

Policies and Procedures Relating to Performance of Functions Under Part 11, Division 3 *Native Title Act 1993* (Cth)

Table of Contents

1. Introduction	4
2. Acronyms	4
3. Glossary	5
4. Relevant Legislation	7
5. Functions and Powers of Representative Bodies (ss 203B and 203BA)	7
5.1. Functions of Representative Bodies	7
5.2. Performance of Functions	8
5.3. Legislative Framework for the Performance of Functions.....	8
5.4. Maintenance of Organisational Structures and Processes (s 203BA(2))	8
5.5. Priorities of Representative Bodies (s 203B(4)).....	9
5.6. Other Requirements in the Performance of Functions.....	9
6. Facilitation and Assistance Functions (s 203BB)	9
6.1. Facilitation and Assistance Functions	10
6.2. Types of Assistance.....	10
6.3. General.....	12
6.4. Decision-Making and Consent	12
6.5. Streamlining of Applications Process	12
7. Requests to QSNTS for Facilitation and Assistance	13
7.1. Who may make a request?	13
7.2. Who makes a decision about the request?	13
7.3. Requests for Assistance Register	13
7.4. Form of Request	14
7.5. Initial Assessment of the Request	14
7.6. Acknowledgment of Receipt of Request.....	14
7.7. Timeframe for Making the Decision (s 203BA(1)(a))	15
7.8. Assessment of a Request for Assistance	15
7.9. Prioritisation of Requests for Assistance	15
7.10. Consideration of Material Relevant to the Request	16
7.11. Factors in Assessing Requests for Assistance for Litigation not Captured in the Operational Plan	16
7.12. Factors in Assessing Requests for Assistance to File a Claim	16

7.13.	Factors in Assessing Requests for Assistance for Joinder, Etc.	17
7.14.	Communication of Decision to Requestor	17
7.15.	The Scope and Content of Assistance	18
8.	Certification Functions (s 203BE).....	19
9.	Dispute Resolution Functions (s 203BF)	20
10.	Notification Functions (s 203BG).....	21
11.	Agreement-Making Function (s 203BH)	21
11.1.	Overview.....	21
11.2.	Decision-Making in Relation to the Exercise of s 203BH Function	22
12.	Internal Review Functions (s 203BI).....	22
12.1.	Overview.....	22
12.2.	Internal Review Process	23
12.3.	QSNTS Internal and External Review Register	24
13.	Other Functions (s 203BJ)	24
Appendix A: QSNTS Facilitation and Assistance Requests Process		26
Appendix B: QSNTS Internal Review Process.....		27

1. Introduction

QSNTS is a Native Title Service Provider (**NTSP**) funded by the National Indigenous Australians Agency (**NIAA**) under s 203FE of the *Native Title Act 1993* (Cth) (**NTA**) to provide the same functions as a Native Title Representative Body (**NTRB**).

This document provides information to stakeholders about how QSNTS carries out those functions.

2. Acronyms

ACHA	<i>Aboriginal Cultural Heritage Act 2003</i> (Qld)
CATSI Act	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth)
CEO	Chief Executive Officer, QSNTS
FCA	Federal Court of Australia
ILUA	Indigenous Land Use Agreement
NIAA	National Indigenous Australians Agency
NNTT	National Native Title Tribunal
NTA	<i>Native Title Act 1993</i> (Cth)
NTDA	Native Title Determination Application
NTRB	Native Title Representative Body
NTSP	Native Title Service Provider
PBC	Prescribed Body Corporate
PLO	Principal Legal Officer
QSNTS	Queensland South Native Title Services Limited
RNTBC	Registered Native Title Body Corporate

3. Glossary

Determination

A decision by the Federal Court of Australia that native title does or does not exist in a particular area of land or waters.

Future Act

A legislative or non-legislative act in relation to land and/or waters that may affect native title by extinguishing it, or by creating interests that affect the continued existence, enjoyment or exercise of native title. Examples include:

- The grant of pastoral leases;
- The creation of national parks;
- The establishment of public works (including roads and pipelines);
- The grant of mining or exploration rights; and
- The compulsory acquisition of native title.

Future Act Agreement

Generally refers to an agreement made under the right to negotiate provisions of the NTA, but may also refer to an Indigenous Land Use Agreement (**ILUA**) that consents to a future act.

Indigenous Land Use Agreement

A voluntary agreement about the use and management of an area of land or waters where native title exists or might exist. An ILUA is made between one or more native title groups and others, and can be either certified or non-certified. An NTRB/NTSP may certify that all reasonable efforts have been made to ensure that all persons who hold or may hold native title in relation to the area covered by the ILUA have been identified, and that all of the persons so identified have authorised the making of the agreement. Once registered by the National Native Title Tribunal (**NNTT**), an ILUA is legally binding not only on the people who are parties to the agreement but also on all native title holders for that area.

National Indigenous Australians Agency	The Australian Government department (along with the Department of the Attorney General) responsible for administration of the NTA and, in particular, the funding and oversight of NTRB/NTSPs.
Native Title Claimant	The group of people identified on a native title claim application as claiming native title through the Federal Court process under the NTA.
Native Title Group	Either a native title claimant group or a native title holding group.
Native Title Holder	The group of people who hold native title. In a post-determination context, where a Registered Native Title Body Corporate (RNTBC) holds the native title on trust, the native title holder is the RNTBC. Where an RNTBC is an agent for the native group, then the native title group itself will be the native title holder.
Native Title Representative Body	NTRBs are organisations recognised by the Minister and/or funded by the Australian Government to perform functions to assist native title groups in a specific region pursuant to Part 11 the NTA.
Native Title Service Provider	NTSPs are organisations funded by the Australian Government under s 203FE of the NTA to perform the functions of an NTRB. QSNTS is an NTSP.
Prescribed Bodies Corporate	Prescribed Bodies Corporate (PBCs) are the legal corporations that hold (in the case of Trustee PBC) or manage (in the case of an Agent PBC) native title on behalf of the native title group recognised through the Federal Court as common law native title holders. See also 'Registered Native Title Bodies Corporate'.

Registered Native Title Bodies Corporate

When a determination recognising native title is made by the Federal Court, the NTA requires traditional owners to establish a corporation to represent them and their interests. These organisations are known as RNTBCs. They are most commonly referred to as PBCs.

Representative Body

Includes NTRBs and NTSPs.

Service Region

The area for which QSNTS is the native title service provider.

4. Relevant Legislation

- *Native Title Act 1993* (Cth) (**NTA**)
- *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**)
- *Aboriginal Cultural Heritage Act 2003* (Qld) (**ACHA**)

5. Functions and Powers of Representative Bodies (ss 203B and 203BA)

5.1. Functions of Representative Bodies

A representative body has the following functions under the NTA:¹

- facilitation and assistance functions (s 203BB)
- certification functions (s 203BE)
- dispute resolution functions (s 203BF)
- notification functions (s 203BG)
- agreement making function (s 203BH)
- internal review function (s 203BI)
- other functions in (s 203BJ).

¹ NTA s 203B(1).

5.2. Performance of Functions

In performing the functions of a representative body, QSNTS must comply with the NTA as well as the terms of its agreement with the NIAA. According to QSNTS' agreement with the NIAA, the grant provided to QSNTS is to be used for the activities identified in QSNTS' Operational Plan and budget.

QSNTS will also be guided in the performance of its functions by a developing body of case law.

5.3. Legislative Framework for the Performance of Functions

The NTA requires a representative body to use its best efforts to perform its functions in a **timely manner**, which includes any legislative time limits relevant to the performance of its functions.²

5.4. Maintenance of Organisational Structures and Processes (s 203BA(2))

QSNTS **must** perform its functions with regard to organisational structures and processes that promote:

- (a) satisfactory representation of persons who hold or may hold native title within its service region;³ and
- (b) effective consultation with Indigenous people within its service region.⁴

QSNTS must also ensure that its structures and processes operate fairly with regard to:

- (a) consultation with and participation by Indigenous people;
- (b) QSNTS' procedures for decision-making and review thereof;
- (c) QSNTS' rules or requirements relating to the conduct of executive officers;
- (d) the nature of QSNTS' management structures and processes; and
- (e) QSNTS' procedures for reporting back to persons who hold or may hold native title in the service region and to Indigenous peoples living in the area.

² NTA ss 203BE(1)(a) and (b); see also *Miller v Goldfields Land and Sea Council Aboriginal Corporation* (2014) 219 FCR 153 at [39] per White J; *MT (decd) v Western Australia* [2013]FCA 1302 at [36] per Barker J.

³ NTA s 203BA(2)(a).

⁴ NTA s 203BA(2)(b).

5.5. Priorities of Representative Bodies (s 203B(4))

The NTA provides that a representative body **must**, from time to time, determine the priorities it will give to performing its functions.

The representative body may also allocate resources as it sees fit so as to be able to perform its functions efficiently. This means QSNTS has flexibility to reorder priorities within its Operational Plan to accommodate changing circumstances. However, in doing so it must give priority to the protection of the interests of **native title holders**.

5.6. Other Requirements in the Performance of Functions

QSNTS must not enter into an arrangement with another person under which the person is to perform the functions of the representative body,⁵ except:

- (a) in relation to s 203BB facilitation and assistance functions;
- (b) when, in the situation where a matter⁶ overlaps partly with an adjoining representative bodies area and QSNTS has entered into a written agreement with the other representative body;⁷ and when QSNTS has entered into arrangements and contracts to obtain services to assist in the performance of its representative body functions,⁸ including QSNTS entering into an agreement with the NNTT to provide assistance in performing its dispute resolution functions.⁹

6. Facilitation and Assistance Functions (s 203BB)

This section prescribes QSNTS' obligations in the performance of its facilitation and assistance functions. Before considering the types of facilitation and assistance functions, it is important to note the following:

⁵ NTA s 203B(3)

⁶ 'Matter', as referred to in ss 203BB and 203BC, is defined in s 203BB(6) to mean a native title application, or a consultation, mediation, negotiation or proceeding of a kind referred to in s 203(1)(b)(listed at [8.2]).

⁷ NTA s 203BD.

⁸ NTA s 203BK(2).

⁹ NTA s 203BK(3).

- QSNTS must not perform its facilitation and assistance functions **unless it is requested to do so**,¹⁰ and
- Facilitation and assistance functions are only exercisable in relation to a matter that is within:
 - QSNTS' Service Region;¹¹ and
 - the scope of QSNTS' statutory functions.

6.1. Facilitation and Assistance Functions

Section 203BB(1) states that 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 applications¹²; and
- (b) to assist RNTBCs, native title holders and persons who may hold native title (including by representing them or facilitating their representation) in consultations, mediations, negotiations and proceedings relating to the following:
 - i. native title applications;
 - ii. future acts;
 - iii. ILUAs or other agreements in relation to native title;
 - iv. rights of access conferred under the NTA or otherwise; and
 - v. any other matters relating to native title or to the operation of the NTA.

6.2. Types of Assistance

6.2.1. Native Title Applications

Assistance in relation to native title applications may include:

- (a) preparation of native title determination applications;
- (b) responding to non-claimant applications;

¹⁰ NTA s 203BB(2).

¹¹ NTA s 203BB.

¹² NTA s 201A - '*native title application*' means an application under sub-s 24DJ(1) or ss 61, 69 or 75, and includes an appeal under sub-s 169(1).

- (c) preparation of compensation applications;
- (d) mediation; and
- (e) litigation.

6.2.2. ILUAs and other Agreements

In accordance with the NTA, QSNTS maintains policies and procedures to assist RNTBCs, native title holders, and persons who may hold native title in relation to particular land and waters, with negotiation and authorisation of ILUAs and other agreements that relate to native title or the operation of the NTA.

Agreements may cover:

- (a) Future acts, if the right to negotiate or if the right to be consulted apply;
- (b) The relationship between native title rights and interests in the area;
and
- (c) The manner in which native title rights and interests and other interests are exercised.

6.2.3. Cultural Heritage¹³

Although the NTA does not identify cultural heritage as being subject to its facilitation and assistance functions,¹⁴ sub-para 203BB(1)(b)(v) provides that an NTRB's facilitation and assistance functions will extend to '*any other matters relating to native title or to the operation of this Act*'.

In Queensland, the *Aboriginal Cultural Heritage Act 2003* (Qld) (**ACHA**) refers to registered native title claims and registered native title claimants (the applicant for a native title determination application (**NTDA**)) as a benchmark for identifying the "native title party" or "aboriginal party" for an area affected by proposed activity.

¹³ NTA s 203BB(1)(b)(v): any other matters relating to native title and the operation of the NTA.

¹⁴ See NTA sub-paras 203BB(1)(a)—(b)(iv).

6.2.4. How Facilitation and Assistance Functions are to be Performed

In addition to the requirements detailed at [5.2] above, the NTA imposes obligations on a representative body in the performance of its facilitation and assistance functions in relation to any **matter**.¹⁵

6.3. General

A representative body **must** consult with, and have regard to the interests of, any RNTBC, PBC, native title holders or persons (**parties**) who may hold native title who are affected **by the matter**.¹⁶ If the matter involves the representative body representing such parties, it must obtain free prior and informed consent to any general course of action that the representative body takes on their behalf in relation to the matter.¹⁷

6.4. Decision-Making and Consent

A native title holder or a person who may hold native title is taken to have consented to action if:

- (a) there is a process of decision-making that, under the traditional laws and customs of the group to which he or she belongs, must be complied with in relation to giving consent of that kind, and the consent was given in accordance with that process; or
- (b) where there is no such process of decision-making, the consent was given in accordance with a process of decision-making agreed to and adopted by the members of the group to which he or she belongs in relation to giving the consent or giving consent of that kind.

6.5. Streamlining of Applications Process

A representative body must act in a way that promotes an orderly, efficient and cost-effective process for making applications under s 61 of the NTA. Where there are

¹⁵ NTA s 203BC.

¹⁶ NTA s 203BC(1)(a).

¹⁷ Ibid.

overlapping determination applications, the representative body must make all reasonable efforts to minimise the number of overlapping applications.¹⁸

7. Requests to QSNTS for Facilitation and Assistance

A request for assistance must be in writing, either by e-mail, post or in-person at a QSNTS office. A Facilitation and Assistance Request Form is available on the QSNTS website, and the QSNTS Facilitation and Assistance Requests Process flowchart can be viewed at **Appendix A**.

After a request for assistance is received, the request will be acknowledged, and a time frame advised for a decision to be communicated.

The decision will then be communicated in writing to the person making the request or their agent (solicitor or other person assisting the requestor).

7.1. Who may make a request?

A representative body may only exercise its assistance and facilitation functions if an Indigenous person requests assistance.¹⁹

7.2. Who makes a decision about the request?

The QSNTS Chief Executive Officer (**CEO**) is delegated by the QSNTS Board of Directors to make decisions about requests for facilitation and assistance.

7.3. Requests for Assistance Register

The CEO's Executive Assistant (**EA**) maintains a Requests for Assistance Register on file. Upon receipt of a request, the EA will be notified of the request for entry onto the Register.

¹⁸ NTA s 203BC(3).

¹⁹ See Explanatory Memorandum for the *Native Title Amendment Bill 1997*.

7.4. Form of Request

A request to QSNTS for assistance should be made in writing via e-mail, letter or in person at a QSNTS office. A Facilitation and Assistance Request form is available on the QSNTS website.

The requestor must demonstrate that he or she qualifies for assistance (see [7.1]). Additionally, the request should identify the precise nature, extent and purpose of the assistance being sought. This will ensure an assessment can be made of the resources likely to be required in order to provide the requested assistance.

If the request is seeking funding for payment to third party legal practitioners, there should be a rationale as to why it is inappropriate for QSNTS to represent the requestor, details of the litigation (and, if appropriate, the stage it is at) an advice on prospects (from experienced counsel) and a detailed budget.

7.5. Initial Assessment of the Request

Upon receipt of a request, an initial assessment will be made by the CEO as to:

- (a) whether or not it relates to activities within QSNTS' current operational plan, and
- (b) whether the request is of a type provided for under ss 203BB(1)(a) and (b).

7.6. Acknowledgment of Receipt of Request

The CEO's EA will respond to the requestor in a standardised form, which:

- (a) acknowledges receipt of the request;
- (b) advises who the decision-maker will be in regards to the request;
- (c) advises the requestor that in considering the request, regard will be had to relevant material;²⁰
- (d) advises the requestor that it may be necessary to request further information from the requestor; and
- (e) advises the requestor of the timeframe for making the decision.

²⁰ *Minister for Aboriginal Affairs & Anor v Peko-Wallsend Ors* [1986] HCA 40, 29-32.

7.7. Timeframe for Making the Decision (s 203BA(1)(a))

Section 203BA(1)(a) of the NTA requires that a representative body use its best efforts to perform its functions in a timely manner, particularly in respect of matters affected by statutory time limits.²¹

In the absence of statutory time limits, QSNTS will make a decision within a reasonable time after receiving a request for assistance.

7.8. Assessment of a Request for Assistance

The CEO adopts a process of consistency to consider the merits of each case²² and rank requests in order of importance (see [7.9]).²³

7.9. Prioritisation of Requests for Assistance

The CEO will take into account a range of factors when considering whether or not to provide the assistance sought, the first of which will be whether the activity is caught by the current Operational Plan.

The following factors (in order of importance) are relevant when assessing requests:

- (a) Those matters which are in the QSNTS Operational Plan and subject to the internal assessment of priority within that plan;
- (b) Those claims in which the State has accepted connection and the parties are in substantive negotiations for the purposes of reaching agreement on the terms of a consent determination;
- (c) Those claims or matters where a number of ILUAs, particularly comprehensive settlement agreements, are being negotiated to agreement;
- (d) Those claims which are the subject of Court Orders requiring compliance within strict timeframes;
- (e) Those claims that have reasonable prospects of success based on a senior barrister's advice; and

²¹ NTA ss 203BA(1)(a)–(b).

²² See comments – Hicks v Aboriginal Legal Service of Western Australia (Inc)[[2000] FCA 504; Korewal People – Longbottom v NSW Minister for Land & Water Conservation (No 1)[2000] FCA 1229.

²³ NTA s 203B(4) representative bodies have a statutory responsibility to prioritise the performance of its functions.

- (f) Those claims that have been on the Federal Court list the longest.

7.10. Consideration of Material Relevant to the Request

For the purpose of assessing a request for assistance, any material that is in QSNTS' possession is also deemed to be in the CEO's possession.²⁴

7.11. Factors in Assessing Requests for Assistance for Litigation not Captured in the Operational Plan

As a general proposition, all funding received by QSNTS under its agreement with the NIAA is committed to undertaking the prosecution of the QSNTS Operational Plan. That is, QSNTS does not have any contingency fund for new or unforeseen matters.

Generally, funding for requests that relate to matters or issues that are not part of the QSNTS Operational Plan will be the subject of a separate, needs-based application to the NIAA. These factors include:

- (a) the matters listed at [7.9];
- (b) the importance of the question or issue in the context of the NTA and the need for the protection of a right or interest; and
- (c) prospects of success.

7.12. Factors in Assessing Requests for Assistance to File a Claim

Factors to be considered by the CEO when assessing requests for assistance to file a NTDA include:

- (a) Whether the proposed claim impacts on claims that are already in the system;²⁵
- (b) Whether there is a body of credible evidence (including anthropological research) that supports the proposed NTDA;

²⁴ See *Minister for Aboriginal Affairs & Anor v Peko-Wallsend Ors* [1986] HCA 40, 31.

²⁵ see s.203BC(3)(b) NTA

- (c) Whether it can be shown that the applicants are part of a cohesive, identifiable group which can trace its ancestral connection to the area to the time of effective sovereignty;²⁶
- (d) Whether it can be shown that the applicants have a continuing connection to the land and/or waters that they are claiming through the observance a traditional laws and customs received and acknowledged generation by generation from effective sovereignty.

7.13. Factors in Assessing Requests for Assistance for Joinder, Etc.

If an application for assistance proposes to oppose an existing or contemplated native title claim, the applicant must satisfy a threshold test of legal merit. The applicant must show that there is a *prima facie* basis or grounds upon which the applicant might be joined as a respondent to an existing or proposed claim.

The NTA requires that where the NTDA the requestor is seeking to join has been in the Court for some time, the requestor will need to provide a credible explanation for the delay in seeking to join the matter.

7.14. Communication of Decision to Requestor

In making a decision, the CEO will consider the recommendations prepared in accordance with [7.9] to [7.13], but is not bound by them. The CEO may seek any other advice reasonably necessary or appropriate before making a decision.

The requestor will be informed in writing of the CEO's decision regarding their request for assistance. Requests may be:

- (a) declined outright;
- (b) deferred pending further information and advice being obtained; or
- (c) accepted (conditionally, partially or otherwise)
- (d) prescriptive of the manner in which the assistance is delivered.

If the CEO accepts the request (conditionally, partially or otherwise), the requestor will be informed in writing as to the terms and conditions (if any) of the assistance to be

²⁶ Effective sovereignty means the date at which European incursion first impacted the relevant area.

provided by QSNTS. If the CEO decides to decline or brief-out the request, then clear and concise reasons will be provided in writing.

The requestor will also be advised of their right to internal review pursuant to s 203BI of the NTA.

7.15. The Scope and Content of Assistance

Absent any special circumstances, it is unlikely that assistance will be granted to undertake research with a view to prosecuting a claim:

- if the claim would be a 'polygon' claim responsive to a future act notice or a non-claimant application; or
- if the request was intended to be exclusive to the potential native title interests of a particular family or descent group and did not extend to all of those who may hold native title in relation to the area of the potential claim.

In the circumstances described above, QSNTS may elect to undertake research using its s 203BJ(b) function to identify right people for right country. That research would be carried out for QSNTS and not for the person(s) making the request.

At the conclusion of the research project, QSNTS will report back to the person(s) making the request, and to families who have taken part in, or may be affected by, the research, before (if it is appropriate to do so) taking any steps towards assisting with the authorisation of an NTDA.

Assistance that includes the provision of a legal officer employed by QSNTS, or QSNTS briefing out a matter or task to an external lawyer, will **always** be on the basis that the recipient of the assistance (whether an individual or family or group of people or families) consents to that lawyer communicating with the QSNTS Executive about the conduct of the matter, including details of evidence generated and advice given or received in relation to the matter.

If the assistance recipient is a native title claim group or PBC, the claim group or PBC, by accessing the assistance, instructs its Applicant or Board of Directors to consent to the provision by the legal officer or external lawyer of information to the QSNTS Executive.

No member of the QSNTS Executive, who may be perceived as having a conflict of interest in relation to the assistance being provided, will receive that particular information.

If the assistance recipient refuses to accept the advice of a legal practitioner assigned or briefed to assist them, and that advice is based on credible evidence or an established legal principle, QSNTS may cease to provide assistance. In those circumstances, the former assistance recipient will not be able to access the QSNTS Operational Budget further.

8. Certification Functions (s 203BE)

The Certification Function relates to QSNTS expressing a formal opinion about the **process** through which an application or an indigenous land use agreement was authorised.

For internal matters, a Deputy Principal Lawyer provides the CEO with a certification brief. The certification brief sets out the steps that were taken to comply with the requirements of ss. 251A and 251B of the NTA and provides evidence to support the submission that steps were appropriate and completed.

The function is exercised by QSNTS in relation to matters external to QSNTS (but within the Region for which QSNTS is responsible) on a fee for service basis. On request, QSNTS will provide external parties with quote for undertaking the work required to exercise the function and guidance with what should be included in the brief accompanying the request for Certification.

If the CEO is satisfied that the requirements of s 203BE(2) that:

- all reasonable efforts have been made (including by consulting all representative Aboriginal/Torres Strait Islander bodies for the area) to ensure that all persons who hold or may hold native title in relation to land or waters in the area covered by the agreement have been identified;
- all of the persons so identified have authorised the making of the agreement;
and
- any conditions under section 251BA on the authority that relate to the making of the agreement have been satisfied,

have been met, a Certificate will be issued.

In exercising its section 203BE Function, QSNTS is not required to, and does, not consider the substance or commerciality of the application or indigenous land use agreement.

9. Dispute Resolution Functions (s 203BF)

The purpose of the dispute resolution function under s 203BF is to promote the resolution of disputes and mediate between constituents²⁹ in relation to:

- (a) Making native title applications;
- (b) The conduct of consultations, mediations, negotiations or proceedings about native title applications, future acts, ILUAs, rights of access conferred under the NTA or otherwise (including funding the costs for these activities);³⁰ or
- (c) Any other matter relating to native title or the operation of the NTA.

This is not a request-based function and therefore does not need to be an existing dispute before QSNTS can exercise this function.³¹ It may also be exercised prior to any dispute actually arising.³²

Where a dispute arises as a result of overlapping claims, QSNTS must make all reasonable efforts to promote agreement between the competing claim groups and to minimise the number of applications.³³

The courts have indicated that the following activities constitute dispute resolution processes for the purposes of s 203BF:

- (a) Engaging an anthropologist to assess competing or potentially competing native title interests over an area;³⁴

²⁹ The dispute resolution function, when referring to “constituents”, means only native title claimants and does not include respondent government parties. See NTA s 203BF(2).

³⁰ *Clancy on behalf of Wullli Wullli People No 2 v Queensland* [2017] FCA 869 at [4] per Collier J.,

³¹ *Wilson v South Australia (No 2)* [2016] FCA 812 at [57] per White J.

³² *Ibid.*

³³ *Budby v State of Queensland*, as above n 6 at [26] per Mansfield J.

³⁴ *Budby on behalf of the Barada Barna People v State of Queensland* [2013] FCAFC 149 at [27] per Mansfield and Jagot JJ.

- (b) Facilitating a meeting or mediation between constituents even where QSNTS does not represent the claim (but had received various complaints about the claim's conduct);³⁵ This includes where the NTRB's lawyers have been replaced as solicitors on record for the native title proceeding;³⁶
- (c) Engaging senior counsel to provide advice;³⁷ or
- (d) Employing the dispute resolution functions of the NNTT.

10. Notification Functions (s 203BG)

Notification functions relate mainly to future act and other notices which governments and corporations are required to issue for proposed acts which may impact native title.

A representative body must ensure, as far as reasonably practicable, that notices given to it in relation to land or waters wholly or partly within the area for which it represents, are brought to the attention of any person that the representative body is aware of who holds, or may hold, native title.

The NTRB must make its best endeavours to perform its functions in a timely manner and give notice of the relevant time limits under the NTA or another law of the Commonwealth, a state or a territory.

11. Agreement-Making Function (s 203BH)

11.1. Overview

Under s 203BH of the NTA, representative bodies including QSNTS have an agreement-making function, which is to be party to ILUAs. A representative body must, as far as practicable, having regard to the matters proposed to be covered by the agreement, consult with, and have regard to the interests of, persons who hold or may hold native title in relation to land or waters in that area.

As a general policy, QSNTS will not exercise the s 203BH function unless special circumstances exist [see 11.2].

³⁵ *Edwards on behalf of the Wongkumara People v State of Queensland* [2014] FCA 282 at [7] and [23] per Reeves J.

³⁶ *Gomeri People v Attorney General of New South Wales* [2017] FCA 1464 at [104] per Rangiah J.

³⁷ *Re Lake Torrens Overlap Proceedings* [2015] FCA 519 at [24] per Mansfield J.

11.2. Decision-Making in Relation to the Exercise of s 203BH Function

In considering whether to exercise its s 203BH function, QSNTS may consider whether:

- The ILUA is post-determination;
- The ILUA is contemplated by the determination;
- The ILUA is an Area Agreement; and
- The ILUA is one which the RNTBC cannot be a party to in its entirety because of non-claimed parts within the external boundary of a determination.

When making a recommendation to the Board on whether to exercise the function:

- (a) The solicitor on the record (or, if there is no claim, the PLO) will provide a rationale to the Executive explaining the background to the ILUA and the necessity for QSNTS to become a party to the ILUA;
- (b) The Executive will make a recommendation to the Board; and
- (c) The Board will consider the rationale and the Executive's recommendation and resolve to either enter into the ILUA or not enter into the ILUA.

Before reaching a decision, the Board may request further information from the Executive.

Decisions arising from requests to the organisation to exercise this function will be reported in the QSNTS Annual Report.

12. Internal Review Functions (s 203BI)

12.1. Overview

Section 203BI of the NTA requires that a representative body provide and publicise a process for registered native title bodies corporate, native title holders and persons who may hold native title, to seek internal review of decisions made, and actions taken by, that representative body in the performance of its functions and exercise of its powers. Please refer to **Appendix B** for The QSNTS Internal Review Process flowchart, which is also available on the QSNTS website.

The types of reviewable matters under s 203BI include:³⁸

- a decision of QSNTS not to provide assistance under its facilitation and assistance functions; and
- the exercise of its other functions where it affects an eligible person (such as directors of a PBC, native title holders and those who may hold native title).

Administrative decision-makers, including QSNTS, have a duty to accord procedural fairness to those affected by their decisions where there is an absence of a clear, contrary legislative intention.³⁹ QSNTS aims to uphold the principles of procedural fairness while conducting an internal review under s 203BI.

12.2. Internal Review Process

The QSNTS internal review process is as follows:

- (a) Once a request has been made for internal review, the request must be acknowledged within seven (7) days.
- (b) An internal reviewer (a lawyer who was not involved in the decision or otherwise not conflicted in conducting the review) shall be appointed to undertake the review.
- (c) The reviewer will consider all relevant material and, within 28 days of the acknowledgement letter, will:
 - i. affirm the decision; or
 - ii. advise that the decision should be varied; and
 - iii. notify the CEO in writing of their decision, and the reasons for this.
- (d) The CEO will notify the requestor of the outcome of the review within seven (7) days of having received the reviewer's decision.
- (e) If the person seeking the review requests, a representative of QSNTS will meet with the requestor to explain the decision. This is not an opportunity for further review of the decision.

³⁸ NB: Complaints about QSNTS' staff conduct are not a reviewable matter under s 203BI and are instead covered by separate QSNTS policies and procedures.

³⁹ See *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40.

- (f) If the person affected by the decision does not accept the outcome of the internal review, they may seek an external review of the decision under s 203FBA of the NTA.

12.3. QSNTS Internal and External Review Register

The Executive Assistant to the CEO maintains a register of requests made under s 203BI and the outcomes of those requests.

13. Other Functions (s 203BJ)

Section 203BJ of the NTA contains a number of diverse functions which generally support the performance of the other mandated functions in the NTA and may be exercised without a request for assistance. In addition to the functions referred to in sections 203BB to 203BI, a representative body must:

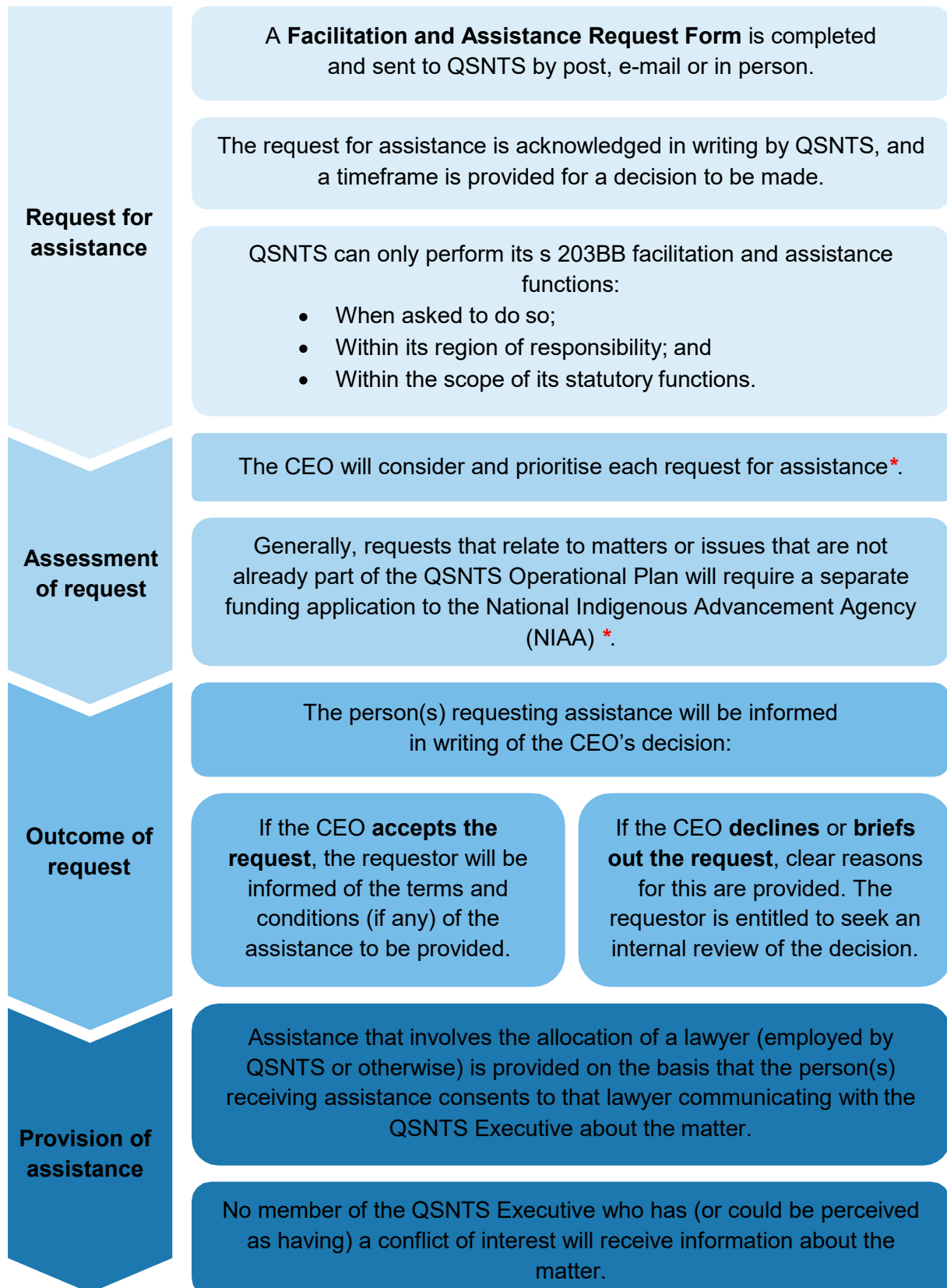
- (a) as far as is reasonably practicable, enter into written arrangements with other representative bodies so that the representative body can exercise its facilitation and assistance functions in relation to a matter of a kind referred to in paragraph 203BD(a) or (b); and
- (b) as far as is reasonably practicable, identify persons who may hold native title in the area for which the body is the representative body; and
- (c) as far as is reasonably practicable, take such action as the body considers appropriate to promote understanding, among Aboriginal people and Torres Strait Islanders living in the area, about matters relevant to the operation of this Act; and
- (d) as far as is reasonably practicable, inform such of the following as the representative body knows are, in relation to the area:
 - i. registered native title bodies corporate;
 - ii. native title holders;
 - iii. persons who may hold native title;of any matter that the representative body considers may relate to, or may have an impact upon, native title in the area; and
- (e) whenever the body considers it necessary in the performance of its functions, consult with Aboriginal or Torres Strait Islander communities that might be affected by the matters with which the body is dealing; and

- (f) as far as is reasonably practicable, co-operate with other representative bodies for the purpose of promoting the effective and efficient exercise of the functions and powers of representative bodies.

Of these functions, QSNTS most often exercises the s 203BJ(b) function as the basis to conduct research into areas where there is no extant native title determination application or in circumstances where there are assertions that the claim group description for an active NTDA is defective.

The remaining functions are largely self-explanatory and are invoked on an 'as needed' basis.

Appendix A: QSNTS Facilitation and Assistance Requests Process



* The criteria applied to assessing requests for assistance is outlined in *QSNTS's Policies and Procedures Relating to Performance of Functions under Part 11, Division 3 Native Title Act 1993 (Cth)*.

Appendix B: QSNTS Internal Review Process

