Nuga Nuga Aboriginal Corporation (ICN 8089)
48/231 North Quay, BRISBANE QLD 4000
ABN: 23 791 863 046
admin@karingbalpeople.org

Committee Secretary
Economics and Governance Committee
Parliament House
George Street
Brisbane Qld 4000
Email: egc@parliament.qld.gov.au

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Karingbal People – Submission to the Queensland Parliament Economics and Governance Committee on the Revenue and Other Legislation Amendment Bill 2018

Overview of submission

As Elders and members of the Karingbal People, we the undersigned are making this submission to the Economics and Governance Committee (**the Committee**) in relation to Clause 95 of the Revenue and Other Legislation Amendment Bill 2018 (**the Bill**).

We make this submission as the reforms proposed by Clause 95 of the Bill adversely affect our rights to protect our Aboriginal cultural heritage and do not have sufficient regard to Aboriginal tradition. The proposed amendment is a blunt response to issues arising from a Queensland Supreme Court proceedings which resulted in a finding that the Cultural Heritage Unit within the Department of Aboriginal and Torres Strait Islander Partnerships (**DATSIP**) had misinterpreted a crucial section of the *Aboriginal Cultural Heritage Act 2003* (Qld) (**ACHA**).

Clause 95 of the Bill would entrench a situation which puts Aboriginal cultural heritage at significant risk of harm. In the Arcadia Valley region, for which the Karingbal People are the traditional owners, the effect of the Bill would be to make the ACHA defunct insofar as it would no longer meet its fundamental objectives. We the Karingbal People are directly affected by such a proposal, and yet we have not been afforded any consultation on this proposed amendment, nor have our direct approaches to the relevant Minister been responded to.

We urge that Clause 95 of the Bill not be passed into law, and the State commit to a process of consultation and policy development that delivers not only certainty for project proponents but also appropriate, not arbitrary, arrangements for identifying parties who should be consulted and involved in the protection of Aboriginal cultural heritage.

Background to the Karingbal People

The Karingbal People are the traditional owners of lands and waters in the Arcadia Valley region of Southern-Central Queensland.

In 2013, the Federal Court of Australia made a native title determination[1] in relation to an area that was the subject of overlapping native title claims. The claims were brought by

- The Bidjara People.
- Two claims by the Karingbal People, as constituted by the descendants of Albert Albury Senior and Jemima of Albinia.
- Two claims by the Brown River People, as constituted by the descendants of Albert Albury Senior (who are Karingbal People, but who used a different name for these native title claims to distinguish themselves from the differently constituted Karingbal claims).

The decision of the Federal Court was, in summary:

- The Bidjara People were once the native title holders for that part of the determination area where Carnarvon Gorge is located, but more recent generations did not meet the technical continuity of connection requirements of the *Native Title Act 1993* (Cth) (**Native Title Act**) which are necessary for a successful determination.
- The Bidjara People did not and never had held native title over the remainder of the determination area, known as Arcadia Valley.
- The Karingbal People were once the native title holders for the Arcadia Valley part of the determination area, but more recent generations did not meet the technical continuity of connection requirements of the Native Title Act which are necessary for a successful determination.
- The descendants of Albert Albury Senior (also known as the Brown River People) were Karingbal People. The descendants of Jemima of Albinia were not Karingbal People and had never held native title over any part of the determination area.

The decision of the Federal Court was not disturbed on appeal to the Full Federal Court.[2]

Effect of the proposed amendments in Karingbal Country

The effect of Clause 95 of the Bill is to insert the word "registered" before the words "native title holder" in section 34(1)(b)(i)(C) of the ACHA. This amendment is directed at reinstating DATSIP's previous incorrect interpretation of the operation of the "last claim standing" provision of that Act. The last claim standing provision is part of the mechanism under the ACHA to identify the relevant Aboriginal Party that a project proponent must deal with, for example, to negotiate or develop cultural heritage management plans and cultural heritage agreements, and thus comply with the Aboriginal cultural heritage duty of care under the ACHA.

Sections 34 and 35 of the ACHA set out a hierarchy for how an Aboriginal Party is identified for a particular area. Key provisions are, in summary:

- If there is a registered native title holder for an area (being a registered native title body corporate or another entity that is the subject of a determination of native title under the Native Title Act and is registered on the National Native Title Register as holding native title rights and interests – i.e. as a result of a successful native title determination), that is the Aboriginal Party for the area (s 34(1)(c) of the ACHA).

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[1] *Wyman v State of Queensland* [2013] FCA 1229

[2] *Wyman v State of Queensland* [2015] FCAFC 108

- If there is no determined native title holder but there is one or more registered native title claimants for an area, the registered native title claimants are Aboriginal Parties for the area (s 34(1)(a) of the ACHA).
- The "last claim standing" - if there are no registered native title claimants for an area, but there have previously been registered native title claimants, in certain circumstances the last of these native title claimants to have been registered is the Aboriginal Party for the area (s 34(1)(b)(i) of the ACHA).
- If none of the above apply, an Aboriginal Party is a person who is an Aboriginal person with particular knowledge about traditions, observances, customs or beliefs associated with the area, and the person has responsibility under Aboriginal tradition for some or all of the area, or for significant Aboriginal objects located or originating in the area, or is a member of a family or clan group that is recognised as having responsibility under Aboriginal tradition for some or all of the area, or for significant Aboriginal objects located or originating in the area (s 35(7) of the ACHA).

DATSIP had been (wrongly, as subsequently held by the Queensland Supreme Court (discussed further below)) applying the last claim standing provision in relation to the Arcadia Valley. It did so by making reference on its cultural heritage register to each of the descendants of Jemima of Albinia and the Bidjara People, as well as the descendants of Albert Albury Senior, as all being the Aboriginal Party for the area in accordance with the last claim standing provision. The consequences of this approach were:

- People who were not and never had been native title holders for the area were put on an equal footing with the descendants of Albert Albury Senior, who the Federal Court held were Karingbal People and who were descended from the native title holders for the area.
- Karingbal cultural heritage was therefore highly vulnerable to harm given people with no traditional affiliation with, or traditional knowledge of, Karingbal cultural heritage were able to make decisions about Karingbal cultural heritage, often to the exclusion of the legitimate Karingbal People.

The effect of the proposed amendment in Clause 95 of the Bill is to give legislative effect to DATSIP's previously erroneous view, by removing the ouster of the last claim standing where there have previously been native title holders other than those the subject of a successful determination of native title under the Native Title Act.

This will expressly empower people who have been found by the Federal Court not to hold or be descended from the holders of native title to make decisions in relation to Karingbal cultural heritage. This raises grave risks for Karingbal cultural heritage and is directly contrary to the main purpose of the ACHA, which is to provide effective recognition, protection and conservation of Aboriginal cultural heritage. The proposed amendment is a blunt instrument in that it seeks to overcome uncertainty around various issues arising as a consequence of the NNAC Decision (referred to below), without any attempts to consider the broader policy implications involved.

The last claim standing provision has been a controversial and widely disliked provision of the ACHA. By amending it as is proposed under the Bill, the negative aspects of it will be exacerbated and entrenched. Many native title parties and their representatives dislike the last claim standing provision as it merely provides for expedience in identifying a party to have dealings with, without proper regard for whether that party is suitably qualified and authorised to manage Aboriginal cultural heritage and avoid harm to it. Qualification merely on the basis of having passed the registration test under the Native Title Act is one thing. But retention of that qualification in circumstances where a claim has failed, is quite another.

Failure of a claim can occur for many reasons. At one end of the spectrum this might be dismissal for want of prosecution or withdrawal of the claim due to insufficient resources or inadequate research at the relevant point in time. In the middle of the spectrum is failure of a claim due to the people who once held native title being unable to make out the technical continuity of connection requirements of the Native Title Act, notwithstanding such persons may still have traditional knowledge and responsibility for Aboriginal cultural heritage, as is the case for the Karingbal People in Arcadia Valley. At the extreme

other end of the spectrum is failure of a claim due to people being found to have never held native title in an area, and whose claims are entirely spurious and without foundation.

The last claim standing provision, as it is proposed to be amended, determines priority amongst such failed claims without regard to such merits – and merely with regard to the arbitrary criteria of the time when a claim ceased to be registered. In the case of the Arcadia Valley, this has the effect of preserving a practice of allowing proponents to pick and choose amongst failed claimants.

This severely detracts from the efficacy of the objectives of the ACHA, in that people who lack traditional knowledge to be able to identify Aboriginal cultural heritage, and the traditional affinity necessary to apply rigour in doing so, may participate in cultural heritage management to the exclusion of those people who have the traditional knowledge, responsibility and affinity. In some cases, this may take place merely because the lesser knowledge and affinity delivers a less expensive exercise for the proponent. This is exactly what has been occurring in Arcadia Valley, which has resulted in a number of instances of harm to Karingbal cultural heritage, and should not be given legislative legitimacy.

We would be happy to provide the Committee with further information in relation to specific instances of harm to Karingbal cultural heritage, if that would assist its deliberations.

The effect of Clause 95 of the Bill in the Arcadia Valley, and possibly in other parts of Queensland, would be to make the ACHA defunct insofar as it would no longer meet its fundamental objectives. Its passage would also raise significant doubt as to whether the ACHA would continue to constitute a State law which provides effective protection of Aboriginal cultural heritage from the threat of injury or desecration, for the purposes of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

The Explanatory Notes for the Bill make reference to the validating and transitional provisions potentially breaching a fundamental legislative principle under section 4(3)(g) of the *Legislative Standards Act 1992* (Qld) (**LAS Act**) given their retrospective effect. With respect, it is very disappointing that the drafters of the Explanatory Notes fail to recognise the obvious breach of this fundamental legislative principle, being the manner in which Clause 95 of the Bill adversely affects the rights of the Karingbal People to care for, protect and manage our cultural heritage, given the remit the proposed amendment gives to other people who do not have the traditional knowledge or the traditional responsibility to do so. This is a glaring oversight in the Explanatory Notes and is one that the Committee should take into consideration.

Similarly, the fundamental legislative principle in section 4(3)(j) of the LAS Act, which requires sufficient regard to Aboriginal tradition, is clearly breached by Clause 95 of the Bill. The effect of the proposed amendment is to entirely disregard such matters. The oversight in relation to considering these matters in the Explanatory Notes highlights the fact that this blunt approach to dealing with the issues is ill-conceived and requires greater consultation and policy formulation before legislative amendments should be brought.

Efforts made by Karingbal People in native title and Aboriginal cultural heritage

Obviously, the Karingbal People have applied an enormous amount of effort in pursuing their native title claims over a long period of time, and a significant amount of funds have also been expended on their behalf. Unfortunately, the technicalities of the Native Title Act and its interpretation by the Courts has resulted in the Karingbal People being denied a determination of native title in their favour notwithstanding the Court's recognition of their status in relation to Arcadia Valley.

This result, combined with the DATSIP interpretation of the last claim standing provision of the ACHA, has meant that the Karingbal People have often been denied the ability to appropriately care for their cultural heritage in the Arcadia Valley region. Other people, who the Federal Court has expressly found have no current or previous native title interests, and who have no traditional knowledge or traditional responsibility for Aboriginal cultural heritage (as addressed in the NNAC Submissions to DATSIP dated 23 August 2018 referred to below), have been able to hold themselves out as Native Title Parties and

therefore participate in the management of Karingbal cultural heritage, often to the exclusion of the Karingbal People.

The Karingbal People therefore took further steps to protect their cultural heritage, as they are traditionally entitled and in fact traditionally obliged to do. This involved an application to the Minister for Aboriginal and Torres Strait Islander Partnership's delegate on 17 February 2016 for registration of the Karingbal People's corporation, Nuga Nuga Aboriginal Corporation (**NNAC**), as a registered Aboriginal cultural heritage body over the Arcadia Valley region. An Aboriginal cultural heritage body has a statutory role of identifying the relevant Aboriginal Parties for the purposes of negotiating cultural heritage agreements and developing cultural heritage management plans.

NNAC submitted there were no Native Title Parties that needed to be consulted on the Aboriginal cultural heritage body application, as there were no registered claimants and the last claim standing provision could not apply. This is because the last claim standing provision is subject to the proviso in section 34(1)(b)(i)(C) of the ACHA that "there is not, and never has been, a native title holder for the area." On the basis of this proviso, the last claim standing provision is ousted given the Federal Court's finding that the Karingbal People once held native title in the relevant area.

The Minister's delegate refused NNAC's application for registration as an Aboriginal cultural heritage body on 4 October 2016, on the basis of DATSIP's interpretation of the last claim standing provision proviso as a reference to a native title holder being someone who was the subject of a positive determination of native title under the Native Title Act. The delegate therefore considered the Federal Court's decision was irrelevant to the merits of NNAC's application.

NNAC commenced judicial review proceedings in relation to this decision on 9 December 2016. The decision was subsequently withdrawn due to deficient delegation arrangements, but was then remade refusing the application on 24 March 2017, and the judicial review proceedings were reinstated. In the proceedings before Justice Jackson in the Supreme Court of Queensland, the Counsel for the Minister argued that the decision to refuse the application was correct because the reference to "native title holder" in the last claim standing provision should be constructed to mean a "determined native title holder" (consistent with DATSIP's view).

Justice Jackson upheld NNAC's application for judicial review on 20 December 2017, primarily on the grounds that there was no justification to depart from the plain text of the provision, based on the ordinary rules of statutory interpretation (**NNAC Decision**). His Honour noted:

> *The absence of the word "registered" before the words "native title holder" in sub-par (C)* [of the last claim standing provision] *suggest that a different meaning is intended from "registered native title holder".*[3]

Further, the Court held that:

> *On its ordinary meaning, sub-sub-par (C)* [of the last claim standing provision] *asks two questions. First, is there a native title holder for the area? Second, has there ever been a native title holder for the area? Looking at the text in the context described above, nothing expressly requires that the native title for either question must have been determined under s 225 of the NTA.*[4]

Importantly, Counsel for the State, when pressed by the Court, refused to indicate that the State considered the omission of the word "registered" from the proviso to the last claim standing provision was a drafting mistake. This is consistent with there being 4 other references to "native title holder" throughout the ACHA which, unlike the last claim standing provision reference, are all prefaced with the word "registered," and the provision having been legislated on two separate occasions (originally in 2003 and amended in 2010) without the word "registered" being included.

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[3] *Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships* [2017] QSC 321 at [21]

[4] *Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships* [2017] QSC 321 at [32]

Significantly, notwithstanding DATSIP maintaining its position that the proviso in the last claim standing is in relation to a registered or determined native title holder, the State did not appeal the NNAC Decision.

As a consequence of the NNAC Decision, the Minister's delegate was required to remake the decision on the NNAC application for registration as an Aboriginal Cultural Heritage Body. To date, only a draft decision (reaffirming the original decision to refuse the application, notwithstanding Justice Jackson's decision) has been provided to NNAC. NNAC made a further submission to DATSIP on 23 August 2018 in support of its application, but NNAC is yet to receive a response from DATSIP on that submission or a decision on the application generally.

NNAC and the Karingbal People have put significant effort and resources into these matters for the purposes of the long-term protection of Karingbal cultural heritage. Whilst NNAC has agreed reimbursement of some of its costs with the State (including pursuant to a costs order under the NNAC Decision), and has had the benefit of some pro bono assistance from its legal advisors, it has still incurred significant costs in pursuing these matters. These costs have been paid out of funds received under native title agreements, which have a limited source, and would otherwise have been available for the general advancement and welfare of the Karingbal People. It would be a severe detriment to the Karingbal People to have incurred these costs for no benefit, which is the effect of the proposed amendments in Clause 95 of the Bill.

Lack of consultation

The Karingbal People and their representatives have been in constant contact with DATSIP since the NNAC Decision was handed down. Relevantly, legal representatives of the Karingbal People met with DATSIP's Cultural Heritage Unit representatives on 17 May 2018, at which the DATSIP representatives gave an assurance that there would be broad consultation, including with Karingbal People, before any legislative reform was undertaken.

The Karingbal People were not consulted or even notified before the introduction of the Bill. It is particularly disconcerting that the Karingbal People first heard that the Bill was about to be introduced from a representative of Santos, who had received that advice from DATSIP. It is distressing that project proponents were worthy of receiving such advice from DATSIP, the State Government agency whose purpose is to further the interests of Aboriginal and Torres Strait Islander Peoples, but Aboriginal People whose cultural heritage will be directly affected by the Bill were not.

We also wrote directly to the Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships on 5 March 2018 seeking the Deputy Premier's assurance that no legislative amendments would be made without consultation with the Karingbal People. No acknowledgement of or response to this correspondence has ever been received.

Importantly, in the Consultation section of the Explanatory Notes for the Bill, there is no reference to the proposed amendments to the ACHA. This is an admission that there has been no consultation undertaken on what is an extremely important issue with severe ramifications for the Karingbal People and potentially other Aboriginal People and Torres Strait Islanders. We submit these amendments should not be passed without the proper consultation we have sought and which we have been assured we would be given.

We note the Deputy Premier's second reading speech included the following comments in relation to the proposed amendment:

> *I note that there are other policy issues that arise from the cultural heritage acts. These issues require comprehensive consultation and further policy development. There is an opportunity for the government to explore the possibility of a broader review of the cultural heritage acts in the future.*

However this provides shallow comfort given the potential for ongoing harm to Karingbal cultural heritage in the meantime. This suggestion of an opportunity for further review and reform lacks any substantive commitment as to content or timing. We have already endured two and a half years of delays since the original application for Aboriginal cultural heritage body status, and Karingbal cultural heritage has been exposed to, and has suffered, harm throughout that period. The State Government has already had nine months since the NNAC Decision to work up a solution that meets the needs of industry but also protects the traditional rights of Aboriginal People and Torres Strait Islanders, and all that has been devised is the blunt inclusion of a word that the State declined to say had been mistakenly omitted in representations before the Supreme Court.

The ACHA and subordinate instruments/supporting documents have been the subject of reviews in 2010 and 2016, but no amendments of any substance have ever been made arising from these reviews. Vague statements about future opportunities for consultation and policy developments give us little comfort when our cultural heritage remains subjected to the significant risk of harm that the proposed amendments will entrench in the meantime. These matters should be properly dealt with as a priority now and not be the subject of an ill-conceived, band aid solution which attacks our rights and undermines the objectives of the legislation sought to be amended.

Alternatives

The Karingbal People remain committed to working cooperatively with DATSIP and industry to come up with a solution that avoids entrenching the pitfalls of the last claim standing provision.

More productive, effective and comprehensive remedies may include revisiting the qualifications and role of Aboriginal Cultural Heritage Bodies to deliver certainty for proponents, rather than the mere "mailbox" function these tend to serve in many respects currently.

Other options include legislative reform to the definition of Aboriginal Party to give greater transparency and certainty around which people qualify as Aboriginal Parties under section 35(7) of the ACHA.

These matters require reaching a policy position in relation to the interaction between native title determinations and how these affect assessments of traditional knowledge and traditional responsibility, and should be directed at ensuring Aboriginal cultural heritage protection keeps pace with native title developments in Queensland (which is imperative given the many linkages between these matters throughout the ACHA). It would also better serve to protect Aboriginal cultural heritage from harm, something that Clause 95 of the Bill does not.

We would be pleased to provide any further written or verbal assistance to the Committee as is considered necessary and appropriate. We would also be happy to provide copies of the documentary material referred to in this submission, should that be requested. Please direct any further enquiries to [redacted] at [redacted] or on [redacted]

Yours sincerely

per

Charles Stapleton Mark Albury Rebecca Scheske