Queensland Law Society

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Office of the President

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Committee Secretary
Economics and Governance Committee
Parliament House
George Street
Brisbane Qld 4000

By email: egc@parliament.qld.gov.au

Dear Committee Secretary

Revenue and Other Legislation Amendment Bill 2018

Thank you for the opportunity to provide comments on the Revenue and Other Legislation Amendment Bill 2018 (the Bill). The Queensland Law Society (QLS) appreciates being consulted on this important piece of legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the Not for Profit Law Committee, the Revenue Law Committee, the Property and Development Law Committee, the Mining and Resources Law Committee and the Reconciliation and First Nations Advancement Committee, whose members have substantial expertise in the areas affected by the Bill.

QLS notes that the Bill proposes amendments to 13 Acts of Parliament and associated regulations.

In the time allowed for consultation, we have focused on the issues outlined below. By not commenting on the full scope of the provisions in the Bill, QLS does not express endorsement or otherwise of the draft legislation.

Key issues

With respect to the Bill, we raise the following key issues:

- QLS broadly supports the amendments to the duties framework to enable an expansion of the transfer duty framework for e-conveyancing in Queensland. Although it is not contemplated in the Bill, QLS also requests that consideration is given in the near future to the payment of transfer duty directly to the Office of State Revenue (OSR) through approved electronic conveyancing (e-conveyancing) platforms.

- QLS supports the amendments to give effect to the administrative arrangements implemented by the Office of State Revenue, as identified in the Bill.
- A range of concerns have been identified below in relation to the proposed amendments to Part 11A of the *Taxation Administration Act 2001* particularly:
    - The practical effect of these amendments will be to require all charities (or qualifying not-for-profits) in Queensland to carefully review their constitutions, take legal advice on them, and if necessary amend them within the proposed transitional periods.
    - This will have the effect of imposing more red tape and diverting charitable resources away from the front line charity service delivery;
    - QLS submits that six months is insufficient transitional time given that these amendments may require organisations to call an Extraordinary General Meeting and a special resolution;
    - QLS submits that a period of 18 months (not 6 months) is more appropriate for most organisations. Further time may be required if statutory amendment is required to a Constitution as eighteen months may not be sufficient time for consideration by the organisation and the State legislature to act.
- As a broader piece of policy work to help reduce red tape, the QLS also commends that consideration be given to the adoption of the Commonwealth definition of "charity" as the gateway condition to State revenue concessions.
- In relation to the changes to the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003*, further consultation is required to ensure that Aboriginal tradition and Island custom is preserved in the course of developing changes to administrative arrangements that have such a significant effect, given the broader policy implications of these changes.

Amendments to *Duties Act 2001*

E-conveyancing amendments

QLS broadly supports the amendments to the duties framework to enable an expansion of the transfer duty framework for e-conveyancing in Queensland.

The expansion to allow for the transfer of vacant land, commercial land and industrial land, in addition to the current residential land category, will be helpful for legal practitioners in Queensland.

Although it is not contemplated in the Bill, QLS also requests that consideration is given in the near future to the payment of transfer duty directly to the Office of State Revenue (OSR) through approved electronic conveyancing (e-conveyancing) platforms.

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At present, the legislation does not permit the payment of transfer duty directly when settling a transfer by e-conveyancing. This has the effect that a practitioner who seeks to use the e-conveyancing system to complete a settlement must:

- Make all other payments for settlement in the e-conveyancing platform (such as payments to mortgagees and sellers);
- Separately:
    - attend to the requirements of the OSR's "OSRConnect" platform in relation to the transaction;
    - In a "paper environment", arrange:
        - for a cheque to be drawn in payment of the duty – this involves a number of internal accounting steps within the firm such as administrative staff completing the necessary forms to request cheques, obtaining signatures from authorised partners and then drawing cheques;
        - for the payment to be made to OSR which involves further administrative time.

These additional steps in a paper environment add significant time to a payment which could otherwise be made in a matter of seconds in the e-conveyancing environment. It also means a delay in the duty being received by OSR. In our estimation, this is a factor affecting the uptake of e-conveyancing in Queensland.

QLS would be pleased to work with OSR in relation to a legislative and administrative framework for permitting the direct payment of duty which would be practical for practitioners and self-assessors but would also be acceptable to OSR.

Amendments to give effect to administrative arrangements

QLS supports the amendments to give effect to the administrative arrangements in relation to:

- extension of transfer duty concession for family businesses of primary production;
- treating certain deregistered managed investment schemes as exempt managed investment schemes; and
- correcting a cross-reference in the landholder duty provisions in section 179 of the Duties Act.

It is noted that these amendments will be retrospective in effect. QLS considers it is appropriate, in these very limited and specific circumstances, to give retrospective effect where the amendments are clearly beneficial to the taxpayer.

Amendments to *Taxation Administration Act 2001*

Charitable Institution registration – a gateway condition to State Revenue concessions

In summary, the proposed amendments relate to whether charities (and other requisite not-for-profits) will satisfy the requirements to be registered as "*charitable institutions*" under the *Taxation Administration Act 2001* (**TAA**), which is the gateway requirement for access by those entities to the following State revenue exemptions:

- [Stamp] Duty;
- Land Tax;
- Payroll Tax.

For example, section 414 of the *Duties Act 2001* (Qld), in relation to concessions for Transfer Duty refers the reader to the TAA for the definition of a "charitable institution". *Charitable institution* is defined in Schedule 6 of the Duties Act as follows:

> ***charitable institution*** means an institution registered under the Administration Act, part 11A.

Administration Act is then in turn defined in that same Schedule as follows:

> ***Administration Act*** means the *Taxation Administration Act 2001*.

TAA - Charitable Institution registration

Part 11A of the TAA (**Registration of charitable institutions**) then sets out requirements for registration as a charitable institution under that part which in effect provides a Queensland definition of *charity*, which is different to the Commonwealth definition of charity as defined for Commonwealth purposes in the *Charities Act 2013* (Cth).

We will return to the desirability of a common national definition of charity shortly, but first we comment on the changes to meaning proposed by the Bill.

The material section of Part 11A of TAA currently provides as follows (emphasis added):

> ***149C Restrictions on registration***
>
> *(1) The commissioner may register the institution only if it is an institution mentioned in subsections (2) to (4).*
>
> *(2) Each of the following may be registered—*
>
> *(a) a religious body or a body—*
>
> *(i) that is controlled by, or associated with, a religious body; and*
>
> *(ii) whose principal object and pursuit is the conduct of activities of a religious nature;*
>
> *(b) a public benevolent institution;*
>
> *(c) a university or university college;*
>
> *(d) a primary or secondary school;*
>
> *(e) a kindergarten;*

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(f) an institution whose principal object or pursuit is the care of the sick, aged, infirm, afflicted or incorrigible persons;

(g) an institution whose principal object or pursuit is the relief of poverty;

(h) an institution whose principal object or pursuit is the care of children by—

(i) being responsible for them on a full-time basis; and

(ii) providing them with all necessary food, clothing and shelter; and

(iii) providing for their general wellbeing and protection.

(3) Also, an institution may be registered if its principal object or pursuit—

(a) is fulfilling a charitable object or promoting the public good; and

(b) is not a leisure, recreational, social or sporting object or pursuit.

(4) In addition, the trustees of an institution mentioned in subsection (2) or (3), other than a university or university college, may be registered.

*(5) However, an institution, other than an institution or trustee of an institution mentioned in subsection (2)(a) or (c), must not be registered **unless, under its constitution, however described**—*

(a) its income and property are used solely for promoting its objects; and

(b) no part of its income or property is to be distributed, paid or transferred by way of bonus, dividend or other similar payment to its members; and

(c) on its dissolution, the assets remaining after satisfying all debts and liabilities must be transferred—

(i) to an institution that, under this section, may be registered; or

(ii) to an institution the commissioner is satisfied has a principal object or pursuit mentioned in subsection (3)(a); or

(iii) for a purpose the commissioner is satisfied is charitable or for the promotion of the public good.

The Bill proposes to amend Part 11A as it relates to the requirements of the Constitution of a charity in Clause 83 of the Bill as follows (emphasis added):

Amendment of s 149C (Restrictions on registration)

(1) Section 149C(5), 'unless, under its constitution, however described'—

omit, insert—

unless its constitution, however described, expressly provides that

(2) Section 149C—

insert—

(6) In this section—

***constitution**, of an institution, includes a law, deed or other instrument that constitutes the institution and governs the activities of the institution or its members.*

The Bill therefore proposes a definition of "constitution" along with the requirement that the Constitution (as defined), *expressly provides that*:[1]

> *(a) its income and property are used solely for promoting its objects; and*
>
> *(b) no part of its income or property is to be distributed, paid or transferred by way of bonus, dividend or other similar payment to its members; and*
>
> *(c) on its dissolution, the assets remaining after satisfying all debts and liabilities must be transferred—*
>
> *(i) to an institution that, under this section, may be registered; or*
> *(ii) to an institution the commissioner is satisfied has a principal object or pursuit mentioned in subsection (3)(a); or*
> *(iii) for a purpose the commissioner is satisfied is charitable or for the promotion of the public good.*

It seems that the amendments proposed by the Bill may be in response to the decision of the Supreme Court of Queensland, by Jackson J, on 15 April 2015 in *Queensland Chamber of Commerce and Industry v Commissioner of State Revenue* [2015] QSC 77 (Qld Chamber of Commerce Case).

The Qld Chamber of Commerce Case was in relation to payroll tax and particularly whether the Queensland Chamber of Commerce and Industry was entitled to be registered under Part 11A of the TAA as a charitable institution. The Commissioner contended that there were no *express provisions* in the constitution of the Queensland Chamber of Commerce and Industry that satisfied the following:

- the s149C (a) - use of income and property solely for promoting its objects - requirement; and
- the 149C (b) - no distribution of income or property to members - requirement.

The court looked to the *effect* of the provisions of the constitution of the Queensland Chamber of Commerce and Industry and decided that these requirements were satisfied, despite, (a) not being in the constitution at all and, (b) only in terms of language of "profits".

It was the *purposes (or objects)* of the Queensland Chamber of Commerce and Industry in its constitution, that according to his Honour satisfied the sub-paragraph (a) requirement, in that the objects imposed obligations for the income and assets to be applied for the promotion of the objects.[2]

What the amendments proposed by the Bill would mean is that, at least in relation to the s149C (a) (use of income and property solely for promoting its objects) requirement, the Queensland Chamber of Commerce and Industry would have failed. This appears to be the intention of the Bill.

The Explanatory Memorandum to the Bill explains[3] (**emphasis added**):

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[1] Then picking up the balance of the language in s147C of the TAA
[2] See especially paragraphs 57 and 58 of the judgment
[3] Page 12

> It was never intended that an entity should qualify for registration if its constitution, or another instrument constituting and governing it, **does not expressly contain the restrictions in section149C(5) of the Taxation Administration Act**.
>
> However, as the Taxation Administration Act does not specifically state that these restrictions must be expressly included, an entity may be registered as a charitable institution **if the practical effect of its constitution or other governing instrument, within the framework of the relevant statutory and common law rules, is that the restrictions are satisfied.**
>
> The Taxation Administration Act will be amended to require that **an entity must expressly include the restrictions in section 149C(5) in its constitution** or other governing instrument.

The practical effect of these amendments will be to require all charities (or qualifying not-for-profits) in Queensland to carefully review their constitutions, take legal advice on them, and if necessary amend them within the proposed transitional periods. The members of the QLS Not For Profit Law Committee have indicated that in their experience many charity constitutions will need to be amended in order to comply. This will have the effect of imposing more red tape and diverting charitable resources away from the front line charity service delivery.

If the proposed amendment had been in place and the Queensland Chamber of Commerce and Industry had known about it, and been given the opportunity to change its constitution to expressly provide for the matters proposed to be required, would it have done so? Clearly this question cannot be answered definitively, but why would it not have? Its constitution already had this effect according to the Supreme Court.

It is further noted that the proposed amendment seeks to effectively prescribe that the constitution must contain terms identical with the language of the statute, rather than terms to this effect. In the experience of the members of our Not For Profit Law Committee the following language variations often occur:

- 'asset' as a substitute for 'property';
- 'profit', 'dividend or bonus' as a substitute for 'income';
- 'purpose' in place of 'object'.

Additionally, prescriptive language, at least in its current form, does not take into account how the language is applied to *charitable trusts* (which do not have members) as opposed to 'institutions'. Charitable trusts also face the additional challenge of whether the terms of the trust contain an express power of amendment and then the limitations of that power of amendment (absent an order of the court). An order of the court was required in the recent Queensland Supreme Court Decision of Justice Ann Lyons *In the matter of the Public Trustee of Queensland as trustee of Queensland Community Foundation* [2016] QSC 276, despite an express power of amendment in the Trust Deed.

A charity can distribute to a member, if the member is itself a charity and the distribution is in furtherance of the charitable purpose. Any prescriptive language would need to take this into account.

It is also noted that the *template constitution for a charitable company limited by guarantee*[4] published by the Australian Charities and Not-for-profits Commission would not meet the requirements.

All of the above matters provide caution to the proposal of a statute prescribing language for a constitution rather than this being the effect of the constitution.

However, if the requirement for prescriptive language is to remain, that language should be broadened to contemplate the type of language customarily in use, and there should be provision allowing for an exemption to be allowed by the Commissioner, if the words are not exactly the same as the legislation states but have the same effect.

QLS submits that the consequence of the amendments will mean that charities who do not actively engage with the review and amendment of their constitutions within the transition period may see a loss of State revenue concessions that have been long enjoyed.

Policy intent queried – the clarification or tightening of State revenue concessions?

It may be that the policy intent of the Bill is tightening the availability of State revenue concessions as has been seen in other States and Territories. If so, then QLS submits that this intent should be clearly expressed and achieved in a manner with far less significant unintended consequence.

The tightening policy intent in other States and Territories are summarized in a 2016 Paper[5] given by the Chair of the QLS Not-for-profit Law Committee. Andrew Lind summarized the approach in Western Australia legislature in response to a Chamber of Commerce and Industry of Western Australia case as follows:

> On 9 March 2015, **Western Australia** enacted the *Taxation Legislation Amendment Act (No 2) 2015* (WA). It amends the respective Duties Act, Land Tax Act, Payroll Tax Act and Taxation Administration Act of Western Australia to remove exemptions for some classes of charities. ... *The Chamber of Commerce and Industry of Western Australia* case[6] found that the Chamber of Commerce was a charity and so entitled to payroll tax exemption. This ... lead to the 2015 amendments to the exemption regime in WA, to exclude "relevant bodies" (assuming they were not specifically let back in by being declared a "beneficial body"). ... "*Relevant body*" is defined in the 2015 [WA] amendments to mean:
>
> a a political party;
>
> b an industrial association;
>
> c a professional association;
>
> d a body, other than a body referred to in paragraph (a), (b), (c), or (e) that promotes trade, industry or commerce, unless the main purposes of the body are charitable purposes that fall within the first 3 categories (being relief of poverty; advancement of education and advancement of religion) identified by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 as developed by the common law of Australia from time to time;

[4] https://www.acnc.gov.au/ACNC/Publications/Templates/ConstitutionTemplate.aspx
[5] Nina Brewer and Andrew Lind, More *Bang for your Buck? A State by State Review of duty, land tax and payroll tax exemptions available to Charities*, Delivered at the Television Education Network Annual Charity Law Conference in Melbourne 2016
[6] *CCIWA v Commissioner of State Revenue (WA)* 2012 WASAT 146

e a body that is a member of a class of bodies prescribed for the purposes of this paragraph; and

f a body that [is a member of a pay-roll tax group, related body corporate, or that has a sole or dominant purpose of conferring a benefit on another relevant body].

If the Queensland policy intention is to narrow the State revenue concessions, as they apply to bodies such as Chambers of Commerce and Industry, it seems to the QLS that amendments like the Western Australian amendments have much to commend them because of both the clarity they provide and the reduction in unintended consequences for others, given the targeted nature of the amendments.

Adopting the Commonwealth definition of charity

As a broader piece of policy work to help reduce red tape, the QLS also commends that consideration be given to the adoption of the Commonwealth definition of charity[7] as the gateway condition to State revenue concessions. This does not of course mean that that the flood-gates will open in terms of State revenue concessions, as additional statutory conditions can be and are imposed as a condition of concession. Additional conditions are already imposed on concessions for duty, land tax and payroll tax in Queensland.

It is noted that the Queensland Chamber of Commerce and Industry Limited is not a registered charity with the ACNC.

It is understood that consideration of adoption of the Commonwealth definition of charity and the degree to which other requisite non-charitable not-for-profits gain entry through the gateway condition is beyond the scope the current Bill, but the QLS commends the consideration of further consultation on such an approach.

Transitional periods are insufficient

The Bill proposes transitional periods of six months for most charities and eighteen months if the Constitution is established by statute.

QLS submits, based on the comments already made, that six months is insufficient transitional time and would often require an Extraordinary General Meeting to be held and usually a special resolution passed rather than amendments being able to be made within the usual AGM cycle. Some charities have a large membership base and the cost and disruption of calling an EGM may not be insignificant. QLS submits that a period of 18 months is more appropriate, particularly given the nature of charitable organisations involving a high number of volunteer board members who will need to be briefed about the consequences of these changes. These organisations may also need to obtain legal advice in relation to the necessary amendments prior to arranging an Extraordinary General Meeting to approve amendments to the constitution.

Additionally, we note that any amendments to the constitution of an incorporated association will need to be approved by the Office of Fair Trading before they can take effect.[8] This is another reason to support the extension of the transitional period from 6 months to 18 months. While it is acknowledged that the Model Rules for incorporated associations would comply

[7] As set out in the *Charities Act 2013* (Cth)
[8] See section 48(8) *Associations Incorporation Act* 1981 (Qld).

with the proposed changes, in the experience of our members many incorporated associations have adopted constitutions different to the Model Rules.

If statutory amendment is required to a Constitution, eighteen months may not be sufficient time for consideration by the organisation and the State legislature to act.

Amendments to *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003*

The proposal to reinsert the 'last claim standing' provisions in the *Aboriginal Cultural Heritage Act* 2003 and *Torres Strait Islander Cultural Heritage Act* 2003 is the Department of Aboriginal and Torres Strait Islander Partnerships (the **Department**) response to the Supreme Court decision of *Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships* [2017] QSC 321 (**Nuga Nuga**).

Nuga Nuga was an application for judicial review of the Department's decision to refuse to register an Aboriginal cultural heritage body for an area under the *Aboriginal Cultural Heritage Act* 2003 (Qld) (**ACHA**).[9] The Court found the function and purpose of section 34 of ACHA as a whole, is a provision to define who is a "native title party", which is, in turn, used to define the expression "Aboriginal party", under the ACHA.[10] The Court found the ACHA contemplated two classes of 'native title holder' – those at common law and those with a positive determination of native title. It follows that these two classes of native title holders provides for a broader definition of "*Aboriginal party*".

Prior to Nuga Nuga, the Department applied a narrow interpretation of section 34 which excluded the common law native title holder and restricted the meaning of "*native title holder*" to those with a determination of native title. This in turn narrowed the meaning of "*Aboriginal party*". In Nuga Nuga the Department attempted to justify this narrow approach by arguing *inter alia* that the inclusive approach would render the Department's task of deciding whether there is and never has been a native title holder for the area impossible or too difficult and that cannot have been the intention of the legislature.[11] The Court rejected the Department's arguments noting "... *the difficulties are overstated.*"[12]

Over the past 8 years Queensland native title representative bodies and service providers (**NTRB/SP**) have made numerous submissions to the Department relating to the ACHA and highlighting various deficiencies in that Act and expressing the significant concerns of constituents, particularly about the operation of the 'last claim standing' provisions. The concern has focused on the Department's failure to take into account judicial findings of a court of superior record in relation to who are traditional owners for an area as well as the intra and inter Indigenous disputation that arises because of the over-reliance on artificial administrative arrangements such as the 'last claim standing' provisions.

The proposal to reinsert the 'last claim standing' provisions in the Acts will perpetuate these disputes and appears a matter of administrative convenience for the Department which won't

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[9] *Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships* [2017] QSC 321 at [1].
[10] *Ibid* at [22].
[11] *Ibid* at [48].
[12] *Ibid* at [54].

accept the findings of Nuga Nuga, and now apprehends it must expend additional resources to inquire into the identity of people who held native title at common law.[13]

This is a misapprehension as NTRB/SPs have statutory functions under the *Native Title Act 1993* (Cth) (**NTA**) to, as far as is reasonably practicable, identify persons who may hold native title in the area for which the body is the representative body[14] and to make reasonable efforts to minimise the number of overlapping native title claims.[15]

In performing its statutory functions, NTRB/SPs are required to maintain organisational structures and administrative processes that promote the satisfactory representation of and consultation with its constituents in a fair manner.[16] NTRB/SPs also have a statutory function to undertake dispute resolution between constituents[17] and in that capacity are acutely aware of the causes of such disputes, which in many cases relate to cultural heritage. With this in mind, NTRB/SPs are the only bodies with both the statutory duty and ability to undertake the research demanded by the ACHA.

While NTRB/SPs ought to have a role in assisting the Department to identify Aboriginal parties for an area that does not suggest that such bodies usurp the authority of the Federal Court of Australia to determine the rightful native title holders for an area. In May 2018 there were 135 positive determinations within Queensland, the native title holders for which are represented by 84 Registered Native Title Body Corporates (**RNTBC**). The Federal Court is rapidly resolving claims and the number of RNTBCs will grow considerably over the coming years.

Where a RNTBC exists, that body corporate is the only appropriate entity to be registered pursuant to section 36 of the ACHA as an Aboriginal Cultural Heritage Body for all of the area within the external boundary of the area claimed under the successful native title determination application. Registration of a RNTBC, rather than some other body, will avoid the proliferation of Indigenous corporations within Queensland who undertake the same work.

Where a RNTBC does not exist for an area, then the expertise and resources of NTRB/SPs should be utilised to assist the Department with:

(1) the identification of Aboriginal parties where required (i.e. where no Aboriginal cultural heritage body exists); and
(2) determination (and certification by the NTRB/SP) of whether a corporation that has applied to be registered as an Aboriginal cultural heritage body for an area under section 36 of the ACHA is an appropriate body to identify Aboriginal parties for the area.

The *Legislative Standards Act 1992* (Qld) prescribes the minimum standards for legislation in Queensland including a set of fundamental legislative principles. The fundamental legislative principles requires that legislation should have sufficient regard to the rights and liberties of individuals and to the institution of Parliament. In turn, sufficient regard to the rights and

[13] *Ibid* at [48].
[14] *Native Title Act* 1993 (Cth), section 203BJ(b).
[15] Section 203BE(3), *Native Title Act* 1993 (Cth.).
[16] Section 203BA(2), *Native Title Act 1993* (Cth.)
[17] Section 203BF, *Native Title Act* 1993 (Cth.)

liberties of individuals depends on whether, for example, the legislation has sufficient regard to Aboriginal tradition and Island custom.[18]

The proposed amendment seeks to introduce artificial administrative arrangements. It has no regard to Aboriginal tradition and Island custom because it refuses to recognise and accommodate determined native title holders at common law. The proposed amendment ignores that native title at common law is the basis of native title under the NTA[19] and the basis of native title in an Act in Queensland, including the ACHA.[20]

Rather than seeking to amend legislation on the basis of administrative convenience, we suggest that the Department work collaboratively with the growing body of RNTBCs and the existing NTRB/SP.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team by phone on [redacted] or by email to [redacted]

Yours faithfully

Ken Taylor
President

[18] Section 4(3)(j) *Legislative Standards Act 1992*
[19] Section 223(1) *Native Title Act 1993* (Cth)
[20] Section 36 and Schedule 1, *Acts Interpretation Act 1954* (Qld), definition "*native title*"