surely in such cases the State must assume the responsibility for the costs incurred by the applicant in preparing a Form 1 Application, holding an authorisation meeting and submissions to the NNTT in respect of the registration test and the cost of maintaining litigation in the Federal Court.

Further, the State position that it does not have a policy on non-native title negotiations and therefore all native title parties must submit all of their material in accordance with the *Guidelines for the Preparation of Connection Reports* is ludicrous. An applicant in such circumstances is required to present all of its material and await a response from the State declaring whether it is prepared to accept that there is credible evidence of native title and therefore native title rights and interest will be recognised, or whether some other offer might be put on the table that doesn't include recognition of native title. The criticisms of this process are manifold.

Firstly, the State does not have any public policy statement setting out how it goes about its process of assessment, hence the allegation of opacity. In fact what appears to occur is the State decides whether there is some form of society that has normative

behaviour derived from traditional laws and customs and whether there are any laws or customs capable of recognition as native title rights and interests.

Secondly, the notion that the decision is made purely on evidentiary grounds is a non-sense. The position currently taken by the State is that it must be satisfied that there is sufficient evidence to make out the case on the balance of probability before it will enter an agreement to consent to a determination that native title exists. That is, is it likely that that the applicant could prove its case on the hearing of the matter before a Court on evidence of the nature disclosed in the submitted material. While the State is entitled to formulate whatever policy it desires, the aim of the policies in relation to the settlement of native title litigation should be not be to determine whether the Applicant could prove all the elements of native title were it put to proof. The aim should be to determine whether there is sufficient material for the State to be satisfied that there is a reasonably arguable case.

ABOVE NEEDS FURTHER REFINEMENT

Section 87 of the NTA provides that if at any time after the notification period an agreement is reached between the parties, and

- the Court is satisfied that an order in, or consistent with, those terms would be within the power of the Court; (s 87(1)(c) NTA)

- the Court may, if it appears to it to be appropriate to do so, act in accordance with whichever of subsection (2) or (3) is relevant in the particular case. (s 87(2) NTA)

In the Gunditjmara decision, North J set out the function of the Court in exercising fits power to make orders based on agreements. He said [at 37]

> *In this context, when the Court is examining the appropriateness of an agreement, it is not required to examine whether the agreement is grounded on a factual basis which would satisfy the Court at a hearing of the application.* ***The primary consideration of the Court is to determine whether there is an agreement and whether it was freely entered into on an informed basis****: Nangkiriny v State of Western Australia (2002) 117 FCR 6; [2002] FCA 660, Ward v State of Western Australia [2006] FCA 1848. (****Emphasis added****)*

His Honour then makes clear the role to be played by the States in the satisfying itself. He said

> *Insofar as this latter consideration applies to a State party, it will require the Court to be satisfied that the State party has taken steps to satisfy itself that there is a credible basis for an application: Munn v Queensland (2001) 115 FCR 109; [2001] FCA 1229. There is a question as to how far a State party is required to investigate in order to satisfy itself of a credible basis for an application. One reason for the often inordinate time taken to resolve some of these cases is the overly demanding nature of the investigation conducted by*

> *State parties.* ***The scope of these investigations demanded by some States is reflected in the complex connection guidelines published by some States****.*
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> *38 The power conferred by the Act on the Court to approve agreements is given in order to avoid lengthy hearings before the Court.* ***The Act does not intend to substitute a trial, in effect, conducted by State parties for a trial before the Court.*** *Thus, something significantly less than the material necessary to justify a judicial determination is sufficient to satisfy a State party of a credible basis for an application. The Act contemplates a more flexible process than is often undertaken in some cases. These comments relate to the requirements of s 87, and are not intended to reflect on the conduct of the State in this case. (****Emphasis added****)*

What will be interesting to what is the response of the State to the criticism of the Court and the new found capacity for the NNTT to conclude that it is acting in 'bad faith'. The benefit of a having widely publicised and well understood policy is that NTRBs and Applicants can participate, albeit indirectly, in the Government policy development process.

Just as the State was forced to admit that it did not have any policy or guidelines on the negotiation of non-native title outcomes, and hence had to stop dangling that carrot in front of applicants, it should be required to overhaul its oppressive and opaque connection report guidelines.

IV. Incorporated Bodies

The fourth concept which found its way into the QSNTS LSSP was the requirement for each claim group to have an incorporated body that accurately reflected the recommended claim group description before any group was eligible for funding.

The philosophy underpinning such a requirement was that perhaps the most enduring outcome of the whole native title process may be the capacity development that is carried out on the way to the resolution of the native title proceedings. In most cases, the rights and interests which will be recognised are those which the members of the claim group are already exercising. The income that is derived from the native title and cultural heritage processes is also in most cases of such minimal proportions that it will not make nay difference to the social conditions of the claim group.

However, the capacity to operate a corporate entity that reflects the Indigenous national entity is something that can facilitate lasting change. Such a corporation can manage its own cultural heritage matters, manage trusts into which compensation payments are made, hold shares, and be the party which represents the traditional owners interests in regional intra and extra Indigenous agreements. Additionally it can hold land, engage in commercial contracts, engage in training schemes and where appropriate be the prescribed body corporate.

The creation of such a network of incorporated bodies has not been embarked upon with rose coloured glasses. QSNTS understands that there are a number of claim groups in which the present decision making mechanisms are a long way from the level of capacity necessary for sustainable unassisted self management.

Whatever the future holds for the individual native title applications in the region, the future of the individual nations is inexorably bound to the ability of each nation to manage its own affairs. There are those groups who presently have the capacity to use their nation status to drive political social and economic change, and there are those who may dependant upon outside assistance for many years to come. Unfortunately, the skills required to manage the business of an Indigenous nation are often only held by one or two individuals within the organisation. There are many reasons why these circumstances arise. But the future must be in the development of appropriate representative structures within each claim group that allows for ongoing skills development and succession planning. QSNTS places a very high priority on the development and maintenance of effective decision making skills and systems within claim groups.

INSERT REFERENCES AND COMMENTARY REGARDING AMENDMENTS TO NTA ALLOWING FUNDING OF AND ASSISTANCE TO PRESCRIBED BODIES CORPORATE

REVIEW OF THE LSSP

As foreshadowed in the LSSP and referred to earlier in this paper, it has always been the intention of the QSNTS to review the LSSP every second year or following the amendment of the NTA. As a result of the recent amendments to the NTA QSNTS has commenced a review process which will include feedback from Applicants and other stakeholders having dealings with the QSNTS and traditional owners in the region. This time the State will be included in the consultation process.

The issues which present themselves for particular consideration in the review include:

- The authorisation process
- The use of the newly acquired certification functions
- The removal of reference to non-native title outcomes
- Frameworks for negotiations given the increased powers of the NNTT
- Opportunities for regional negotiations and settlements
- Alternative Procedure mechanisms for future acts

Authorisation process

The LSSP provides that all meetings to authorise the making of native title applications would be held on country wherever possible. The LSSP also provides that travel allowance will not be paid to claim group members to attend authorisation meetings. Understandably, this particular policy position has come in for some criticism from some traditional owners.

A review of the authorisation policy will include some discussion regarding the role of the authorisation process. At its most basic form, the authorisation process is about ensuring the legal process that is the making of an application for a determination of native title is done on the instruction of those in whose name the determination is

sought. The reality of the dispersal of Aboriginal people in southern Queensland is that if you were to hold a large meeting to which all descendants of the original inhabitants were invited the attendees would inevitably be a random sample of the group, but end up in the same result namely an agreement that applicants should be nominated and elected from the floor of the meeting. And the applicants so appointed would vary depending on a range of variables including where the meeting was held and what limits the NTRB put on funding individuals to attend.

This process is unsatisfactory. The process always unfolds along family lines with people often speaking of the need to represent not only their own family, but taking on the roles of representing families who are not present at the meeting. The process is not representative. Nor is it transparent or traditional. It is merely political. And while ever cultural heritage rights are determined by the registered claimants in a native title claim the position of the registered claimant will have a financial benefit attached to it that in turn will ensure that the appointment remains political.

The idea is not to remove the politics from the process but to remove the randomness. But creating policy which can be applied to a whole region about a process that is as individual to each claim group as the authorisation process is no mean task. It is evident however, that if an NTRB simply advertises a meeting it will get a decision at the meeting that all the families present need to be represented by the named Applicants. The result will be that the Applicants as a group require ongoing management because of their perceived and real obligations to represent their own and other families in competition with the other families rather than making decisions based upon the needs of the claim group as a whole.

A viable alternative would appear to be the introduction of a much more heavily resourced preliminary process whereby information sessions are provided at central locations so that each family or descent group may be briefed and requested to put forward its view about how the decisions ought to be made with knowledge that travel allowance will not be paid and meetings will be held on country wherever possible.

In respect of the issue of claim group representation a further observation can be made that an amendment to s 61 of the NTA to add a further provision to the effect that the "person" claiming on behalf of the claim group must be <u>either</u> a member of the claim group <u>or a prescribed body corporate representing the claim group</u> would greatly assist the management of claims and representation of claim groups. This would result in the directors of the prescribed body corporate being holding the decision making capacity in accordance with the constitution of the PBC. They would also be able to be removed or replaced with much greater ease than currently exists.

Certification

The LSSP will need to consider and accommodate the capacity of the QSNTS to 'certify' applications and Indigenous land use agreements (ILUAs). This is particularly so given the inconsistent approaches apparently being taken by the delegates of the Registrar, NNTT.

The application of the certification function gives rise to its own set out problems. The QSNTS must satisfy itself that it is appropriate to certify an application. There are a number of things it may do to satisfy itself in this regard but it is difficult to see

how it can be achieved without the recourse to and reliance on an anthropological report. It is likely that only an anthropologist could say that he or she is of the opinion that there is or is not a traditional decision making process.

Deletion of reference to "Non Native Title Processes"
Having completed the first round of land summits and the post land summit mediations much of the difficult work in sorting out the claims has been done. The end result should be that each claim group has an identifiable claim group and identifiable lands and waters that are free from overlap except in those places where shared country can be proven to have existed.

Once each of those claims has been registered, there would appear to be few reasons in favour of keeping those proceedings which are not funded on foot. If the QSNTS takes the position that it will actively defend the area the subject of the claim against any claim then a native title claim group which has secured its cultural heritage rights under the Aboriginal Cultural Heritage Act 2003 (Qld) may be persuaded to withdraw its application. The result for the QSNTS would be the minimisation of resources expended on the litigation process with greater resources being able to be directed to those claims that have or are in the process of substantive mediation.

Indeed for most claim groups there would be no need to proceed to a form of settlement that didn't include recognition of native title rights and interests.

Negotiation Frameworks
The revision of the LSSP provides that opportunity for the QSNTS to engage with the State of Queensland to identify and agree upon some frameworks for negotiations. The present situation where the State advises NTRBs that it will deal with matters on a case by case basis is inadequate. NTRBs set out in great detail the work plans for each claim yet the State is not called upon to set out its priorities for the year.

In the Queensland South region the development of detailed arrangements regarding the negotiations of claims would be of great assistance. It is foreshadowed that such arrangements may include agreement as to the type and form of information the State requires to be satisfied that the applicants have a reasonably arguable case. The type of information may be a checklist of issues against which the applicant's expert reports may be measured. Such report and the completed checklist may be peer reviewed. The State would only need to be satisfied that a reputable anthropologist had formed the necessary opinion.

In such circumstances that State may only need 28 days to consider the checklist and indicate its willingness to enter substantive negotiations. The substantive negotiations may be bounded by an agreement to rely upon the current tenure layer in determining whether native title had been extinguished unless there were particular parcels in respect of which the State wished to undertake historical tenure searches.

It would be difficult to see how the State could insist in relying upon the *Guidelines to the Preparation of a Connection Report* when confronted in mediation before the NNTT with a proposal to conduct mediation in accordance with the above processes.

Regional Negotiations and Settlements
The revision of the QSNTS LSSP will identify the fairly settled form of orders that Courts are prepared to make in native title matters. It is apparent that the forms of non-exclusive rights and interests that may be recognised are the stock standard rights to hunt, fish and gather for domestic purposes, the right to access, the right to camp, and the right to maintain sites. Assuming a group of claims has similar land tenure issues they would appear much to be gained by taking a regional approach to negotiations. This "regional approach" would very much depend on the ability of QSNTS to reach agreement with the major stakeholders in the area about a standardised settlement framework.

Future Acts Alternative Procedure
The review of the LSSP will also provide the QSNTS with the opportunity to engage with the State in respect of an alternative procedure mechanism which will have the effect of directing the proponents of future acts through the ILUA process. This may be done by the introduction by the State of a requirement upon the proponents to show good reason why they should not obtain consent to their future act through an ILUA, in certain areas. Those areas would be identified by reference to schedule which contained maps of all those areas in which a native title claim had passed the registration test after a specified date, say 2002.

The proposal would not be particularly controversial for the State in that the proponents would be aware that if a native title claim has passed registration since 2002 it will most likely pass the registration test again. However the benefit for native title claimants would be significant. It would give native title applicants much greater security and increase the incentive to remove their registered claims until such times as their matter was ready to proceed to substantive negotiation.

The progress of such discussion may be significantly enhanced by including the Federal Court, for surely it would be interested in having input to a process which would result in far fewer applications before the Court.

Conclusions

There are a number of conclusions that can be drawn from the three year process of development and implementation of the QSNTS LSSP. They are:

1. a clearly articulated and communicated policy framework benefits traditional owners;
2. very few people actually read a strategic plan until there is an issue which is out of the ordinary;
3. the certainty of process is increased;
4. the politics of stakeholders can be more readily exposed;
5. the speed with which a native title service provider or NTRB can develop and adjust policies to meet legislative and other changes in the landscape is much faster than the State, the NNTT or FACSIA and is an real advantage that should be exploited.

Native title is not about connection, it is about process. It is only once you have won the process management battles that connection becomes a relevant consideration.

There are probably another three to five years of process battles in the Queensland South region. Who knows what attitude the State will take to connection in 2010.