



Resourcing Queensland's future

7 September 2018

Mrs Trudy Struber
Committee Secretary
Economics and Governance Committee
Email: egc@parliament.qld.gov.au

Dear Mrs Struber

Re: QRC Submission – Revenue and Other Legislative Amendment Bill 2018

Thank you for the opportunity to comment on the *Revenue and Other Legislation Amendment Bill 2018*.

Queensland Resources Council (QRC) has, in consultation with its members, developed a submission which conveys industry's view on the proposed amendments set out in the Bill to the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003*. Please find **attached** QRC's submission on this section of the Bill.

QRC supports the proposed amendments which will restore certainty to the process of identifying Aboriginal and Torres Strait Islander parties for our members.

During the Deputy Premier's first reading speech, it was noted: "*There is an opportunity for the government to explore the possibility of a broader review of the cultural heritage acts in the future*". QRC recognises there may be wider issues to consider regarding the process of identifying Aboriginal and Torres Strait Islander parties as articulated during the *Cultural Heritage Duty of Care Guidelines* issues paper and looks forward to a continued productive and open consultation with the government as part of any broader review.

Should you have any queries on the content of this submission, please contact [REDACTED], Manager Social and Indigenous Policy, [REDACTED]

Yours sincerely

A handwritten signature in black ink, appearing to read "I. Macfarlane".

Ian Macfarlane
Chief Executive

Revenue and Other Legislation Amendment Bill 2018

Submission to
the Committee Secretary
Economics and Governance Committee

7 September 2018

INTRODUCTION

The Queensland Resources Council (QRC) welcomes the opportunity to provide a submission to the Economics and Governance Committee (the Committee) on the *Revenue and Other Legislation Amendment Bill 2018* (the Bill). This submission deals exclusively with Part 10, Division 2 and Part 10, Division 6, which propose amendments to the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* (the Cultural Heritage Acts) respectively. QRC has no comments on the other proposed amendments included within the Bill.

QRC is the peak representative organisation of the Queensland minerals and energy sector. QRC's membership encompasses minerals and energy explorers, producers and processing companies, and associated service companies. Indigenous cultural heritage regulation and policy have a very significant interest for and impact on, QRC members given their broad application to and coverage of member activities. QRC's submission therefore represents the views of hundreds of individuals and companies who are direct stakeholders in the management of Indigenous cultural heritage in this State.

QRC supports the effective recognition, protection and conservation of Indigenous cultural heritage and the resources industry has a strong history and established best practice in protecting cultural heritage, including working closely with Aboriginal and Torres Strait Islander parties. A critical aspect of this is the ability to identify such parties with certainty.

Utilising the familiar native title claims process under the *Native Title Act 1993* (Cth) (the NTA), the Cultural Heritage Acts seek to promote such certainty of identification by providing for current or former registered native title holders or registered native title claimants to be (and to be dealt with by land users as) "native title parties" - that is, Aboriginal or Torres Strait Islander parties for the area, to the exclusion of any other Aboriginal or Torres Strait Islander people.

The way this was intended to work was by providing that, where there are no current registered native title holders or registered native title claimants for an area, the registered native title claimant with the claim to most recently have failed in the area would be the Aboriginal or Torres Strait Islander party. However, this "last claim standing rule" would not apply if there had previously been a "native title holder" for the area. The QRC, in common with the Department for Aboriginal and Torres Strait Islander Partnerships (DATSIP) - which administers the Cultural Heritage Acts, understood this exception to mean that the last claim standing rule would not apply in areas where native title holders had previously been recognised in a determination of native title made under the NTA.

In *Nuga Nuga Aboriginal Corporation vs Minister for Aboriginal and Torres Strait Islander Partnerships* [2017] QSC 321 (the Nuga Nuga decision), the Supreme Court held instead that this exception to the last claim standing rule would apply to all areas where Aboriginal (or Torres Strait Islander) people have held traditional rights and interests (at any time), regardless of whether a determination of native title had been made to that effect.

The intention of the last claim standing rule was to enable certain identification of Aboriginal and Torres Strait Islander parties in areas with no current registered native title holders or registered native title claimants. The result of the Nuga Nuga decision was to effectively abolish the last claim standing rule, and to therefore make it practically impossible to identify Aboriginal and Torres Strait Islander parties in these areas with certainty. Another consequence of the Nuga Nuga decision was to cast doubt on the validity of existing Cultural Heritage Management Plans and Agreements that land users, in good faith, had entered into with last claim standing Aboriginal and Torres Strait Islander parties.

In these circumstances, QRC welcomes and supports the Deputy Premier's policy objective and the amendments set out in the Bill, which are directed at restoring certainty to this process and *reinstating the last claim standing rule as it was understood by decision-makers under the Cultural Heritage Acts prior to the Nuga Nuga decision*, and at validating and preserving decisions and actions taken prior to the commencement of these amendments in reliance on, as applicable, the pre- and post-Nuga Nuga understanding of the last claim standing rule.

QRC also understands that DATSIP has imposed a temporary moratorium on approval and registration decisions in relation to cultural heritage studies, cultural heritage management plans and Aboriginal cultural heritage body registration applications while this Bill is under Committee consideration. As this moratorium adversely impacts our members' projects and developments, QRC strongly encourages timely consideration and resolution of this Bill by the Committee to enable these decision-making processes to be resumed at the earliest opportunity.

SUBMISSION ON THE BILL

Overall, QRC supports the proposed amendments outlined within the Bill, with some minor changes as set out below.

Clauses 95 and 108: Amendment of s 34 (Native title party for an area)

1. QRC strongly supports the proposed amendment of section 34(1)(b)(i)(C) of the Cultural Heritage Acts to insert the word "**registered**" before "*native title holder*". This amendment will reinstate the previous understanding that the circumstance in which the last claim standing rule will not apply is where there are or have previously been people who have been determined to hold native title under the NTA. The amendment will provide certainty to all land users - including QRC's members - in the identification of the appropriate Aboriginal and Torres Strait Islander people to be involved in the assessment and management of cultural heritage where there are no current registered native title holders or claimants.

Clauses 98 and 111, Insertion of new ss 170/168 (Consideration of particular cultural heritage studies endorsed before commencement)

2. While QRC is not aware of any of its members being involved in the carrying out of cultural heritage studies under Part 6 of the Cultural Heritage Acts, QRC supports the intention behind this amendment, which is to ensure that, if a land user has commenced the process to undertake a cultural heritage study in compliance with the post-Nuga Nuga understanding of the last claim standing rule, that land user would not need to recommence the process - and DATSIP would have to decide whether or not to record the findings of the study in the appropriate Cultural Heritage Register without regard to the amendments.

Clauses 98 and 111, Insertion of new ss 171/169 (Approval of particular cultural heritage management plans endorsed before commencement)

3. QRC also supports the intention behind this amendment, which again is to ensure that land users who have commenced processes for a cultural heritage management plan in reliance on the interpretation given to the Cultural Heritage Acts by the Nuga Nuga decision will not, if the amendments commence, be disadvantaged by having DATSIP consider whether or not to approve the plan under the post-commencement Cultural Heritage Acts.
4. However, QRC is concerned that this amendment does not go far enough. In particular, QRC members may, in reliance on the Nuga Nuga decision, have entered into (or have undertaken negotiations for) agreements with Aboriginal or Torres Strait Islander people

who are not native title parties and therefore who (if these amendments commence) will not be Aboriginal or Torres Strait Islander parties. If these amendments commence, the protection under ss 23(3)(a)(iii), 24(2)(a)(iii), 25(2)(a)(iii) or 26(2)(a)(iii) of the Cultural Heritage Acts that would have been provided by such agreements would be lost. QRC considers that transitional arrangements should be enacted to preserve the validity and effectiveness of these types of agreements with Aboriginal or Torres Strait Islander parties (and of negotiations begun for such agreements before commencement of these amendments).

Clauses 98 and 111, insertion of new s.172/170 (Validation of particular acts and omissions done before commencement)

5. QRC strongly supports the intent of this amendment which, as described in the *Explanatory Note*, "will have the effect of ensuring any actions taken or decisions made before the commencement of these amendments, that were based on the interpretation of [the last claim standing rule] prior to the Nuga Nuga decision are and always have been valid and lawful".
6. However, while QRC strongly supports the intention behind this validation provision, QRC submits that the current drafting should be extended to cover acts or omissions that were "ineffective" (as well as or instead of being invalid or unlawful), and to declare such acts to be as "effective" as they would have been if amended section 34 were in force at the appropriate time. This revised wording would pick up consultations with incorrect Aboriginal or Torres Strait Islander parties that may not have been unlawful or invalid, but may simply have been ineffective to discharge a member's cultural heritage duty of care.
7. QRC submits the following drafting amendments for consideration (amendments to be applied to clause 98 of the Bill in respect of s 172 of the *Aboriginal Cultural Heritage Act 2003*):

172 Validation of particular acts and omissions done before commencement

- (1) An act or omission done under this Act before the commencement, to the extent it was ineffective, invalid or unlawful as a result of the pre-commencement section 34, is declared to be, and to have always been, as effective, valid and lawful as if amended section 34 were in force at the time of the act or omission.

- (2) In this section—

amended section 34 means section 34 as in force on the commencement.

pre-commencement section 34 means section 34 as in force before the commencement.

Corresponding amendments could then be applied to Clause 111 of the Bill in respect of s 169 of the *Torres Strait Islander Cultural Heritage Act 2003*.

QRC welcomes further consultation on the issues raised in this submission and on the Bill more generally. Thank you again for the opportunity to comment on the Bill, and for the Committee's consideration of QRC's feedback.

If you have any queries regarding the contents of this submission, please do not hesitate to contact [REDACTED], Manager Social and Indigenous Policy via email [REDACTED] or phone [REDACTED]

Yours sincerely



Ian Macfarlane
Chief Executive