



HopgoodGanim

LAWYERS

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Economics and Governance Committee
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Dear Secretary

Submission on the *Revenue and Other Legislation Amendment Bill 2018*

1. We refer to the call for submissions for the above inquiry.
2. We act for the Yugara/Yugarapul Aboriginal Corporation ORIC ICN 7131 in relation to this matter only, which includes the representatives of the Yugara/Yugarapul People, who were the native title claimants in Federal Court proceedings QUD586/2011 (QUD139/2015) over the greater Brisbane River region (the **Yugara People**).
3. We intend this correspondence to be a submission which:
 - (a) addresses amendments to the Queensland *Aboriginal Cultural Heritage Act 2003* (the **ACHA**) proposed by the *Revenue and Other Legislation Amendment Bill 2018* (the **Bill**);
 - (b) argues that the revival of the “last claim standing” rule as previously understood by decision-makers under the ACHA and *Torres Strait Island Cultural Heritage Act 2003*:
 - (1) will lead to groups maintaining their status as native title parties despite judicial determination that facts relied upon in their native title determination applications were false;
 - (2) fails to accord natural justice to other potential Aboriginal parties (see section 35(7) of the ACHA);
 - (3) is inconsistent with fundamental legislative principles as defined in the *Legislative Standards Act 1992*; and
 - (c) recommends that provision be made in the amendments that the “last claim standing” rule does not apply in circumstances where:
 - (1) there has been a determination that the former registered native title claimants (**RNTCs**) do not hold native title over the relevant area; or
 - (2) the Department of Aboriginal and Torres Strait Islander Partnerships (**DATSIP**) cannot be satisfied that the former RNTCs meet the criteria of an Aboriginal party in that they

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do not have particular knowledge about traditions, observances, customs or beliefs associated with the area, or any responsibilities under Aboriginal tradition for the area, or for any Aboriginal objects in the area;¹ and

- (d) recommends that DATSIP should be able to receive and consider further information, in relation to whether a party should be, or should continue to be, the “last claim standing” RNTC.

Last claim standing rule

4. Clause 108 of the Bill provides:

<i>Amendment of s 34 (Native title party for an area)</i>	1
<i>Section 34(1)(b)(i)(C), before ‘native title holder’—</i>	2
<i>insert—</i>	3
<i>registered</i>	4

5. The Yugara People have made previous submissions to the Minister for Aboriginal and Torres Strait Islander Partnerships on 26 June 2015, 20 January 2016, and 20 March 2018 on the interpretation of section 34 of the ACHA (**Previous Submissions**). In the Previous Submissions, we argued that section 34(1)(b)(i)(C) does not only apply to registered native title holders, but also includes common law native title holders.
6. In *Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships (Nuga Nuga)*,² Justice Jackson considered the meaning of section 34(1)(b)(i)(C) and made findings consistent with the argument in our submission, finding that the “*better conclusion, in my view, is that the native title holder referred to in sub-sub-par (C) is not only a native title holder whose title has been positively determined under s 225 of the [Native Title Act]*”.³

Aboriginal Party for the greater Brisbane area

7. The greater Brisbane area has been subject to the following native title proceedings:
- (a) *Sandy on behalf of the Yugara People v State of Queensland* [2014] FCA 243;
 - (b) *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 (**Brisbane Native Title Case**);
 - (c) *Sandy on behalf of the Yugara People v State of Queensland (No 3)* [2015] FCA 210;and
 - (d) *Sandy on behalf of the Yugara People v State of Queensland* [2017] FCAFC 108
8. The Brisbane Native Title Case concerned a hearing of the overlapping Yugara People (Sandy and others / First Applicant) and Turrbal People (Isaacs / Second Applicant) native title claims. Ultimately, Justice Jessup determined that native title did not exist over the claim area. However, Justice Jessup did make the following findings regarding the language and identity of the people:⁴

¹ *Aboriginal Cultural Heritage Act 2003* s 35(7).

² [2017] QSC 321.

³ *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 [2017] QSC 321 [61].

⁴ *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 [42] and [43].



I would accept that a single language ... was spoken over a region much more extensive than the claim area ... To this extent, identifying the language as "Yugara" or similar would have at least have the advantage of implying a geographical spread of the language which recognises two relatively uncontroversial circumstances: that it differed from that spoken to the north by the Wakka Wakka and the Gubbi Gubbi peoples, and that its use extended well to the south of the claim area, broadly as indicated on Watson's map."

9. As the last registered claim, the Turrbal People were recognised by DATSIP as the native title party for the area under section 34(1)(b)(i)(C) from the consolidated trial in December 2013 until the *Nuga Nuga* decision was handed down in December 2017.
10. The Yugara People were unable to become registered claimants because they shared the same asserted apical ancestor the Duke of York (by descent from his daughter Kitty). Consequently there was a dispute between the Yugara people and the Isaacs descendants. The Yugara People asserted the Duke of York's daughter died in December 1846 and therefore had no living descendants. The Yugara argument in this respect was ultimately the finding made by Justice Jessup in FCA 2015.
11. In the Previous Submissions, the Yugara People argued that the Turrbal Association Inc, the registered cultural heritage body for the Brisbane area, should be deregistered on the basis that the Isaacs descendants have no biological connection to the Duke of York and, therefore, do not have particular knowledge about traditions, observances, customs or beliefs associated with the area, or any responsibilities under Aboriginal tradition for the area, or any Aboriginal objects for the area.⁵
12. The Yugara People submit that the Turrbal People's claim was registered in part on the basis of information that was later determined to be incorrect. The Turrbal People were a group defined as:

*"Connie Isaacs and her biological descendants, being the only known descendants of the Turrbal man known as the 'Duke of York', and the only named descendants of those people who comprise the Turrbal People as at 7 February 1788."*⁶

13. The reasons for the decision to register the Turrbal People's claim state that the decision was made, for the purposes of section 190C(4)(b) of the *Native Title Act 1993 (Cth)*, on the basis that Connie Isaacs "[was] the oldest surviving descendant of the [Duke of York]".⁷ However, the Brisbane Native Title Case, Justice Jessup rejected the Turrbal case on biological descent.⁸ His Honour found that it was "most unlikely" that Connie Isaacs' father was descended from the Duke of York.⁹
14. In the Full Court, Justices Reeves, Barker and White held that:

*"the evidence to prove that the Turrbal appellants who claim descent from Billy Isaacs are also descendants of the traditional owners of the claim area at the time of the imposition of British sovereignty in 1858 is lacking, and [Justice Jessup] is not shown to have been in error in so finding"*¹⁰

⁵ *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 [85], [250], [162], and [254].

⁶ *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 [16].

⁷ National Native Title Tribunal, *Registration test decision (Edited reasons)* - QC98/26 (15 January 2009) 14. Note: the Duke of York was referred to as the 'Chief of the Brisbane Tribe'.

⁸ *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 [254].

⁹ *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 [253].

¹⁰ *Sandy on behalf of the Yugara People v State of Queensland* [2017] FCAFC 108 [219].



15. Accordingly, the Yugara People submit that the Turrbal People's claim, if the proper facts were known, should never have been registered.

Errors of fact

16. The revival of the "last claim standing" rule will lead to certain groups maintaining their status as native title parties, despite evidence that their registration was based on errors of fact.

17. In *Puhlhofer v LB Hillingdon*, Lord Brightman held that:

*"Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is **the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power** save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely"* (emphasis added).¹¹

18. Chief Justice Mason supported this finding in *Australian Broadcasting Tribunal v Bond*.¹²

19. As it is beyond the power of the courts to review an administrative decision based on a mere error of fact, the Parliament has a responsibility to ensure that decision makers can correct decisions based on information that is subsequently found to be inaccurate.

20. Section 34 does not provide that the registration of a native title party may be reviewed where factual information relied on by the decision maker in the initial application is later determined to be incorrect.

21. In the case of the Yugara People, this will lead to the Turrbal People maintaining their status as native title party for the QUD 586/2011 area, despite Justice Jessup's finding that facts relied on in the Turrbal People's application were incorrect.¹³

22. Reinstatement of the "last claim standing" rule, as proposed by the Bill, will lead to groups maintaining their status as native title parties in the face of judicial determinations that facts relied upon in their applications were ultimately found to be false.

Natural justice and procedural fairness

23. The proposed resurrection of the "last claim standing" rule fails to accord natural justice and procedural fairness to those Aboriginal groups whose rights and interests are impacted by the decision to register another group as the native title party for an area.

24. Justice Mason in *Kioa v West* held that:

*"It is a fundamental rule of the common law doctrine of natural justice ... that ... when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it."*¹⁴

¹¹ *Puhlhofer v LB Hillingdon* [1986] 1 AC 484 [14].

¹² *Australian Broadcasting Tribunal v Bond* [1990] HCA 33 [95]-[96].

¹³ *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 [2017] QSC 321 [61].

¹⁴ *Kioa v West* [1985] HCA 81 [28].



25. Further, procedural fairness will “promote better decision-making in government because the decision-maker will have before him or her all the relevant information required.”¹⁵
26. The proposed reinstatement of the “last claim standing” rule will lead to delegates making decisions about registration of native title parties, without taking all of the pertinent information into account. For instance, in the case of the Yugara People, the decision-maker will not have the power to consider Justice Jessup’s finding that the Turrbal People’s application was made on the basis of information that was not correct.
27. Accordingly, revival of the “last claim standing” rule will lead to parties whose rights are affected by decisions under section 34 of the ACHA not being accorded natural justice or procedural fairness.

Conflict with fundamental legislative principles

28. The Yugara People submit that the Bill conflicts with fundamental legislative principles as defined in the *Legislative Standards Act 1992* as it fails to have sufficient regard to the rights and liberties of individuals, in that it;¹⁶
- (1) is inconsistent with principles of natural justice;¹⁷
 - (A) As addressed in paragraphs 23 to 27 above.
 - (2) adversely affects rights and liberties retrospectively;¹⁸ and
 - (A) The Explanatory Notes state that the policy intent of the amendment to section 34 “is that stakeholders who have commenced a process in order to comply with the ACHA and TSICHA before and after the Nuga Nuga decision should not be disadvantaged”.¹⁹
 - (B) However, the Bill operates to deny recognition of the Yugara People under the ACHA as the correct Aboriginal parties who have particular knowledge about traditions, observances, customs and beliefs.
 - (C) This is clear evidence that the amendments are likely to affect adversely the rights and liberties of certain indigenous groups, by retrospectively ceasing to recognise them as the correct Aboriginal party for the area.
 - (3) fails to have sufficient regard to Aboriginal tradition and Island custom.²⁰
 - (A) Justice Jessup identified that the Yugara People have particular knowledge about traditions, observances, customs and beliefs in the QUD 586/2011 claim area.²¹ In contrast, His Honour made no findings to the effect that the Turrbal People has such knowledge.
 - (B) The following people were found to have biological descent from the asserted Yugara ancestors from the greater regional area:

¹⁵ Australian Law Reform Commission, *Traditional Rights and Freedoms - Encroachments by Commonwealth Laws* (ALRC, 3 August 2017) 413.

¹⁶ *Legislative Standards Act 1992* s 4(2)(a).

¹⁷ *Legislative Standards Act 1992* s 4(3)(b).

¹⁸ *Legislative Standards Act 1992* s 4(3)(g).

¹⁹ Explanatory Notes, Revenue and Other Legislation Amendment Bill 2018, p 18.

²⁰ *Legislative Standards Act 1992* s 4(3)(j).

²¹ *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 [42], [43], [315].



- (i) “For the reasons I have given, I find that Jackey Jackey was an ancestor of Des and Pearl Sandy”,²²
 - (ii) “Mrs James is descended from [Alexander Sandy and Paimba / Mary Ann Mitchell]”,²³ and
 - (iii) “Des and Pearl Sandy are descended from [John Bungaree and Mary Ann Sandy]”.²⁴
- (C) The effect of the proposed reinstatement of the “last claim standing rule” is to deny the Yugara People the right to “care for country” or “speak for country”, by allowing another group to act as the native title party for the area. This is a clear indication that the proposed amendment to the ACHA is at odds with Aboriginal tradition and Island custom.

Recommended changes to the amendment

29. In response to the issues identified in this submission, the Yugara People respectfully recommend that provision should be made in the amendments that the “last claim standing” rule does not apply in circumstances where:
- (a) there has been a determination that the former RNTCs do not hold native title over the relevant area; or
 - (b) the DATSIP cannot be satisfied that the former RNTCs meet the criteria of an Aboriginal party in that they do not have particular knowledge about traditions, observances, customs or beliefs associated with the area, or any responsibilities under Aboriginal tradition for the area, or for any Aboriginal objects in the area.
30. The Yugara People further recommend that provision should be made in section 34 for DATSIP to receive and consider additional information in relation to whether a party should be, or should continue to be, the “last claim standing” RNTC.
31. The draft section below incorporates the following proposed amendments:

34 Native title party for an area

...

(1A) Subsection (1)(b)(i) does not apply where:

- (a) the area is subject to a determination under the Commonwealth Native Title Act that native title does not exist; or*
- (b) the Minister is not satisfied that the former registered native title holder:*
 - (i) has particular knowledge about traditions, observances, customs or beliefs associated with the area; and*

²² *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 [280].

²³ *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 [315].

²⁴ *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 [315].



(ii) *either*

(A) *has responsibility under Aboriginal tradition for some or all of the area, or for significant Aboriginal objects located or originating in the area; or*

(B) *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.*

(1B) For the purpose of subsection (1A)(b), the Minister may receive and consider further information, either from decisions of a court or by submission from interested parties.

Conclusion and request for oral submissions

32. Thank you for the opportunity to provide a submission on the Bill. The Yugara People request a brief oral presentation to the Economics and Governance Committee to present their objection to the proposed amendments to the ACHA without additional amendment as suggested above, so as to have an opportunity to respond to any questions that the Committee has in relation to this submission.

Yours faithfully

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Prepared on instructions from Desmond Sandy, Ruth James, Myfanwy Locke and Pearl Sandy on behalf of the Yugara People and the Directors of the Yugara-Yugarapul Aboriginal Corporation ORIC ICN 7131.