



Australian Government



**TSRA**  
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19 September 2020

National Indigenous  
Australian's Agency  
CATSI Act Review  
By email only: [CATSIActReview@niaa.gov.au](mailto:CATSIActReview@niaa.gov.au)

### **CATSI Act Review Submissions**

Dear Team

We thank you for the opportunity to discuss your current review in greater detail, on Thursday 17 September 2020 with Garry Scott, Senior legal officer, and TSRA Member for Badu, Horace Baira, who is also our TSRA Portfolio Member for Native Title.

### **Overview of the TSRA as a Native Title Representative body**

Our TSRA NTO has the prime objective of being recognised as an organisation providing high quality and culturally appropriate professional services to Native Title Holders and claimants through consulting with and effectively assisting and representing Traditional Owners in the Torres Strait region in the performance of our functions under the Native Title Act 1993 (Cth).

NTRBs are primarily responsible for providing native title and related assistance to their constituents effectively and equitably. Constituents are those persons who hold or may hold native title in their area. On that basis, one of the guiding principles for the operations of NTRBs is their responsibility to act in the best interests of their constituents.

The Torres Strait Regional Authority is recognised as the NTRB for the Torres Strait region. The TSRA was first appointed a NTRB under the Native Title Act 1993 (Cth) in 1995. Under the 1998 amendments to the Native Title Act 1993 (Cth), each representative body was required to re-apply for recognition. Following an independent examination, the TSRA was recognised by the then Minister for Aboriginal and Torres Strait Islander Affairs as the NTRB for the Torres Strait region. Our NTRB status is regularly reviewed with our current tenure as has been approved by the Minister up to 30 June 2021. We anticipate being invited to make further application for NTRB status

The TSRA will fulfil its functions as the NTRB for the region, as defined under the Native Title Act 1993 (Cth); and operates in accordance with relevant legislation, including the Aboriginal and Torres Strait Islander Act 2005 (ATSIA Act), the Native Title Act 1993 (Cth) (NTA) and the Public Governance Performance and Accountability Act 2013 (PGPA Act).

### **Submissions with respect to Dispute Resolution by NTRB bodies**

The Torres Strait region is fortunate to have not experienced the same level of dispossession which historically took place over a large part of Australia. Given colonisation first occurred in Sydney and the southern parts of Australia, the effects of dispossession from a land tenure point of view, have been less in the more northern, and other remote areas of Australia.

Our submissions deal with the Traditional customary landowner lore procedures that we believe need to be maintained and strengthened in our NTRB region.



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There are numerous other matters in the CATSI Act review which are worthy of comment. These submissions do not deal with those matters.

### **Council of Elders**

We note that page 13 of the draft CATSI Act review report refers at paragraph 2.11 and 2.12, to the following.

- *providing for CATSI corporations to include rules in their rule books that take account of Aboriginal and Torres Strait Islander tradition and circumstances.*

*2.12 The CATSI Act also allows governance structures to include advisory committees such as elders' councils that may embed these traditional values within modernised corporate structures.*

Within the Torres region, most of our constituent rule books contain rules which already reflect the above.

Within our region, each RNTBC has a rule book which usually refers to a Council of Elders (or other named body, with similar functions) within the Dispute resolution section of their rulebook.

Historically the body of Elders and customary law makers was known as the "Kod". The Council of Elders is the modern-day version of the Kod.

By way of example see the see the rule 19. *Resolution of disputes and competing claims over land issues* in the Mura Badulgal (Torres Strait Islanders) Corporation rule book<sup>1</sup> There are clear guidelines setting out how the RNTBC and Council of Elders is to receive and determine complaints regarding land disputes.

The Council of Elders is under customary law/lore, the final arbiter in respect of customary land disputes.

As is the case in many Native title determination in Australia, there is a RNTBC appointed to hold in trust the Native Title rights of the common law holders. THE RNTBC has the jurisdiction to apply the customary lore of common law holders in determining customary land disputes.

Custom land in the Torres Strait region is usually held in discrete defined areas, by specific families and clans. The boundaries of these customary land estates, features such as large rocks or trees which are often palm trees. Over the years, some of these boundary markers have been removed or altered, which of itself can give rise to land disputes.

Many RNTBC will elect to carry out an informal or formal mediation of customary land disputes. It is only if the mediation is not successful that the rule books then direct that the dispute must be referred to the Council of Elders for final arbitration/determination.

We are currently providing varying levels of assistance with more than 30 separate customary land and sea disputes. We are continuing to receive requests from various island community members and/or their RNTBC/PBC's, for facilitation and assistance and dispute resolution assistance with customary land disputes.

Our NTO provides assistance with formal mediation through Native National Native Title Tribunal mediation and other requested assistance with process and procedure. This is in order to provide support to our RNTBC Directors and Councils of Elders to make decisions in accordance with their own traditional lore and custom.

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<sup>1</sup> The rule book of Mura Badulgal (Torres Strait Islanders) Corporation RNTBC (ICN 3720) Registered on 20 January 2017

The current matters where our constituent RNTBC's have referred matters to the NNTT for mediation, will need to ensure that participation and advice is provided to the mediator from the RNTBC and Council of Elders.

Native Title Legislation Amended bill 2019 ("NTLAB") is referred to in your draft report at page 55 under the heading of Dispute Resolution.

We note the proposed section 60AAA – *Assistance in relation to registered Native title bodies corporate*, of the NTLAB. The further avenues of assistance from the NNTT are welcomed and are being undertaken, however it is of vital importance that any assistance offered by the NNTT does not detract for the sole authority of land dispute resolution which under customary lore is held by the Council of Elders.

We also note reference to the possibility of arbitration being undertaken by the NNTT. Whilst this may be beneficial for perhaps internal RNTBC disputes, we advise that in our region, there is already a system of customary lore in place, with and arbiters of customary disputes being the RNTBCs, together with the Council of Elders.

We consider that the traditional decision-making customary lore of the Traditional owners needs to be given full and proper effect in accordance with Article 23 of the United Nations Declaration on the Rights of Indigenous peoples. 2007.

### **Capacity building of the RNTBC and Council of Elders for customary dispute resolution**

Efforts need to be focussed on capacity building of the RNTBC and Council of Elders for dispute resolution, so as to support them in their own self-determination.

There is more than 10 Councils of Elders in our region, with varying stages of functioning and capacity.

We consider that there is scope for separate specific Commonwealth funded position/s to attend Council of Elders hearings to provide guidance on process and procedure and ensure decisions are properly recorded. We have found many PBC/Councils of Elders are ready willing and able however, they want some procedural support through the process.

Currently, most Rule books for RNTBCs in Torres region, have provisions for a lawyer – usually from our NTRB, to be available for such a procedural advisory function, should intra mural customary land disputes, need proceed to Council of Elder, after attempts at mediation first.

We have heard of concerns raised about certain Council of Elders decisions allegedly not being correct, or made after a lack of procedural fairness being applied equally to disputing parties.

The Traditional owners have their own customary lore decision review process, if it is accepted by the Elders, that a past decision may be wrong, for example, because an important piece of information was not considered or made available, at the time of their decision.

There might be scope for a review or appeal system before the NNTT, dealing with aspects of procedural fairness under law. This might be more in keeping with recognising that it is the Council of Elders decisions, which remain of primary paramount importance, as they have for thousands of years.

A large amount of further capacity building work and funding is required to fully record the customary dispute resolution or decision review process and decisions. Further specific consultation is also required with our Traditional Owner constituents is needed on this topic.

### **Other Traditional law jurisdictions**

The CATSI Act Review Summary report at page 10, paragraph 36 states;

*Other*

36. *There were a range of miscellaneous issues that were also raised in relation to the transparency and accountability of officers of corporations, including:*

- *Whether there should be additional remedies available to the courts where transgressions have occurred, for example, compulsory training for board members.*
- *Corporations should specify in their rules traditional customs and practices, which could form the basis of a safe harbour for directors and officers.*
- *Providing an additional defence, based on the business judgment rule, for directors complying with traditional customs and practices.*
- *A need to ensure that directors have the requisite financial, engagement, literacy and numeracy skills to advance a corporation.*

Of note in these submissions is the suggestion of, in effect, codifying tradition and custom into the rules. If this was supported by our constitutes, then it would be a major task to ensure that it was done properly with the Traditional owners. In fact, some of our RNTBCs are holding Elder workshop where one of the vital tasks at the workshop, has been identified by the RNTBC as the recording of custom stories and customary lore.

We note the overseas example of Navajo First Nations American customary common laws recorded in <https://www.navajolaw.info/navajo-common-law>

This example above represents an example of a system where customary lore is truly given the respect and position that it needs from a Traditional owners point of view.

If ever there was an arbitration process in the NNTT, (which we say is not appropriate for customary land disputes in the Torres region), regard can be had to the legislative requirements of other Pacific countries, such as Solomon Islands, where there is a review process which provides for a matter to be referred to the court, only where customary dispute resolution has been exhausted.

Section 12. of the Local Court Act, Solomon Islands <sup>2</sup>states;

*(1) Notwithstanding anything contained in this Act or in any other law, no local court shall have jurisdiction to hear and determine any customary land dispute unless it is satisfied that—*

*(a) the parties to the dispute had referred the dispute to the chiefs;*

*(b) all traditional means of solving the dispute have been exhausted; and*

*(c) no decision wholly acceptable to both parties has been made by the chiefs in connection with the dispute.*

It was pleasing to hear following the discussion with the CATSI Act review team on Thursday 17 September 2020 recognition of the unique cultural and customary factors in our region of Australia. Notably, this includes the strength of the different Island, Councils of Elders for their customary land lore decision making customary governance.

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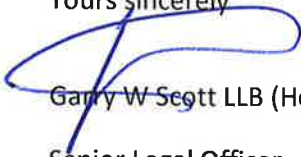
<sup>2</sup>

<http://www.paclii.org/countries/sb.html>

We appreciate the opportunity to make these submissions and trust the any changes to legislation will ensure the strong customary lore structures in place here in the Torres Strait are able to be protected and given prominence.

There is of course much more work needed further specific funding and capacity building. We hope that the continued hard work of our NTO, and other bodies in our region, in these areas, will allow our region to be a great example of successful interaction between Law, Customary Lore and Self determination.

Yours sincerely



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