CLAYTON UTZ

Email 7 September 2018

Committee Secretary
Economics and Governance Committee
Parliament House
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Dear Madam

Queensland Parliament - Economics and Governance Committee
Inquiry into the *Revenue and Other Legislation Amendment Bill 2018* (Bill)

1. Introduction

1.1 Clayton Utz is Australia's largest independent law firm. Our native title and cultural heritage services group (widely regarded as the country's premier top-tier native title and cultural heritage practice) operates nationally, with practitioners based in our Brisbane, Perth, Melbourne, Darwin and Sydney offices.

1.2 We primarily advise our clients (typically, the developers of very large resources, energy and infrastructure projects, as well as government departments and corporations at all levels and native title representative bodies) on the impacts that native title and Indigenous cultural heritage can have on their developments, and the agreement-making and other mechanisms available for the resolution of these issues. Our team's expertise, experience and track record in advising both government and private clients on these issues is unparalleled.

1.3 Our core professional experience includes advising our clients on all processes related to the development of cultural heritage management plans (**CHMPs**), as well as other cultural heritage agreements entered into with Aboriginal parties and Torres Strait Islander parties (these agreements are often colloquially referred to as cultural heritage management agreements, or **CHMAs**), under both the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* (together, **Cultural Heritage Acts**).

1.4 Notably, we are currently providing (or have recently provided) cultural heritage advice to Cross River Rail Delivery Authority on Cross River Rail, Australian Rail Track Corporation on the Inland Rail Programme, Brisbane City Council on Brisbane Metro, U&D Mining Pty Ltd on the Meteor Downs South Project, Destination Brisbane Consortium on Queen's Wharf Brisbane and Australia Pacific LNG Pty Limited on the Australia Pacific LNG Project. These are just a few of the many public and private sector organisations whose interests are directly affected by that aspect of the Bill that is the subject matter of this submission.

1.5 It is apparent from the Explanatory Note (**EN**) that the objectives of the Bill include amending the Cultural Heritage Acts to resolve the uncertainty created by the Supreme Court decision of *Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships* [2017] QSC 321 (**Nuga Nuga Decision**). The Bill seeks to do so by:

(a) promulgating into law the interpretation of what is often informally referred to as the "last claim standing rule" that was widely accepted and applied before the Nuga Nuga Decision;

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(b) validating decisions and actions taken based on that pre-Nuga Nuga Decision interpretation of the "last claim standing rule"; and

(c) preserving other decisions and actions taken, after the date of the Nuga Nuga Decision, in reliance on the post-Nuga Nuga Decision interpretation of the "last claim standing rule".

1.6 We consider that the depth of our professional experience in relation to advising on cultural heritage issues, as well as our intimate knowledge of the issues the Nuga Nuga Decision has posed for our clients, means we are well-placed to make this submission to the Committee's Inquiry into the Bill, and we welcome the opportunity to do so.

2. Identifying Aboriginal parties and Torres Strait Islander parties - the "last claim standing rule" and the Nuga Nuga Decision

2.1 The Cultural Heritage Acts impose a duty on all land users to take all reasonable and practicable measures to avoid harming Aboriginal cultural heritage and Torres Strait Islander cultural heritage. Failure to comply with this "cultural heritage duty of care" is one of several criminal offences created by the Cultural Heritage Acts' "cultural heritage protection provisions". Individuals and corporations risk criminal prosecution if they commit any of these offences, with conviction being punishable by fines and (in some cases) imprisonment. Additional layers of protection for cultural heritage are provided by the availability of "stop orders" under the Cultural Heritage Acts, and injunctions under the *Land Court Act 2000*, to restrain the carrying out of activities that could contravene the cultural heritage protection provisions or otherwise harm cultural heritage.

2.2 Compliance with the cultural heritage duty of care while carrying out activities in an area will often require consultation with the Aboriginal party or Torres Strait Islander party for the area. Moreover, a land user who, relevantly, is acting under an approved CHMP or a CHMA (that have been developed and agreed with the relevant Aboriginal party or Torres Strait Islander party) will be taken to have complied with the cultural heritage duty of care (and will be able to resist any criminal prosecution or any stop order or injunction application).

2.3 These circumstances make it critical for land users to be able to confidently identify the Aboriginal/Torres Strait Islander party for any area – and the Cultural Heritage Acts prescribe a formula for doing so. There are two types of Aboriginal/Torres Strait Islander party.

2.4 In an area where there is a "native title party", whose status is based on the steps they have taken to have their native title rights and interests recognised under the *Native Title Act 1993* (Cth) (**NTA**), no other Aboriginal or Torres Strait Islander person who does not also constitute a native title party can be an Aboriginal or Torres Strait Islander party for the area. Where there is no native title party for an area, identification of "traditional" Aboriginal or Torres Strait Islander parties is less certain and depends on knowledge of local traditions, observances, customs or beliefs, and on responsibility under Aboriginal tradition or Island custom for the area.

2.5 Under the Cultural Heritage Acts, the following entities or people will be native title parties:

(a) where a determination of native title under the NTA is in effect, the registered native title holder (**RNTH**) - being the entity registered by the National Native Title Tribunal as either:

(i) the holder of the determined native title rights and interests, whether in its own right or in trust for the determined native title holders (these native title holders, in the NTA, are called **Common Law Holders**); or

(ii) the agent of Common Law Holders;

(b) (in some cases) a former RNTH;

(c) a registered native title claimant (**RNTC**) (although there may be cases where a RNTC takes priority over a former RNTH); and

(d) the RNTC for the registered native title claim to most recently have failed in relation to the area. Critically for current purposes, an exception to this "last claim standing rule" will arise if there is, or has ever been, a native title holder in relation to the area.

2.6 Before the Nuga Nuga Decision, it was widely believed (including by the Department of Aboriginal and Torres Strait Islander Partnerships (**DATSIP**), which administers the Cultural Heritage Acts) that the "native title holder" exception to the last claim standing rule would only arise in an area where there are, or have previously been, people whose native title rights and interests for the area had been recognised in a determination of native title made under the NTA (i.e. Common Law Holders).

2.7 In the Nuga Nuga Decision, however, the Court found that the exception would arise if, at any time, Aboriginal or Torres Strait Islander people had held rights and interests akin to native title rights and interests in relation to the area, irrespective of whether those rights and interests had been recognised under a determination of native title.

2.8 In short, if one considers that, at sovereignty, there likely were people holding traditional rights and interests in relation to most if not all of Queensland, then, on a literal reading of the Nuga Nuga Decision, there would be very little scope for application of the last claim standing rule.

2.9 The EN to the Cultural Heritage Acts made it clear that the use of the native title claims process established under the NTA was in recognition of the fact that Aboriginal and Torres Strait Islander people who are the traditional owners of an area, are the appropriate people to be involved in the assessment and management of their cultural heritage *whether or not their native title continues to exist*. The EN summarised the relevant Parliamentary intention as being to provide certainty to all persons in the identification of the appropriate Aboriginal and Torres Strait Islander people to be involved in the assessment and management of cultural heritage.

2.10 The last claim standing rule itself was enacted by amendments introduced to the Cultural Heritage Acts in 2010, prior to which all former RNTCs were regarded as native title parties in areas without a current determination or native title claim. The relevant EN made it clear that the purpose of introducing the last claim standing rule was to:

"*put beyond doubt the identity of the native title party for cultural purposes in the situation where there are two or more previously registered claimants for an area.* ***The amendment will put this issue beyond doubt for all stakeholders***." [Our emphasis.]

2.11 There remain extensive areas of Queensland in respect of which there has never been a native title determination, and in relation to which there is no active registered native title claim. For land users generally, compliance with cultural heritage obligations in many of these areas has been achieved by consulting, and reaching agreement, with former RNTCs in their

capacity as native title parties under the last claim standing rule. What, to all intents and purposes, was the abolition of the last claim standing rule by the Nuga Nuga Decision:

(a) made it practically impossible to identify Aboriginal/Torres Strait Islander parties in these areas with certainty; and

(b) cast doubt on the validity of existing CHMPs and CHMAs that land users, in good faith and in reliance on the pre-Nuga Nuga Decision interpretation of the last claim standing rule, had entered into with last claim standing Aboriginal and Torres Strait Islander parties.

2.12 It seemed clear that these difficulties could only clearly be addressed by the passage of amending legislation, with retrospective effect, to clarify that the only native title holders whose presence would prevent the application of the last claim standing rule are Common Law Holders, whose rights and interests have been recognised under a Federal Court (or High Court) determination of native title, made under the NTA.

2.13 By introducing the Bill, the Queensland Government has taken a welcome first step in the process of delivering the required solution. We wholeheartedly support the proposed amendments to the Cultural Heritage Acts that are included in the Bill.

3. The proposed amendments

3.1 The Bill seeks to insert two categories of amendment into the Cultural Heritage Acts, one of which would operate prospectively, and the other retrospectively.

Prospective amendment

3.2 The prospective amendment, which would amend s.34(1)(b)(i)(C) with effect from the date on which the Bill receives the Royal Assent, would clarify that the "native title holder" exception to the last claim standing rule will only be triggered in areas where there is or has previously been a RNTH – as opposed to merely a holder of rights and interests akin to native title rights and interests – for the area.

3.3 Given that, as previously noted, a prerequisite for registration of an entity as a RNTH is a determination of native title under the NTA, this amendment would restore certainty to the identification of Aboriginal and Torres Strait Islander parties by reinstating the last claim standing rule as it was understood by DATSIP decision-makers, proponents of major projects and Aboriginal and Torres Strait Islander persons under the Cultural Heritage Acts prior to the Nuga Nuga Decision.

3.4 It is important to stress that this is all the amendment would do. In particular, we understand that at the public briefing on 3 September 2018, one question asked was whether enactment of this proposed amendment would extinguish or have some other impact on the rights of native title holders who are not Common Law Holders. The answer is that the proposed amendment would have no discernible impact on any individual's or group's native title rights and interests. That is, the inclusion of the word "registered" to s.34(1)(b)(i)(C) will make no difference whatsoever to whether people in fact hold or may exercise native title rights and interests.

3.5 It seems to us from a review of section 34(1) of the Cultural Heritage Acts that the simple purpose of the "native title holder" exception to the last claim standing rule was to make it clear that, in an area with no active registered native title claim, the last claim standing RNTC will be the appropriate people to speak for country - unless:

(a) there is a native title determination in force for the area, in which case, the RNTH would be the appropriate native title party under s.34(1)(c); or

(b) there has previously been a native title determination for the area, in which case, the former RNTH would be the appropriate native title party where s.34(1)(d) applies.

3.6 In other words, the exception was merely a means of clarifying the hierarchy of native title parties in areas with no active registered native title claim. It was not intended to somehow extend additional native title rights to people asserting native title who are not Common Law Holders.

3.7 Based on the EN extracts we have previously cited, it seems to us that the legislative intention underpinning the role of native title parties was a presumption that:

(a) RNTCs for an area, as people who have been authorised by a native title claim group to lodge a claim over the area and to deal with all matters arising in relation to that claim; and

(b) RNTHs for an area, as entities who typically have been authorised by the Common Law Holders for the area to either hold their determined native title rights and interests in trust for them or to be their agent,

would be the most appropriate people or entities to be responsible for assessing and managing the cultural heritage of the area.

3.8 Clearly, the other aspect of Parliament's intention in utilising the NTA native claims process, was to enable all stakeholders to be able to identify with certainty in the vast majority of cases, the people with whom consultations and agreements would be effective to discharge the cultural heritage duty of care. The last claim standing rule was an essential aspect of this statutory scheme.

3.9 Where there are no native title parties, s.35(7) of the Cultural Heritage Acts stipulates that people will be Aboriginal or Torres Strait Islander parties if they are Aboriginal or Torres Strait Islander people:

(a) with particular knowledge of local traditions, observances, customs or beliefs associated with the area; and

(b) who either have responsibility under Aboriginal tradition or Island custom for the area or for the cultural heritage of the area, or are members of family or clan groups with that responsibility.

3.10 It is self-evident that land users who are not themselves Aboriginal or Torres Strait Islander people will typically be ill-equipped to identify who these "traditional" Aboriginal or Torres Strait Islander parties are (or, more particularly, to identify when a person offering his or her services is **not** such a party). This not only has serious implications for being able to identify Aboriginal or Torres Strait Islander parties with certainty - it greatly, in our view, increases the risk of people who do not in fact satisfy s.35(7) being involved in cultural heritage management - which, almost by definition, could lead to desecration of or other harm to such cultural heritage.

3.11 This circumstance, in our submission, is:

(a) inconsistent with the "main purpose" of the Cultural Heritage Acts which is "to provide effective recognition, protection and conservation of Aboriginal and Torres Strait Islander cultural heritage" (s.4); and

(b) derogates from another purpose of the Cultural Heritage Acts, which is to establish "processes for the timely and efficient management of activities to avoid or minimise harm to Aboriginal and Torres Strait Islander cultural heritage" (s.6(i)).

3.12 It follows that the most serious consequence of the Nuga Nuga Decision was to greatly increase the circumstances in which recourse would have to be had to such "traditional" Aboriginal or Torres Strait Islander parties.

3.13 In our submission, passage of the Bill (which we would strongly support) would:

(a) enable the State to advise stakeholders that last claim standing RNTCs are once again native title parties for areas with no Common Law Holders or current registered native title claimants; and

(b) in doing so, revive the viability of some of the State's most important projects and developments, including those currently proposed in Brisbane and in parts of the Gold Coast, the Darling Downs, Carnarvon Gorge and the Surat and Bowen Basins.

Retrospective amendments

3.14 There are in turn two categories of amendments with retrospective effect, comprising:

(a) transitional provisions to ensure that land users who commenced processes for either a cultural heritage study or a CHMP 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 record the findings of the study in the appropriate Cultural Heritage Register or decide whether or not to approve the CHMP under the "post-commencement" Cultural Heritage Acts; and

(b) a validation provision directed at acts or omissions done under the Cultural Heritage Acts that were invalid or unlawful in light of the Nuga Nuga Decision interpretation of the last claim standing rule. If the Bill becomes law, all such acts or omissions (including the issue of written CHMP notices to, and the making of CHMPs and CHMAs with, people erroneously thought to have been last claim standing native title parties) will be declared to have been as valid, and as lawful, as they would have been had the amended last claim standing rule been in effect.

Transitional provisions

3.15 While we support the intent behind the transitional provisions, we are concerned that the amendments do not go far enough. In particular, it is unclear why the transitional provisions apply to cultural heritage studies and CHMPs, and not to CHMAs. Given that the intention is to preserve the validity of actions taken in accordance with the law as posited in the Nuga Nuga Decision, this seems to us to be a gap in the Bill.

3.16 It is foreseeable that land users would have entered into (or have undertaken negotiations for) CHMAs with s.35(7) "traditional" Aboriginal or Torres Strait Islander parties for an area, in the belief that the abolition of the last claim standing rule meant that there were no native title

parties for the area. If the result of the amendments commencing would be the reinstatement of a last claim standing former RNTC as a native title party, those CHMAs would automatically cease to constitute agreements with Aboriginal or Torres Strait Islander parties within the meaning and for the purposes of 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 mean the CHMA would no longer enable the land user to discharge their cultural heritage duty of care and would no longer give the land user the benefit of a defence in relation to the other cultural heritage protection provisions.

3.17 In our view, it would not be unreasonable to enact transitional arrangements to preserve the validity and effectiveness of these types of CHMAs (and of negotiations begun for such agreements before commencement of the Bill).

Validation provision

3.18 We strongly support the intention behind the validation provision.

3.19 The provision is directed at acts or omissions done under the Cultural Heritage Acts that were invalid or unlawful in light of the Nuga Nuga Decision interpretation of the last claim standing rule. If the Bill becomes law, all such acts or omissions (including the issue of written CHMP notices to, and the making of CHMPs and CHMAs with, people erroneously thought to have been last claim standing native title parties) will be declared to have been as valid, and as lawful, as they would have been had the amended last claim standing rule been in effect.

3.20 The effect of this provision will be to clarify that people who carried out activities under those CHMPs and CHMAs:

(a) complied with the cultural heritage duty of care;

(b) did not otherwise commit any of the offences created by the Cultural Heritage Acts' cultural heritage protection provisions; and

(c) will no longer have their activities and projects exposed to the risk of injunctions or stop orders.

3.21 In our submission, while the enactment of retrospective legislation is justifiably to be regarded as exceptional, given that those agreements were entered into in good faith by parties acting in accordance with the widely-held understanding of the law, it is correct that Parliament should act to clarify the legal position. In short, where members of the public have regulated their affairs on the basis of the law as it was widely understood to exist, only to have the law declared to be different; and where those members of the public stand to suffer significant prejudice as a result, the exceptional circumstances justifying the enactment of retrospective legislation must surely be considered to exist.

3.22 That having been said, we would submit 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 "pre-commencement" consultations with people erroneously thought to have been last claim standing native title parties which, while they may not have been unlawful or invalid *per se*, may simply (by dint of the error) have been ineffective to discharge the cultural heritage duty of care.

3.23 In our submission, this additional element could be addressed by amending the validation provision in the following way (the text below applies 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.

3.24 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*.

Thank you for the opportunity to make these submissions. If you have any questions, please feel free to contact our Mark Geritz or Tosin Aro using the contact details below.

Yours faithfully

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