

NINGY NINGY CULTURAL HERITAGE ASSOCIATION

REVIEW OF THE CULTURAL HERITAGE ACTS

On Monday 22 July 2019 I attended a Cultural Heritage Acts Review Consultation Meeting. When invited to this meeting it was in my representation as the Turrbal Cultural Heritage Party. Please note that the Ningy Ningy people are a clan group that is common to the Turrbal people of the Brisbane-Moreton Bay area and the Gubbi/Kabi people of the Sunshine Coast-Mary River area.

Under Aboriginal law, clan rights are stronger than tribal rights when speaking for a particular area. The Ningy Ningy People do have tribal rights in the other Turrbal clan areas and other Gubbi/Kabi clans areas. Again these rights are not as strong as a clansperson's right to speak for their own clan area.

King Sandy of Brisbane "Kerwallie" was a Ningy clansman. He has been misrepresented in the public domain in recent years. The fact is, **he has no surviving descendants.**

I now submit as follows for the abovenamed review:

1. If the Nuga Nuga case was the reason for the 2018 amendments to the Cultural Heritage Act 2003(CHA 2003), then the decision of the Nuga Nuga case is a genuine legal reason to rely on for the new anticipated amendments to the CHA 2003

See attachment "A", which is a copy of a previous Fact Sheet that was issued by the Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP). Note that in the Nuga Nuga case, Justice Jackson of the Supreme Court of QLD held that the Commonwealth Native Title Act 1993 intended that, there are common law native title holders, as well as positive determined native title holders.

Recognition for common law native title holders

- a. When reading section 34(1)(b)(i)(C) of the current 2018 amended CHA 2003, there is no mention of a process by which a common law native title holder can becoming a cultural heritage party.
- b. There are common law native titled holders in Queensland such as the Ningy Ningy people. The Ningy Ningy people are both expressed and implied common law recognised native title holders pursuant to the Commonwealth Aboriginal and Torres Strait Heritage Protection Act 1984 and other relevant legal instruments.
- c. There ought to be a process by which a common law native title holder gets written into the description of section 34(1)(b)(i)(C) of the CHA 2003.
- d. In the name of justice, I submit on behalf of a common law recognised native title holders group, that we be given the opportunity to apply for the status to be a cultural heritage party.
- e. Therefore I believe that there needs to be a statutory mechanism put in place so that the recognised common law native title holders are afforded the justice that the law entitles them to.

2. The Last Claim Standing provision ought to stay in the CHA 2003

- a. It is my belief that just because a claim is dismissed in the Federal Court does not mean that those identified claimants on the dismissed claim application are not native title holders. Every Australian should be afforded the opportunity to take their case to the High Court particularly in cases like these which are relevant to Section 51(xxvi) of the Australian Constitution.

This section reads:

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

@ Section 51(xxvi) the people of any race for whom it is deemed necessary to make special laws.

Isn't the Commonwealth Native Title Act 1993 and the Commonwealth Aboriginal and Torres Strait Islander Heritage Protection Act 1984 special laws that are deemed necessary for people of two races, one being the Aboriginal race and the other being Torres Strait Islander Melanesian race?

I believe that it is an indigenous person's constitutional right to take their case in these instances to the High Court, if they have a genuine legal reason to do so and that they have the financial ability to sustain a court challenge.

3. Justice

- a. I believe that the Federal Court may have acted in an "Ultra Vires" manner when it dismissed the Turrbal people's native title application. This act of dismissal was contrary to provisions in section 84(8) and section 84(9) of the NTA 1993. The Turrbal claimant group were an 'applicant' pursuant to section 253 and Section 61(2) in the NTA 1993. In addition to these they were an 'applicant' pursuant the Federal Court decision of the Spender J in *Turrbal People v State of Queensland (Includes corrigendum dated 17 March 2008) [2008] FCA 316 (11 March 2008)*. I understand that this situation may have occurred due to the fact that these sections of the NTA 1993 were not argued in the court hearing that lead to the dismissal of the Turrbal People's native title application.
- b. The last claim standing should remain in the CHA 2003. It is my belief that there **has been an issue of injustice** which has happened in this process either intentionally or unintentionally.
- c. Due to the constitutional matter already raised in this submission which is the option for taking a case to the High Court, the Turrbal matter should have been left open. That would have been the conscionable thing to do.
- d. This position by the Ningy Ningy people is taken because the Ningy Ningy group are a clan of the Turrbal people.

3. Review of Section 35 of the CHA2003

- a. There should be no changes to this section.

Maroochy Barambah

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Maroochy Barambah
Song woman & Law woman
13 September 2019

Proposed amendments ATTACHMENT "A" Aboriginal Cultural Heritage Act 2003 and Torres Strait Islander Cultural Heritage Act 2003

Fact Sheet

Effect of the Nuga Nuga decision

On 20 December 2017, in the matter of *Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships* [2017] QSC 321 (Nuga Nuga decision), Judge Jackson rejected the Minister's submission that 'native title holder' in section 34(1)(b)(i)(C) referred only to a native title holder as identified in a positive determination of native title under the Commonwealth *Native Title Act 1993*, and found that native title holder also refers to a person who held native title at common law.

This meant that the 'last claim standing' provision did not apply in the way decision-makers under the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* (Cultural Heritage Acts) understood it to apply. As a result, the Nuga Nuga decision has caused uncertainty for land users and Aboriginal and Torres Strait Islander parties in complying with the Cultural Heritage Acts.

Some decisions which the Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP) or the Minister of Aboriginal and Torres Strait Islander Partnerships have made were rendered invalid (for example, approved cultural heritage management plans developed with previously registered native title claimants) as a result of the Nuga Nuga decision.

What has DATSIP done since the Nuga Nuga decision?

DATSIP has identified stakeholders that have been affected by the Nuga Nuga decision.

In May 2018, DATSIP:

- issued a fact sheet to advise affected stakeholders that DATSIP was considering whether previously registered native title claimants can continue to be recognised as a 'native title party';
- wrote to 66 previously registered claimants seeking their views of DATSIP's intention to remove them as 'native title parties' from the Cultural Heritage Register maintained by DATSIP; and
- removed previously registered native title claimants from the Aboriginal and Torres Strait Islander Cultural Heritage Online Portal.

What is DATSIP doing to restore certainty?

On 22 August 2018, the Revenue and Other Legislation Amendment Bill 2018 (the Bill) was introduced into Parliament. The Bill amends a number of Acts which the Deputy Premier, Treasurer and Minister for Aboriginal and Torres Strait Islander Partnerships has responsibility.

In particular, the amendments to the Cultural Heritage Acts propose to reinstate the 'last claim standing' provision as previously understood by decision-makers under the Cultural Heritage Acts when the provision was inserted in 2010. The Bill seeks to provide certainty to land users and Aboriginal and Torres Strait Islander parties by clarifying that the 'last claim standing' provision applies where there is not, and never has been, a registered native title holder – which means a person who has been determined to hold native title under the Commonwealth *Native Title Act 1993* only.

Stakeholders who have commenced or undergone a process under the Cultural Heritages Acts will not be disadvantaged in the interim period. The proposed amendments will validate decisions made or actions taken prior to the commencement of these amendments.