ECONOMICS AND GOVERNANCE COMMITTEE

Members present:

Mr LP Power MP (Chair)
Ms NA Boyd MP
Mr ST O'Connor MP
Mr DG Purdie MP
Ms KE Richards MP
Mr RA Stevens MP

Staff present:

Ms M Salisbury (Acting Committee Secretary)
Ms L Pretty (Assistant Committee Secretary)

PUBLIC HEARING—INQUIRY INTO THE REVENUE AND OTHER LEGISLATION AMENDMENT BILL 2018

TRANSCRIPT OF PROCEEDINGS

MONDAY, 17 SEPTEMBER 2018

Brisbane

MONDAY, 17 SEPTEMBER 2018

_____

The committee met at 10.09 am.

CHAIR: I declare open this public hearing for the committee's inquiry into the Revenue and Other Legislation Amendment Bill 2018. I would like to acknowledge the traditional owners of the land on which we meet. My name is Linus Power, the member for Logan and chair of the committee. With me here today are: Ray Stevens, the member for Mermaid Beach and deputy chair; Sam O'Connor, the member for Bonney; Dan Purdie, the member for Ninderry; Kim Richards, the member for Redlands; and Don Brown, the member for Capalaba, who is attending in the place of Nikki Boyd, the member for Pine Rivers, who is unable to attend the hearing today as she has work on with a separate committee.

On 22 August 2018 the Hon. Jackie Trad MP, Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships, introduced the Revenue and Other Legislation Amendment Bill 2018. The parliament referred the bill to the Economics and Governance Committee for examination, with a reporting date of 5 October 2018. The purpose of the hearing this morning is to hear evidence from stakeholders to assist the committee with its examination of the bill.

The hearing is a proceeding of the Queensland parliament and is subject to the standing rules and orders of the parliament. Any person may be excluded from the hearing at my discretion or by order of the committee. The hearing is being recorded and broadcast live on the parliament's website. Media may be present and will be subject to my direction. The media rules are available from committee staff if required. All those present today should note that it is possible you might be filmed or photographed during the proceedings. I ask everyone present to turn mobile phones off or switch them to silent. Only the committee and invited witnesses may participate in the hearing. Witnesses are not required to give evidence under oath, but I remind witnesses that intentionally misleading the committee is a serious offence.

GERRATY, Ms Amy, General Manager, Transformation, Property Exchange Australia (via teleconference)

CHAIR: I now welcome Amy Gerraty, from the Property Exchange Australia, PEXA, who is joining us via teleconference this morning. Good morning, Amy, I invite you to make a short opening statement after which committee members may have some questions for you.

Ms Gerraty: PEXA is Australia's first and only operational online property lodgement and settlements network and was created as a result of an industry led push towards efficiency and national consistency in property transactions. COAG introduced e-conveyancing as part of the seamless national economy priorities in 2008 and the move to e-conveyancing supported the development of a single national solution in making transactions.

PEXA is currently live in five jurisdictions which do operate pursuant to their own land titles legislation and processes. As far as possible, PEXA has sought to work with the states to deliver national consistency and, failing that, has sought to mask the state based differences to deliver a consistent experience. National businesses transacting in PEXA, including banks and large law firms, experience the same look and feel in PEXA in various jurisdictions though some process steps may differ.

PEXA allows parties to a conveyancing transaction (lawyers on each side and the incoming and outgoing banks) to transact together in an electronic workspace. Together, they prepare electronic instruments for lodgement and accompanying settlement schedules which set out the funds coming in for settlement and the destination of those funds. The PEXA workspace retrieves information from the Torrens register which the parties use to prepare the registry instruments. Prior to settlement, each instrument is verified with the land registry to ensure it is acceptable for lodgement. Prior to lodging a dutiable instrument, PEXA requires confirmation that duty has been assessed and that duty has been paid or there has been a commitment to pay.

PEXA is integrated with state based revenue offices to verify duty information and to ensure consistency of relevant information entered in the PEXA platform and the duty assessment system. Once the PEXA system has received verification from both the land registry and the revenue office, the parties must digitally sign the relevant instruments. Lawyers will sign on behalf of their clients.

The parties also prepare and digitally sign a settlement schedule. The total of the incoming and outgoing funds must balance prior to settlement. Aside from loan payouts and vendor funds, the outgoing funds also include electronic payments, the duty and lodgement fees.

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.

In making the submission, PEXA's intent was firstly to highlight our support for the initiative, particularly the measures to support expansion of the electronic transaction scope in Queensland. PEXA broadly supports the amendments and submits only minor alterations in some respects. There are three minor alterations we suggested. One, that Queensland consider payment directly to the revenue office from settlement. PEXA does note this may not require legislative amendment and may be a policy matter for the revenue office. Two, consider allowing sequential transfers of land together in one lodgement case, which can be differentiated from a transfer by direction. Three, consider allowing transfers to a nominee of the original purchaser.

CHAIR: Thank you very much. Are there any questions?

Mr STEVENS: Yes. How does PEXA address matters of data security and privacy? Who monitors the security of PEXA?

Ms Gerraty: 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.

That is obviously a fairly key requirement for not just the state but from the parties to transact in PEXA because we are integrated with not just the land registry but the Reserve Bank of Australia and all of the major financial institutions. It is clearly a high priority for PEXA and all members of the network that we maintain data security.

Mr STEVENS: The state registrars organise the auditors, is that what you are saying?

Ms Gerraty: PEXA engages independent auditors, which is an obligation that we have. The engagement is completed by PEXA. We have the independent auditor. The state registrars approve the appointment of the auditor.

Mr STEVENS: They approve the auditor.

Ms Gerraty: They receive the outcomes—the reports.

Ms RICHARDS: With regard to being the sole provider in Queensland of electronic lodgement services, are you the sole provider in other Australian jurisdictions? Are you aware of any plans to re-regulate the e-conveyancing market?

Ms Gerraty: Currently, yes PEXA is the only electronic lodgement network in any Australian jurisdiction. We are live in five jurisdictions. There are three that we are yet to get to—being Tasmania, the Northern Territory and the ACT. At present there are no other active electronic lodgement network operators. There are two aspirants that have passed a stage 1 application to become operators. There is a second stage that they would need to get through with the registrars in various states before being able to operate an electronic lodgement network.

In relation to the question about the plan to change the regulatory landscape, PEXA was formed as part of an intergovernmental agreement and there was a requirement for that agreement to be reviewed after seven years. That review is imminent. I suppose part of that review will look at the regulatory landscape and how that plays out moving forward.

Mr O'CONNOR: One of the changes that you put in was to amend one or more transfers to one transfer. Is this the only way that you think it would allow an arrangement where two agreements can be completed without separate transfers?

Ms Gerraty: I do not know that I could rule out any other product solutions. The submission in relation to the transfers via direction is really to call-out that PEXA cannot deliver or cannot achieve a transfer by direction in the way that it happens in paper. In paper all three parties—the vendor, the first purchaser and then the subsequent purchaser who acquires their right from the first purchaser—would enter into one transfer document to give effect to the two agreements.

PEXA is structured in such a way that data needs to come to the land registry and then be completed in the work space in accordance with data standard instructions that exist. Part of the design would require that type of arrangement to be effected by two transfers lodged together A to B and then B to C. That would be the only way that we could deal with what would traditionally be known as the transfer by direction.

The other matters which are related in some way could be lodged in a different way together. For example, if I am selling my property and then using funds to buy another property. They are related from my perspective. Transfers in respect of different pieces of land can be lodged separately in separate work spaces in PEXA but settled simultaneously. In terms of linkage for transactions there are many options functionally, but we were specifically trying to make the submission in relation to the transfer by direction.

CHAIR: Thank you Ms Gerraty for being with us today. We will conclude the telephone call. Thank you very much.

Ms Gerraty: Thank you very much for having me.

ARO, Mr Tosin Special Counsel, Clayton Utz

HORSBURGH, Ms Andi, Manager, Social and Indigenous Policy, Queensland Resources Council

MACFARLANE, Mr Ian, Chief Executive, Queensland Resources Council

MAYO, Ms Georgy, Director, Resource Policy, Queensland Resources Council

RICHARDSON, Mr David, Manager, Land Access, Tenure and Native Title, U&D Mining Industry (Australia)

CHAIR: I welcome our next witnesses. I invite you to make a short opening statement after which committee members may have some questions for you.

Mr Macfarlane: It is a pleasure to be here. Firstly, I would like to acknowledge the traditional owners of the land on which we meet and pay my respects to elders past and present and all community elders past and present. Thank you to the committee for the opportunity to appear before you today and also to explain why it is important that these amendments to the cultural heritage acts be enacted by the parliament.

Resources underpin the Queensland economy by creating a job every hour, exporting a billion dollars in goods and services every week and providing $100 million per week to state royalties which pays for roads, hospitals, schools, teachers, police et cetera. The benefits from the mining industry also extend to the Indigenous people of Queensland, with mining one of only two industries in the sector which employs the state average population of Indigenous people—that is, four per cent. We employ over four per cent in our workforce. The resource industry also plays a vital role in protecting and conserving Indigenous cultural heritage for all Australians and for future generations, and continues to be an essential part of our doing business.

It provides a gateway for meaningful engagement to deliver employment opportunities and economic benefits for traditional owner groups within an operational footprint while also increasing the cultural awareness and capability of companies. The cultural heritage officer roles generated provide opportunities for traditional owner groups to work on country, in some instances reconnect to the culture and is a pathway to other jobs in our industry. Central to this process is the ability to identify the correct Aboriginal parties to engage.

QRC understands the intention of the last claim standing rule was to provide certainty in areas where no current registered native title holders or registered native title claimants exist. There are large areas in Queensland to which the last claim standing rules apply from resources regions right through to Brisbane. 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.

This is a significant issue for our sector which is why I have requested to appear before you today. Of the 80 affected agreements we estimate that at least 50 of these relate to resources companies. This is just management plans not to mention the many more voluntary agreements. There is an urgency to confirm the validity of these agreements.

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.

The current process, quite frankly, is unworkable and will drastically hinder the ability of proponents to deliver projects on time and on budget and, as I said earlier, to deliver the benefits that come from those projects to the Indigenous communities. QRC recognises this is a contentious area of the legislation and that there are bigger issues at play regarding the last claim standing rule.

It is clear the Indigenous community have ideas on potential solutions which warrant further conversation and the Deputy Premier in her introductory speech noted the potential for a broader review of the legislation in future and we support that view. However, while these conversations are taking place the industry is seeking certainty of process and to reinstate the previous understanding so companies can continue to operate.

I am joined today by representatives from U&D and Clayton Utz. If the committee does not mind, we will direct committee questions to the person best placed to respond. I think David is going to make a short statement.

CHAIR: Mr Richardson, do you want to make an opening statement?

Mr Richardson: My name is David Richardson and I work for U&D Mining in the position of Land Access, Tenure and Native Title Manager. I report directly to the general manager for resource development who in turn reports to the chief executive officer of the company. Without wanting to repeat what we have already set out in our submission, I just wanted to give you a summary of why the commencement of this bill is so important to U&D.

Our Meteor Downs South Coal Mine (MDS) is located in Central Queensland, 40 kilometres south-east of the town of Springsure and is accessed via the Dawson Highway. The mine is located within the area that was at issue in the Nuga Nuga decision. I have been involved with our Meteor Downs South project since late 2010, initially as a senior geologist and in my current capacity since 2012. I have personally been involved with the numerous cultural heritage surveys and agreement negotiations with both the Karingbal and Bidjara Aboriginal parties who previously had registered native title claims in the area.

The mining lease for the project was granted in December 2015 to Endocoal Ltd, a company that is wholly owned by U&D. In July 2017, U&D entered into a 50-50 joint venture management agreement with Sojitz Coal Mining. Sojitz is appointed as the operator of the mine and U&D as a joint venture partner. Mine construction commenced on 17 January 2018 with first coal uncovered on 15 March 2018.

In February of this year the chief executive of the Department of Aboriginal and Torres Strait Islander Partnerships informed us of a demand letter sent to them by a legal representative of the Nuga Nuga Aboriginal Corporation requesting both the removal from the register of our Karingbal Cultural Heritage Management Plan and the issue of a stop order to restrain us from undertaking any works or activities for the project. This came out of the blue and at a critical time in our project development—only one month prior to our anticipated first coal production and just six months after the joint venture had made a significant investment in capital equipment somewhere in the vicinity of $30 million.

It was at this time that we sought the assistance of Clayton Utz lawyers, with whom we had an already well-established relationship. We were at a loss as to how we could find ourselves to be in a position where our cultural heritage works carried out after a certain point in time were now regarded to be invalidly undertaken by members of the Karingbal group. The two men behind Nuga Nuga Aboriginal Corporation were two of the five members of the last claim standing Karingbal Aboriginal Party—the very group that we had engaged, at significant cost, to undertake many of these surveys.

We particularly wondered how this could have happened when we looked back on the extensive surveys that we had commissioned and carried out since 2010 to ensure that cultural heritage would be identified and managed in the project area, and our considerable efforts to reach agreement with the five members of the Karingbal Aboriginal Party—the group that we understood to be the native title party for the area considering the 'last claim standing rule'.

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. As I understand it, the native title party provisions were intended to introduce certainty to cultural heritage management processes. U&D firmly believes that passage of the bill would achieve this end and would like to express its firm support of the bill.

Mr Aro: I also would like to begin by acknowledging the traditional owners of the land on which we are gathered and by paying my respects to their elders past, present and emerging. My name is Tosin Aro. I am a Special Counsel at Clayton Utz and a member of our native title and cultural heritage services group.

On 15 February this year, not long after the Nuga Nuga decision was handed down, I co-authored an article titled 'Aboriginal cultural heritage management in disarray as Court does away with the "Last Claim Standing" rule'. We concluded the article by suggesting—

> ... this seems to be a clear situation that merits the passage of legislative amendments, with retrospective effect, to clarify that it is only where there have been determined native title holders that the last claim standing rule does not apply.

The amendments proposed in this bill, if passed, would deliver precisely the clarification that we argued was needed and that is essential to the viability of major projects across the state—not least the high priority Cross River Rail and the nation-building Inland Rail Programme.

The cultural heritage acts recognise that, given both the serious consequences of failing to comply with the cultural heritage duty of care and the risk of harm to cultural heritage when unqualified people are recruited to carry out cultural heritage management works, there is an overwhelming need to be able to identify appropriate Aboriginal and Torres Strait Islander parties with certainty. The acts seek to deliver this certainty by utilising the Native Title Act's native title claims process. However, this in our view does not mean that parliament was necessarily equating native title rights and interests with having responsibility for the custody and management of cultural heritage.

Where a native title claim has resulted in a positive determination, there is general acceptance that the prescribed body corporate, or PBC, that represents the native title holders is the appropriate Aboriginal or Torres Strait Islander party. Similarly, where the members of a native title claim group have authorised an applicant to lodge a claim on their behalf and that claim has passed the registration test, most people accept that it would be reasonable to infer that that applicant—which, after registration, becomes known as a registered native title claimant—would have knowledge of and responsibility under Aboriginal tradition or Island custom for cultural heritage within their claim area.

In our submission, however, while the failure of such a claim might indicate that the members of the claim group are not—and perhaps were never—native title holders, that in and of itself does not make it wrong to continue to infer that the former registered claimant is an appropriate group to speak for country. If it were otherwise, given that both the Federal Court and Full Court held that no claim group members are descended from pre-sovereignty traditional owners, there would be nobody qualified to manage cultural heritage in Brisbane.

In short, the objective of the statutory scheme is to enable land users to have confidence that they are doing the right thing where they deal with PBCs, current registered claimants and last claim standing parties. In areas without any of these three categories of party, the only option is to rely on people who assert that they are traditional Aboriginal parties or customary Torres Strait Islander parties. This is a particular issue where CHMPs are required in these areas, as such CHMPs need to be developed with everybody who responds to a public notice, with no reliable way of vetting the respondents or testing their assertions.

Public notice CHMPs are currently only required in about 10 per cent of the state. Failure to pass this bill, however, would mean they would be required in what I understand is estimated to be over a third of the state, including Brisbane. This, of course, would greatly undermine the certainty that is meant to underpin parliament's intended scheme.

I conclude by saying that all this bill seeks to do is restore that scheme. Clearly, reasonable minds can differ on whether this scheme really does provide the best solution to this complex issue. However, let us get the current system working again and then resume the debate about whether or not there might be a better way. The Minister for Aboriginal and Torres Strait Islander Partnerships has herself indicated that such a debate is overdue.

CHAIR: We might move to questions. Mr Macfarlane has indicated that we get the panel to choose who would be most appropriate to answer them.

Mr STEVENS: In the time since the Nuga Nuga decision was handed down, can you advise the committee how many of your members have had to identify the correct native title party to deal with when there was no registered native title holder or registered native title claimant and how have you gone about it?

Mr Macfarlane: We do not have that information, but I will ask Andi to fill in some details.

Ms Horsburgh: What we have information on is the number of previous agreements which have been affected. As Ian mentioned in his opening remarks, of the around 80 that DATSIP said were affected during the departmental briefing, we estimate that around 50 of those are resource company agreements. Since Nuga Nuga, we know that over the next 12 months a number of our members will need to engage with last claim standing parties, so that may be coming forward.

CHAIR: Mr Aro, you have put to us that there could be the risk of harm when you do not have the appropriate party involved in cultural heritage issues. The Law Society has put to us that the current mechanism is effectively an arbitrary administrative arrangement which does provide the certainty that is important but does not necessarily always identify the appropriate party. Are you concerned that that there will still be the risk of harm by restoring certainty?

Mr Aro: Yes. I read the Queensland Law Society's submission. The difficulty is with identifying who the correct parties will be. As I sought to demonstrate in my opening statement, chances are that where you either have proven yourselves or shown that you hold native title and you have been determined to hold native title or if you have been authorised by the community at large to bring a

claim—you have passed the registration test, so you have gone a certain way along the path towards proving your native title—it is reasonable to infer that you are somebody who has the proper responsibility under Aboriginal tradition or Island custom to be able to speak for country.

The certainty that parliament has chosen is to use that process where you can infer from a set of circumstances that these people are perhaps not the only people but appropriate people to speak for country. There may be other people but, with the objective of certainty in mind, you can say that it is reasonable to infer that these are the correct people.

If those people are proven not to hold native title, we say that that does not necessarily make it wrong to continue to infer that those are the correct parties. The fact that they do not hold native title for perhaps technical reasons, or who knows why, does not mean that other people are better placed to hold native title or that proponents should not be able to continue to have certainty that if they continue to deal with those parties they will be okay and they will not be exposed under the act.

CHAIR: You also made the case that it could be found that they do not hold native title and have never had native title in the past, not for technical reasons but for reasons of having no historical record of connection to a particular piece of country. Isn't that a concern that we are dealing with the inappropriate party in that case?

Mr Aro: It is perhaps a concern but it is not the complete picture. I used the example of Brisbane. We have projects that are happening in the CBD of Brisbane. There were native title claims that were lodged over the CBD of Brisbane. The Federal Court and the Full Court both found that there was nobody who could establish that connection to the people who were the traditional owners before sovereignty. There was nobody in Brisbane. On that argument you would be suggesting that there is nobody who is qualified to manage cultural heritage in Brisbane.

What we are saying is that 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 to include not just 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.

Mr Macfarlane: If I could add to that, we appreciate that this may not be the perfect solution but in the absence of any other it is the best solution at the moment. As we have committed to, we the Resources Council and the industry are happy to be involved in a discussion going forward which the Deputy Premier and minister have alluded to. We will participate in that. If a better system is able to be established both in terms of providing certainty and in establishing the rightful owner, then we are prepared to be involved in that.

CHAIR: The Deputy Premier said that these issues require comprehensive consultation and further policy development and there is an opportunity for the government to explore the possibility of a broader review of cultural heritage acts in the future. Mr Macfarlane, you would be supportive of that process?

Mr Macfarlane: We are very supportive of that process. This is the best solution available at the moment, but if there is a better solution we would certainly support that.

Mr O'CONNOR: I have a question for the QRC. You talked about extending clauses 98 and 111 to include 'ineffective'. Could you give us more information on that? That was in your submission.

Mr Macfarlane: We might defer to Mr Aro if that is all right.

Mr Aro: What the bill, if passed, would validate is acts and omissions that were done previously that are invalid or unlawful. What the QRC submission seeks to do is extend that to things which, even though they were not necessarily invalid or particularly unlawful, were not effective to achieve compliance with the cultural heritage duty of care. They may have been lawful because they were things that did not breach any law, but they just did not achieve the requirements necessary to comply with the duty of care.

Ms RICHARDS: In relation to the transitional provisions, it is noted that they apply to the cultural heritage management plans and not to the cultural heritage management agreements. Could you explain to the committee the difference between the two and why it is important to apply to both?

Mr Aro: There is a more stringent process to develop cultural heritage management plans. A notice is required in the first instance. That is a written notice if you can identify native title parties or a public notice where you cannot. After negotiations have occurred and the plan has been developed

and agreed, if all of the consultation parties agree that you can do so, the agreement is then approved by the chief executive of DATSIP. They then enable you to comply with the cultural heritage duty of care. It is an involved process and sometimes it is a required process. It is a required process if your project needs an environmental impact statement.

If you do not have an EIS project and you do not want to go to the effort or the trouble and expense of developing a cultural heritage management plan, the act also says that you will have complied with the duty of care where you have another agreement with an Aboriginal party. That sort of agreement is basically just that: it is a voluntary agreement with an Aboriginal party and, when it is executed and in force, complying with it protects you. It is not approved by the state and it may never be seen by the state. It is simply an agreement with an Aboriginal party. That is the difference.

Ms RICHARDS: Is there an indication of quantum that that would apply to where it is an agreement versus the plans in place in terms of the resourcing sector?

Mr Aro: It will be difficult simply because the state does not have those records because they are not sent to the state and they are not approved by the state. We would say that there are many more of those agreements. A difficulty with failing to pass this bill relates to that point. The act says that you will have complied with the cultural heritage duty of care if you have an agreement with an Aboriginal party.

Part of the protection that is built into the cultural heritage act is that where you have native title parties they typically consist of a number of individuals who are the applicant for a claim and who are the registered native title claimant for a claim. Your agreement with an Aboriginal party is an agreement that has to be signed off by all of those people. If you do not have a native title party, particularly where you do not have last claim standing parties and all you have are people who assert they are Aboriginal or Torres Strait Islander parties, your agreement with an Aboriginal party can suddenly become an agreement with any one of those individuals who will agree with you. There is the potential there for less protection for cultural heritage in those circumstances.

CHAIR: That could be an unintended consequence of someone who has found legal protection through that process but who has not necessarily gone through the best process of consultation with Aboriginal cultural heritage.

Mr Aro: Absolutely.

CHAIR: I have a question for Mr Richardson. In its submission U&D stated 'it is the utmost importance to U&D that Aboriginal cultural heritage be given the respect and care it inherently deserves'. With the last claim standing provision we have heard evidence that there could be consequences where that last claimant is not necessarily the group most connected to a particular development, and in that case the respect and care it inherently deserves is not really best served by that situation. Is that a concern for the company?

Mr Richardson: Yes, it is a concern. The area over our project that I was talking about was an area of overlapping claims. As I said, we have been doing work with groups since 2010. In the early days when we were doing exploration we would invite more than one group so the Karingbal group at the time and the Bidjara. There is nothing to say that we have to choose one group over the other. In some cases that is the best way for us to make sure there is the best chance of protecting cultural heritage on the ground, but there can obviously be problems and issues between those groups. It is in our best judgement then perhaps that they might agree between themselves who is best to protect or advise on cultural heritage.

CHAIR: It is a concern then that on the ground you might have a greater understanding that one group has a connection to it, but not being the last claim standing would not be the group you would legally deal with. This might be something that Mr Aro might comment on. When people like Mr Richardson are dealing with people on the ground and they have an understanding of the local history and information, they might have an understanding that the last claim standing is not necessarily the person most connected with their project and the land which it is on, but legally they would be required to deal with the last claim standing in that mechanism?

Mr Aro: In Mr Richardson's circumstance, the proponents of the Nuga Nuga Aboriginal Corporation are included within the last claim standing party. They are not strangers to that party. They are actually included within the last claim standing party. They for a number of years petitioned the court for a determination of native title that would have included all of them as native title holders, and if the Wyman decision that they refer to had gone a different way they all would be native title holders.

The court found that they were made up of different people and only some of them could establish the required link to the pre sovereignty owners, although none of them could show that native title had not effectively been abandoned in the interim. Having said that, they were all included within that group that was petitioning the court for a positive determination of native title. The court has made its findings and so we are where we are. Even within those circumstances and within that country, I do not think anybody would suggest that the descendants whose ancestors were not there before sovereignty have nothing to do with anything. Their ancestors clearly were present in that country and have been present in that country for a long time. They have cultural heritage, as defined in the cultural heritage act is referable to that ancestor that really only the women who were part of the last claim standing can really speak for, and the men who are the proponents of the Nuga Nuga corporation are really not best placed to speak for that cultural heritage. One wing, if you like, of the last claim standing party was found to have connection to the pre sovereignty owners. Notwithstanding that, the members of that wing are not necessarily the best people to speak for all of the cultural heritage of the area.

It is a very difficult situation. You could start from first principles every time and try and work out who, but it is very difficult to do so. What the act tries to do is obviate the need to do all of that in all circumstances and use the native title claims process on the understanding that if you have been authorised by a wide body of people to make a native title claim, and that claim has had enough about it to become registered, then chances are that you probably are an appropriate person in some form to speak for the cultural heritage of the area.

CHAIR: I guess we have the particular circumstances and then the potential for application in other areas. I take from the shaking of heads behind us that there is some dispute over the particulars as well. There being no further questions, thank you very much for your submissions and for the time you have taken here. I really appreciate it.

THIESSEN, Ms Felicity, Solicitor, Queensland South Native Title Services

WISHART, Mr Tim, Principal Legal Officer, Queensland South Native Title Services

CHAIR: Mr Wishart, I understand you want to make a brief opening statement?

Mr Wishart: Thank you, Mr Chair. I commence by acknowledging and offering my respect to the country on which we are gathered and to the traditional owners of this country and their old people and elders. Queensland South Native Title Services is a native title service provider funded by the Australian government under section 203FE of the Native Title Act to perform the functions of a native title representative body. QSNTS has operated since being afforded ministerial recognition as the service provider for its region in 2005. In 2008 the region that Queensland south is responsible for was expanded and now encompasses about two-thirds of the state.

As at the date Queensland South Native Title Services received initial ministerial recognition, there have been no determinations of native title in the QSNTS region. QSNTS is currently assisting native title claim groups in 22 applications that are before the Federal Court and has assisted, since a landmark determination over Minjerribah for the Quandamooka people, 18 claim groups to successfully achieve native title determinations.

Whether or not a native title claim group is successful in its determination application, the provision of the state's cultural heritage legislation applies. That legislation applies to land that was freehold before the passage of the Commonwealth's Racial Discrimination Act or the Native Title Act—that is, the state's cultural heritage regime applies even where native title has been lawfully extinguished and as a matter of law cannot be claimed.

Understandably, the hierarchy of persons who must be consulted and who hold responsibility for matters under the state's cultural heritage regime is linked to the outcome of the Native Title Act. In particular, successful claimants are afforded primacy. Claimants whose native title determination applications have been registered by the Native Title Tribunal are next, and up until the Supreme Court's decision in Nuga Nuga Aboriginal Corporation and the Minister for Aboriginal and Torres Strait Islander Partnerships, which I will refer to as Nuga Nuga, claimants who had been registered but whose claim had been withdrawn, dismissed or failed were next. Other provisions applied to land and waters that had not been the subject of a native title claim.

It is the issue of the status of claimants whose claims were withdrawn, discontinued or dismissed that I wish to focus on; that is, the so-called last claim standing provisions. The general intent of the last claim standing provision is unobjectionable. It provides some presumed certainty that the persons who made the claim are the appropriate persons to be consulted about the protection of cultural heritage on the land and waters that were the subject of their claim. That position allows proponents and others who may want to undertake activities that may interfere with Indigenous cultural heritage to have some certainty that they are dealing with the appropriate people; however, the outcome of two matters before the Federal Court have proved that certainty to be illusory. Those matters were: Wyman on behalf of the Bidjara People v State of Queensland (No. 2)[2013] FCA 1229; and Sandy on behalf of the Yugara People v State of Queensland (No. 2)[2015] FCA 15, which I will refer to as Sandy. Each of those matters involved trials of overlapping native title determination applications. Each of the applications was opposed by the state. Each of the five sets of applicants failed.

The background to Wyman is set out neatly at page 2 of the written submission of the Nuga Nuga Aboriginal Corporation, which, I am happy to say, Queensland South Native Title Services supports. In Sandy there were two competing claims and neither claim was successful. In Sandy, it was a specific finding of the court that none of the claimants could establish that a person or persons from whom they could demonstrate descent were traditionally associated with the claim area. In each of Wyman and Sandy there were registered native title claimants, but in each of the two matters not all of the claimants had achieved registration. That is, in Wyman, the Bidjara and Karingbal claims were registered but the claims of the Brown River People could not, for technical reasons, be registered. In Sandy, the Turrbal claim was registered but the Yugara Ugarapul claim was not.

When the claims failed through the operation of the last claim standing provisions, those persons who had been the last registered claimants remained as the native title party under the cultural heritage regime. That applied despite the fact that, in Wyman, the Bidjara people and the descendants of Jemima of Albinia were found not to have been associated with the Arcadia Valley and, it follows, could not have been native title holders. In Sandy, although the Turrbal claimants could not demonstrate persons from whom they were found to have been descended could ever have been native title holders for the claim area, those claimants remained the native title party under the

Aboriginal Cultural Heritage Act. Nuga Nuga put paid to the perverse outcome that persons who could not demonstrate that they or their old people had ever been native title holders for a place could retain primacy for that place for cultural heritage purposes.

In early 2010 amendments were introduced to the cultural heritage legislation regime to create the last claim standing concept. From that time QSNTS has made submissions urging that the proposal is flawed. My CEO, Kevin Smith, wrote to the then minister, the Hon. Stephen Robertson, on the topic on 19 March 2010. More recently, on 27 August 2015 Mr Smith wrote to Minister Pitt, pointing out the particular last claim standing anomalies arising from the Wyman and Sandy decisions and suggesting a cure. That letter noted that the issues raised had been informally discussed with staff at the cultural heritage unit in the then Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, which is now DATSIP, and those officers advised that they were aware of that mischief.

On 7 September 2015 Mr Smith wrote again to Minister Pitt about another set of concerns with the implementation of the cultural heritage legislation and seeking a meaningful dialogue in relation to that legislation. My participation in subsequent discussions with senior bureaucrats demonstrated that those bureaucrats had an awareness of the issues that were being raised, particularly around the anomaly in the last claim standing provisions, but their perceptions were that there were not many cases where the perverse outcomes possible under the last claim standing concept were manifest and that there were issues deeper than those which Wyman and Sandy had highlighted. The implication was that something more than a simplistic amendment to the legislative scheme was necessary.

In April 2016 at a native title users group forum conducted by the Federal Court again raised the issue of the anomaly of the last claim standing provision in a paper I gave, and later that day the Federal Court's Native Title Registrar said squarely to one of the senior DATSIP bureaucrats in an open forum, 'When are you going to do something about the last claim standing provision?' I reiterate: those discussions around that provision have been ongoing for three years.

QSNTS supports the need for certainty for persons operating in a space where the effect of a proposed activity on cultural heritage must be assessed and dealt with. Further, persons who have undertaken activities based on the pre Nuga Nuga interpretation of the legislation should not be exposed to penalty. There is clearly a problem with the last claim standing provision, and that problem needs to be fixed. I will leave it to your Indigenous witnesses to explain how they feel about wrong people having primacy over cultural heritage matters on their country in circumstances where that primacy is bestowed and affirmed by the state.

I will confine myself to this point: I am speaking about circumstances where a superior court of record has made findings about the status of particular people in relation to country. Those findings are that, not only do those people not hold native title, but their old people are not from that country. Despite that, the pre Nuga Nuga interpretation of the last claim standing provision afforded those wrong people primacy in cultural heritage matters.

Nuga Nuga has now apparently raised the cultural heritage unit of DATSIP from its torpor and required it to focus on the problem and reconsider its position. Despite knowing for at least three years that they were presiding over flawed legislation, the best that the department's bureaucrats can do is come up with a one-word amendment that simply serves to entrench the mischief. Not only should the amendment to the last claim standing provision contained in clause 95 of the bill not pass; its drafters should get a fail.

Mr STEVENS: Mr Wishart, that was a very comprehensive explanation in relation to your views on the matter. Where is the boundary between Queensland south and Queensland north native title services?

Mr Wishart: There is no Queensland north. There is the North Queensland Land Council. I will just explain the region for which we hold statutory responsibility, Mr Stevens. Our region starts at the New South Wales border and spans that border. It goes north up the South Australian and Northern Territory borders to about 250 kilometres north of Mount Isa and then it jags back to the coast—bizarrely following local authority boundaries rather than any sort of traditional boundary—but following local authority boundaries to just south of Sarina.

Mr STEVENS: Have you registered this claim?

Mr Wishart: That is not a claim.

Mr STEVENS: I am only kidding.

Mr Wishart: No, we are not following the Cape York Land Council's example. Would that we could.

Mr STEVENS: We have heard of the difficulties, if you like, in terms of the last claim standing. How would you propose a native title party be identified if there is no registered native title holder or claimant to a particular piece of land?

Mr Wishart: One of the ways it can be done is to consult organisations such as that which I represent. Native title service providers and representative bodies are funded by the federal government to, amongst or 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.

Mr STEVENS: There is no definitive way that you could quantify who actually is in a particular area as a claimant?

Mr Wishart: No. The difficulty, Mr Stevens, is that postcolonial activities by successive governments in removing Aboriginal people from their traditional areas and putting them in missions and forcibly taking away their culture has resulted in a lot of dislocation. Necessarily, the way that native title jurisprudence has developed, we need to look back to the time of effective sovereignty to understand the foundation for a native title claim group, and that is part of the problem. We do not have that perfect vision.

Mr Aro was quite right when he said that people have long associations with areas through which they gain some knowledge. We call that 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. It is a difficult problem and there is no simple answer, but it needs to be given thought.

CHAIR: Just extending on organisations such as yourselves being involved in the determination of appropriate cultural heritage groups to consult, it may have been that your organisation was involved in consideration of which group to put forward for native title and which group to support legally through that process and another group that was not supported by your services and then put your group in the position of making effective determination about which group should therefore be the appropriate partner for cultural heritage purposes.

It seems that you had already supported one process or may have supported one. I am not necessarily talking about your organisation, but any of the land councils or native title bodies. It would seem that you had been involved in the process but were then asked to make a determination post that fact of perhaps already supporting one claim or another.

Mr Wishart: Chair, the conclusions that organisations such as mine reach in these matters are based on evidence and extensive research. We have recently assisted two claim groups to lodge native title determination applications—

CHAIR: I have no doubt about that. In terms of the process and its exposure to possible legal claim later, a group that had already been on the public record supporting one claim and then being the body to determine between two competing claims, is that a process that may present more difficulties?

Mr Wishart: It all presents difficulties. It is not easy. It is an onerous task. My organisation is in fact partially responsible for the way that Wyman fell out, because partway through the litigation we formed the few that persons who formed part of a claim group for the Karingbal people ought not be there. That was the genesis of the Brown River claim. That is why the last claimants standing in Karingbal form three persons who were found not to hold native title, whose old person was found not to be a traditional owner of the country of the Arcadia Valley, and two persons whose old people were found to be traditional owners of the Arcadia Valley.

They are hard decisions and it is based on hard evidence. It is a terrible thing to go to people and deliver the message that, despite your long oral tradition, there is objective evidence that your old people simply did not come from this place. It is a terrible thing to have to do, but that is the evidence. We are in a court process.

CHAIR: I do not necessarily think that answers the question, but I appreciate that.

Mr O'CONNOR: Prior to the Nuga Nuga decision are you aware of any groups that made a native title claim on an area irrespective of their knowledge of country and their likelihood to succeed with the claim, but they have put the claim in in order to become the titleholder under the last claim standing provision?

Mr Wishart: The short answer is yes. The longer answer is that in the post Mabo euphoria about persons being able to actually claim native title, a lot of claims were lodged that were not founded on rigorous research. People often claimed over what we would call historical country rather than traditional country. There were claims that were badly flawed. I do not have the numbers at my fingertips, but in our region there have been some hundreds of claims that have been lodged and withdrawn, not necessarily registered, in the process. As the jurisprudence has developed and native title rep bodies have become more sophisticated in the way they go about their work, the claims are better founded in evidence and have a better chance of success.

Mr PURDIE: To follow on from that, how often does that happen? Obviously, it is not exactly that you end up negotiating with someone with no traditional connection with the land but end up being the go-to person for these cultural heritage negotiations. Is that a common thing?

Mr Wishart: It is not common. That is why perhaps it has been put on the back shelf. The problem is this, and I am speaking as a non-Indigenous person: you have people who have been found by a superior court of record to not ever be capable of being native title holders, as the current jurisprudence understands that, asserting cultural heritage rights over country that you know your old people have belonged to. That is the mischief. I said to some of the bureaucrats some years ago that if that happens once that is one time too many.

CHAIR: When it comes to a claimant to native title, we are not suggesting that people maliciously or, as I think you said, enthusiastically put forward claims. In these cases, people have what you have identified legally as historical claims rather than where they have a connection to the land, but not at the point of European settlement. They may have a reasonably strong connection to the land and that is why they have put forward the native title claim; is that fair to say?

Mr Wishart: Your statement is a blanket statement, Chair. To the extent some people would be bona fide in the way they go about things; some might be more cynical about the way they go about things.

CHAIR: Other claimants might be direct descendants of someone we can legally prove, at the time of European settlement, was connected to the land and there is evidence of that. Due to the process of dislocation, they may have had little contact with the land post that period. Due to the processes of missionary activity and others, they may not have strong understandings of the cultural associations in that area. However, theirs would be the strongest claim under the process that you seem to be suggesting, through descent.

Mr Wishart: I am not quite following your premise, Chair.

CHAIR: My premise is that those who make claims, presumably in goodwill, about native title but are found not to be descendants of people connected to the land at the time of European settlement and, therefore, do not have a claim of native title may have strong connections to the land that may be useful for exploring Aboriginal cultural heritage in the area.

Mr Wishart: Potentially, yes. It depends on who has educated them and where they have gained their knowledge.

CHAIR: Potentially, those who do have claims through direct descent may not have the same knowledge about the country, but are direct descendants of those who were inhabitants of the land at the time of—

Mr Wishart: That is correct.

CHAIR: It is quite a complex process.

Mr Wishart: It is horrendously complex. I listened carefully to the submissions of the QRC. Really, that submission is putting expediency before legitimacy. This is a difficult issue. However, simply going back to the broken legislation is not the way to fix it. There needs to be extensive consultation amongst all manner of stakeholders in this matter to get this legislation right. It is an important piece of legislation, but it has to be right.

CHAIR: The suggestion you have put forward is that organisations such as yours be the determinant of who—

Mr Wishart: No. If I said that, I misspoke. What I intended to say was organisations such as mine are the repository of a great deal of research and knowledge about places and we are a good starting point to consult.

Ms RICHARDS: Leading on from that, what might that process or the legislation look like, in your mind?

Mr Wishart: The expedient amendment that I conceived after the Wyman and Sandy decisions was to make provision that persons who were native title claimants and whose old people were found to be not associated with the claim area would not be one of the native title parties for the cultural heritage purposes. That is the difficulty, as I understand things, that sits with the former Karingbal claim at the moment. There were five registered claimants when the Karingbal claim went to trial and failed. Three of those claimants were descended from a person called Jemima of Albinia, who was found not to be a traditional owner of that country. The other two were descended from a person who was found to be a traditional owner for that country, yet those three people still form part of the native title party for cultural heritage purposes if the pre-Nuga Nuga situation is restored. That is the position that Mr Aro advocated for. With respect, it is wrong, because it is reinstating people who have been found not to be right for the country to that position of primacy.

Mr O'CONNOR: How would you suggest that a native title party be identified if there is no registered native title holder or claimant?

Mr Wishart: Consultation with appropriate organisations such as mine and then consultation with people on the ground.

CHAIR: There being no further questions, thank you very much, Mr Wishart and Ms Thiessen.

FULCHER, Dr Jonathan, Partner, HopgoodGanim Lawyers, Yugara-Yugarapul Aboriginal Corporation

SCHESKE, Ms Rebecca, Nuga Nuga Aboriginal Corporation

SINGLETON, Dr Scott, Karingbal People's Legal Advisor, King & Wood Mallesons, Nuga Nuga Aboriginal Corporation

CHAIR: I now welcome Rebecca Scheske and Scott Singleton from the Nuga Nuga Aboriginal Corporation and Johnathon Fulcher, representing the Yugara-Yugarapul Aboriginal Corporation. Good morning. I invite each organisation to make a short opening statement, after which committee members may have some questions for you.

Ms Scheske: My name is Rebecca Scheske and I am a Karingbal woman. I thank the committee for the opportunity to make a submission and to speak to you all today. I also acknowledge the traditional owners of the land on which we meet and pay my respects to their elders past, present and emerging.

My uncle Charles Stapleton, as a senior Karingbal Elder, together with Mark Albury have fought so hard to protect our rights as Karingbal people to care for our traditional country and our Aboriginal cultural heritage. This has come at a great emotional toll to my elders and to those of us who understand the significance of our heritage and the responsibilities this brings. This has been a long and hard process.

The Federal Court found that the Karingbal people were the native title holders for our country, Arcadia Valley, but because of some legal technicalities we could not succeed in our native title claim. The Federal Court also found that the people claiming native title over Arcadia Valley from were not from there at all. Unfortunately, that finding did not overcome the way that DATSIP was implementing the Aboriginal Cultural Heritage Act, which allowed the people who have no traditional responsibility or knowledge of Arcadia Valley equal rights as us. I have personally witnessed those people not dealing appropriately with cultural heritage during clearance programs and I personally have been excluded from participating for pointing that out.

Two and a half years ago, we made application for registration of our corporation, the Nuga Nuga Aboriginal Corporation, as the cultural heritage body for the area to try to get on the front foot in protecting our sacred sites and our artefacts. After a very long period, the department rejected this application so we challenged this in the Supreme Court and the Supreme Court found we were right. We fought for the findings in the Nuga Nuga case, because it was the only way left for us to protect our cultural heritage. We tried to talk to the department about how we could protect our cultural heritage, but all the department wanted to do was to preserve the way it went about business that allowed people who have no knowledge or responsibility for our country to deal with our artefacts and our sacred sites.

The Supreme Court found that there was no basis for the department's position. The Karingbal people were elated, because we thought now we would be able to meet our traditional responsibilities in our country. That was the opportunity for the state to work with us and put our cultural heritage body in place, which was what we applied for in the first place. That would have ensured both our ability to protect our cultural heritage and for proponents certainty about who they have to deal with. However, DATSIP did not work with us to do that. After the Supreme Court's decision, DATSIP again gave a preliminary decision indicating refusal of our application. This gave no certainty for us or for proponents. We have responded in detail to that preliminary decision, but our application seems to have been parked indefinitely. For two and a half years, we have sought cultural heritage body status and still there is no decision from DATSIP.

The effect of the amendments to the definition of 'Aboriginal party' in the Aboriginal Cultural Heritage Act is to take our only success from us. It defeats the whole purpose of protecting cultural heritage by putting it in harm's way when people who have no knowledge and no responsibility can sign off on clearances. It gives some proponents the ability to pick and choose who they deal with and in some cases it could force proponents to deal with people who cannot speak for country. The proposed amendments will entrench the rights of people who have been found to hold no rights over the area, as the determination will last forever, and the Karingbal people will have no further recourse through cultural heritage or native title laws.

The Karingbal people were not consulted on the amendments. I personally wrote to the minister about this back in March this year, but have never received a response. I think it is wrong that Aboriginal people are not consulted at all about something that has such significant effects on matters that are so important to us.

The Karingbal people have no problem with certainty for proponents and their current arrangements. We are happy to more forward and leave behind what has happened in the past, but we cannot wait around for some uncertain future reform process to take place, while the very problem that puts our cultural heritage at risk is entrenched in the act.

I urge the committee to recommend that the amendment to the definition of 'Aboriginal party' not proceed, and that a proper process of consultation and policy development to address these issues take place as soon as possible. If it does, we will be the first to put our hands up to participate in a cooperative way. We cannot accept these amendments. We never have and never will seek to speak or manage what is not our responsibility to manage. That would go against our beliefs and customs. To pass these amendments is nothing but a slap in the face to the people who have the great responsibility for overseeing country. These amendments render the Aboriginal Cultural Heritage Act defunct, because they give the people with no traditional knowledge and responsibility rights over the people who do.

CHAIR: Thank you. Does anyone else want to speak?

Dr Singleton: Thank you, Mr Chairman. I will be brief. One of the things that I think is important to bring to the committee's attention is that the Karingbal people's view is that the legislative amendment proposed is wrong, but it is also unnecessary. There is already a provision in the legislation that would create the certainty for proponents and for Aboriginal people that is desired. That is what we have applied for all along, which is a registered Aboriginal cultural heritage body. That would actually allow the certainty, certainly in this country and in other countries. It would require a level of due diligence by the department to do that.

However, the Karingbal people have had two and a half years of trying to assist the department with that due diligence with multiple submissions, including one most recently that addresses some of the very questions that you have asked today around what is it that you would show to show traditional knowledge and traditional responsibility. That included sworn evidence from Karingbal people representatives. I am happy to table that, if that is of assistance to the committee.

CHAIR: Could you bring it forward and we will look at it?

Dr Singleton: Having said that, if it were the case that the committee was of the view that amendments are required and an Aboriginal cultural heritage body is insufficient to address the problem that has been identified in the legislation, then the Karingbal people endorse the amendment to the amendment that has been put forward on behalf of the Yugarapul people. Thank you, Mr Chair.

CHAIR: Mr Fulcher?

Mr Fulcher: Thank you for the opportunity to make both written and oral submissions to the committee. It is very much appreciated. I acknowledge the senior elder of my client, Uncle Des Sandy, who is with us today.

The Yugara-Yugarapul people, like many Aboriginal people in Queensland, are not opposed to development, nor do they wish to prevent efficiency, certainty and simplicity in the operation of the last claim standing rule. If they were fundamentally opposed to development, they could not have borne what has happened in Brisbane and Ipswich over the past 100 years to their heritage, their sites and places and their cultural identity. They wish to see balance in the operation of the rule. They do not want to see people whose claims to native title have been proven to be based on false premises in the Federal Court to continue to profit from that situation. The Federal Court has determined in the judgements that we cite in our submission that the Turrbal people have no biological descent to the apical ancestors in Brisbane. These judgements are in rem—that is, they are against the whole world, including the state of Queensland. Indeed, it was the state of Queensland that sought the ruling and the negative determination of native title over Brisbane.

By reimposing the last claim standing rule in the manner contemplated by the bill, the state is simply ignoring, in respect of the Turrbal people, a judgement of the Federal Court that binds it and that it itself sought. The Yugara-Yugarapul people say that that is unjust, as it allows the Turrbal people to profit from a situation that the Federal Court has determined has no basis in fact or law. But it is not only unjust; it is also contrary to law unless the decision-maker determining who the last claim standing is has discretion to take account of a judgement such as the ones in Sandy v the State of Queensland referred to by Mr Wishart.

The Yugara-Yugarapul people are not saying, 'Don't reintroduce this rule.' They are saying, 'Don't reintroduce this rule so it is productive of further injustice.' We have suggested that the decision-maker be able to have some discretion to decide who the Aboriginal party should be when

the last claim standing cannot establish any link to country or any right to speak for country. That is based on decisions in the Australian Broadcasting Tribunal v Bond as to errors of fact in decision-making processes and how the court deals with those. That is in our submission.

The Yugara-Yugarapul people understand that the department does not wish to be deciding between competing claims to Aboriginal party status but, if it does not, injustice is the inevitable result in cases where the Federal Court has decided, after being urged by the state itself, to make a decision that renders the last claim standing unable to prove any ongoing rights or status in relation to country.

The Land Court has cultural heritage jurisdiction. In the event that the decision-maker in the department decides something to which those aggrieved are opposed, they could object to the Land Court as a body that can determine such competing claims. Development is fundamental to the future of this state—the Yugara-Yugarapul people understand and accept that—but it should not be at all costs and certainly not at the cost of further injustice being heaped upon Aboriginal people who just want some fairness and the capacity to be heard when last claim standing are impugned by the Federal Court.

The right to speak for country is at the heart of customary law and at the centre of native title law. 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.

It is all about balancing the rights of each interest group rather than preferencing the rights of developers over the rights of Aboriginal people. The rule can certainly be reintroduced, but it ought not be at the expense of Aboriginal people who, after all, are at the centre of the processes in the act sought to be amended to reinstate the rule. Thank you.

CHAIR: Are there any questions from the committee?

Mr STEVENS: I have a question of Ms Scheske, but it may be best answered by Mr Fulcher—I am not too sure. There is certainty required by industry—there are some 80 claimants et cetera—and trying to get a resolution to the matter is what this legislation is all about. Would it assist if a sunset clause of, say, three years were added to this legislation until a better methodology was put forward? Mr Fulcher might be able to help you.

CHAIR: The suggestion would be that that be a time—

Mr STEVENS: That is what a sunset clause is—that this legislation gets put in place and it gets reviewed again in three years time.

Ms Scheske: These gentlemen have—

Mr STEVENS: Correct. I mentioned that it might be best answered by Mr Fulcher, who has long experience in these matters.

Mr Fulcher: Obviously, I have acted for developers as well so I understand the certainty point. Yes, it is an incredibly important part of this process but, as you have heard, we are not advocating a lack of certainty; we are simply advocating a second step in situations where the Federal Court has ruled on something that clearly would be unjust to ignore. That is essentially all we are saying. The step could be—and we have drafted something in our submission—added to the bill that would enable the decision-maker in the department in circumstances where there is a judgement like in Sandy, like in Wyman, to a make a discretionary call about who the Aboriginal party is and then there is to be a right to object to that. There are judicial review processes in any event, but there could be a right of review by the Land Court.

Mr STEVENS: By that answer, the answer to my question is that a sunset clause is of no assistance?

Mr Fulcher: It will not cure injustice because, for three years, there will be injustice. That seems to us to be unacceptable in circumstances where there is another solution, which is an administrative law solution that goes into legislation all the time to take account of competing claims to things.

Mr STEVENS: Thank you.

Dr Singleton: The only thing that I would add to that is that, obviously, if it is a three-year period until the sunset date, in our submission that is a three-year period of Karingbal cultural heritage, and Aboriginal cultural heritage generally, continuing to be exposed to risk of harm. Desecration is forever. It would create those risks.

Mr STEVENS: Thank you.

CHAIR: I have a question for Dr Singleton. I notice that you said that the current legislation provides a mechanism for declaring an Aboriginal cultural heritage body and that the department could at any time during that period—or any future period—make a determination about that. Why is that ability not working in practice? Can you give us guidance on that?

Dr Singleton: Thank you for the question. I think there is great reluctance on behalf of the department to approve cultural heritage bodies in circumstances where further due diligence beyond a registered native title claim, or a determined native title holder, is in place. There is provision in the Native Title Act about the people who would need to be, in the current circumstances, consulted. That comes down to concepts of having traditional knowledge and traditional responsibility for country. That requires the department to carry out that investigation.

As applicants for that status, the Nuga Nuga Aboriginal Corporation, on behalf of the Karingbal people, have sought at great length and at great cost to carry out those investigations and to provide that evidence and to seek clarity on the law in the Supreme Court to assist the department to do that. That is why we say, 'It is time to make that decision and that would resolve the issue without the need for this legislative amendment.'

CHAIR: In some cases in the future there could be two parties who assert the same sorts of rights and contest the other party's assertions. It is a difficult administrative decision, but you say that they have within the legislation the mechanism to do that and it just needs to be taken up in a stronger and more robust way?

Dr Singleton: Yes, in circumstances where there are multiple parties that could meet the traditional knowledge and traditional responsibility criteria, obviously, I think the department would be reasonable in saying that it is incumbent on those parties to work together. Here, based on the sworn evidence that we have handed up, that is not the case.

It is an interesting provision—the Aboriginal cultural heritage body provision—in the sense that it was always looked on as somewhat of a postbox. It did not achieve a lot. Ironically, we have now found that it has come into its own. This is the opportunity to use it for something meaningful.

CHAIR: In that way, there is the administrative ability under the current act to provide the kind of justice that your corporation is seeking?

Mr Fulcher: I hate to not present a completely united front here, but the problem with the provision from my perspective is that one of the things that the department, or the minister, has to take into account in deciding an Aboriginal cultural heritage body status for a group is, 'Is there any dispute about that?' If there is any dispute about it, then it is going to be difficult for the determination to be made.

I hope that the department might make decisions in the teeth of some opposition, but I think its previous practice indicates that it is not really prepared to take on issues of fundamental dispute between parties when they have to make some kind of discretionary decision—unless the law, as we are suggesting, is amended to allow them to have that discretion. That is what we are suggesting—that the law needs to be clear that the decision-maker in the department in cases such as Wyman and Sandy has the discretion to make a decision about who the Aboriginal party should be when there is clear court evidence about all of the issues that have been in dispute between the groups.

CHAIR: In this case, we have a dispute. We have Dr Singleton asserting that the department could have made that decision through the current legislation, presumably, where we have knowledge that there is a dispute over the facts, but also some judicial information that gives some guidance to the department?

Mr Fulcher: I think the department could make the decision now—I agree with Scott about that—but it is not.

CHAIR: The question then is that the recommendation that you made still relies on the same department and the same set of facts and the ability to make a decision that removes a particular group's Aboriginal cultural heritage rights.

Mr Fulcher: But it will be clear from our amendment that the department had the discretion to do that, which might give them, if I use the colloquial expression, a bit of bottle in relation to making that decision that they currently are concerned about making.

Mr O'CONNOR: Mr Fulcher, from your perspective, what would the proposed changes mean for the Yugera people? Were they unable to become registered claimants?

Mr Fulcher: Their claim could not register because there was already a registered claim over the same area.

Mr O'CONNOR: By the Turrbal people.

Mr Fulcher: By the Turrbal people. What is very clear from our submission, you will note, is that the registration test decision for the Turrbal claim was based on evidence from the Turrbal people that the court found to be wrong. We feel that, if the decision had been made not to register that claim, there would have been a different result.

It is true that the Yugara-Yugarapul people did not get determined to be the native title holders for the greater Brisbane area, which was the area of the Turrbal claim, but they are connected to apical ancestors in South-East Queensland. Very clearly, the court says that in the judgement. They just happen to be on the outskirts, or the edge, of the greater Brisbane claim area. They are definitely connected to South-East Queensland. Uncle Des has a significant knowledge of the Brisbane area—where the old bora rings were, where all the major sites of intangible heritage are located as well as the sites of tangible heritage. That knowledge is not being allowed to be used because of this rule.

Mr O'CONNOR: Would the Turrbal people's claim become the last claim standing?

Mr Fulcher: Yes.

Mr O'CONNOR: They are?

Mr Fulcher: They are not technically at the moment, because the amendment has not happened, but they would be reinstated as the last claim standing in what we say are circumstances where the court has been very clear that they are not biologically descended at all.

Mr O'CONNOR: Thank you.

CHAIR: Are there any further questions? There being no further questions, we thank you very much for your participation. I really appreciate your time here. I also want to move a motion to table the submission that was put forward by King & Wood Mallesons. Carried. Thank you.

DEVINE, Ms Wendy, Principal Policy Solicitor, Queensland Law Society

INGRAM, Mr Ivan, Member, Reconciliation and First Nations Advancement Committee, Queensland Law Society

LIND, Mr Andrew, Chair, Not for Profit Law Committee, Queensland Law Society

TAYLOR, Mr Ken, President, Queensland Law Society

CHAIR: Good afternoon. I invite you to make a short opening statement, after which committee members may have some questions for you.

Mr Taylor: Thank you for inviting the Queensland Law Society to appear at the public hearing on the Revenue and Other Legislation Amendment Bill. My name is Ken Taylor. I am the president of the Queensland Law Society. The society is an independent, apolitical representative body and the peak professional body for the state's legal practitioners, whom we represent, educate and support. In carrying out its central ethos of advocating for good law and good lawyers, the society proffers views which are representative of its member practitioners. In particular, I note the efforts of the Not for Profit Law Committee, the Mining and Resources Law Committee, the Reconciliation and First Nations Advancement Committee, the Property Law Committee and the Revenue Law Committee in compiling written submissions on the bill.

In our written submission on the bill the society particularly highlighted concerns in relation to the proposed amendments to the Taxation Administration Act 2001, which will have significant practical effects on charities in Queensland, and our concerns about insufficient transitional time frames. The society also raised concerns in relation to the amendments proposed to the Aboriginal Cultural Heritage Act and the Torres Strait Islander Cultural Heritage Act. The society considers that further consultation is required in relation to those proposed amendments. The society supported the proposed amendments to the duties framework to expand the transfer duty framework for e-conveyancing in Queensland. The society also supports the amendments to give effect to the administrative arrangements implemented by the Office of State Revenue as identified in the bill.

I appear today alongside two of our subject matter experts on the issues. Andrew Lind is the chair of our Not for Profit Law Committee and Ivan Ingram is a member of the Reconciliation and First Nations Advancement Committee. I am also accompanied by Wendy Devine, the principal policy solicitor of the society. I would now like to invite Mr Lind to provide a very short statement to the issues of concern relating to the not-for-profit and charities issues.

Mr Lind: There are just a couple of things I want to mention that were not raised in our written submission. We did raise the issue of all charities needing to review their constitutions during the transitional period and the transitional period being inadequate. It is not a given that all charities are going to be able to change their constitutions to comply, even if they were aware that they needed to, called the EGMs and those with the authority made the requisite decisions. For example, charitable trusts do not have members, and the ability to amend the terms of a charitable trust depends upon the terms of the trust deed and the breadth of the power of amendment in the deed. As was seen in a recent Supreme Court decision in Queensland 'In the matter of the Public Trustee of Queensland as trustee of the Queensland Community Foundation in 2016', the court was required to make an order that the power of amendment was broad enough to make the amendment to the charitable trust deed proposed in that particular set of circumstances.

The resources that will need to be diverted by all charities—the ACNC reports that in Queensland there are approximately 7½ thousand charities with a street address in Queensland—during the transitional period will not be insignificant. It will involve staff and volunteer time, distraction from core purpose delivery, legal costs and costs of calling and convening an EGM. Therefore, I ask the question: what is the purpose of the amendments and what mischief are they seeking to address?

It seems to me that the legislation in its current form, along with the chamber of commerce decision in 2015, provides the certainty the sector requires as to the meaning of 'charitable institution' and the amendments as currently proposed will create burden on charities, and every charity that is properly advised and able to make the amendments will make the amendments, as indeed I would have thought the chamber of commerce would have done in Queensland. Could it be that the amendments as proposed, if passed, will lead to a fresh wave of litigation about what the amendments as passed mean, as was seen in a very recent decision in the ACT, handed down at the end of last month, about amendments to the ACT's revenue legislation in 2015 in the decision of Australian Pork Limited v Commissioner for ACT Revenue?

Mr STEVENS: In relation to the amendments to the cultural heritage acts, the Queensland Law Society submits that, rather than legislatively restore the last claim standing provision, the department should work collaboratively with native title representative bodies—I think they are probably doing that now—and service providers as well as registered native title body corporates. Would this consultation be to determine the rightful native title holder—in other words, there will have to be someone who will actually make a decision on the rightful native title holder? How long do you believe that consultation could go on, particularly appeal rights and so on for the person found to not be the rightful native title holder?

Mr Ingram: We heard earlier today submissions made by Queensland South Native Title Services. It is a representative body exercising the functions under part 11 of the Native Title Act, so it is one of the several bodies here in Queensland referred to in our submission that the department may be able to work with in its consultation to identify who the right people are for country. Those native title service providers and representative bodies, as mentioned previously by Mr Wishart, carry a depth of research and work already done in the native title regime that would at least assist the department in identifying who those right people may be or at least narrow the scope of who are the appropriate Aboriginal parties to consult with. In terms of how long the consultation process may be, that is something I cannot necessarily speak to as the Queensland Law Society. It could be expedited through those consultations with the representative bodies who hold that knowledge or it could take quite a long time. At this stage it is rather indeterminate.

Mr STEVENS: Would it be appropriate, then, for, say, a body like the Queensland group that we had here before to have to give a decision back to the department within a certain period of time: 'We need 12 months, 18 months or two years of consultation but then that decision has to be made'? Industry looks for certainty, and, with these things, how long is a piece of string in terms of finding out who the real native title holder is? Could that be a possibility?

Mr Ingram: In terms of it expanding to beyond a reasonable amount of time, as you were saying, Queensland already has the benefit of 135 positive native title determinations, so for those areas for which the determination has been reached as to who the right people are for country underneath the native title regime. There are also currently 84 registered native title body corporates who are likely to be the appropriate Aboriginal party for the purpose of the cultural heritage act. It is those areas where there may be no native title claim that we are looking at. At least for the southern and south-western part of Queensland, that is quite a large area, but at least it is confined to a space that has likely been worked on previously by a native title representative body or service provider.

CHAIR: Mr Lind, we had a public briefing—the transcript is available online—at which Ms Goli from the department gave us information about the process of charities in adopting their constitutions. Mr Stevens asked about the 80 charities that they would write to of which they had awareness. He asked—

Are they the only ones that will apply to?

The answer was—

There are a broader range of charities out there, but they may not have sought exemptions. It will only come up if and when they come to seek an exemption from us. Then we will look to see whether or not it is in their constitution at that time. Our practice generally at that point is: if it is not in their constitution, we will tell them it needs to be in the constitution. They will go away and put it in their constitution, and then we will register them.

Is that information that was presented to us incorrect? In that way, it does not seem to be a huge imposition. It is only about those that seek an exemption, and at that time they can do it.

Mr Lind: Yes, you are correct: it is in relation to those that seek exemption. I read that passage in the transcript. The answer to the question, as I read it, was that at the moment there are approximately 80 charities that have been registered on the basis of the Supreme Court decision. I think that is distinct from the number of charities that are already registered for exemptions in Queensland that would number far in excess of that. I do not know what the number is. As far as I am aware, the Queensland charitable institutions register is not a publicly available register. Any charity operating in Queensland that wants to seek payroll tax exemptions, land tax exemptions or duty exemptions would need to seek to register.

My concern is that another unintended consequence might be a charity acquiring a new headquarters in Queensland. They sign a contract. Then they see their lawyers. Prior to that they have not made the amendments to their constitution. The duty boom gate comes down and they are paying duty, because the dutiable event happens at the time of the signing of the contract.

I think there are some unintended consequences in what might appear to be a neat administrative fix, but I think it will have the effect of pushing existing charities that have long enjoyed a place in this exemption tent outside the tent. I think that might sound in the 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.

The other thing to say is that charitable trusts cannot actually comply with the second condition because they do not have members. They cannot include a provision in their constitution that they will not distribute profits or income or assets to members by way of dividend, bonus or otherwise because it simply does not make sense in the context of not having members. If they sought the cooperation of the Supreme Court for such an amendment, would the court be inclined to make such an order where it had no utility? I just raise that as a query—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.

CHAIR: Putting aside the second part about charitable trusts, which is relatively complex, in the first part, 'when they go forward to seek an exemption they will look towards their constitution', you are saying if they have made a sale under one particular constitution then they would be liable for duty.

Mr Lind: Correct.

CHAIR: Here it says—

This is what we do today. That is what we have always done. This court case said that it did not need to be in their constitution.

Ms Goli's evidence is that this is the same practice that happened previously. It had not been a problem, although they could have tested it in the way the QCCI—

Mr Lind: Yes, certainly in our experience as a firm we put a lot of these duty exemptions in. The department will initially say, 'Where are these particular provisions in your constitution?' Again, ordinarily as long as we can point to parts of the constitution that have that effect, we are successful in getting them registered as exempt charitable institutions. That is the way the law works at the moment, and that would save the charities that inadvertently enter into a dutiable transaction. If their constitutions have that effect currently, they will still be able to get the exemption.

CHAIR: So the department is not correct in saying that it would work in the same fashion that you said there, that the dutiable transaction has occurred and you found that—

Mr Lind: It would work that way if the charity sought an exemption before entering into the dutiable transaction, and in our experience they often do not. They often assume that they are registered. They do not necessarily understand the difference between registering in Queensland and registering with the ACNC. They assume that if they are a registered charity with the ACNC, they do not have to separately register with the state revenue authority. Ordinarily we are seeking these registrations post a contract being signed.

CHAIR: It does seem to be a contradiction. It says here—

If a charity was constituted tomorrow and then it came to us next year and decided it wanted to seek an exemption but it did not have it in its constitution, we would tell them that if they want to be registered as a charity for state tax purposes they need to have it in their constitution.

Mr Lind: Correct. Under the new requirements, that is correct, they would have to add it to their constitution. Under the current requirements as long as that was the effect of their constitution, they would be able to get the registration.

Mr O'CONNOR: I could not see this in your submission, but did the Law Society have any commentary on the proposed changes around home-brew?

Ms Devine: No, we did not address that in our submission.

Mr O'CONNOR: Do you have anything to add?

Ms Devine: No, we do not have any comment on that aspect of the bill.

CHAIR: There being no further questions, that concludes the hearing for today. There were no questions taken on notice in this session. We thank you very much for the information you have provided today. Thank you also to our Hansard reporters. A transcript of these proceedings will be available on the committee's web page in due course.

The committee adjourned at 12.04 pm.