Queensland Law Society

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Office of the President

9 October 2018

Our ref: WD-NFP

Hon. Jackie Trad MP
Deputy Premier, Treasurer and Minister for
Aboriginal and Torres Strait Islander Partnerships
PO Box 5326
WEST END QLD 4101

By post and by email: [redacted]

Dear Minister

Revenue and Other Legislation Amendment Bill 2018

The Queensland Law Society (**QLS**) is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. The QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

QLS provided a submission dated 7 September 2018 (**enclosed**) to the Economics and Governance Committee on the Revenue and Other Legislation Amendment Bill 2018 (the **Bill**).

In addition, the President and subject matter experts from QLS policy committees gave oral evidence at the public hearing held on 17 September 2018 (extract of transcript **enclosed**).

Having read the Parliamentary Committee's report to Government, released on 5 October 2018, QLS is concerned that no amendments are recommended in relation to the proposed changes to the *Taxation Administration Act 2001* (**TAA**) which will significantly affect charities in Queensland.

In the experience of our members, many charity constitutions will need to be amended in order to comply with these proposed amendments, which will potentially involve organisations incurring the costs of seeking advice and diverting charitable resources away from their front line service delivery.

Charitable institution registration administration

This letter has been written with the assistance of the Chair of the QLS Not-for-profit Law Committee, Andrew Lind.

As outlined in our submission and in oral evidence, QLS considers that the current law in relation to the conditions of registration as "*charitable institutions*" under the *Taxation*

Administration Act 2001 (**TAA**) is clear. The current position is that a charitable institution may be registered if its constitution contains provisions to the effect of the requirements (restrictions) in s149C(5) of the TAA, following the decision of the Supreme Court in *Queensland Chamber of Commerce and Industry v Commissioner of State Revenue* [2015] QSC 77.

The proposed amendments will impose an impractical red-tape burden that affected charities update their constitutions to specifically include these restrictions, which we consider is unnecessary given the clarity of the current legislation.

QLS would like to reiterate the following serious concerns with the practical implications (and unintended consequences) of the Bill in respect of the proposed amendments to the conditions to be registered as "*charitable institutions*" under the TAA, if it is passed as tabled:

1. **There will be far more than "82 affected institutions".**[i]

   All charitable (and other complying not-for-profit) institutions who currently enjoy state revenue exemptions (and have done so for decades) will be potentially affected by these changes, not just those who have registered since the *Chamber of Commerce* decision in 2015,[ii] unless the Department has done the work of reviewing all Constitutions in light of the proposed changes. There is no public register of the number of existing registered "charitable institutions" who currently enjoy Queensland revenue exemptions, but our members report that the number is likely to be in the thousands.[iii]

   The reason is that the statutory conditions of registration as a "charitable institution" are continuing conditions by virtue of s149C(5) – "*an institution, … must not be registered unless*"[iv] – and s149I and s149H of the TAA. That is, once an organisation is registered as a "charitable institution", it may not always be eligible or entitled to be a "charitable institution", unless the conditions of registration continue to be complied with (and are complied with at the relevant, otherwise 'taxable event', time).

   Additionally there is exposure to the offence provision under s149H of the TAA which provides as follows:

   > ***149H Notice of ceasing to be entitled to be registered***
   >
   > *Within 28 days after a charitable institution stops being entitled to be registered under section 149C, it must give written notice to the commissioner.*
   >
   > *Note—*
   >
   > *Failure to give the notice is an offence under the Administration Act, section 120.*

2. Given that there are significantly more than 82 affected charities, **six months is an inadequate transition period.**

   The Australian Charities and Not-for-Profits Commission data indicates that over 7,500 charities have a street address in Queensland. It is impossible to identify how many of these charities may qualify (under the current legislation) for registration as a "charitable institution" under the TAA or how many of these may be affected by the proposed amendments, if they were to seek to rely on one of the available exemptions in the future. However, it is anticipated the changes will affect many more than 82 Queensland charities.

3. **State Revenue events take place at a point in time, and if an organisation is not entitled to be registered as a 'charitable institution' at that point in time (as required by the new law, even if they have been registered in the past), they will be a taxpayer for that 'taxable event' and unable to claim the exemption.**

   For example:

   a. *Land Tax* is assessed at midnight on 30 June. If a charity has not changed its Constitution by 30 June, then it will be liable to pay land tax as at 30 June (for the following year), on the basis that it is no longer entitled to be registered as a charitable institution at the relevant date.[v] Some charities are land rich and may be significantly adversely affected by this change, if passed by the potential imposition of land tax assessments when exemptions have long been enjoyed.

   b. *Payroll Tax* liability arises on the relevant return date. If a charity has not changed its Constitution by the relevant return date, then it will be liable to pay payroll tax as at the return date, on the basis that it is no longer entitled to be registered as a charitable institution at the relevant date.[vi] Some charities are, of course, very large employers and without the benefit of the exemption, may be liable to a significant payroll tax liability.

   c. *Duty* is assessed at the time of the dutiable transaction under the *Duties Act 2001*, which in the case of transfer duty on the purchase of land, is at the time of the signing of the contract of sale. If a charity has not changed its Constitution before it signs a contract, then it will be liable to transfer duty, on the basis that it is no longer entitled to be registered as a charitable institution at the time of signing the contract of sale. Our members report that charities normally retain them to act in real property acquisitions after a contract of sale has been signed and at this point, it will be too late for the charity to alter its Constitution to claim the exemption.

4. As outlined above, State Revenue events are "point in time" events and if a charity does not meet the requirements to comply at that point in time with the proposed new law (even if they have in the past), they will be a taxpayer for that taxable event. **In light of this potential liability for charities, six months is an inadequate transition period.**

5. **Some charitable institutions will be <u>unable</u> to comply with the proposed second condition that is proposed in the amended section 149C(5) of the TAA.**

   That condition is that the Constitution must expressly provide that ... *no part of its income or property is to be distributed, paid or transferred by way of bonus, dividend or other similar payment to its members.*[vii] QLS submits that this may be impossible in the following circumstances:

   a. For Charitable Trusts without members with an inadequate power of amendment (e.g. many testamentary charitable trusts established in wills) where the trustee

would require an order of the court to make the amendment. Charitable Trusts normally do not have members and QLS queries whether the court would be inclined to make an order for such an amendment in order to allow the proper administration of the trust?

b. For Charities who have members that are other charities, which our QLS members report is not an uncommon structure. For example, this occurs where there is a peak Federated Charity whose members are the state and territory charitable institutions of the peak body. In many of these structures it is the parent body that may be the principal fund raiser who in turn distributes the funds raised to the state and territory member charities.

6. **If the proposed second condition required to be a "charitable institution" is to be retained as an express provision in a Constitution, QLS recommends that there should be:**

    a. **a grandfathering exemption for charitable trusts established pursuant to instrument dated prior to the end of the transition period** (including Wills signed by the Will maker before that date). While some mental gymnastics will be required by drafters of charitable trusts, it may be possible for drafters who know of these proposed requirements to draft a provision for the purposes only of compliance with the state revenue exemptions while noting that the trust does not have members;

    b. **a carve out in relation to members who are themselves entitled to be registered as charitable institutions** (without requiring the registration).

7. The affect of the Bill, if passed in its current form, **may be to push some household name charities outside the state revenue 'exemption tent'** and the imposition of state taxes on those charities who have long enjoyed exemptions, at least for one taxable event(s), before amendments are made to Constitutions (assuming changes to the constitutions can be made).

8. In addition to the points raised under paragraph 6 above, if the Bill is to be passed, QLS recommends that the following further amendments should be made:

    a. The base transition period should be increased from 6 months to 18 months to:

        - allow constitutional amendments to be considered in AGM cycles minimising the need for EGMs; and
        - for those charities who may no longer be entitled to exemption to plan accordingly; and

    b. That after the words "expressly provides", words such as "with language to the effect" should be added given the common variations in Constitution clauses in practice which we raised in our submission dated 7 September 2018.

QLS has written to the Deputy Leader of the Opposition and Shadow Treasurer, the Honourable Tim Mander, in similar terms to this correspondence.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Principal Policy Solicitor, Wendy Devine by phone on [redacted] or by email to [redacted]

Yours faithfully

[redacted]

President

Enclosures

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[i] Page 8 of the Committee Report. It is noted that we have not been able to access Queensland Treasury and DATSIP, correspondence dated 14 September 2018.

[ii] The decision of the Supreme Court of Queensland, by Jackson J, on 15 April 2015 in *Queensland Chamber of Commerce and Industry v Commissioner of State Revenue* [2015] QSC 77

[iii] It is expected that Queensland Treasury could confirm the number.

[iv] See para 18 of the judgement of Jackson J in *Queensland Chamber of Commerce and Industry v Commissioner of State Revenue* [2015] QSC 77

[v] It is noted that the entity may still be a registered "charitable institution" but as a matter of substance it may not be entitled to be.

[vi] Ibid

[vii] Proposed amendment to s149C of the TAA.

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7 September 2018

Our ref: Gen-LP

Committee Secretary
Economics and Governance Committee
Parliament House
George Street
Brisbane Qld 4000

By email: [redacted]

Dear Committee Secretary

Revenue and Other Legislation Amendment Bill 2018

Thank you for the opportunity to provide comments on the Revenue and Other Legislation Amendment Bill 2018 (the Bill). The Queensland Law Society (QLS) appreciates being consulted on this important piece of legislation.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the Not for Profit Law Committee, the Revenue Law Committee, the Property and Development Law Committee, the Mining and Resources Law Committee and the Reconciliation and First Nations Advancement Committee, whose members have substantial expertise in the areas affected by the Bill.

QLS notes that the Bill proposes amendments to 13 Acts of Parliament and associated regulations.

In the time allowed for consultation, we have focused on the issues outlined below. By not commenting on the full scope of the provisions in the Bill, QLS does not express endorsement or otherwise of the draft legislation.

Key issues

With respect to the Bill, we raise the following key issues:

- QLS broadly supports the amendments to the duties framework to enable an expansion of the transfer duty framework for e-conveyancing in Queensland. Although it is not contemplated in the Bill, QLS also requests that consideration is given in the near future to the payment of transfer duty directly to the Office of State Revenue (OSR) through approved electronic conveyancing (e-conveyancing) platforms.

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- QLS supports the amendments to give effect to the administrative arrangements implemented by the Office of State Revenue, as identified in the Bill.
- A range of concerns have been identified below in relation to the proposed amendments to Part 11A of the *Taxation Administration Act 2001* particularly:
    - The practical effect of these amendments will be to require all charities (or qualifying not-for-profits) in Queensland to carefully review their constitutions, take legal advice on them, and if necessary amend them within the proposed transitional periods.
    - This will have the effect of imposing more red tape and diverting charitable resources away from the front line charity service delivery;
    - QLS submits that six months is insufficient transitional time given that these amendments may require organisations to call an Extraordinary General Meeting and a special resolution;
    - QLS submits that a period of 18 months (not 6 months) is more appropriate for most organisations. Further time may be required if statutory amendment is required to a Constitution as eighteen months may not be sufficient time for consideration by the organisation and the State legislature to act.
- As a broader piece of policy work to help reduce red tape, the QLS also commends that consideration be given to the adoption of the Commonwealth definition of "charity" as the gateway condition to State revenue concessions.
- In relation to the changes to the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003*, further consultation is required to ensure that Aboriginal tradition and Island custom is preserved in the course of developing changes to administrative arrangements that have such a significant effect, given the broader policy implications of these changes.

Amendments to *Duties Act 2001*

E-conveyancing amendments

QLS broadly supports the amendments to the duties framework to enable an expansion of the transfer duty framework for e-conveyancing in Queensland.

The expansion to allow for the transfer of vacant land, commercial land and industrial land, in addition to the current residential land category, will be helpful for legal practitioners in Queensland.

Although it is not contemplated in the Bill, QLS also requests that consideration is given in the near future to the payment of transfer duty directly to the Office of State Revenue (OSR) through approved electronic conveyancing (e-conveyancing) platforms.

At present, the legislation does not permit the payment of transfer duty directly when settling a transfer by e-conveyancing. This has the effect that a practitioner who seeks to use the e-conveyancing system to complete a settlement must:

- Make all other payments for settlement in the e-conveyancing platform (such as payments to mortgagees and sellers);
- Separately:
    - attend to the requirements of the OSR's "OSRConnect" platform in relation to the transaction;
    - In a "paper environment", arrange:
        - for a cheque to be drawn in payment of the duty – this involves a number of internal accounting steps within the firm such as administrative staff completing the necessary forms to request cheques, obtaining signatures from authorised partners and then drawing cheques;
        - for the payment to be made to OSR which involves further administrative time.

These additional steps in a paper environment add significant time to a payment which could otherwise be made in a matter of seconds in the e-conveyancing environment. It also means a delay in the duty being received by OSR. In our estimation, this is a factor affecting the uptake of e-conveyancing in Queensland.

QLS would be pleased to work with OSR in relation to a legislative and administrative framework for permitting the direct payment of duty which would be practical for practitioners and self-assessors but would also be acceptable to OSR.

Amendments to give effect to administrative arrangements

QLS supports the amendments to give effect to the administrative arrangements in relation to:

- extension of transfer duty concession for family businesses of primary production;
- treating certain deregistered managed investment schemes as exempt managed investment schemes; and
- correcting a cross-reference in the landholder duty provisions in section 179 of the Duties Act.

It is noted that these amendments will be retrospective in effect. QLS considers it is appropriate, in these very limited and specific circumstances, to give retrospective effect where the amendments are clearly beneficial to the taxpayer.

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Amendments to *Taxation Administration Act 2001*

Charitable Institution registration – a gateway condition to State Revenue concessions

In summary, the proposed amendments relate to whether charities (and other requisite not-for-profits) will satisfy the requirements to be registered as "*charitable institutions*" under the *Taxation Administration Act 2001* (**TAA**), which is the gateway requirement for access by those entities to the following State revenue exemptions:

- [Stamp] Duty;
- Land Tax;
- Payroll Tax.

For example, section 414 of the *Duties Act 2001* (Qld), in relation to concessions for Transfer Duty refers the reader to the TAA for the definition of a "charitable institution". *Charitable institution* is defined in Schedule 6 of the Duties Act as follows:

> ***charitable institution*** means an institution registered under the Administration Act, part 11A.

Administration Act is then in turn defined in that same Schedule as follows:

> ***Administration Act*** means the *Taxation Administration Act 2001*.

TAA - Charitable Institution registration

Part 11A of the TAA (**Registration of charitable institutions**) then sets out requirements for registration as a charitable institution under that part which in effect provides a Queensland definition of *charity*, which is different to the Commonwealth definition of charity as defined for Commonwealth purposes in the *Charities Act 2013* (Cth).

We will return to the desirability of a common national definition of charity shortly, but first we comment on the changes to meaning proposed by the Bill.

The material section of Part 11A of TAA currently provides as follows (emphasis added):

> ***149C Restrictions on registration***
>
> *(1) The commissioner may register the institution only if it is an institution mentioned in subsections (2) to (4).*
>
> *(2) Each of the following may be registered—*
>
> *(a) a religious body or a body—*
>
> *(i) that is controlled by, or associated with, a religious body; and*
>
> *(ii) whose principal object and pursuit is the conduct of activities of a religious nature;*
>
> *(b) a public benevolent institution;*
>
> *(c) a university or university college;*
>
> *(d) a primary or secondary school;*
>
> *(e) a kindergarten;*

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(f) an institution whose principal object or pursuit is the care of the sick, aged, infirm, afflicted or incorrigible persons;

(g) an institution whose principal object or pursuit is the relief of poverty;

(h) an institution whose principal object or pursuit is the care of children by—

(i) being responsible for them on a full-time basis; and

(ii) providing them with all necessary food, clothing and shelter; and

(iii) providing for their general wellbeing and protection.

(3) Also, an institution may be registered if its principal object or pursuit—

(a) is fulfilling a charitable object or promoting the public good; and

(b) is not a leisure, recreational, social or sporting object or pursuit.

(4) In addition, the trustees of an institution mentioned in subsection (2) or (3), other than a university or university college, may be registered.

*(5) However, an institution, other than an institution or trustee of an institution mentioned in subsection (2)(a) or (c), must not be registered **unless, under its constitution, however described**—*

(a) its income and property are used solely for promoting its objects; and

(b) no part of its income or property is to be distributed, paid or transferred by way of bonus, dividend or other similar payment to its members; and

(c) on its dissolution, the assets remaining after satisfying all debts and liabilities must be transferred—

(i) to an institution that, under this section, may be registered; or

(ii) to an institution the commissioner is satisfied has a principal object or pursuit mentioned in subsection (3)(a); or

(iii) for a purpose the commissioner is satisfied is charitable or for the promotion of the public good.

The Bill proposes to amend Part 11A as it relates to the requirements of the Constitution of a charity in Clause 83 of the Bill as follows (emphasis added):

Amendment of s 149C (Restrictions on registration)

(1) Section 149C(5), 'unless, under its constitution, however described'—

omit, insert—

unless its constitution, however described, expressly provides that

(2) Section 149C—

insert—

(6) In this section—

***constitution**, of an institution, includes a law, deed or other instrument that constitutes the institution and governs the activities of the institution or its members.*

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The Bill therefore proposes a definition of "constitution" along with the requirement that the Constitution (as defined), *expressly provides that*:[1]

> *(a) its income and property are used solely for promoting its objects; and*
>
> *(b) no part of its income or property is to be distributed, paid or transferred by way of bonus, dividend or other similar payment to its members; and*
>
> *(c) on its dissolution, the assets remaining after satisfying all debts and liabilities must be transferred—*
>
> *(i) to an institution that, under this section, may be registered; or*
> *(ii) to an institution the commissioner is satisfied has a principal object or pursuit mentioned in subsection (3)(a); or*
> *(iii) for a purpose the commissioner is satisfied is charitable or for the promotion of the public good.*

It seems that the amendments proposed by the Bill may be in response to the decision of the Supreme Court of Queensland, by Jackson J, on 15 April 2015 in *Queensland Chamber of Commerce and Industry v Commissioner of State Revenue* [2015] QSC 77 (Qld Chamber of Commerce Case).

The Qld Chamber of Commerce Case was in relation to payroll tax and particularly whether the Queensland Chamber of Commerce and Industry was entitled to be registered under Part 11A of the TAA as a charitable institution. The Commissioner contended that there were no *express provisions* in the constitution of the Queensland Chamber of Commerce and Industry that satisfied the following:

- the s149C (a) - use of income and property solely for promoting its objects - requirement; and
- the 149C (b) - no distribution of income or property to members - requirement.

The court looked to the *effect* of the provisions of the constitution of the Queensland Chamber of Commerce and Industry and decided that these requirements were satisfied, despite, (a) not being in the constitution at all and, (b) only in terms of language of "profits".

It was the *purposes (or objects)* of the Queensland Chamber of Commerce and Industry in its constitution, that according to his Honour satisfied the sub-paragraph (a) requirement, in that the objects imposed obligations for the income and assets to be applied for the promotion of the objects.[2]

What the amendments proposed by the Bill would mean is that, at least in relation to the s149C (a) (use of income and property solely for promoting its objects) requirement, the Queensland Chamber of Commerce and Industry would have failed. This appears to be the intention of the Bill.

The Explanatory Memorandum to the Bill explains[3] (**emphasis added**):

[1] Then picking up the balance of the language in s147C of the TAA
[2] See especially paragraphs 57 and 58 of the judgment
[3] Page 12

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> It was never intended that an entity should qualify for registration if its constitution, or another instrument constituting and governing it, **does not expressly contain the restrictions in section149C(5) of the Taxation Administration Act**.
>
> However, as the Taxation Administration Act does not specifically state that these restrictions must be expressly included, an entity may be registered as a charitable institution **if the practical effect of its constitution or other governing instrument, within the framework of the relevant statutory and common law rules, is that the restrictions are satisfied.**
>
> The Taxation Administration Act will be amended to require that **an entity must expressly include the restrictions in section 149C(5) in its constitution** or other governing instrument.

The practical effect of these amendments will be to require all charities (or qualifying not-for-profits) in Queensland to carefully review their constitutions, take legal advice on them, and if necessary amend them within the proposed transitional periods. The members of the QLS Not For Profit Law Committee have indicated that in their experience many charity constitutions will need to be amended in order to comply. This will have the effect of imposing more red tape and diverting charitable resources away from the front line charity service delivery.

If the proposed amendment had been in place and the Queensland Chamber of Commerce and Industry had known about it, and been given the opportunity to change its constitution to expressly provide for the matters proposed to be required, would it have done so? Clearly this question cannot be answered definitively, but why would it not have? Its constitution already had this effect according to the Supreme Court.

It is further noted that the proposed amendment seeks to effectively prescribe that the constitution must contain terms identical with the language of the statute, rather than terms to this effect. In the experience of the members of our Not For Profit Law Committee the following language variations often occur:

- 'asset' as a substitute for 'property';
- 'profit', 'dividend or bonus' as a substitute for 'income';
- 'purpose' in place of 'object'.

Additionally, prescriptive language, at least in its current form, does not take into account how the language is applied to *charitable trusts* (which do not have members) as opposed to 'institutions'. Charitable trusts also face the additional challenge of whether the terms of the trust contain an express power of amendment and then the limitations of that power of amendment (absent an order of the court). An order of the court was required in the recent Queensland Supreme Court Decision of Justice Ann Lyons *In the matter of the Public Trustee of Queensland as trustee of Queensland Community Foundation* [2016] QSC 276, despite an express power of amendment in the Trust Deed.

A charity can distribute to a member, if the member is itself a charity and the distribution is in furtherance of the charitable purpose. Any prescriptive language would need to take this into account.

It is also noted that the *template constitution for a charitable company limited by guarantee*[4] published by the Australian Charities and Not-for-profits Commission would not meet the requirements.

All of the above matters provide caution to the proposal of a statute prescribing language for a constitution rather than this being the effect of the constitution.

However, if the requirement for prescriptive language is to remain, that language should be broadened to contemplate the type of language customarily in use, and there should be provision allowing for an exemption to be allowed by the Commissioner, if the words are not exactly the same as the legislation states but have the same effect.

QLS submits that the consequence of the amendments will mean that charities who do not actively engage with the review and amendment of their constitutions within the transition period may see a loss of State revenue concessions that have been long enjoyed.

Policy intent queried – the clarification or tightening of State revenue concessions?

It may be that the policy intent of the Bill is tightening the availability of State revenue concessions as has been seen in other States and Territories. If so, then QLS submits that this intent should be clearly expressed and achieved in a manner with far less significant unintended consequence.

The tightening policy intent in other States and Territories are summarized in a 2016 Paper[5] given by the Chair of the QLS Not-for-profit Law Committee. Andrew Lind summarized the approach in Western Australia legislature in response to a Chamber of Commerce and Industry of Western Australia case as follows:

> On 9 March 2015, **Western Australia** enacted the *Taxation Legislation Amendment Act (No 2) 2015* (WA). It amends the respective Duties Act, Land Tax Act, Payroll Tax Act and Taxation Administration Act of Western Australia to remove exemptions for some classes of charities. … *The Chamber of Commerce and Industry of Western Australia* case[6] found that the Chamber of Commerce was a charity and so entitled to payroll tax exemption. This … lead to the 2015 amendments to the exemption regime in WA, to exclude "relevant bodies" (assuming they were not specifically let back in by being declared a "beneficial body"). … "*Relevant body*" is defined in the 2015 [WA] amendments to mean:
>
> a a political party;
>
> b an industrial association;
>
> c a professional association;
>
> d a body, other than a body referred to in paragraph (a), (b), (c), or (e) that promotes trade, industry or commerce, unless the main purposes of the body are charitable purposes that fall within the first 3 categories (being relief of poverty; advancement of education and advancement of religion) identified by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 as developed by the common law of Australia from time to time;

[4] https://www.acnc.gov.au/ACNC/Publications/Templates/ConstitutionTemplate.aspx
[5] Nina Brewer and Andrew Lind, More *Bang for your Buck? A State by State Review of duty, land tax and payroll tax exemptions available to Charities*, Delivered at the Television Education Network Annual Charity Law Conference in Melbourne 2016
[6] *CCIWA v Commissioner of State Revenue (WA)* 2012 WASAT 146

e a body that is a member of a class of bodies prescribed for the purposes of this paragraph; and

f a body that [is a member of a pay-roll tax group, related body corporate, or that has a sole or dominant purpose of conferring a benefit on another relevant body].

If the Queensland policy intention is to narrow the State revenue concessions, as they apply to bodies such as Chambers of Commerce and Industry, it seems to the QLS that amendments like the Western Australian amendments have much to commend them because of both the clarity they provide and the reduction in unintended consequences for others, given the targeted nature of the amendments.

Adopting the Commonwealth definition of charity

As a broader piece of policy work to help reduce red tape, the QLS also commends that consideration be given to the adoption of the Commonwealth definition of charity[7] as the gateway condition to State revenue concessions. This does not of course mean that that the flood-gates will open in terms of State revenue concessions, as additional statutory conditions can be and are imposed as a condition of concession. Additional conditions are already imposed on concessions for duty, land tax and payroll tax in Queensland.

It is noted that the Queensland Chamber of Commerce and Industry Limited is not a registered charity with the ACNC.

It is understood that consideration of adoption of the Commonwealth definition of charity and the degree to which other requisite non-charitable not-for-profits gain entry through the gateway condition is beyond the scope the current Bill, but the QLS commends the consideration of further consultation on such an approach.

Transitional periods are insufficient

The Bill proposes transitional periods of six months for most charities and eighteen months if the Constitution is established by statute.

QLS submits, based on the comments already made, that six months is insufficient transitional time and would often require an Extraordinary General Meeting to be held and usually a special resolution passed rather than amendments being able to be made within the usual AGM cycle. Some charities have a large membership base and the cost and disruption of calling an EGM may not be insignificant. QLS submits that a period of 18 months is more appropriate, particularly given the nature of charitable organisations involving a high number of volunteer board members who will need to be briefed about the consequences of these changes. These organisations may also need to obtain legal advice in relation to the necessary amendments prior to arranging an Extraordinary General Meeting to approve amendments to the constitution.

Additionally, we note that any amendments to the constitution of an incorporated association will need to be approved by the Office of Fair Trading before they can take effect.[8] This is another reason to support the extension of the transitional period from 6 months to 18 months. While it is acknowledged that the Model Rules for incorporated associations would comply

[7] As set out in the *Charities Act 2013* (Cth)
[8] See section 48(8) *Associations Incorporation Act* 1981 (Qld).

with the proposed changes, in the experience of our members many incorporated associations have adopted constitutions different to the Model Rules.

If statutory amendment is required to a Constitution, eighteen months may not be sufficient time for consideration by the organisation and the State legislature to act.

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

The proposal to reinsert the 'last claim standing' provisions in the *Aboriginal Cultural Heritage Act* 2003 and *Torres Strait Islander Cultural Heritage Act* 2003 is the Department of Aboriginal and Torres Strait Islander Partnerships (the **Department**) response to the Supreme Court decision of *Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships* [2017] QSC 321 (**Nuga Nuga**).

Nuga Nuga was an application for judicial review of the Department's decision to refuse to register an Aboriginal cultural heritage body for an area under the *Aboriginal Cultural Heritage Act* 2003 (Qld) (**ACHA**).[9] The Court found the function and purpose of section 34 of ACHA as a whole, is a provision to define who is a "native title party", which is, in turn, used to define the expression "Aboriginal party", under the ACHA.[10] The Court found the ACHA contemplated two classes of 'native title holder' – those at common law and those with a positive determination of native title. It follows that these two classes of native title holders provides for a broader definition of "*Aboriginal party*".

Prior to Nuga Nuga, the Department applied a narrow interpretation of section 34 which excluded the common law native title holder and restricted the meaning of "*native title holder*" to those with a determination of native title. This in turn narrowed the meaning of "*Aboriginal party*". In Nuga Nuga the Department attempted to justify this narrow approach by arguing *inter alia* that the inclusive approach would render the Department's task of deciding whether there is and never has been a native title holder for the area impossible or too difficult and that cannot have been the intention of the legislature.[11] The Court rejected the Department's arguments noting "... *the difficulties are overstated.*"[12]

Over the past 8 years Queensland native title representative bodies and service providers (**NTRB/SP**) have made numerous submissions to the Department relating to the ACHA and highlighting various deficiencies in that Act and expressing the significant concerns of constituents, particularly about the operation of the 'last claim standing' provisions. The concern has focused on the Department's failure to take into account judicial findings of a court of superior record in relation to who are traditional owners for an area as well as the intra and inter Indigenous disputation that arises because of the over-reliance on artificial administrative arrangements such as the 'last claim standing' provisions.

The proposal to reinsert the 'last claim standing' provisions in the Acts will perpetuate these disputes and appears a matter of administrative convenience for the Department which won't

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[9] *Nuga Nuga Aboriginal Corporation v Minister for Aboriginal and Torres Strait Islander Partnerships* [2017] QSC 321 at [1].
[10] *Ibid* at [22].
[11] *Ibid* at [48].
[12] *Ibid* at [54].

accept the findings of Nuga Nuga, and now apprehends it must expend additional resources to inquire into the identity of people who held native title at common law.[13]

This is a misapprehension as NTRB/SPs have statutory functions under the *Native Title Act 1993* (Cth) (**NTA**) to, as far as is reasonably practicable, identify persons who may hold native title in the area for which the body is the representative body[14] and to make reasonable efforts to minimise the number of overlapping native title claims.[15]

In performing its statutory functions, NTRB/SPs are required to maintain organisational structures and administrative processes that promote the satisfactory representation of and consultation with its constituents in a fair manner.[16] NTRB/SPs also have a statutory function to undertake dispute resolution between constituents[17] and in that capacity are acutely aware of the causes of such disputes, which in many cases relate to cultural heritage. With this in mind, NTRB/SPs are the only bodies with both the statutory duty and ability to undertake the research demanded by the ACHA.

While NTRB/SPs ought to have a role in assisting the Department to identify Aboriginal parties for an area that does not suggest that such bodies usurp the authority of the Federal Court of Australia to determine the rightful native title holders for an area. In May 2018 there were 135 positive determinations within Queensland, the native title holders for which are represented by 84 Registered Native Title Body Corporates (**RNTBC**). The Federal Court is rapidly resolving claims and the number of RNTBCs will grow considerably over the coming years.

Where a RNTBC exists, that body corporate is the only appropriate entity to be registered pursuant to section 36 of the ACHA as an Aboriginal Cultural Heritage Body for all of the area within the external boundary of the area claimed under the successful native title determination application. Registration of a RNTBC, rather than some other body, will avoid the proliferation of Indigenous corporations within Queensland who undertake the same work.

Where a RNTBC does not exist for an area, then the expertise and resources of NTRB/SPs should be utilised to assist the Department with:

(1) the identification of Aboriginal parties where required (i.e. where no Aboriginal cultural heritage body exists); and
(2) determination (and certification by the NTRB/SP) of whether a corporation that has applied to be registered as an Aboriginal cultural heritage body for an area under section 36 of the ACHA is an appropriate body to identify Aboriginal parties for the area.

The *Legislative Standards Act 1992* (Qld) prescribes the minimum standards for legislation in Queensland including a set of fundamental legislative principles. The fundamental legislative principles requires that legislation should have sufficient regard to the rights and liberties of individuals and to the institution of Parliament. In turn, sufficient regard to the rights and

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[13] *Ibid* at [48].
[14] *Native Title Act* 1993 (Cth), section 203BJ(b).
[15] Section 203BE(3), *Native Title Act* 1993 (Cth.).
[16] Section 203BA(2), *Native Title Act 1993* (Cth.)
[17] Section 203BF, *Native Title Act* 1993 (Cth.)

liberties of individuals depends on whether, for example, the legislation has sufficient regard to Aboriginal tradition and Island custom.[18]

The proposed amendment seeks to introduce artificial administrative arrangements. It has no regard to Aboriginal tradition and Island custom because it refuses to recognise and accommodate determined native title holders at common law. The proposed amendment ignores that native title at common law is the basis of native title under the NTA[19] and the basis of native title in an Act in Queensland, including the ACHA.[20]

Rather than seeking to amend legislation on the basis of administrative convenience, we suggest that the Department work collaboratively with the growing body of RNTBCs and the existing NTRB/SP.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team by phone on [redacted] or by email to [redacted]

[redacted]

Ken Taylor
President

[18] Section 4(3)(j) *Legislative Standards Act 1992*
[19] Section 223(1) *Native Title Act 1993* (Cth)
[20] Section 36 and Schedule 1, *Acts Interpretation Act 1954* (Qld), definition "*native title*"

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

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.