CLAYTON UTZ

Email 28 September 2018

Ms Melissa Salisbury
Acting Committee Secretary
Economics and Governance Committee
Parliament House
George Street
BRISBANE QLD 4000
egc@parliament.qld.gov.au

Dear Ms Salisbury

Economics and Governance Committee: Inquiry into the *Revenue and Other Legislation Amendment Bill 2018*

1. **Background**

1.1 We refer to the Public Hearing held for the above Inquiry on 17 September 2018, and to the email from Ms Pretty dated 24 September 2018 inviting witnesses to review the draft Transcript of the Public Hearing.

1.2 Ms Pretty's email included an invitation to send a separate letter to the Committee if witnesses wished to clarify any of their statements or provide any additional material.

1.3 In response to that invitation, we have set out brief clarifying and additional remarks in the remainder of this letter.

2. **Native title vs Aboriginal tradition**

2.1 Mr Aro noted in his opening statement (p.6 of the Transcript), and in responding to questions from the Chair, that having responsibility for the custody and management of cultural heritage did not necessarily require establishment of native title.

2.2 Cultural heritage is defined in the Cultural Heritage Acts to include areas and objects that are significant to Aboriginal people and Torres Strait Islanders because of Aboriginal tradition/ Island custom and/ or the history, including contemporary history, of an Aboriginal/ Torres Strait Islander party for the area.

2.3 Similarly, people will be Aboriginal/ Torres Strait Islander parties for an area under s.35(7) of the Cultural Heritage Acts if they have knowledge of local Aboriginal/ Torres Strait Islander traditions, observances, customs and beliefs, as well as responsibility under Aboriginal tradition/ Island custom for cultural heritage.

2.4 In our view, "native title parties" are people who may fairly be regarded as having the relevant knowledge and responsibility. However, there is a wealth of authority in the decided cases to the effect that one does not need to hold native title to have responsibility under Aboriginal tradition.

2.5 For example, in the Queensland Court of Appeal decision of *Stevenson v Yasso* [2006] QCA 40, at paragraph [47], McMurdo P stated the following (our emphasis):

"*The definition of 'Aboriginal tradition' in the Acts Interpretation Act 1954* ***does not require the establishment of a native title under the common law as described in Mabo [No. 2]*** *but refers to 'the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people'. The ordinary meaning, consistent with the dictionary definition of 'tradition', is 'the handing down of statements, beliefs, legends, customs, etc., from generation to generation, especially by word of mouth or by practice'.*"

2.6 In other words, finding that a person's ancestors were not associated with an area before sovereignty, should not necessarily disqualify a person from being regarded as having the appropriate knowledge about, as well as the required responsibility under Aboriginal tradition/ Island custom for, cultural heritage. This will particularly be the case where the person:

(a) clearly comes from a group of people who, for a very long time, have been connected with the relevant area; and

(b) is the latest recipient of knowledge of traditions, observances, customs and beliefs that have been handed down from generation to generation in accordance with the understanding of Aboriginal/ Torres Strait Islander lore and practice.

2.7 Our client U&D Mining Industry (Australia) Pty Ltd is the proponent of the Meteor Downs South project, which is located within the disputed country at issue in the Nuga Nuga Decision. In our submission, based on the above precedent, the fact that three of the members of the Karingbal last claim standing party were found by the Federal Court not to be descended from pre-sovereignty traditional owners does not (in light of their families' long-standing connection to the area)[1] make it unjust for the entire Karingbal last claim standing party to continue to be accepted as an Aboriginal party.

2.8 It is for these reasons that we say that native title is not the only basis for finding that it is appropriate for people to have responsibility for the custody and management of cultural heritage.

3. Suggested YYAC exception to the last claim standing rule

3.1 Relatedly, Mr Aro also noted in his opening statement (again on p.6 of the Transcript), and in responding to questions from the Chair, that it does not follow from the fact that a registered native title claimant has been found by a Judge not to be descended from pre-sovereignty traditional owners that the (former) registered native title claimant is no longer an appropriate Aboriginal/ Torres Strait Islander party.

3.2 This issue is discussed in a number of submissions, including those lodged on behalf of the Yugara/Yugarapul Aboriginal Corporation which suggest that, while the last claim standing rule should be reintroduced, it should not apply where there has been a determination that the last claim standing party does not hold native title over the relevant area.

3.3 Our above discussion of the differences between native title and Aboriginal tradition is relevant to this issue.

[1] See *Wyman v State of Queensland* (No 2) [2013] FCA 1229; in particular, her Honour's conclusions about Jemima of Albinia at paragraphs [529]-[532] and the extensive evidence about their families' connection to country and spiritual and other practices from Jemima's descendants at paragraphs [304]-[323].

3.4 In addition, however, the suggested exception could easily lead to perverse results. Last claim standing parties who have been the subject of negative native title determinations are those who have been convinced enough of the merits of their claim to go to trial. In many cases, such as in the case of Jemima's descendants in *Wyman* and of the Turrbal People in *Sandy*, they will have done so without the benefit of legal representation. Without the benefit of such assistance, they will typically have been able to show connection to a point many, many years ago, although not as far back as sovereignty.

3.5 The suggested exception to the last claim standing rule would result in:

(a) these parties no longer being last claim standing parties;

(b) conversely (and perversely), other registered native title claimants who, while they were able to adduce enough evidence to pass the registration test, were not sufficiently convinced of the strengths of their claim to go to trial, continuing in their role as last claim standing parties.

3.6 To our mind, this proposed exception, far from avoiding injustice, could easily encourage registered native title claimants who are not certain of winning at trial to "tactically" discontinue their claims to preserve their rights under the Cultural Heritage Acts.

3.7 In our submission, this point serves to underline the complexity of this issue and underscore the need to:

(a) restore the current scheme, so that it can once again operate as intended; and

(b) then, commence a detailed consultation process directed at both reviewing the current operation of the Cultural Heritage Acts and also considering whether there may be an alternative model that would better ensure that appropriate people are involved in the protection and conservation of cultural heritage.

Yours sincerely

Mark Geritz, Partner
[redacted]

Tosin Aro, Special Counsel
[redacted]

Copy

Email
Ms Lynda Pretty
Economics and Governance Committee
Parliament House
George Street
BRISBANE QLD 4000
egc@parliament.qld.gov.au

Email
Mr David Richardson
U&D Mining Industry (Australia) Pty Ltd
Suite A, Level 4, Rowes Building
235 Edward Street
BRISBANE QLD 4000
[redacted]

Our ref 12245/12139/80124867