Parliamentary Committees



Revenue and Other Legislation Amendment Bill 2018

Report No. 16, 56th Parliament
Economics and Governance Committee
October 2018

Economics and Governance Committee

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Acknowledgements

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Contents

Abbreviations

ACHA	*Aboriginal Cultural Heritage Act 2003*
ACNC	Australian Charities and Not-for-profits Commission
AMP	Alcohol Management Plan
the Authority	Cross River Rail Authority
the Bill	Revenue and Other Legislation Amendment Bill 2018
CHMP	Cultural Heritage Management Plan
Commissioner	Commissioner of State Revenue
committee	Economics and Governance Committee
DATSIP	Department of Aboriginal and Torres Strait Islander Partnerships
Duties Act	*Duties Act 2001*
e-conveyancing	electronic conveyancing
ELN	Electronic Lodgement Network
ELNO	Electronic Lodgement Network Operator
FLP	fundamental legislative principle
ITAA	*Income Tax Assessment Act 1997* (Cth)
JLOM Act	*Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984*
Land Tax Act	*Land Tax Act 2010*
the National Law	the New South Wales *Electronic Conveyancing (Adoption of National Law) Act 2012*
NNAC	Nuga Nuga Aboriginal Corporation
NTA	*Native Title Act 1993* (Cth)
Nuga Nuga decision	*Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships* [2017]
OSR	Office of State Revenue
Payroll Tax Act	*Payroll Tax Act 1971*
PEXA	Property Exchange Australia Pty Ltd
PPIUT	pooled public investment unit trust
PUT	public unit trust
QCCI decision	*Queensland Chamber of Commerce and Industry Limited v Commissioner of State Revenue* [2015]
QLS	Queensland Law Society

QRC	Queensland Resources Council
QSNTS	Queensland South Native Title Services
Registrar	Registrar of Titles
Rockland decision	*Rockland & Ors v Queensland Police Service* [2013]
SPE Act	*State Penalties Enforcement Act 1999*
SPER	State Penalties Enforcement Registry
Taxation Administration Act	*Taxation Administration Act 2001*
TSICHA	*Torres Strait Islander Cultural Heritage Act 2003*
VAQ	Victims Assist Queensland
Victims of Crime Assistance Act	*Victims of Crime Assistance Act 2009*

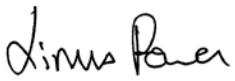
Chair's foreword

This report presents a summary of the Economics and Governance Committee's examination of the Revenue and Other Legislation Amendment Bill 2018.

The committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the committee, I thank those individuals and organisations who made written submissions and appeared at the committee's hearings. I also thank our Parliamentary Service staff and the Mornington Island community for their assistance.

I commend this report to the House.



Linus Power MP
Chair

Recommendations

The committee recommends the Revenue and Other Legislation Amendment Bill 2018 be passed.

1 Introduction

1.1 Role of the committee

The Economics and Governance Committee (the committee) is a portfolio committee of the Legislative Assembly.[1] The committee's areas of portfolio responsibility are:

- Premier and Cabinet, and Trade
- Treasury
- Aboriginal and Torres Strait Islander Partnerships, and
- Local Government, Racing and Multicultural Affairs.[2]

The committee is responsible for examining each bill in its portfolio areas to consider the policy to be given effect by the legislation and the application of fundamental legislative principles.[3]

1.2 Inquiry process

The Revenue and Other Legislation Amendment Bill 2018 (the Bill) was introduced into the Legislative Assembly and referred to the committee on 22 August 2018. The committee was required to report to the Legislative Assembly by 5 October 2018.

During its examination of the Bill, the committee:

- invited written submissions from the public, identified stakeholders and subscribers; a list of the 14 submissions received and accepted by the committee is at **Appendix A**
- received a public briefing from Queensland Treasury and the Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP) on 3 September 2018; a list of witnesses who appeared at the briefing is at **Appendix B**
- held a public hearing on Mornington Island on 12 September 2018 and another in Brisbane on 17 September 2018; a list of witnesses who appeared at these hearings is at **Appendix B**
- requested and received a written briefing from Queensland Treasury and DATSIP on the Bill and issues raised in submissions.

Copies of the material published in relation to the committee's inquiry, including submissions, correspondence from the departments, and transcripts are available on the committee's webpage.

1.3 Policy objectives of the Bill

According to the introductory speech of the Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships, the Hon Jackie Trad MP, the objective of the Bill is to amend Queensland's revenue legislation and other Acts administered through Queensland Treasury and DATSIP for particular purposes.[4]

The Bill proposes to amend:

- the *Duties Act 2001*, Duties Regulation 2013 and the *Taxation Administration Act 2001* to support an expansion of the transfer duty framework for electronic conveyancing in Queensland
- the *Taxation Administration Act 2001* to require charitable entities to include information about income and property in their constitutions

1 The committee was established on 15 February 2018 under the Parliament of Queensland Act 2001 (POQA) section 88 and the Standing Rules and Orders of the Legislative Assembly (Standing Orders), SO 194.

2 POQA, s 88; Standing Orders, SO 194, sch 6.

3 POQA, s 93(1).

4 Queensland Parliament, Record of Proceedings, 22 August 2018, p 1960.

- the *Duties Act 2001*, the *Land Tax Act 2010* and the *Payroll Tax Act 1971* to provide a retrospective legislative effect to certain beneficial administrative arrangements
- the *State Penalties Enforcement Act 1999* to create consistency in the Act following the introduction of a new service delivery model for the State Penalties Enforcement Registry by the *State Penalties Enforcement Amendment Act 2017*
- the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* to better capture and prohibit substances (such as turbo yeast) that can be used to make homemade alcohol in nine discrete Indigenous communities
- the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* to reinstate the 'last claim standing' provision as understood by decision-makers prior to the Supreme Court ruling in *Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships* [2017], and validate decisions made and actions taken where processes had already commenced under these Acts, and
- the *Cross River Rail Delivery Authority Act 2016* to make minor administrative changes, and the *Land Acquisition Act 1967* to expressly confirm that the Minister may endorse compulsory land acquisitions in relation to the Cross River Rail project.[5]

1.4 Government consultation on the Bill

The explanatory notes state that consultation on the amendments to support the expansion of electronic conveyancing (e-conveyancing) for transfer duty in Queensland was undertaken with the Department of Natural Resources, Mines and Energy and the Queensland Law Society. [6] The Office of State Revenue (OSR) also liaised with Property Exchange Australia Limited (PEXA) to ensure necessary system design changes can be made to align with the proposed amendments.[7]

According to the explanatory notes, consultation was also undertaken with the mayors of the nine Indigenous communities which have alcohol management plans containing a ban on homemade alcohol (Aurukun, Doomadgee, Kowanyama, Lockhart River, Mornington Island, Napranum, Pormpuraaw, Woorabinda and Wujal Wujal), community justice groups and DATSIP regional directors affected by proposed amendments to the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* and the consultation had 'not raised any issues'.[8] According to representatives of DATSIP, the response to this departmental consultation was: 'fairly quiet, which we are taking as a good thing'.[9]

In relation to amendment to the *Cross River Rail Delivery Authority Act 2016* and the *Acquisition of Land Act 1967*, consultation was undertaken with the Department of the Premier and Cabinet, the Department of Transport and Main Roads and the Department of Natural Resources, Mines and Energy.[10]

Public consultation was not undertaken concerning other revenue amendments in the Bill due to the 'technical and machinery nature' of the amendments.[11]

5 Explanatory notes, pp. 1-4.

6 Explanatory notes, p 18; Queensland Treasury and Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP), correspondence dated 3 September 2018, p 1.

7 Queensland Treasury and DATSIP, correspondence dated 3 September 2018, p 1.

8 Explanatory notes, p 18; public briefing transcript, Brisbane, 3 September 2018, p 7.

9 Public briefing transcript, Brisbane, 3 September 2018, p 7.

10 Explanatory notes, p 18.

11 Explanatory notes, p 18.

Concern was raised by the Nuga Nuga Aboriginal Corporation (NNAC) that it was not consulted in relation to proposed amendments to the *Aboriginal Cultural Heritage Act 2003* (ACHA) and the *Torres Strait Islander Cultural Heritage Act 2003* (TSICHA).[12] In response DATSIP stated it is currently considering a broader holistic review of the cultural heritage framework, at which point there would be 'an extensive consultation process and consideration of stakeholder feedback'.[13]

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

After examination of the Bill, including the policy objectives it is intended to achieve, and consideration of the information provided by the department, submitters and witnesses, the committee recommends that the Bill be passed.

Recommendation 1

The committee recommends the Revenue and Other Legislation Amendment Bill 2018 be passed.

12 Submission 2, p 6.

13 Queensland Treasury and DATSIP, correspondence dated 14 September 2018, p 9.

2 Examination of the Bill

2.1 Revenue legislation

2.1.1 Electronic conveyancing for land transactions

Background to electronic conveyancing for land transactions

E-conveyancing is a national online service through which documents required for property conveyancing can be digitally prepared, signed, settled and lodged. E-conveyancing can provide significant efficiencies in property conveyancing and is expected to replace many paper and manual processes that are currently used in traditional property transactions.[14]

Queensland adopted national framework provisions for e-conveyancing with the *Electronic Conveyancing National Law (Queensland) Act 2013*, from the New South Wales *Electronic Conveyancing (Adoption of National Law) Act 2012* (the National Law). The National Law enacts a national scheme to ensure consistency of legislation in all jurisdictions participating in e-conveyancing.[15]

Since the introduction of the National Law, parties can elect to use an Electronic Lodgement Network (ELN) to electronically settle certain transactions, as an alternative to attending a physical settlement. Certain Land Registry forms are created, digitally signed and lodged with the Registrar through a dedicated ELN workspace for the transaction, in the ELN system, as part of the settlement process.[16]

The *Payroll Tax Rebate, Revenue and Other Legislation and Amendment Act 2015* established the transfer duty and taxation administration framework to support e-conveyancing. At the time, the duty framework permitted only 'ELN transfers', with limitations on the scope of transfer duty concessions or exemptions applied. The Registrar now permits electronic lodgement of a broad range of land-based transactions through e-conveyancing.[17]

In order to participate in e-conveyancing, self-assessors must subscribe to an authorised ELN operator (ELNO). Property Exchange Australia Pty Ltd (PEXA) is currently the sole authorised ELNO in Queensland and the only network operator in Australia.[18] PEXA was formed in 2010 in response to a Council of Australian Governments' initiative to deliver a single national e-conveyancing service to the Australian property industry. PEXA is a limited company with key shareholders including the Victorian, New South Wales, Queensland and Western Australian governments, and a number of banks.[19]

Amendments to support expansion of e-conveyancing in Queensland

The Bill proposes supporting the Department of Natural Resources, Mines and Energy's expansion of e-conveyancing and supporting e-conveyancing transactions more generally by adjusting the duty framework to permit more land-based dutiable transactions to be accessed by registered self-assessors.[20] Amendment to the *Duties Act 2001* (Duties Act), Duties Regulation 2013 and the *Taxation Administration Act 2001* (Taxation Administration Act) will allow most land based dutiable transactions to be lodged and settled through e-conveyancing.[21]

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14 Explanatory notes, p 15.

15 Explanatory notes, p 19; the committee notes Tasmania, South Australia, the Australian Capital Territory and the Northern Territories have not joined the national scheme.

16 Explanatory notes, p 4.

17 Explanatory notes, p 5.

18 Queensland Treasury and DATSIP, correspondence dated 3 September 2018, 1; public hearing, Brisbane, 17 September 2018, p 2. PEXA informed the committee that there are plans to increase the number of ELNOs in Australia.

19 Property Exchange Australia, *About PEXA*, http://www.pexa.com.au

20 Hon Jackie Trad MP, Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Island Partnerships, Queensland Parliament, Record of Proceedings, 22 August 2018, p 1960; explanatory notes, p 5.

21 Hon Jackie Trad MP, Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Island Partnerships, Queensland Parliament, Record of Proceedings, 22 August 2018, p 1960.

The Duties Act will be amended to provide two distinct sub-categories of dutiable transactions for e-conveyancing purposes to cater for differences in transactions:

- *ELN transfers*—transfers of land with an antecedent qualifying agreement which are traditionally completed with a financial settlement, unless otherwise excluded; and
- *ELN lodgements*—all other land-based dealings that do not qualify as an ELN transfer, unless otherwise excluded.[22]

Amendments will also clarify that the electronic document lodged with the Registrar to effect an ELN transfer or an ELN lodgement will be known as an 'ELN transaction document'.[23] The definition of 'ELN transaction document' will be expanded to include a broader range of documents expected for registration as ELN lodgements.[24] Additional amendments to the Duties Act account for the distinct definitions of ELN transfer, ELN lodgement and ELN transaction document.[25]

The Duties Regulation 2013 will be amended to insert reference to ELN transfers and ELN lodgements.[26]

The Taxation Administration Act will be amended to reflect the new definition for ELN transaction document, as amended in the Duties Act.[27]

The Bill intends to extend the Commissioner of State Revenue (the Commissioner)'s benefit of a first charge over land to reflect the new, wider scope.[28] The Commissioner's benefit of a first charge over defined land applies to where the self-assessor has endorsed the transaction based on a payment commitment.[29] The amendments to definitions in the Duties Act at clause 14, to remove restrictions on the classification of land from the definition of 'relevant transfer agreement', will broaden eligible ELN transfers to settle all types of land under a payment agreement.

Stakeholder feedback and government response

The Property Council of Australia was supportive of the Bill, and of e-conveyancing in general:

> *E-conveyancing delivers a range of benefits for parties transacting property in Queensland ... significantly reduces the time taken to complete a transaction, lowers the risks associated with human error, and makes funds from property sales available much sooner than a standard paper transaction.*[30]

PEXA welcomed the introduction of the proposed amendments relating to e-conveyancing and made comment in their submission on a number of issues:

- there are benefits, including risk minimisation, to OSR accepting payments directly from a PEXA settlement, rather than have them directed to the self-assessor so that at settlement execution, the amount is paid directly to the predefined account of the Revenue Office
- non-monetary, or zero consideration transactions should be capable of electronic transfer, as they are in other states
- further amendment is recommended of the definition of ELN Transfer to refer to one transfer, thereby allowing an arrangement where two agreements in one settlement can be completed by two separate transfers by direction, each capable of assessment for duty

22 Bill, cls 8-9; explanatory notes, p 5.
23 Bill, cls 4-7, 10.
24 Bill, cl 14; explanatory notes, p 5.
25 Bill, cls 12-47, 49-50.
26 Bill, cls 51-53.
27 Bill, cls 81,85.
28 Queensland Treasury and DATSIP, correspondence dated 3 September 2018, p 1.
29 Bill, cl 14.
30 Submission 7, p 1.

- expansion to include all transfers capable of being lodged in paper should be in the scope of e-conveyancing, including the nomination of a transferee by the purchaser.[31]

The Property Council of Australia expressed support for the comments provided by PEXA in their submission to the Bill.[32]

The Queensland Law Society (QLS) supported the expansion of the transfer duty framework for e-conveyancing and also submitted that the expansion should allow for the payment of transfer duty directly to the OSR. According to the QLS, this would cut down on additional steps currently requiring a 'paper environment' and significant time spent on a process that could take seconds if processed electronically. The QLS claimed that the absence of this feature in the current system is currently negatively affecting the uptake of e-conveyancing in Queensland.[33]

At the public hearing, PEXA advised:

> *In other jurisdictions a commitment to pay results in payment from settlement directly to the relevant revenue office. In Queensland the commitment to pay results in an electronic transfer to the lawyer who is the self-assessor who will subsequently pay the revenue office. In the intervening period, funds are held by the lawyer not the state. Requirement to complete payment of duty after settlement erodes the efficiency for the lawyer who had otherwise completed all preparations and verifications prior to settlement. Additionally, the state loses the benefit of having earlier access to funds and the resulting interest which could be earnt on those funds.*[34]

In relation to allowing transfer duty payments directly from a PEXA settlement, Queensland Treasury stated it did not consider the measure appropriate as the arrangement 'would require significant changes to the self-assessor transfer duty framework, with unquantifiable risks to revenue'.[35] Queensland Treasury noted that payment may be finalised not only by cheque, but also using 'convenient' payment methods such as BPay, BPOINT, direct debit or online through OSRconnect.[36]

Queensland Treasury noted that non-monetary transactions and transfers by direction will not be prevented from being settled via e-conveyancing by the Bill's proposed amendments. Transfers by direction are only excluded from electronic settlement via the 'ELN transfer' category to ensure appropriate revenue protection.[37] The department also noted that transfers to a person other than the named purchaser are currently unable to be self-assessed by a registered self-assessor and are therefore outside the scope of e-conveyancing.[38]

In response to questions of data security, storage and authority, Queensland Treasury reassured the committee that PEXA is just one of a number of electronic systems involved in the e-conveyancing process in Queensland, namely: PEXA, OSR's revenue management system or OSRconnect, and the title registry system administered by the Department of Natural Resources, Mines and Energy. If data was compromised in the e-conveyancing process, revenue and duty would not be affected because those components are assessed outside of the e-conveyancing system by OSRconnect.[39] According to Queensland Treasury, in relation to duty:

> *… the arrangements between the solicitor and OSR and OSRconnect are very secure. There is not any possibility for that to be hacked into because of the secure connection.*[40]

31 Submission 6, pp 2-3.

32 Submission 7, p 1.

33 Submission 12, pp 2-3

34 Public hearing transcript, Brisbane, 17 September 2018, p 2.

35 Queensland Treasury and DATSIP, correspondence dated 14 September 2018, p 3.

36 Queensland Treasury and DATSIP, correspondence dated 14 September 2018, p 6.

37 Queensland Treasury and DATSIP, correspondence dated 14 September 2018, p 3.

38 Queensland Treasury and DATSIP, correspondence dated 14 September 2018, p 3.

39 Public briefing transcript, Brisbane, 3 September 2018, p 2.

40 Public briefing transcript, Brisbane, 3 September 2018, p 2.

On data security, PEXA informed the committee that:

> *PEXA is regulated by the registrar in each state. It is required to comply with operating requirements. Operating requirements are set at a national level and then implemented by each state. Those requirements require PEXA to meet various standards of security for the network as a whole, including in relation to data.*
>
> *There are obligations, for example, that all data in relation to the electronic lodgement network must be held on shore. No data is to be retained by PEXA outside of Australia. There are requirements to maintain an information security management system and submit to yearly audits in relation to our data security or information management. The results of those audits are returned to the state or the states collectively as part of our annual compliance submission.*
>
> *Additionally, we also have contractual obligations with various parties in relation to our data security which requires us to undergo some audits in accordance with international standards—SOC 2 audits—and various attack and penetration testing that is undertaken by third parties. The results of those are also recorded at least annually.*[41]

Committee comment

The committee acknowledges that the Bill's proposed amendments to revenue legislation support the expansion of e-conveyancing and should be viewed as part of a staged approach to the implementation of e-conveyancing in Queensland.

2.1.2 Charitable institution registration administration

Background to charitable institution registration administration

Entities registered as charitable institutions under the Taxation Administration Act may be eligible for duty, land tax and payroll tax exemptions. Depending on an institution's circumstances, eligibility for these exemptions can be of significant value, particularly if an entity is liable for land tax or payroll tax, both of which are imposed on a recurring periodic basis.[42]

Pursuant to section 149C(5) of the Taxation Administration Act, an entity generally must not be registered for duty, land tax or payroll tax exemptions 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.[43]

41 Public hearing transcript, Brisbane, 17 September 2018, p 2.

42 Explanatory notes, p 12.

43 Taxation Administration Act 2001, s 149C(5).

Currently, the entity may be registered if the *practical effect* of its constitution or other government instrument, within the framework of the relevant statutory and common law rules, is that these requirements are satisfied. Express provision is not required. This was confirmed in 2015 by the *Supreme Court of Queensland in Queensland Chamber of Commerce Industry Ltd v Commissioner of State Revenue* [2015] (QCCI decision).[44]

In the wake of the QCCI decision, Queensland Treasury asserts that:

> *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 section 149C(5) of the Taxation Administration Act.*[45]

Amendments to charitable institution registration administration

Clause 83 of the Bill proposes amending the Taxation Administration Act at section 149C to require that an entity must 'expressly provide' the restrictions set out in the Act in its constitution or other governing instrument. The definition of constitution in section 149C is also to be amended, at clause 83(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.[46]

The Bill's amendments propose to 'merely restore' the intended operation of the registration provisions and reinstate what has been a 'longstanding practice'.[47]

Queensland Treasury officials informed the committee that only charitable institutions who registered for duty exemption with the OSR after the QCCI decision in 2015 will be required to amend their constitutions. As at 14 September 2018, the department had identified 82 affected institutions.[48]

The Bill proposes transitional provisions to allow entities a 'reasonable amount of time' to make amendments to their constitution. Generally, entities will have six months to amend, while entities governed by statute will have eighteen months to amend, in recognition of the more complex processes required to amend legislation.[49]

Setting aside the 82 identified affected charities, the total number of charities operating in Queensland is unknown. The department emphasised that the amendment relates to charities *seeking* certain state tax exemptions so that, while there may be any number of charities operating in Queensland, it is only when they approach the OSR for tax exemption will they be required to have appropriate wording in their constitutions in order to obtain registration.[50] Queensland Treasury described the process of registration from point of contact:

> *Our practice generally at that point is: if it is not in their constitution, we will tell them it needs to be in their constitution. They will go away and put it in their constitution, and then we will register them. That is what we do today. That is what we have always done. This court case [the QCCI decision] said that it did not need to be in their constitution, so the amendment reinstates our practice and our understanding of the law, which was that it needed to be in the constitution.*[51]

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44 Queensland Treasury and DATSIP, correspondence dated 3 September 2018, p 4; *Queensland Chamber of Commerce and Industry Ltd v Commissioner of State Revenue* [2015] QSC 77.

45 Explanatory notes, p 12.

46 Bill, cl 83.

47 Queensland Treasury and DATSIP, correspondence dated 14 September 2018, p 5.

48 Queensland Treasury and DATSIP, correspondence dated 14 September 2018, p 5.

49 Bill, cl 84; Queensland Treasury and DATSIP, correspondence dated 3 September 2018, p 1.

50 Public briefing, Brisbane, 3 September 2018, p 4.

51 Public briefing, Brisbane, 3 September 2018, p 4.

Stakeholder feedback and government response

The QLS questioned the purpose of the amendments relating to registered charities and submitted that the legislation as it stands, along with the QCCI decision, provides sufficient certainty needed for the definition of a charitable institution. They added that the proposed amendments will place a burden on current charities.[52]

Queensland Treasury's process of registration, described above, was referred to during the public hearing when the QLS submitted that there are 'unintended consequences in what might appear to be a neat administrative fix' in the Bill's provisions. For example, when an established charity acquires a new headquarters in Queensland and applies for registration, it may be ineligible for duty exemption because it was undertaking charitable activities prior to application and had not made the necessary amendments to their constitution. The QLS predicted a need for future retrospective amendments to this legislation, 'when we see some unintended consequences of household name charities needing to pay duty when they thought they did not have to because they had not made the prescribed changes to their constitutions'.[53]

During the public hearing the QLS drew the committee's attention to the requirement that a constitution must expressly provide terms identical to the language of the statute, and raised concern that this prescriptive language will not take into account how it may be applied to charitable trusts, because charitable trusts do not have members.[54] The QLS expressed caution over:

> *… the danger of prescribing a particular form of words rather than that being the substantive effect of the provisions of the constitution, which is the law at the moment*.[55]

The Australian Charities and Not-for-profits Commission (ACNC)[56] advised that the proposed requirements for express wording in the Bill will result in a situation where Queensland charities will have different wording in their constitutions to the ACNC template governing documents. The ACNC submitted that these differences 'are likely to raise questions for Queensland charitable institutions that have adopted an ACNC template document as to whether amending its constitution to comply with s149C(5) will have an adverse effect on its registration with the ACNC'.[57] The QLS also expressed concern over this possible outcome.[58]

Queensland Treasury responded that, as this would have been the situation for many years prior to the QCCI decision, the department 'is not aware of widespread concern' amongst charities that amending their constitution would have an adverse effect on their ACNC registration.[59]

The ACNC supported the formation of a common definition of 'charity' in all Australian jurisdictions based on the definition of charity in the Commonwealth legislation.[60] Queensland Treasury noted ACNC's suggestion but stated that the proposal was beyond the scope of the current Bill.[61]

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52 Submission 12, p 8.

53 Public hearing, Brisbane, 17 September 2018, p 22.

54 Public hearing, Brisbane, 17 September 2018, p 55.

55 Public hearing, Brisbane, 17 September 2018, p 22.

56 The Australian Charities and Not-for-profits Commission (ACNC) registers and regulates charities under federal legislation, the *Charities Act 2013* (Cth). The Charities Act requires charities to be not-for-profit, but does not mandate how a charity must demonstrate this in its governing rules. The ACNC provides template constitutions and template rules for charitable companies and associations.

57 Submission 1, p 2.

58 Submission 12, p 8.

59 Queensland Treasury and DATSIP, correspondence dated 14 September 2018, p 2.

60 Submission 1, p 3.

61 Queensland Treasury and DATSIP, correspondence dated 14 September 2018, p 2.

QLS expressed concern that the policy intent of the Bill may be to tighten the availability of state revenue concessions. In response, Queensland Treasury confirmed that:

> *…the amendments are not intended to narrow the availability of State revenue concessions. They are solely to restore the intended policy position.*[62]

The ACNC and the QLS also submitted that the transitional period was insufficient. For example, the ACNC stated:

> *Six months is a very short period for charities to ascertain if a change is required and then have the changes approved at a general meeting. This is particularly true for small charities or charities operated solely by volunteers.*[63]

Queensland Treasury responded by advising that 'current transitional periods are appropriate in light of the common administrative requirements for amending a constitution'.[64] Accordingly, the committee was informed that:

> *The Office of State Revenue will write to each of the affected charities notifying them of the change and giving them information about the time within which they have to comply. There will also be communication at an industry-wide level with charities.*[65]

However, the Queensland Treasury also advised that 'if the government considers that a longer period is appropriate this would not create administrative difficulties for OSR'.[66]

Committee comment

The committee notes the uncertainty surrounding the status of charitable trusts already registered in Queensland, which may no longer be eligible for duty exemption after the Bill is passed, as a result of non-compliance with the amended provisions of section 149C. The Deputy Premier and Treasurer may wish to clarify this issue during the second reading of the Bill in the Legislative Assembly.

2.1.3 Retrospective effect to beneficial administrative arrangements

Background to retrospective effect to beneficial administrative arrangements

The Bill seeks to provide retrospective legislative effect to beneficial administrative arrangements already in operation after public rulings were made by the Commissioner. Public rulings are the Commissioner's interpretation of laws administered by Queensland Treasury. The rulings intend to clarify the application of potentially ambiguous provisions in legislation.[67]

Transfer duty concession

The Duties Act imposes transfer duty on the dutiable value of transactions, unless an exemption or concession applies. A transfer duty concession is available for certain dutiable transactions between specified family members which relate to business property used to carry on particular family businesses of primary production.

For the purposes of the family primary production business concession, 'business property' is defined in the Duties Act to encompass only land and personal property. Other types of dutiable property that may be used to carry on a primary production business (for example, business assets) are not covered by the family primary production business concession.

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62 Queensland Treasury and DATSIP, correspondence dated 14 September 2018, p 3.

63 Submission 1, pp 2-3.

64 Queensland Treasury and DATSIP, correspondence dated 14 September 2018, p 2.

65 Public briefing, Brisbane, 3 September 2018, p 3.

66 Queensland Treasury and DATSIP, correspondence dated 14 September 2018, p 2.

67 Queensland Treasury, *Public rulings and royalty rulings*, https://www.treasury.qld.gov.au/taxes-and-royalties/public-rulings/

From 12 October 2016, an administrative arrangement has operated to extend the family primary production business concession to cover all dutiable property used to conduct a primary production business.[68]

Exempt managed investment schemes

Under the Duties Act, transfer duty is imposed on the acquisition or surrender of a trust interest in a trust that directly or indirectly holds dutiable property. However, dealings in a public unit trust (PUT) that holds or has an interest in dutiable property are generally exempt from duty.

The Duties Act provides five categories of PUT, including pooled public investment unit trusts (PPIUTs). To qualify as a PPIUT, a unit trust must satisfy certain conditions in section 75 of the Duties Act, including that it must be either a registered managed investment scheme (registered scheme), an exempt managed investment scheme (exempt scheme) or a pooled superannuation trust.

An administrative arrangement approved on 9 August 2017 has enabled the Duties Act to be administered on the basis that deregistered managed investment schemes may be treated as an exempt scheme, in particular circumstances and subject to certain conditions. A deregistered managed investment scheme that is treated as an exempt scheme will qualify as a PPIUT if it satisfies the conditions in section 75 of the Duties Act.[69]

Landholder duty provisions

Under the Duties Act, landholder duty is imposed on relevant acquisitions by a private landholder (unlisted corporation) or a public landholder (listed corporation or listed unit trust).

For a relevant acquisition by a private landholder, landholder duty is imposed on the dutiable value of the relevant acquisition. Under section 179 of the Duties Act, the dutiable value is generally calculated by multiplying the unencumbered value of the landholder's Queensland land-holdings by the interests that make up the relevant acquisition. However, certain interests are disregarded or excluded under section 179 of the Duties Act.

In order to ensure that landholder duty is properly calculated, an administrative arrangement was approved on 22 August 2017 which has enabled the Duties Act to be administered on the basis that an incorrect cross-reference in section 179 is corrected.[70]

Deceased estate land

Under the *Land Tax Act 2010* (Land Tax Act), land tax is imposed on all freehold land in Queensland as at midnight 30 June each year, unless an exemption applies. The owner of land is generally liable to pay land tax on the taxable value of their taxable land.

If a liability for land tax arises on land that is part of a deceased estate, the executor or administrator of the estate is usually the owner under the Land Tax Act. However, despite the provisions of the Land Tax Act, it is intended that the deceased, and not the executor or administrator, is generally taken to be the owner of the land until the administration of the deceased's estate is complete, to ensure that the lower land tax rates and higher tax-free thresholds for individuals continue to apply during administration. Additionally, it is intended that exemptions that were available to the deceased (such as the home exemption) continue to apply for the financial year immediately following the death of the deceased, unless the land starts to be used in a way that is contrary to the policy underpinning the relevant exemption.[71]

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68 This administrative arrangement was published as Public Ruling DA105.3.1 *Extension of concession for dutiable transactions for family businesses of primary production*; explanatory notes, p 8.

69 This administrative arrangement was published in Public Ruling DA075.3.1 *Certain deregistered managed investment schemes may be treated as an exempt managed investment scheme*; explanatory notes, p 9.

70 This administrative arrangement was published as Public Ruling DA179.1.1 *Landholder duty—dutiable value of relevant acquisition in a private landholder*; explanatory notes, p 10.

71 Explanatory notes, p 11.

This policy position is longstanding, dating back to the *Land Tax Act 1915*. The provisions of the *Land Tax Act 1915* supported the intended policy and there was no intention for deceased estate land to be assessed differently under the current Land Tax Act. An approved administrative arrangement has enabled the Land Tax Act to continue to be administered on this basis.[72]

Payroll tax exemption for motor vehicle allowances

The *Payroll Tax Act 1971* (Payroll Tax Act) imposes payroll tax on taxable wages paid or payable in a financial year. Wages include allowances paid or payable by an employer. However, a motor vehicle allowance paid or payable to an employee during a return period is only taxable to the extent that it exceeds the exempt component.

The exempt component is calculated by reference to the rate prescribed under the *Income Tax Assessment Act 1997* (Cwlth) (ITAA) for calculating a deduction for car expenses for a large car. This rate no longer exists as the Commonwealth amended the ITAA to replace the separate rates for small, medium and large cars with a single rate determined by the Federal Commissioner of Taxation from the 2015-16 year onwards (federal single rate).

An administrative arrangement approved on 1 December 2016 has enabled the Payroll Tax Act to be administered on the basis that, for motor vehicle allowances paid or payable on or after 1 July 2016, the exempt component is calculated by reference to the federal single rate.[73]

Amendments to provide retrospective effect to administrative arrangements

The Bill proposes amendments to the Duties Act in order to:

- extend the transfer duty concession for family businesses of primary production to all types of dutiable property used to conduct a primary production business[74]
- ensure that certain deregistered managed investment schemes can be treated as exempt managed investment schemes to gain exemption from duty in particular circumstances and subject to certain conditions,[75] and
- correct a cross-reference in the landholder duty provisions to ensure that landholder duty is properly calculated.[76]

The Bill proposes amendment to the Land Tax Act in order to:

- ensure that deceased estate land is assessed for land tax as intended.[77]

For this purpose, the Bill would amend the Land Tax Act to provide retrospective effect to the longstanding assessment practice in respect to deceased estates, such that the deceased is generally taken to be the owner of land until the administration of the deceased's estate is complete. Exemptions available to the deceased will continue to apply for the financial year immediately following the deceased's death, provided the land is not used for a different purpose.[78]

The Bill proposes amendment to the Payroll Tax Act to:

- update the rate used to calculate the exempt component of a motor vehicle allowance, ensuring that payroll tax can be correctly calculated.[79]

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72 Explanatory notes, p 11.

73 Explanatory notes, p 11.

74 Bill, cl 50.

75 Bill, cl 11.

76 Bill, cl 48.

77 Bill, cls 55-56.

78 Bill, cls 55-56; explanatory notes, p 11

79 Bill, cls 58-59.

The Bill would amend the Payroll Tax Act to give retrospective legislative effect to an administrative arrangement such that for motor vehicle allowances paid or payable on or after 1 July 2016, the exempt component is calculated by reference to a single rate determined by the Federal Commissioner of Taxation for the financial year immediately preceding the financial year in which the allowance is paid or payable.[80]

Stakeholder feedback

The QLS expressed support for the Bill's proposed amendments to the Duties Act, Land Tax Act and Payroll Tax Act to give retrospective legislative effect to beneficial administrative arrangements. The QLS considered the introduction of retrospective legislation in this Bill to be appropriate where the amendments are 'clearly beneficial to the taxpayer'.[81]

2.1.4 Reform of State Penalties Enforcement Registry service delivery

Background to reform of State Penalties Enforcement Registry service delivery

The *State Penalties Enforcement Amendment Act 2017* introduced a new service delivery model for the State Penalties Enforcement Registry (SPER). Key features of the new service delivery model include:

- enhanced information sharing between SPER and other prescribed agencies
- non-monetary debt finalisation options for people in hardship, including the introduction of work and development orders, and
- changes to the case management of debtors.[82]

Amendment to State Penalties Enforcement Act 1999 and related legislation

The Bill intends to support the implementation of the new service delivery model for SPER.

Parts 6 and 7 of the Bill propose technical amendments to address inconsistencies between sections of the *State Penalties Enforcement Act 1999* (SPE Act) and the *State Penalties Enforcement Amendment Act 2017*.[83] The amendments aim to ensure that the SPE Act accurately and precisely reflects the new service delivery model and objectives introduced by the *State Penalties Enforcement Amendment Act 2017*.[84]

The requirement for these amendments has primarily arisen from changes made to the SPE Act to introduce the new SPER service delivery model. Amendments relate to the introduction and operation of non-monetary debt finalisation program (work and development orders), which is a key element of SPER's new service delivery model for debtors who are experiencing genuine hardship.

There are minor technical changes relating to the case management of debtors and consistent arrangements for the registration of different debt types with SPER.[85] These changes also propose to amend the *Victims of Crime Assistance Act 2009* (Victims of Crime Assistance Act) by providing for debts referred by Victims Assist Queensland (VAQ) to be treated as defaulted court debts on registration, leading to the issue of an enforcement order, without the need to first issue a court debt payment notice.[86]

80 Bill, cl 59; explanatory notes, p 11.
81 Submission 12, p 3.
82 State Penalties Enforcement Amendment Bill 2017, explanatory notes, p 1.
83 Bill, cls 60-75, 76-79.
84 Explanatory notes, p 2.
85 Bill, cls 63, 67, 70; explanatory notes, p 2.
86 Bill, cls 86-87; explanatory notes, p 13; Queensland Treasury and DATSIP, correspondence dated 3 September 2018, p 5.

In relation to the proposed amendments to the *Victims of Crime Assistance Act 2009*, Queensland Treasury assured the committee that the amendments would not adversely affect victims of crime as they only relate to administrative processes:

> *The administrative scheme here is that the state, the VAQ, pays the victims of violent crime a certain amount under the administrative scheme. That person receives their payment. This is a debt to the state from the offender. Victims Assist Queensland is recovering on behalf of the state.*[87]

The committee did not receive stakeholder feedback on the Bill's proposed amendments to the SPE Act and other related amendments.

2.2 Legislation relating to alcohol restrictions in Queensland Indigenous communities

2.2.1 Background to alcohol restrictions in Queensland Indigenous communities

Alcohol restrictions are in place in 19 discrete Aboriginal and Torres Strait Islander communities across Queensland. These restrictions ban or limit the amount and type of alcohol brought into a community. Alcohol restrictions range from a total ban on alcohol, home-brew and home-brew equipment, to limited quantities of light or mid-strength beer.[88] These restrictions are outlined in each discrete community's Alcohol Management Plan (AMP), which is regulated under the *Aboriginal and Torres Strait Islander Communities (Justice, Land and Other Matters) Act 1984* (JLOM Act) and the *Liquor Act 1992*.

Homemade alcohol offences currently apply in eight communities with a total ban on alcohol (Aurukun, Kowanyama, Lockhart River, Mornington Island, Napranum, Pormpuraaw, Woorabinda and Wujal Wujal) and one prescribed community area which has restrictions on the amount of alcohol a person can have (Doomadgee).[89]

It is an offence under the *Liquor Act 1992* to possess or attempt to bring alcohol into declared Indigenous communities in excess of the carriage limit set by the alcohol restrictions.[90]

The JLOM Act includes prohibitions in communities with a zero-carriage limit and prescribed community areas relating to the possession of a home-brew kit and home-brew concentrate, supply of home-brew concentrate, possession of homemade alcohol and supplying homemade alcohol to another person.[91]

The explanatory notes maintain that despite the prohibitions in place, homemade alcohol remains a significant issue in these communities. There is relatively easy access to low-cost ingredients to make homemade alcohol including fruit juice, sugar and increasingly, turbo yeast. Turbo yeast is a form of yeast and nutrient pack specifically designed to produce alcohol in bulk. [92]

At the public briefing, DATSIP advised that turbo yeast:

> *…enables brewing at a much higher concentrate and much faster, so it can produce higher volumes at higher levels of alcohol and in much quicker times—up to 48 hours, whereas a normal brewing process can take a number of weeks. It speeds up the supply of quite dangerous levels of alcohol into communities.*[93]

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87 Public briefing, Brisbane, 3 September 2018, p 4.

88 Queensland Government, 'About community alcohol restrictions', https://www.qld.gov.au/atsi/driving-transport/community-alcohol-restrictions/about-community-alcohol-restrictions

89 Explanatory notes, p 2.

90 Liquor Act 1992, s 168C.

91 JLOM Act, s 38

92 Explanatory notes, p 2.

93 Public briefing transcript, Brisbane, 3 September 2018, p 8.

Meaning of 'home-brew concentrate'

The meaning of 'home-brew' concentrate as contained in the current JLOM Act was questioned when three people were each charged with possessing 'home-brew concentrate', namely yeast, on Mornington Island, contrary to the JLOM Act. [94]

The appellants admitted the facts necessary to prove the charges. In each case there was no dispute either that the appellants had yeast in their possession or that they intended for yeast to be used on the island to make home-brew alcohol. However, they contested the prosecution case on the basis that yeast did not fall under the definition of 'home-brew concentrate' as defined by the JLOM Act in that it was not 'a substance, that includes malt and hops, ordinarily used to brew beer'.[95]

In *Rockland & Ors v Queensland Police Service* [2013] (Rockland decision),[96] the Queensland District Court considered whether the possession of yeast should be interpreted as a 'home-brew concentrate' as defined in the JLOM Act, extending the definition to a substance that is not malt and hops. The court found that the definition did not include yeast as a 'home-brew concentrate' used to make alcohol, similar to malt and hops, despite evidence received by the court to indicate that yeast can be fermented to produce ethanol, or alcohol.[97]

According to the explanatory notes to the Bill, the Rockland decision highlighted that some substances (such as turbo yeast) are not captured in the definition of 'home-brew concentrate' because it does not include malt and hops.[98]

DATSIP has identified homemade alcohol as a 'particularly significant issue' in the Mornington Island community, resulting in serious health consequences including fatalities, and is an issue in other communities during the wet season (as noted by hospitals and mental health services). Mornington Shire Council has specifically identified the use of turbo yeast in the production of homemade alcohol as a significant concern for the community.[99]

2.2.2 Prohibiting substances for the making of homemade alcohol

The Bill applies to the nine relevant discrete communities - the eight AMP communities with zero carriage limits and Doomadgee (as a prescribed community area).

The Bill proposes to address the gap in the definition of 'home-brew concentrate' in section 38 of the JLOM Act to include the possession of substances or a combination of substances, other than 'home-brew concentrate', used with the intention of making homemade alcohol. An existing complementary offence provision is provided in relation to possessing equipment or components of equipment.[100]

The new offence provision is not intended to capture the possession of a substance or combination of substances used for their original purpose (for example yeast, sugar, fruit juice). The offence will be triggered by the intention of a person to use the substance or combination of substances in a way that is not for their original purpose, for example, discovery of large quantities of substances being fermented.[101]

Stakeholder feedback

The Cape York Land Council Aboriginal Corporation supported the objectives of the Bill that capture and prohibit substances that can be used to make homemade alcohol in Cape York communities.[102]

94 Rockland & Ors v Queensland Police Service [2013] QDC 61.
95 Rockland & Ors v Queensland Police Service [2013] QDC 61.
96 Rockland & Ors v Queensland Police Service [2013] QDC 61.
97 Rockland & Ors v Queensland Police Service [2013] QDC 61.
98 Explanatory notes, p 3.
99 Queensland Treasury and DATSIP, correspondence dated 3 September 2018, p 5.
100 Explanatory notes, p 33.
101 Explanatory notes, p 33.
102 Submission 4, p 1.

During the public hearing on Mornington Island on 12 September 2018, there were differing views on the effectiveness of the proposed changes to the legislation.

Some stakeholders were concerned that the provision to capture substances other than 'home-brew concentrate' was too vague, and it was suggested that if the goal is to ban turbo yeast, then the proposed provision should be specific to turbo yeast. For example, Ms Susan Sewter stated:

> *If it is about turbo yeast then it has to be specific otherwise we are going into a grey area.*
>
> *…it has to be specific because from what you are saying the legislation at the moment is very vague. There is no protection for people.*[103]

On the impact of turbo yeast in particular, Mr Frank Mills, CEO of Mornington Shire Council advised the following:

> *We have had turbo yeast based home-brew analysed. There is no sugar left in it. It is converted to alcohol and ethanol. It has 27,000 times the amount of ethanol as there would be in a standard drink. Whilst it may taste sweet, there is essentially no sugar left in it. It is not the sugar content that is creating issues with people's health, it is actually the toxicity of what they are drinking that is causing organ failure. That is how serious it is.*[104]

However, the committee heard evidence from a local Elder about a recipe shared by six year old children for homemade alcohol that does not use turbo yeast, but instead requires sugar, Vegemite, cordial and water. The committee also heard evidence of people being sold home-brew for as much as $500 for a 10 litre container.[105]

The Queensland Police Service argued in relation to the proposed amendment:

> *…it has to be general to cover all those different ingredients. Turbo yeast is a big problem for the community because it happens so quickly. People can brew quickly. It is a quick changeover of the alcohol basically. If turbo yeast were taken away it takes longer but there is still a problem because it can still be made.*[106]

Concerns about the vague nature of the provision extended to concerns about proving intent, particularly in relation to household items such as sugar. For example, Ms Sewter argued:

> *You can suspect that people are making home-brew—however you get that information—but how do you put it altogether when you get into the house? How can you safely say that that person is going to make home-brew? You may see sugar. You could be using that barrel to carry water. To me it is just making assumptions.* [107]

On the matter of intent, the Queensland Police Service, advised:

> *…intent is a state of mind…if you had juice and Vegemite at home and we were to come in for some reason and we saw that, we would have to talk to you about it. We would have to ask you questions about it. We cannot just all of a sudden put you before the court in relation to those few ingredients. Turbo yeast is a different story.*[108]

The Queensland Police Service also advised 'One of the big things with the legislation that they are proposing is that it covers turbo yeast. Turbo yeast is not something that you can use to cook'.[109]

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103 Public hearing transcript, Mornington Island, 12 September 2018, p 3.
104 Public hearing transcript, Mornington Island, 12 September 2018, p 9.
105 Public hearing transcript, Mornington Island, 12 September 2018, p 7.
106 Public hearing transcript, Mornington Island, 12 September 2018, p 4.
107 Public hearing transcript, Mornington Island, 12 September 2018, p 3.
108 Public hearing transcript, Mornington Island, 12 September 2018, p 4.
109 Public hearing transcript, Mornington Island, 12 September 2018, p 3.

Mr Frank Mills proposed support for the broad definition and the requirement to show intent included in the Bill, stating:

> *The definition of substance under the legislation can be turbo yeast or the next product or the product after or the product after or the product after. Whilst it is wide to some degree it also covers the potential for other substances apart from turbo yeast to be used in home-brew.*
>
> *I am fairly confident around intent and the way the legislation specified that it is not about those people who go to the shop and buy sugar, cordial, fruit juice, Vegemite and all those household staples. It is about a combination of those ingredients and others being used to produce home-brew. There are two ways of looking at it. One is that this is taking a lot of control away from us and it is very broad, but it is actually legislation that allows for changes of circumstances and changes of ingredients.*[110]

Stakeholders also raised concerns that the proposed provision is a 'bandaid' solution to the problems on Mornington Island, and it was suggested that the AMP should be amended to allow alcohol onto the island. For example, Ms Sewter stated:

> *We cannot just sit down and talk about this one piece of legislation because that is just a bandaid. It is another bandaid that you are putting on in this community.*[111]

Concerns were also raised that people would find substitutes to homemade alcohol. For example, Mr Richard Sewter stated:

> *Prohibition forced this on people. People are going to find a substitute, no matter what it is. Do you know what the next thing is going to be here? It is going to be ice. They are going to be on ice and then we will have more problems in the community. You will not have to worry about turbo yeast or anything else there will be harder drugs in this community.*[112]

Mr Sewter provided the following example to support his concerns:

> *They brought in Opal fuel. Some of our kids are scientists and they put a bit of coke [cola] in it and it lifts the octane. It is as simple as that. That is what I have been saying about a substitute. If you take one thing away, there is going to be a substitute—no matter what.*[113]

That view was echoed by the Mayor of Mornington Shire Council, Cr Bradley Wilson.[114]

In support of the proposed amendments, Mr Mills advised that banning turbo yeast and other products was part of a three step process developed by the Mornington Shire Council as published in the Mornington Shire Council's 2017 strategic review of the AMP for Mornington Island. The strategic review also identified the need for a service delivery review and a strategy for the reintroduction of alcohol.[115]

Further to this, Cr Sarah Isaacs stated:

> *This legislation came from us in the beginning. This is what we wanted. We wanted to get turbo yeast off the table. At the end of the day, that is the ingredient that is causing all these health issues. The police cannot do anything about that at the moment. This legislation is going to allow us to have some impact on monitoring that and policing for turbo yeast.*
>
> *…*

110 Public hearing transcript, Mornington Island, 12 September 2018, p 4.

111 Public hearing transcript, Mornington Island, 12 September 2018, p 9.

112 Public hearing transcript, Mornington Island, 12 September 2018, p 5.

113 Public hearing transcript, Mornington Island, 12 September 2018, p 11.

114 Public hearing transcript, Mornington Island, 12 September 2018, p 10.

115 Public hearing transcript, Mornington Island, 12 September 2018, p 5; Mornington Shire Council, Mornington Shire Council Alcohol Management Plan: Strategic Review, September 2017.

This is just that one little piece of the puzzle that we have to fill now to continue this journey that we have started as a council. This is everything that the community has come forward to us about. This is part of the three-step process to get alcohol reintroduced into this community. This is just one piece of the puzzle.

It is not just about the bad stuff that you are all talking about. I hear your frustrations. This is also about the little things too in terms of the social impact. Turbo yeast does speed up the process. It could take from one week to a couple of days. For that whole week you have kids out on the street fighting each other and everything else. This is going to lessen that process as well. It gives us time.[116]

Committee comment

The committee notes the differing views on the proposed changes to the JLOM Act to capture substances that do not come under the definition of 'home-brew concentrate', particularly in relation to intent, and the concerns that homemade alcohol will be replaced by another substance.

While the committee acknowledges the broader argument for alcohol to be reintroduced into the community as a means of addressing such issues, the committee also considers that such an argument is outside the scope of the provisions under consideration, which are a specific measure to assist the intent of the AMP.

However, the committee also notes stakeholder support for the proposed amendments to the JLOM Act to form part of the foundation for the reintroduction of alcohol into the community at a future date.

The committee also notes the impacts of turbo yeast on the community, including the significant health impacts due to the toxicity of alcohol brewed using turbo yeast. Given that the only purpose of turbo yeast is to create alcohol, unlike household products such as Vegemite, sugar or fruit juice, the committee considers that if a person is found in possession of turbo yeast, the legislation should assume an intent to make homemade alcohol. Therefore, the committee considers that turbo yeast or any other yeast designed for the production of alcohol should be referred to separately as a substance that is an offence to possess, along with 'home-brew concentrate', in the JLOM Act.

2.3 Legislation relating to cultural heritage management

2.3.1 Background to Indigenous cultural heritage management

The *Aboriginal Cultural Heritage Act 2003* (ACHA) and *Torres Strait Islander Cultural Heritage Act 2003* (TSICHA) require anyone who carries out a land use activity to exercise a duty of care in relation to the recognition, protection and conservation of Aboriginal and Torres Strait Islander cultural heritage.

Cultural heritage duty of care

Land users must take all reasonable and practicable measures to ensure their activity does not harm Aboriginal or Torres Strait Islander cultural heritage. Consultation with the Aboriginal or Torres Strait Islander party for an area may be necessary if there is a high risk that the activity may harm Aboriginal or Torres Strait Islander cultural heritage. There are fines for causing unlawful harm to Aboriginal and Torres Strait Islander cultural heritage or for breaching the duty of care.[117]

A cultural heritage duty of care can be met by acting in compliance with:

- gazetted cultural heritage duty of care guidelines
- an approved Cultural Heritage Management Plan (CHMP), developed under ACHA and TSICHA

116 Public hearing transcript, Mornington Island, 12 September 2018, p 12.

117 ACHA, s 24, Part 7.

- a native title agreement or another agreement with an Aboriginal or Torres Strait Islander party that addresses cultural heritage
- native title protection conditions – but only if the conditions address cultural heritage.[118]

In order to meet a cultural heritage duty of care it is very important that a land user consults the correct Aboriginal or Torres Strait Islander party in the area. The ACHA and TSICHA defines the term 'native title party' for an area at section 34. The intent of the section is to take advantage of the native title claims process established under the Commonwealth *Native Title Act 1993* (Cth) (NTA) to provide certainty to all persons in the identification of the appropriate Aboriginal or Torres Strait Islander people to be involved in the assessment and management of cultural heritage.[119]

Definition of native title party

Section 34(1) of the ACHA and TSICHA describes 'Native title party for an area' as:

> (1) Each of the following is a native title party for an area—
>
> (a) a registered native title claimant for the area;
>
> (b) a person who, at any time after the commencement of this section, was a registered native title claimant for the area, but only if—
>
> (i) the person's claim has failed and—
>
> (A) the person's claim was the last claim registered under the Register of Native Title Claims for the area; and
>
> (B) there is no other registered native title claimant for the area; and
>
> (C) there is not, and never has been, a native title holder for the area;
>
> or
>
> (ii) the person has surrendered the person's native title under an indigenous land use agreement registered on the Register of Indigenous Land Use Agreements; or
>
> (iii) the person's native title has been compulsorily acquired or has otherwise been extinguished;
>
> (c) a registered native title holder for the area;
>
> (d) a person who was a registered native title holder for the area, but only if—
>
> (i) the person has surrendered the person's native title under an indigenous land use agreement registered on the Register of Indigenous Land Use Agreements; or
>
> (ii) the person's native title has been compulsorily acquired or has otherwise been extinguished.

The ACHA provides that a corporation may also be registered as an Aboriginal Cultural Heritage Body for an area where the native title parties in the area agree that the corporation should be registered.[120] The same provisions apply for the TSICHA.[121]

The meaning of 'native title party' for an area was affected by a decision of the Supreme Court in November 2017 in a claim made by the Nuga Nuga Aboriginal Corporation (NNAC). The decision affected the continued recognition of previously-registered native title claimants as 'native title parties' for their former claim areas.

118 Aboriginal Cultural Heritage Act 2003, s 23.

119 Aboriginal Cultural Heritage Bill 2003, explanatory notes, p 14.

120 ACHA, s 36.

121 TSICHA, s 36.

Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships [2017]

An application was made to the Minister for Aboriginal and Torres Strait Islander Partnerships for the registration of the NNAC as an Aboriginal Cultural Heritage Body. The Minister refused the request on the basis that an affected native title party did not agree to NNAC's registration. The affected native title party was a former registered native title claimant, whose claim to native title had failed in 2014 when the court found no native title existed in the claim area.

NNAC sought judicial review of the Minister's decision to refuse registration, arguing that the former registered claimant did not qualify as a native title party under the 'last claim standing' rule as there had previously been an established native title holder, in common law (at sovereignty), for the area. The Supreme Court found in favour of NNAC, finding a hierarchy of native title parties in section 34, such that a person who is a registered native title claimant is not the native title party if there is, or has been in the past, a native title holder who held native title at common law for the same area (the Nuga Nuga decision).[122]

The meaning of 'native title holder'

Prior to the Nuga Nuga decision, decision-makers under the ACHA and TSICHA understood the requirement under section 34(1)(b)(i)(C) that the provision 'is not, and never has been, a native title holder', referred to a person who has been positively determined by the Federal Court to hold native title under section 225 of the NTA only (and not by common law). The Nuga Nuga decision found that reference to 'native title holder' under section 34(1)(b)(i)(C) can refer to either a common law holder of native title or a person who has been positively determined by Federal Court to hold native title under section 225 of the NTA.[123]

According to DATSIP, the implication of the decision is uncertainty for the identification of native title parties by land users as there is likely to be a native title holder at common law in most parts of Queensland and it is not appropriate for DATSIP to decide whether there is, or has ever been, a holder of native title at common law.[124]

In addition, DATSIP has advised the committee that there are 82 previously approved cultural heritage management plans based on the previous understanding of the 'last claim standing' provision, now rendered invalid by the Nuga Nuga decision.[125]

2.3.2 Reinstatement of 'last claim standing' provision

The Bill proposes to amend the ACHA and the TSICHA to reinstate the 'last claim standing' provision as previously understood by decision-makers under the ACHA and TSICHA prior to the Nuga Nuga decision. To do so, the Bill proposes inserting 'registered' before 'native title holder' at section 34(1)(b)(i)(C), thereby restricting the definition of native title holder to a person who has been positively determined to hold native title under section 225 of the NTA only.[126]

The effect of this amendment will clarify that where there is no other registered native title claimant for an area and there is not, and never has been, a registered native title holder for the area, the 'native title party' is the last registered native title claimant under the national Register of Native Title Claims regardless of whether the claim failed.

In reinstating the previous understanding of section 34(1)(b), the Bill also makes provisions to validate decisions made and actions taken, and transition actions taken where processes have already

122 Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships [2017] QSC 321 at 27.

123 Explanatory notes, p 34; Queensland Treasury and DATSIP, correspondence dated 3 September 2018, p 6.

124 Jennny Humphris, "Confusion as indigenous cultural heritage "Last man standing rule" thrown out', Holding Redlich news post, 22 May 2018; public briefing transcript, Brisbane, 3 September 2018, p 9.

125 Queensland Treasury and DATSIP, correspondence dated 3 September 2018, p 6.

126 Explanatory notes, p 34.

commenced since the Nuga Nuga decision under the ACHA and the TSICHA and prior to the commencement of this Bill. These provisions are intended to ensure:

- that stakeholders who commenced processes for either a cultural heritage study or a cultural heritage management plan following the handing down of the Nuga Nuga decision will not 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 cultural heritage management plan without regard to the amendments proposed if the Bill is successful, and
- ensure any actions taken or decisions made before the commencement of these amendments, that were based on the interpretation of the legislation prior to the Nuga Nuga decision, are and always have been valid and lawful.[127]

Stakeholder feedback

Intent of the ACHA and TSICHA and impact on cultural heritage management

Support was expressed by some submitters for the reinstatement of the 'last claim standing' rule as a means of providing certainty to land users in the identification of the appropriate Aboriginal and Torres Strait Islander people to be involved in cultural heritage management where there are no current registered native title holders or claimants.[128] Submitters argued that it is the intention of the ACHA and TSICHA to provide such certainty to enable the effective recognition, protection and conservation of Indigenous cultural heritage.[129]

In addition, it was argued that, because the ACHA and TSICHA impose a duty on all land users to take all reasonable and practicable measures to avoid harming Aboriginal and Torres Strait Islander cultural heritage, and there are significant consequences for failing to comply with this cultural heritage duty of care, it is critical for land users to be able to confidently identify the Aboriginal or Torres Strait Islander party for any area.[130]

With the handing down of the Nuga Nuga decision, it was argued that currently it is 'practically impossible to identify Aboriginal and Torres Strait Islander parties in areas where there are no current registered native title holders or claimants with certainty'.[131]

At the public hearing, QRC advised:

> *The Nuga Nuga decision has removed this certainty and creates problems for all land users with currently registered management plans and agreements, for those finalised and waiting for registration with DATSIP and for prospects of successfully reaching agreements on areas in the future.*[132]

Furthermore, Clayton Utz submitted that the Nuga Nuga decision not only makes it more difficult for land users to identify Aboriginal or Torres Strait Islander parties with certainty, but impacts on the intent of the ACHA and TSICHA because:

> *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…*

and which Clayton Utz submitted:

127 Explanatory notes, pp 34-35.

128 See for example submissions 5, 9, 11, 13.

129 Submissions 5, 11.

130 Submission 11, p 2.

131 Submission 11, p 4.

132 Public hearing transcript, Brisbane, 17 September 2018, p 4.

> *…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.*[133]

QRC stated at the public hearing:

> *In the post Nuga Nuga world where there is no native title holder or claimant, members must issue a public notice. This is essentially an offer to the world meaning any Indigenous person or group may assert an interest. The resource proponents cannot adjudicate or make an assessment of who holds rights and interests to a given area and relies on guidance to identify Aboriginal parties who should be consulted or involved.*[134]

Clayton Utz advised that in a situation such as that given by the QRC above, cultural heritage management plans need to be developed with everybody who responds to a public notice, with no reliable way of vetting the respondents or testing their assertions. Furthermore, cultural heritage agreements, which are voluntary agreements, can become an agreement with any Aboriginal party[135] who is considered a traditional Aboriginal party, meaning there is the potential for less protection for cultural heritage in those circumstances. [136]

To avoid such a risk, Clayton Utz argued that a 'last claim standing' group, although not found to be a native title holder (and potentially found to have never been a native title holder) might still be an appropriate group to speak for country because:

> *…native title is one touchstone, is one frame of reference, is one point of reference, but it is not the only one because Aboriginal cultural heritage is defined not just as historical and pre-sovereignty cultural heritage. It is evidence of Aboriginal occupation of areas including historical or even recent occupation of areas. In these circumstances the people who can speak for those things are not necessarily people who are connected to pre-sovereignty traditional owners. They can be people who have been there for decades or even more than a hundred years but cannot prove the technical requirements to hold native title which is, of course, a very high bar.* [137]

However, in contrast to these views, it was submitted by a number of stakeholders that it is the proposed reinstatement of the 'last claim standing' rule, not the Nuga Nuga decision, which is contrary to the intent and objectives of the ACHA and TSICHA, and which would put Aboriginal cultural heritage at risk of harm due to an inappropriate party being given responsibility for the cultural heritage management of an area.[138]

Some submitters opposed to the proposed amendment argued that the reinstatement of the 'last claim standing' provision was for reasons of expediency, and that providing certainty to land users was at the expense of native title holders at common law.

For example, the NNAC stated:

> *Many native title parties and their representatives dislike the last claim standing provision as it merely provides for expedience in identifying a party to have dealings with, without proper regard for whether that party is suitably qualified and authorised to manage Aboriginal cultural heritage and avoid harm to it.*[139]

133 Submission 11, pp 5-6.

134 Public hearing transcript, Brisbane, 17 September 2018, p 4.

135 Under section 35(1), of the ACHA, a native title party for an area is an Aboriginal party for the area.

136 Public hearing transcript, Brisbane, 17 September 2018, p 8.

137 Public hearing transcript, Brisbane, 17 September 2018, p 7.

138 See for example submissions 2, 10, 12, 14

139 Submission 2, p 3.

Similarly, the QLS referred to this provision as an 'artificial administrative arrangement' which causes intra- and inter-Indigenous disputation, and argued that reinserting the 'last claim standing' provisions will:

> *....perpetuate these disputes and appears a matter of administrative convenience for the Department which won't 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.*[140]

In particular, a number of stakeholders raised concerns that the 'last claim standing' provision fails to take into account judicial findings in relation to traditional owners for an area. By not taking into account judicial findings, submitters argued that there is the potential for certain groups to maintain their status as native title parties, despite evidence that they are not descendants of the original Aboriginal people and do not have the requisite connection to land and waters. Meanwhile, groups who are found to have the connection, but are not able to meet the technical requirements of the Native Title Act, are unable to participate under the 'last claim standing' provision.[141]

Queensland South Native Title Services (QSNTS) referred to two examples where groups given responsibility for cultural heritage management under the 'last claim standing' rule were both found to not have the requisite connection to land and waters. In addition, competing claimants were found to have links to country through judicial processes, either by once (but no longer) holding native title or having knowledge about traditions, observances, customs and beliefs, but were not provided recognition as a native title party. Despite this, the groups recognised by the 'last claim standing' rule 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' despite being found to have no connection.[142]

The NNAC, one of the competing claimants as mentioned above, argued:

> *The last claim standing provision, as it is proposed to be amended, determines priority amongst such failed claims without regard to such merits - and merely with regard to the arbitrary criteria of the time when a claim ceased to be registered. In the case of the Arcadia Valley, this has the effect of preserving a practice of allowing proponents to pick and choose amongst failed claimants.*
>
> *…[the proposed amendment] will expressly empower people who have been found by the Federal Court not to hold or be descended from the holders of native title to make decisions in relation to Karingbal cultural heritage. This raises grave risks for Karingbal cultural heritage and is directly contrary to the main purpose of the ACHA, which is to provide effective recognition, protection and conservation of Aboriginal cultural heritage.* [143]

Similarly, the QSNTS advised that the Nuga Nuga 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. However, QSNTS argued that the potential effect of the proposed amendment:

> *…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.*[144]

140 Submission 12, pp 10-11.

141 Submission 2, 12, 14.

142 Submission 14, pp 1-2; submission 2, pp 2-3; submission 3, p 3.

143 Submission 2, p 3.

144 Submission 14, p 3.

The QSNTS also advised that while there may be people who have long associations with areas through which they gain some knowledge, this may be referred to 'as an historical association rather than a traditional association. What the High Court has told us is that we look back to the people who occupied the land at the time of effective sovereignty to identify those who may hold native title'.[145]

Some submitters argued that groups who have been determined not to have descended from the original inhabitants of an area should not be recognised as an Aboriginal or Torres Strait Islander party. For example, Hopgood Ganim Lawyers stated on behalf of the Yugara/Yugarapul Aboriginal Corporation:

> *If that right is proven not to exist in a claim group, that group should not continue to profit from it by force of statutory fiat merely to aid the certainty of development. When large projects take years to come to fruition, the process for determining an Aboriginal party when that is disputed ought take no more than six months to determine. Surely, ample time to ensure fairness and justice have as much as a role to play as certainty, efficiency and simplicity of statutory processes.*[146]

Stakeholder alternative approaches

A number of stakeholders made suggestions regarding amendments to the 'last claim standing' rule including:

- allowing DATSIP to receive and consider additional information (such as judicial findings) in relation to whether a party should be, or should continue to be, the 'last claim standing' registered native title claimant[147]
- providing that the 'last claim standing' rule not apply in circumstances where there has been a determination that the former registered native title claimants do not hold native title over the relevant area, or DATSIP cannot be satisfied that the former registered native title claimants 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[148]
- once an Aboriginal Party has been found to not be able to prove lineal descent and continuity of connection to an area in accordance with the NTA, provide DATSIP with the discretion to decide who the Aboriginal party should be, for example, by allowing an Aboriginal group that can show traditional and familial links to an area to be considered as the new Aboriginal and Native Title Party for the area[149]
- allowing for an addendum to cultural heritage management plans and agreements following judicial decisions to ensure any native title claimants or Traditional Custodians are party to and can make reasonable adjustments to the agreement. [150]

In addition, numerous stakeholders suggested that the ACHA and TSICHA require significant review and reform.[151]

King & Wood Mallesons, representing the NNAC, suggested that the ACHA and TSICHA already contain a provision that would create the certainty for proponents and for Aboriginal and Torres Strait Islander people; the provision allowing for registration of a corporation as an Aboriginal cultural heritage

145 Public hearing transcript, Brisbane, 17 September 2018, p 12.
146 Public hearing transcript, Brisbane, 17 September 2018, p 17.
147 Submissions 3, 10.
148 Submissions 3, 8.
149 Submission 8, p 1; Public hearing transcript, Brisbane, 17 September 2018, p 17.
150 Submission 10, p 3.
151 See for example submissions 2, 14.

body.[152] It was advised that the NTA identifies the people who would need to be consulted for the registration of that corporation, which would require DATSIP to investigate who has traditional knowledge and traditional responsibility for country.[153]

As an alternative to the reinstatement of the 'last claim standing' rule, the QLS suggested that where a Registered Native Title Body Corporate does not exist, DATSIP could liaise with the appropriate Native Title Representative Body or Native Title Service Provider to assist with the identification of Aboriginal parties where required and determine whether a corporation that has applied to be registered as an Aboriginal cultural heritage body for an area is an appropriate body to identify Aboriginal parties for the area.[154]

QSNTS provided support for this proposal, stating:

> *Native title service providers and representative bodies are funded by the federal government to, amongst other things, identify those persons who may hold native title for a particular area. We undertake extensive research to do that. I do not pretend for a moment that we have all of the answers, but we are probably a good starting point.*[155]

Consistency with fundamental legislative principles

Some submitters raised concerns that the proposed amendments conflict with fundamental legislative principles in that they fail to have sufficient regard to the right and liberties of individuals, because the amendments:

- are inconsistent with principles of natural justice (for parties whose rights and interests are impacted by the decision to register another group as the native title party for an area without taking all of the pertinent information into account)
- retrospectively cease to recognise parties as the correct Aboriginal party for the area under the Nuga Nuga decision, and
- fail to have sufficient regard to Aboriginal tradition and Island custom (because the amendments do not recognise judicial findings or accommodate determined native title holders at common law).[156]

In response to the issues raised regarding the intent of the ACHA and TSICHA, the impact on cultural heritage management and conflict with fundamental legislative principles, DATSIP advised:

> *The practical implications of the Nuga Nuga decision require an immediate fix to reinstate the 'last claim standing' provision as it was previously understood by decision-makers under the CHA and affected stakeholders to provide certainty to all stakeholders who have relied on the interpretation of the 'last claim standing' provision prior to the Nuga Nuga decision.*
>
> *This includes approximately 82 approved cultural heritage management plans and 65 previously registered native title claimants affected by the Nuga Nuga decision.*
>
> *The broader policy objectives of section 34(1)(b)(i) and other provisions, and their operation in the context of the legislative framework should be considered as part of a holistic review of the CHA. This would require an extensive consultation process and consideration of stakeholder feedback. This broader review is presently being considered, including allowing appropriate time*

152 An Aboriginal cultural heritage body has a statutory role of identifying the relevant Aboriginal Parties for the purposes of negotiating cultural heritage agreements and developing cultural heritage management plans.

153 Public hearing transcript, Brisbane, 17 September 2018, p 18; submission 2, p 5.

154 Submission 12, p 11.

155 Public hearing transcript, Brisbane, 17 September 2018, p 12.

156 See for example submissions 2, 3, 10, 12.

for this proper consultation. The current amendments will ensure certainty for affected parties in the meantime. [157]

Retrospective amendments

Submitters who supported the Bill expressed support for the provisions in the Bill that ensure that land users who have commenced processes for a cultural heritage management plan based on the interpretation given to the ACHA and TSICHA 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 amended ACHA or TSICHA.[158]

However, concerns were raised that the transitional provisions do not go far enough for parties who have entered into or begun negotiating cultural heritage management agreements (as opposed to cultural heritage studies or cultural heritage management plans) with Aboriginal or Torres Strait Islander people who are not native title parties and who will not be Aboriginal or Torres Strait Islander parties under the proposed amendments.[159]

For example, Clayton Utz stated:

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 [cultural heritage management agreements] 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.[160]

In response to these concerns, DATSIP advised:

An amendment to ensure land users who entered into agreements with Aboriginal or Torres Strait Islander people are afforded the same protection as those who have entered into negotiations for cultural heritage management plans is not required because such actions are preserved by section 20(2) of the Acts Interpretation Acts 1954.[161]

These same submitters also supported the intent of the provision designed to ensure that any actions taken or decisions made before the commencement of the proposed amendment that were based on the 'last claim standing' rule are as valid, and as lawful as they would have been had the amended 'last claim standing' rule been in effect.[162]

U&D Mining provided a case study of their experience prior to and after the handing down of the Nuga Nuga decision. U&D Mining advised they had worked with the Aboriginal party that was a native title party under the ACHA (prior to the Nuga Nuga decision) to develop a CHMP. The Aboriginal party's claim was deregistered, but under the rules as they were applied by DATSIP, was the 'last claim standing' and remained the appropriate Aboriginal Party. U&D Mining then commissioned and carried out the work as outlined in the CHMP. Since the Nuga Nuga decision was handed down, U&D Mining advised they face the prospect that the works that were carried out under the CHMP will not be considered to have been validly undertaken and not effective to ensure that U&D Mining has complied

157 DATSIP, correspondence dated 14 September 2018, p 10.

158 Submissions 5, 11.

159 Submission 5, pp 3-4.

160 Submission 11, pp 6-7.

161 DATSIP, correspondence dated 14 September 2018, p 10.

162 Submissions 5, 11, 13.

with its cultural heritage duty of care. U&D Mining expressed concern that they are at risk of prosecution for breaching cultural heritage obligations, or the granting of stop orders or injunctions (both of which have been either sought or threatened).[163]

At the public hearing, U&D Mining advised that:

> *Currently the company is operating under a cloud of uncertainty as we await the decision on the possible deregistering of our cultural heritage management plan and the looming threat of a Land Court injunction hanging over the project.*[164]

However, submitters raised an issue about this proposed provision, stating:

> *…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 "precommencement" 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.*[165]

In response to this suggestion, DATSIP advised 'An amendment to replace 'unlawful or invalid' with 'ineffective' is not required as 'ineffective' has the same effect as 'unlawful or invalid'.[166]

Committee comment

The committee is cognisant of the concerns regarding the reinstatement of the 'last claim standing' provision, but also recognises the need for DATSIP to provide certainty to the existing cultural heritage management plans, previously registered native title claimants and any future cultural heritage management undertakings affected by the Nuga Nuga decision.

The committee notes that DATSIP has referred to the potential for a broader review of the ACHA and TSICHA, and the widespread support for such a review. As a result, the committee supports the proposed amendment to provide certainty until that review can be undertaken. The committee will be interested to hear of progress on such a review.

2.4 Administration of the Cross River Rail Delivery Authority

2.4.1 Background to amendments relating to the Cross River Rail Delivery Authority

The Bill proposes to amend the *Cross River Rail Delivery Authority Act 2016* to address a number of technical issues, and to generally 'enhance the administrative efficiency' of the Act. An examination of the Bill in relation to amendments to the *Cross River Rail Authority Act 2016* and the *Acquisition of Land Act 1967* are provided below.[167]

2.4.2 Amendment to the Cross River Rail Delivery Authority Act and related matters

The Bill proposes to clarify Board membership of the Cross River Rail Delivery Authority by updating s33(1)(c) of the *Cross River Rail Delivery Authority Act 2016* (the Authority) to replace the reference to repealed legislation with a reference to current legislation.[168] This will remove the potential confusion

163 Submission 13, pp 2-4.

164 Public hearing transcript, Brisbane, 17 September 2018, p 5.

165 Submission 5, p 4; submission 11, p 7.

166 DATSIP, correspondence dated 14 September 2018, p 10.

167 Explanatory notes, p 4; public briefing transcript, Brisbane, 3 September 2018, p 10.

168 Bill, cl 102.

relating to the existing reference to the *Transport (Rail Safety) Act 2010*, which was repealed and replaced in 2017.[169]

The Bill proposes that the Board may appoint a short-term interim chief executive officer in instances where the position becomes vacant.[170] The intent of this amendment is, according to the department, to 'remove any doubts about the capacity of the board to appoint the interim chief executive if a position is vacated for any reason'.[171]

The Bill also proposes to amend the *Cross River Rail Delivery Authority Act 2016* to remove the requirement to have the Authority's budget completed by 31 March each year.[172] Queensland Treasury stated this amendment will increase administrative efficiency by 'removing the requirements to have the budget completed by 31 March each year, which has proven administratively challenging due to the misalignment with the standard Queensland government budget time frames'.[173] The amendment effectively gives the department the 'extra 30 days from an administrative point of view'.[174]

The Bill seeks to amend the *Acquisition of Land Act 1967* to 'expressly confirm' that the Minister administering the *Cross River Rail Delivery Authority Act 2016* is a 'relevant Minister' under the *Acquisition of Land Act 1967* for the compulsory acquisition of land in relation to the project.[175] According to Queensland Treasury this proposal will reduce the 'potential for duplication of effort between multiple government agencies and mitigating potential project delays'.[176] During the public briefing, Queensland Treasury affirmed for the committee that the proposed amendment to the *Acquisition of Land Act 1967* would not affect the rights of the landholder, because 'all of the processes that apply around the compulsory acquisition of land still apply'.[177]

Stakeholder feedback

The Property Council of Australia submitted that the proposed amendments relating to the Cross River Rail project will provide greater flexibility to the government and to the Authority to deliver the project. More broadly, the Property Council expressed its strong support for the project, describing it as 'imperative to meeting the challenges of expected population growth in South East Queensland'.[178]

169 Queensland Treasury and DATSIP, correspondence dated 3 September 2018, p 3.
170 Bill, cl 103; explanatory notes, p 13.
171 Public briefing, Brisbane, 3 September 2018, p 10.
172 Bill, cl 104.
173 Public briefing, Brisbane, 3 September 2018, p 10.
174 Public briefing, Brisbane, 3 September 2018, p 10.
175 Explanatory notes, p 4; Bill, cl 100.
176 Public briefing, Brisbane, 3 September 2018, p 10.
177 Public briefing, Brisbane, 3 September 2018, p 10.
178 Submission 7, p 2.

3 Compliance with the Legislative Standards Act 1992

3.1 Fundamental legislative principles

3.1.1 Rights and liberties of individuals

Amendments to provisions in the Duties Act and Taxation Administration Act

Self-assessment of stamp duty

Clauses 36, 37, 38 and 40 extend the reach of current offence provisions (relating to self-assessment of stamp duty) to identical conduct or actions committed in the context of the expanded range of electronic conveyancing transactions (beyond the current range of simple residential conveyancing). As identified in the explanatory notes, these clauses ensure 'consistency and equity' in the applicability of the offences and in revenue protection'.[179]

Amendments to definitions of 'ELN transfer' and 'relevant transfer agreement' which extend the benefit of the Commissioner's charge

Clause 14 has the effect of similarly extending the range of transactions which could involve a 'payment commitment' (this is a feature of the scheme of self-assessment of stamp duty), and in turn give rise to a first charge in favour of the Commissioner to the extended range of electronic conveyancing transactions.[180]

The issues associated with clauses 14, 36, 37, 38 and 40 were considered by the former Finance and Administration Committee in its inquiry into the then Payroll Tax Rebate, Revenue and Other Legislation Bill 2015.[181] That Bill extended the reach of the offences (relating to self-assessment of stamp duty) from the context of paper-based conveyancing to electronic conveyancing (at that stage limited to the simple residential context). The Finance and Administration Committee was satisfied that those clauses were appropriate in the circumstances.

Transitional provisions for the Revenue and Other Legislation Amendment Bill 2018

Clauses 48, 56 and 59 insert transitional provisions which ensure that amendments to the Duties Act, Land Tax Act and Payroll Tax Act which give legislative effect to administrative arrangements, commence retrospectively from the date the administrative arrangements took effect. As recorded in the explanatory notes, the retrospectivity is beneficial to the individual, whereas any breach of the relevant fundamental legislative principle is predicated on retrospectivity *adversely* affecting rights and liberties.[182]

Committee consideration and comment

The committee notes the QLS submission which considered the retrospective effect to be appropriate, given the amendments are beneficial to the taxpayer, [183] and finds the provisions in the Bill that involve an element of retrospectivity to be beneficial. The committee is satisfied that these potential breaches of this fundamental legislative principle will not adversely affect people's rights and liberties.

179 Explanatory notes, p 16.

180 Explanatory notes, p 16.

181 Finance and Administration Committee, Report No.3a, 55th Parliament, May 2015, *Payroll Tax Rebate, Revenue and Other Legislation Bill 2015*. See discussion at paragraph 13.4 (offences) and paragraph 13.1 (Commissioner's first charge).

182 Explanatory notes, p 17.

183 Submission 12, p 3.

Amendments to provide the Commissioner with administrative power to determine whether a unit trust scheme is eligible for 'pooled public investment unit trust' status

Clause 11 of the Bill inserts new sections 76E to 76G in the *Duties Act 2001*. These sections provide that, subject to certain conditions, a deregistered managed investment scheme may be treated as an exempt scheme if approved by the Commissioner.

Clause 11 in effect gives the Commissioner the power to determine whether a unit trust scheme is eligible for PPIUT status, and therefore entitled to certain duty exemptions under the *Duties Act*.

Section 4(3)(a) of the *Legislative Standards Act 1992* states that whether legislation has sufficient regard to the rights and liberties of individuals depends on whether, for example, it makes rights and liberties, or obligations, dependent on administrative power only if the power:

- is sufficiently defined, and
- is subject to appropriate review.

The Office of the Queensland Parliamentary Counsel Notebook states:

> *Depending on the seriousness of a decision made in the exercise of administrative power and the consequences that follow, it is generally inappropriate to provide for administrative decision-making in legislation without providing criteria for making the decision*.[184]

Parliamentary committees scrutinise provisions that do not sufficiently express the matters to which a decision-maker must have regard in exercising a statutory administrative power.[185]

The Office of the Queensland Parliamentary Counsel Notebook also states:

> *Depending on the seriousness of a decision and its consequences, it is generally inappropriate to provide for administrative decision-making in legislation without providing for a review process. If individual rights and liberties are in jeopardy, a merits-based review is the most appropriate type of review.*[186]

Generally, powers should be delegated only to appropriately qualified officers or employees of the administering department. There should be a review or appeal available against the exercise of administrative power.

Committee consideration and comment

The committee notes the potential for a breach of the fundamental legislative principles in clause 11, but is satisfied that:

- the criteria to which the Commissioner must have regard are well-defined (clause 11, proposed section 76F(3))
- notice of a decision must be given to the applicant, who can lodge an objection to an unfavourable decision (clause 11, proposed section 76F(4) and (5)), and
- any unfavourable decision on an objection can be challenged by appeal to the Supreme Court or by seeking a review in the Queensland Civil and Administrative Tribunal.

Amendments to prohibit possession or supply of things that can be used to make homemade alcohol in discrete Indigenous communities

Clauses 89 and 90 amend the JLOM Act. That Act prohibits possessing or supplying things that can be used to make homemade alcohol in discrete Indigenous communities, a measure aimed at addressing serious health issues from homemade alcohol in those communities.

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184 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 15.

185 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles*: *The OQPC Notebook*, p 15 (citing the Scrutiny of Legislation Committee *Annual Report 1998-1999*, para 3.10).

186 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 18.

The amendments will make it an offence to possess a substance or a combination of substances with the intention of using the substance or substances to make homemade alcohol.

Reasonableness and fairness

The reasonableness and fairness of treatment of individuals is relevant in deciding whether legislation has sufficient regard to the rights and liberties of individuals. Additionally, ordinary activities should not be unduly restricted. The concept of liberty requires that an activity should be lawful unless there is a sufficient reason to declare it unlawful by an appropriate authority. As acknowledged in the explanatory notes:

> *The amendments to prohibit homemade alcohol being made with a substance or combination of substances in the nine discrete Indigenous communities may be considered to impinge on a person's rights and liberties (section 4(2)(a) of the Legislative Standards Act 1992).*[187]

The explanatory notes continue:

> *However in 2013, the High Court of Australia determined that alcohol restrictions were a 'special measure' under the* Racial Discrimination Act 1975 (Cth) *as they impose constraints on individual liberties which are considered necessary for promoting safety for the community (Maloney v the Queen [2013] HCA 28).*
>
> *Given that the High Court considered alcohol restrictions a special measure in restricted communities, the proposed new offence provision is consistent with the measures taken to ensure the alcohol restrictions are not undermined by the effect of homemade alcohol.*

It can be observed here that the decision of the High Court of Australia (in deciding that these restrictions were not invalid on the ground of inconsistency with section 10 the *Racial Discrimination Act 1975* (Cth)) does not of itself determine the issue of whether the provisions raise a potential breach of fundamental legislative principle.

The explanatory notes justify the restriction this way:

> [A] *primary objective of the JLOM Act is to minimise the harm caused by alcohol misuse, and associated violence and health concerns in discrete Indigenous communities. Using unregulated substances (including those not for general consumption) to make homemade alcohol has the potential to cause significant harm, due to the dangerous level of alcohol and toxicity. This similarly applies to using uncontrolled fermentation methods.*
>
> *Therefore, the proposed offence provision is justified to contend with community specific problems and to reduce the harm caused by alcohol misuse.*[188]

Committee consideration and comment

On balance, the committee considers the provisions to have sufficient regard to rights and liberties of individuals in discrete Indigenous communities.

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

Clauses 94 to 98 and clauses 107 to 111 amend cultural heritage legislation to restore the 'last claim standing' provision, which seeks to identify a native title party for an area of land.

187 Explanatory notes, p 17.

188 Explanatory notes, p 17.

According to the department, the validating and transitional provisions potentially could be interpreted as a breach of fundamental legislative principles under section 4(3)(g) of the *Legislative Standards Act 1992*, given their retrospective effect. The policy intent is that stakeholders who have commenced a process in order to comply with the cultural heritage legislation before and after the Nuga Nuga decision should not be disadvantaged.[189]

The committee was informed that the amendments are minimal and deal specifically with the Nuga Nuga decision and require amendment in order to provide certainty to stakeholders required to comply with the ACHA and the TSICHA.[190]

Committee consideration and comment

The committee notes the concerns expressed by a number of submissions to the relevant previsions in the Bill and considers, on balance, that these retrospective provisions in the Bill to have sufficient regard to Aboriginal tradition and Island custom and the rights and liberties of people in Queensland.

3.2 Explanatory notes

Part 4 of the *Legislative Standards Act 1992* requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4, with a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

189 Queensland Treasury and DATSIP, correspondence dated 3 September 2018, p 3.

190 Queensland Treasury and DATSIP, correspondence dated 3 September 2018, p 3.

Appendix A - Submitters

Sub #	Submitter
001	Australian Charities and Not-for-profits Commission
002	Nuga Nuga Aboriginal Corporation
003	Yugara/Yugarapul Aboriginal Corporation
004	Cape York Land Council Aboriginal Corporation
005	Queensland Resources Council
006	Property Exchange Australia Ltd
007	Property Council of Australia
008	Quandamooka Yoolooburrabee Aboriginal Corporation
009	AgForce Queensland Farmers Ltd
010	Chuulangun Aboriginal Corporation
011	Clayton Utz
012	Queensland Law Society
013	U&D Mining (Australia) Pty Ltd
014	Queensland South Native Title Services

Appendix B - Witnesses at public briefing and public hearings

Public briefing — 3 September 2018

Queensland Treasury

- Ms Elizabeth Goli, Commissioner, Office of State Revenue
- Mr Richard Jolly, Deputy Registrar, State Penalties Enforcement Registry
- Mr Jason Mew, Acting Director, Policy and Legislation Division, Office of State Revenue

Department of Aboriginal and Torres Strait Islander Partnerships

- Mr Jason Kidd, Acting Deputy Director-General, Policy
- Mr Tony Cheng, Acting Director, Legal Policy
- Aunty Isabel Tarrago, Director, Cultural Heritage Unit

Cross River Rail Delivery Authority

- Mr Michael Glover, Chief Financial Officer
- Mr Matthew Coe, Principal Advisor
- Mr Peter Silvester, Director, Interface Operations

Public hearing Mornington Island — 12 September 2018

Mornington Shire Council

- Cr Bradley Wilson, Mayor
- Cr Sarah Isaacs, Deputy Mayor
- Cr Jane Ah Kit
- Mr Frank Mills, Chief Executive Officer

Queensland Police Service

- Senior Sergeant Emma Reilly, Officer in Charge, Mornington Island Station

Private capacity

- Ms Robyrta Felton
- Ms Corrine Reading
- Mr Leon Roughsey
- Mr Richard Sewter
- Ms Susan Sewter
- Ms Roxanne Thomas

Public hearing Brisbane — 17 September 2018

Property Exchange Australia Ltd (PEXA)

- Ms Amy Gerraty, General Manager, Transformation

Queensland Resources Council

- Mr Ian Macfarlane, Chief Executive
- Ms Georgy Mayo, Director, Resource Policy
- Ms Andi Horsburgh, Manager, Social and Indigenous Policy

U&D Mining Industry (Australia) Pty Ltd

- Mr David Richardson, Land, Tenure and Native Title Manager

Clayton Utz

- Mr Tosin Aro, Special Counsel

Queensland South Native Title Services

- Mr Tim Wishart, Principal Legal Officer
- Ms Felicity Thiessen, Solicitor

Nuga Nuga Aboriginal Corporation

- Ms Rebecca Scheske
- Dr Scott Singleton, Karingbal People's Legal Advisor, King & Wood Mallesons

Yugara/Yugarapul Aboriginal Corporation

- Dr Jonathan Fulcher, Partner, HopgoodGanim Lawyers

Queensland Law Society

- Mr Ken Taylor, President
- Mr Andrew Lind, Chair, Not for Profit Law Committee
- Mr Ivan Ingram, Member, Reconciliation and First Nations Advancement Committee
- Mr Wendy Devine, Principal Policy Solicitor