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Nuga Nuga Aboriginal Corporation (ICN 8089) (NNAC) – submission to the Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia (the Inquiry)

1 Overview of submission

NNAC is an Indigenous Corporation registered under *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). Its objectives are to care for “Karingbal country and people”. The Karingbal People are the traditional owners of lands and waters in the Arcadia Valley region of Southern-Central Queensland.

This submission is made to the Joint Standing Committee on Northern Australia (**the Committee**) on behalf of NNAC, and addresses the following terms of reference of the Inquiry:

- (f) *the interaction, of state indigenous heritage regulations with Commonwealth laws;*
- (g) *the effectiveness and adequacy of state and federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage in each of the Australian jurisdictions;*
- (h) *how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites;*

In summary, NNAC's submission is the Queensland cultural heritage laws, which are intended to protect Aboriginal cultural heritage in Queensland (including the Karingbal People's cultural heritage) are fatally flawed. This is because of the inclusion of the “Last Claim Standing Provision” in section 34(1)(b)(i) of the ACHA, amongst the provisions directed at identifying the Aboriginal party to engage with to ensure compliance with the ACHA.

NNAC, motivated by the need to protect Karingbal cultural heritage, made an initial application on 17 February 2016 for registration as an Aboriginal cultural heritage body under section 36 of the *Aboriginal Cultural Heritage Act 2003* (Qld) (**ACHA**). The representative of the Queensland Government Department of Aboriginal and Torres Strait Islander Partnerships (**DATSIP**), as delegate of the Minister, eventually rejected this application on 24 March 2017, in reliance on DATSIP's interpretation of the Last Claim Standing Provision.

In its continued desire to protect Karingbal cultural heritage, NNAC successfully brought a judicial review application in relation to DATSIP's decision in the Queensland Supreme Court later in 2017.¹ In that case, His Honour Justice Jackson found the relevant sections of the ACHA did not have the application asserted by the State (**NNAC Decision**). This decision was not appealed by the State, but the then Deputy Premier Jackie Trad subsequently introduced and passed the *Revenue and Other Legislation Amendment Bill 2018* (Qld) (**Last Claim Standing Preservation Bill**) to change the relevant sections of the ACHA to reflect DATSIP's preferred interpretation of the Last Claim Standing Provision.

¹ *Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships* [2017] QSC 321

This was done:

- with no consultation with NNAC;
- without regard to the legitimate and deeply held concerns raised by NNAC as part of the State Parliamentary Committee inquiry into the matter;
- without regard to the need to ensure Karingbal cultural heritage was protected by the law that is asserted to have that purpose; and
- on the basis that the State would revisit the matter promptly as part of a more thorough review of the ACHA (which as at the date of this submission has not materially progressed and there is no reliable indication of when this might be resolved).

NNAC has not even had the courtesy from DATSIP of a final decision on its application for registration as an Aboriginal cultural heritage body post-Justice Jackson's NNAC Decision.

Karingbal cultural heritage remains at serious risk under the current provisions of the ACHA and under the stewardship of DATSIP which purports to be the guardian of Aboriginal cultural heritage. Proponents can and do thumb their noses at the Karingbal People and go about their business in a way that avoids the need to deal with the legitimate traditional owners of the land on which they operate. This means no-one with traditional knowledge or responsibility is involved in protecting Karingbal cultural heritage from harm on these sites. An example of this is U&D Mining

Industry (Australia) Pty Ltd (**U&D**), the proponent of the Meteor Downs South Coal Mine Project.

Karingbal cultural heritage is also placed at risk by deficiencies in the ACHA in relation to costs orders for rehabilitation or restoration against a person convicted of unlawful harm to or possession of Aboriginal cultural heritage under section 27 of the ACHA. Desecration of Aboriginal cultural heritage took place at Bottletree Quarry between 2013 and 2016. This was subsequently the subject of the prosecution of Ostwald Construction Materials Pty Ltd (**Ostwalds**) in 2018.² In that case, the Magistrate ordered the defendant pay \$250,000 in rehabilitation or restoration costs (in addition to a state penalty). Despite the passage of nearly two years, these costs have not been paid, and no rehabilitation or restoration of the harmed Karingbal cultural heritage has taken place.

NNAC urges the Committee to make recommendations for amendments to Commonwealth laws to effectively protect Aboriginal cultural heritage in circumstances where State laws fail to safeguard against the preclusion of the relevant traditional owners of the land making decisions on the management of their Aboriginal cultural heritage. NNAC also submits the Committee should find the ACHA is ineffective and inadequate in relation to these matters and in relation to providing means for delivering rehabilitation and restoration of Aboriginal cultural heritage that has been damaged during the commission of an offence.

2 Background to relevant native title claims

In 2013, the Federal Court of Australia made a native title determination³ in relation to an area that was the subject of the overlapping native title claims of:

- the Bidjara People;
- two claims by the Karingbal People, as constituted by the descendants of Albert Albury Senior and Jemima of Albinia; and
- two claims by the Brown River People, as constituted by the descendants of Albert Albury Senior (who are Karingbal People, but who used a different name for these native title claims to distinguish themselves from the differently constituted Karingbal claims).

In summary, the Federal Court found the Bidjara People did not and never had held native title over the determination area (excluding Carnarvon Gorge), which is known as Arcadia Valley. The Court further held the Karingbal People were once the native title holders for the Arcadia Valley, but more recent generations did not meet the technical continuity of connection requirements of the *Native Title Act 1993* (Cth) (**Native Title Act**). The Court also held the descendants of Albert Albury Senior (also known as the Brown River People) were the Karingbal People, and that the descendants of Jemima of Albinia were not Karingbal People and had never held native title over any part of the determination area. The Full Federal Court did not overturn this decision on appeal.⁴

² *Dunn v Ostwald Construction Materials Pty Ltd* [2018] QMC 23

³ *Wyman v State of Queensland* [2013] FCA 1229

⁴ *Wyman v State of Queensland* [2015] FCAFC 108

Importantly for the purposes of DATSIP's purported application of the Last Claim Standing Provision, this meant the claims of the Bidjara People and of the Karingbal People (as constituted by the descendants of Albert Albury Senior and Jemima of Albinia) failed at the same time and therefore the Bidjara and Karingbal claims were both the last failed claim, with all applicants to both having standing for this purpose (the Brown River claims were never registered and so are not relevant in this regard).

3 The Last Claim Standing Provision

The Last Claim Standing Provision is part of the mechanism under the ACHA to identify the relevant Aboriginal party that a project proponent must deal with, for example, to negotiate or develop cultural heritage management plans (CHMPs) and cultural heritage agreements, and thus comply with the Aboriginal cultural heritage duty of care under the ACHA. Sections 34 and 35 of the ACHA set out a hierarchy for how an Aboriginal party is identified for a particular area. The key provision is that in the absence of there being a registered (determined) native title holder for an area or a registered native title claim, and if there have previously been registered native title claimants, the last of these native title claimants to have remained registered is the Aboriginal party for the area (s 34(1)(b)(i) of the ACHA).

DATSIP applies an interpretation of the Last Claim Standing Provision by suggesting on its register that each of the descendants of Jemima of Albinia, the Bidjara People and the descendants of Albert Albury Senior are the Aboriginal party for the Arcadia Valley. The consequences of this approach are:

- people who were not and never had been native title holders for the area were put on an equal footing with the descendants of Albert Albury Senior, who the Federal Court held are Karingbal People and who are descended from the native title holders for the area; and
- Karingbal cultural heritage is therefore highly vulnerable to harm given people with no traditional affiliation with, or traditional knowledge of, Karingbal cultural heritage are able to make decisions about Karingbal cultural heritage, often to the exclusion of the legitimate Karingbal People.

DATSIP's interpretation of the Last Claim Standing Provision merely provides expedience in identifying a party for a proponent to have dealings with, without proper regard for whether that party is suitably qualified and authorised to identify and manage Aboriginal cultural heritage and avoid harm to it. This interpretation was not only subsequently found to be legally incorrect but is also a deeply flawed policy approach. Failure of a claim can occur for many reasons - from withdrawal of the claim due to insufficient resources or research, to the people who once held native title being unable to make out the technical continuity of connection requirements of the Native Title Act (notwithstanding their traditional knowledge and responsibility for Aboriginal cultural heritage, as was the case for the Karingbal People in Arcadia Valley), to a finding that a claim is entirely spurious and without foundation.

4 Efforts made by Karingbal People in native title and Aboriginal cultural heritage

Obviously, the Karingbal People have applied an enormous amount of effort in pursuing their native title claims over a long period of time. Unfortunately, the technicalities of the Native Title Act and its interpretation by the Courts resulted in the Karingbal People being denied a determination of native title in their favour, notwithstanding the Court's recognition of their traditional status in relation to Arcadia Valley.

This result, combined with the DATSIP interpretation of the Last Claim Standing Provision of the ACHA, has meant that the Karingbal People have often been denied the ability to appropriately care for their cultural heritage in the Arcadia Valley region. Other people, who the Federal Court has expressly found have no current or previous native title interests, have been able to participate in the management of Karingbal cultural heritage, often to the exclusion of the Karingbal People.

The Karingbal People therefore took further steps to protect their cultural heritage, as they are traditionally entitled and obliged to do. This involved an application to the Minister for Aboriginal and Torres Strait Islander Partnership's delegate on 17 February 2016 for registration of NNAC as a registered Aboriginal cultural heritage body over the Arcadia Valley region. An Aboriginal cultural heritage body has a statutory role of identifying the relevant Aboriginal parties for the purposes of negotiating cultural heritage agreements and developing CHMPs. NNAC's submission was based on what the Supreme Court subsequently found was the correct interpretation of the Last Claim Standing Provision – namely that the Last Claim Standing Provision did not apply because the proviso that “there is not, and never has been, a native title holder for the area” was inapplicable given the Federal Court's finding the Karingbal People once held native title in the relevant area.

The Minister's delegate refused NNAC's application for registration as an Aboriginal cultural heritage body on 4 October 2016, on the basis of DATSIP's interpretation of the Last Claim Standing Provision proviso being a reference

to a native title holder who was the subject of a positive determination of native title under the Native Title Act. The delegate therefore considered the Federal Court's decision was irrelevant to the merits of NNAC's application.

NNAC commenced proceedings for the judicial review of this decision on 9 December 2016. In the proceedings, the Counsel for the Minister argued that the decision to refuse the application was correct because the reference to "native title holder" in the Last Claim Standing Provision should be constructed to mean a "determined native title holder". In the NNAC Decision, His Honour Justice Jackson upheld NNAC's application for judicial review on 20 December 2017, primarily on the grounds that there was no justification to depart from the plain text of the provision, based on the ordinary rules of statutory interpretation.⁵ His Honour noted the relevant provision:

asks two questions. First, is there a native title holder for the area? Second, has there ever been a native title holder for the area? Looking at the text in the context described above, nothing expressly requires that the native title for either question must have been determined under s 225 of the NTA.⁶

The State did not appeal the NNAC Decision. As a consequence of the NNAC Decision, the Minister's delegate was required to remake the decision on the NNAC application for registration as an Aboriginal cultural heritage body. To date, only a draft decision (reaffirming the original decision to refuse the application, notwithstanding the NNAC Decision) has been provided to NNAC. NNAC made a further submission to DATSIP on 23 August 2018 in support of its application, but NNAC has never received a response from DATSIP on that or a final decision on the application generally.

5 Last Claim Standing Preservation Bill

Notwithstanding the State did not appeal the NNAC Decision, on 22 August 2018 the then Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships Jackie Trad MP introduced the Last Claim Standing Preservation Bill. The objects of the Last Claim Standing Preservation Bill included the reinstatement of the Last Claim Standing Provision as previously purported by DATSIP prior to the Nuga Nuga Decision. It did so by inserting the word "registered" before the words "native title holder" in the provision, notwithstanding this word had not been included in the ACHA in its 14 years of operation and notwithstanding Counsel for the State in the Nuga Nuga Decision, when pressed by the Court, didn't concede the omission of the word "registered" from the proviso to the Last Claim Standing Provision was a drafting mistake.

NNAC made written⁷ and verbal⁸ submissions on the Last Claim Standing Preservation Bill to the Queensland Parliament Economics and Governance Committee in September 2018. The verbal submissions included testimony of personal experience of other people not dealing appropriately with Karingbal cultural heritage during clearance programs and Karingbal People being excluded from participating in clearances for pointing that out. The following points were also raised in those submissions:

- The proposed amendment is a blunt instrument that makes no attempt to consider the broader policy implications involved in the NNAC Decision – it will expressly empower people found by the Federal Court not to hold or be descended from the holders of native title to make decisions in relation to Karingbal cultural heritage.
- The last claim standing provision, as it is proposed to be amended, determines priority amongst such failed claims without regard to their merits – and merely with regard to the arbitrary criteria of the time when a claim ceased to be registered. In the case of the Arcadia Valley, this has the effect of preserving a practice of allowing proponents to pick and choose amongst failed claimants.
- This severely detracts from the efficacy of the objectives of the ACHA, in that people who lack traditional knowledge to be able to identify Aboriginal cultural heritage, and the traditional affinity necessary to apply rigour in doing so, may participate in cultural heritage management to the exclusion of those people who have the traditional knowledge, responsibility and affinity. In some cases, this may take place merely

⁵ *Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships* [2017] QSC 321 at [21]

⁶ *Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships* [2017] QSC 321 at [32]

⁷ <https://www.parliament.qld.gov.au/documents/committees/EGC/2018/RevenueOLA2018/submissions/002.pdf>

⁸ <https://www.parliament.qld.gov.au/documents/committees/EGC/2018/RevenueOLA2018/trns-ph-17Sep2018.pdf>

because the lesser knowledge and affinity delivers a less expensive exercise for the proponent, which is exactly what has been occurring in Arcadia Valley.

- The effect of the amendments would be to:
 - make the ACHA defunct insofar as it would no longer meet its fundamental objectives - to provide effective recognition, protection and conservation of Aboriginal cultural heritage; and
 - raise significant doubt as to whether the ACHA would continue to constitute a State law which provides effective protection of Aboriginal cultural heritage from the threat of injury or desecration, for the purposes of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).
- Despite the Karingbal People having been in constant contact with DATSIP since the NNAC Decision was handed down (including writing directly to the then Deputy Premier on 5 March 2018, which was never responded to or acknowledged) and assurances received from DATSIP that there would be broad consultation before any legislative reform was undertaken, the Karingbal People were not consulted or even notified before the introduction of the Last Claim Standing Preservation Bill.
- The Deputy Premier's second reading speech made reference to an opportunity for the government to explore the possibility of a broader review of the cultural heritage acts in the future, but such matters provided shallow comfort given the potential for ongoing harm to Karingbal cultural heritage in the meantime

The substance of NNAC's submissions was supported by various Aboriginal representative bodies and the Queensland Law Society.⁹ Despite these submissions, the Queensland committee ultimately recommended the Last Claim Standing Preservation Bill should be passed (with the vague qualification that the Committee will be interested to hear of progress of the broader review forecast by DATSIP).¹⁰ The Bill was then passed by the Queensland Parliament on 30 October 2018.

NNAC and the Karingbal People have put significant effort and resources into these matters for the purposes of the long-term protection of Karingbal cultural heritage. The passage of these amendments caused severe detriment to the Karingbal People and made these efforts fruitless.

DATSIP has initiated a process of broader review of the ACHA, including in relation to the Last Failed Claim Provision. But the pace of the review has been glacial and there is very little meaningful policy proposals coming out of it at this stage.¹¹ It is concerning that DATSIP released a consultation paper and an options paper with very scant detail in them,¹² and there has been no progress on these issues since then that we are aware of, notwithstanding a commitment in the consultation paper for parliamentary processes to consider proposed changes in the first and second quarters of 2020.

6 Ongoing harm to Karingbal cultural heritage

Notwithstanding the setbacks suffered by the Karingbal People in their attempts to protect their cultural heritage, they have adopted a conciliatory approach to proponents who they identify as operating on their Country but not engaging Karingbal in the first instance to assist on cultural heritage matters. Karingbal People have sought to approach proponents directly and introduce themselves, explain the background to these matters and discuss their keenness to work cooperatively with the proponents. Some proponents have responded responsibly when made aware of the applicable circumstances, although some have understandably noted that trying to identify the right people to deal with under the ACHA and DATSIP searches is "like playing pin the tail on the donkey."

Other proponents have steadfastly refused to involve Karingbal People in the management of Karingbal cultural heritage. For example, the Karingbal People repeatedly approached U&D and requested they be involved in the implementation of the CHMP that had been entered into with them. This has been steadfastly refused or ignored. In

⁹ <https://www.parliament.qld.gov.au/work-of-committees/committees/EGC/inquiries/past-inquiries/RevenueOLA2018>

¹⁰ <https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2018/5618T1572.pdf>

¹¹ For the NNAC submission on the review see <https://www.datsip.qld.gov.au/resources/datsima/programs/review-cha/stakeholder-submissions/29-nuga-nuga-aboriginal-corporation.pdf>

¹² For the Consultation Paper, see <https://www.datsip.qld.gov.au/resources/datsima/programs/consultation-paper-review-cultural-heritage-acts.pdf> The Options Paper is not posted on line but can be accessed here -

verbal submissions before the Queensland Parliament Economics and Governance Committee, a representative of U&D told the committee he had personally been involved with the numerous cultural heritage surveys and agreement negotiations with the Karingbal People including the "two men behind" NNAC.¹³

It is true that a CHMP was entered into between U&D and the Karingbal People. However the Karingbal People, as recognised by the Federal Court, have been excluded over many years from roles in the implementation of the CHMP, despite previous cordial approaches to U&D seeking involvement. This has left Karingbal cultural heritage at risk of harm through it being "managed" only with the involvement of a relative of the applicants descended from Jemima of Albinia.

Karingbal has continuing concerns in relation to these and other activities being carried out on Karingbal country without the involvement of Karingbal People. For example, we are concerned that activities are currently taking place at Rougemont Gorge, a highly significant area to the Karingbal People.

The Karingbal People, in good faith, placed Rougemont Gorge on the State's Database as a Significant Aboriginal Area and were initially promised by officers of DATSIP who are responsible for the management of the Database that third parties searching the Database would be directed only to the Karingbal People if they needed to consult about the significance of the area. After the introduction of the Last Claim Standing Preservation Bill, DATSIP chose to renege on the single direction to the Karingbal People and now list the Karingbal People, the descendants of Jemima of Albinia and the Bidjara People on the listing of Aboriginal Party's who can be consulted with regarding this highly significant area. As a result, the Karingbal people have recently been informed by the local landowner that Bidjara People have been taken to Rougemont Gorge to undertake cultural heritage assessment by an exploration company, and because of their complete lack of knowledge, have found that there is no significance associated with the area. As a result, the Karingbal people are fearful that another of their highly significant places is now at considerable risk of damage or destruction.

In circumstances where Karingbal cultural heritage has already been harmed, the ACHA processes are not adequately responding. This is most evident in relation to the orders made against Ostwalds for rehabilitation and restoration costs (QMC 23). In that matter the Magistrate found "the number of artefacts displaced or damaged is at least 50, and likely many more, being as many as hundreds which are now contained in the bund walls", and that the defendant's behaviour amounted to gross negligence.¹⁴

The Karingbal People have made multiple enquiries to the State regarding the status of the rehabilitation payments and the opportunities to carry out the works to restore, as much as possible, the Karingbal cultural heritage harmed. To date it is understood the payments have not been made. The Karingbal People's inability to rehabilitate its cultural heritage, consistent with the Court orders, compound the grief this incident has caused the Karingbal People.

Unfortunately, this matter has also been misconstrued in public commentary that followed. Whilst neither the Court nor the defendant raised such matters, Clayton Utz released an alert referring to "the difficulty inherent in any attempt to consult with the Aboriginal party for this particular area," as well as "problems within the Aboriginal party in this area" as relevant to this matter.¹⁵ These comments are offensive to the Karingbal People. The problems are not with the Karingbal People who have been recognised by the Federal Court as the traditional owners of the area. The problem is with the law that allows these incidents to happen and people who take advantage of this law.

¹³ <https://www.parliament.qld.gov.au/documents/committees/EGC/2018/RevenueOLA2018/trns-ph-17Sep2018.pdf> at page 5

¹⁴ *Dunn v Ostwald Construction Materials Pty Ltd* [2018] QMC 23 at [17], [19] and [44]

¹⁵ <https://www.claytonutz.com/knowledge/2019/march/money-money-money-costs-in-native-title-proceedings-and-the-consequences-of-ignoring-cultural-heritage-obligations>

7 Recommendations

The Karingbal People have been repeatedly disenfranchised by the Last Claim Standing Provision occurring within the ACHA, and Karingbal cultural heritage is at all times at grave risk because of this. The Karingbal People are not alone in this regard,¹⁶ and the provisions need to be revisited to ensure the integrity of the system to protect Aboriginal cultural heritage in Queensland. NNAC urges the Committee to make findings and recommendations that:

- Commonwealth laws be amended to effectively protect Aboriginal cultural heritage in circumstances where State laws fail to safeguard against the preclusion of the relevant traditional owners of the land making decisions on the management of their Aboriginal cultural heritage;
- the ACHA is ineffective and inadequate in relation to these matters and in relation to providing means for delivering rehabilitation and restoration of Aboriginal cultural heritage that has been damaged during the commission of an offence;
- urge the Queensland Government to right the wrong it carried out in the passage of the Last Claim Standing Preservation Bill, and meet the commitments it made in relation to broader reforms in this area as a matter of urgency; and
- give further consideration to the options available to ensure rehabilitation and repair is carried out so that harm to Aboriginal cultural heritage is mitigated, particularly where offenders fail to comply with such orders.

Yours sincerely

Charles Stapleton
Karingbal Elder and NNAC Member

Rebecca Scheske
NNAC Director

¹⁶ See submission on behalf of the Yugara/Yugarapul Aboriginal Corporation to the Queensland Parliament Economics and Governance Committee - <https://www.parliament.qld.gov.au/documents/committees/EGC/2018/RevenueOLA2018/submissions/003.pdf>