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Committee Secretary
Economics and Governance Committee
Parliament House
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By email only

Queensland South Native Title Services - Submission to the Economics and Governance Committee on the Revenue and Other Legislation Amendment Bill 2018

Queensland South Native Title Services Ltd (**QSNTS**) welcomes the opportunity to provide 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).**

This submission is directed solely to the reforms proposed by Clause 95 of the Bill.

Along with many of its constituents, QSNTS is of the view that the *Aboriginal Cultural Heritage Act 2003* (Qld) **(ACHA)** and, inferentially, the *Torres Strait Islander Cultural Heritage Act 2003* (Qld) are fundamentally flawed and require significant review and reform. It is QSNTS's position that the long overdue review and reform goes beyond the stopgap and reactive changes to the ACHA proposed by the Revenue and Other Legislation Amendment Bill 2018.

QSNTS welcomed the decision of the Supreme Court of Queensland in *Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships*[1] (*Nuga Nuga*) as addressing, at least in part, an issue about which QSNTS had been advocating to the Department of Aboriginal and Torres Strait Islander Partnerships (**DATSIP**) for many years.

The particular issue addressed by the Supreme Court was that which is referred to commonly as the 'last claim standing' provision.

QSNTS has been arguing that the last claim standing provision is, in certain circumstances, culturally inappropriate and an affront to Indigenous people.

The most glaring example of this are circumstances where certain persons being part of a Registered Native Title Claimant are the subjects of judicial findings that they do not have the requisite connection to land and waters to be part of the persons who may assert native title in relation to that land and those waters. To use blunt language, the Federal Court of Australia (**Court**)has found that those individuals are not 'right' for that country.

There are two particular examples of this occurring within the region for which QSNTS holds responsibility as a native title service provider pursuant to the *Native Title Act 1993* (Cth). One of those examples was the

[1] [2017] QSC 321

litigation from which the Nuga Nuga Supreme Court action had its genesis[2]. The other was the unsuccessful native title claim that included the Brisbane CBD[3]. Each of those matters involved overlapping native title claims. Each went to trial and was opposed by the State of Queensland. Each was unsuccessful and resulted in findings by the court that native title did not exist within the area claimed.

A striking feature of each of those two matters was that persons who were the Registered Native Title Claimant were found to have no traditional association with the claim area. Despite that, those persons were able to exercise significant influence in relation to the area that had been subject to the fail claim because of the status they were afforded by sections 34 and 35 of the ACHA.

A real-life example of this is to be found in the submission of the Nuga Nuga Aboriginal Corporation to the Committee:

> *DATSIP had been … 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[4] and the Bidjara People[5], 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:*
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> - *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 *Nuga Nuga* litigation established that the interpretation of sections 34 and 35 of the ACHA as applied by DATSIP could not be sustained.

While the *Nuga Nuga* decision caused some consternation and inconvenience to developers and others who sought to obtain an assessment of Aboriginal cultural heritage for proposed projects, the decision had the effect of taking persons who were not, and never could be, native title holders for the area out of the cultural heritage assessment equation.

Were the proposed amendment in clause 95 of the Bill to be given legislative effect, the previous interpretation adopted by DATSIP of the relevant clause would become the law. That would have the effect of permitting persons who had been found by the Court to have no traditional association with the relevant place to be the 'go to' person in relation to cultural heritage for that place.

QSNTS along with other bodies performing like functions in other parts of Queensland have advocated to DATSIP over several years for a review of the ACHA and in particular the effect of the last claim standing provisions. Each of those representations to DATSIP and its Minister have fallen on deaf ears. There has been an historical reluctance to even acknowledge the inappropriateness of the last claim standing

[2] See: *Wyman on behalf of the Bidjara People v State of Queensland (No 2)*[2013] FCA 1229
[3] See: *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15
[4] Jemima of Albinia was found to have no traditional association with the claim area.
[5] The Bidjara People were found to have no traditional association with the Arcadia Valley which is core Karingbal Country.

provision in circumstances where judicial findings have excluded certain people as being appropriate arbiters of matters relating to cultural heritage within a former claim area.

The ACHA is drafted to simplistically take cognizance of the way of a native title determination application is described at the time it is registered and, again at the time it fails. While this may be a convenient device, at times, it wilfully ignores specific judicial findings.

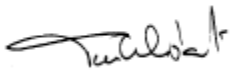
The proposed amendment simply entrenches that position. That position is untenable because it fails to reflect the findings of the Federal Court in *in rem* judgements.

The potential effect of this is that Aboriginal people who have been found to have traditional association with places (albeit they may not have been able to reach the high bar required to achieve a native title determination) are deprived of the opportunity and responsibility to care for their traditional country and those opportunities and that responsibility are devolved upon people simply by virtue of those people being identified in a particular document (the National Native Title Tribunal's Register of Native Title Claims) at a particular time.

QSNTS submits that the amendment should be withdrawn and the totality of the ACHA, if not at the very least the last claim standing provisions, should be referred for a 'root and branch' review and amendment.

QSNTS would be pleased to provide any further submissions to the Committee if the opportunity to do so were to arise.

Should you have any queries please email me on [redacted] or on (07) 3224 1200.



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