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24 July 2019

Cultural Heritage Acts Review
Department of Aboriginal and Torres Strait Islander Partnerships
PO Box 15397
CITY EAST QLD 4002

Via email: CHA_Review@datsip.qld.gov.au

Dear Sir/Madam,

Thank you for the opportunity to provide a submission on the review of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003* (the Cultural Heritage Acts). My comments relate to the Aboriginal Cultural Heritage Act (the Act) - as a Kuuku I'yu Northern Kaanju Traditional custodian, I speak for the Kuuku I'yu Northern Kaanju homelands, Wenlock and Pascoe Rivers, Cape York Peninsula, and as Chairperson, speak for both the Chuulangun Aboriginal Corporation and Mangkuma Land Trust. I do not speak for Torres Strait Islander or other Aboriginal peoples, however, given the similarities between the Acts, I recognise the comments apply reasonably to both Acts, and to other areas of Queensland.

I also thank the Government for conducting a review of the Cultural Heritage Acts in recognition of significant advances since the Acts' inception with respect to cultural heritage, native title resolution, international agreements and decisions of the Courts about the cultural values on traditional lands and the spiritual, material, intellectual and emotional features of our landscapes. I further appreciate the government's commitment to review the appropriate balance between the aspirations of the traditional custodians of cultural heritage, the business and development sectors and appropriate processes for recognising the rights and interests of Aboriginal peoples in light of those significant advances and decisions.

Following the issues as set out in the *Consultation Paper: Review of the Cultural Heritage Acts*, I offer the following comments:

<u>Ownership and defining cultural heritage</u>

The definition of Aboriginal cultural heritage is significantly constrained in its interpretation as object, site or "significant" occurrence based, which fails to adequately recognise the landscape and bio-cultural values of an area that are so intrinsically linked to Aboriginal cultural heritage, and peoples, and are so easily impacted by inappropriate activities. Significant Aboriginal cultural heritage belongs to the landscape and the bio-cultural values therein. For Aboriginal peoples, these values don't function by themselves, but are instead inherent within the landscape itself, and reflected in the presence of spiritual forces rarely acknowledged or understood by

others. The Act, as currently defined, fails to recognise Indigenous knowledge and science epistemologies, customary obligations and bio-cultural stewardship of the land[1].

The Act defines Aboriginal cultural heritage (Div 3, s8) as anything that is:
(a) a significant Aboriginal area in Queensland; or
(b) a significant Aboriginal object; or
(c) evidence, of archaeological or historic significance, of Aboriginal occupation of an area of Queensland.

Whilst "area" could encompass a landscape view, the Act sets out by example to limit the interpretation of "significant" for both areas and objects to Aboriginal tradition (as defined under the *Acts Interpretation Act 1954*, s36) or the history of any Aboriginal party for the area. It further constrains interpretation through examples of "ceremonial place, a birthing place, a burial place or the site" of a massacre - rather than broader cultural landscapes, seascapes and spiritscapes - and gives regard "to authoritative anthropological, biogeographical, historical and archaeological information" - rather than Indigenous knowledge, particularly of those that hold that knowledge. While these disciplines can support Indigenous people in the management of Indigenous cultural heritage, the Act should not again place Indigenous Queenslanders in a position of having to rely on such specialists where they are not required to manage their heritage.

There would be opportunity in the Act to further interpret the application of "Aboriginal Tradition" (the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships) in the Act's context. Such interpretation could better reflect landscape level 'beliefs' and 'relationships', and include "intangible heritage" such as oral traditions, performing arts, rituals, festivals and traditional craft (as set out in the United Nations, Education, Scientific and Cultural Organisations convention definition), as well as, for example, story places and landscapes, Indigenous spatial identities, management approaches and bio-cultural diversity of ecosystems. Regardless of the best way to achieve this, a change to the definition to reflect contemporary interpretations of cultural values on traditional lands and to the spiritual, material, intellectual and emotional features of landscapes, is overdue.

The Act's main purpose is "to provide effective recognition, protection and conservation of Aboriginal cultural heritage" and the fundamental principles that underlie the Act's main purpose are, amongst other things, "to be based on respect for Aboriginal knowledge, culture and traditional practices", that "Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage;" and that "activities involved in recognition, protection and conservation of Aboriginal cultural heritage are important because they allow Aboriginal people to reaffirm their obligations to 'law and country'". If this is to be achieved, then the definition of Aboriginal cultural heritage in the Act must be broadened to recognise and respect Aboriginal cultural heritage as appreciated by Aboriginal people, not

[1] See Mackey, Brendan, and David Claudie. 2015. 'Points of Contact: Integrating Traditional and Scientific Knowledge for Biocultural Conservation': *Environmental Ethics* 37 (3): 341–57. https://doi.org/10/f3km54.

limited to artefacts and place-based sites or events. This is an academic archaeological or anthropological definition of cultural heritage, and does not reflect Indigenous understandings.

This broadened definition would guide reform of the Duty of Care guidelines "to establish timely and efficient processes for the management of activities that may harm Aboriginal cultural heritage (as newly defined). Ideally, this would call up clan-based mapping, that identifies registered cultural landscapes, and require, by regulation, contact with the right people to speak for country in the assessment process.

In summary, to better capture Aboriginal cultural and traditional practices, the Act should more adequately reflect Aboriginal cultural heritage by legislatively acknowledging the bio-cultural values on land, in waterways and in forests and recognise the primary substantive rights of Aboriginal people to set and pursue their own priorities for development, including development of natural resources, as articulated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). And, under a stronger, regulatory guideline (or statutory code), a development assessment process for identifying all significant Aboriginal cultural heritage and genuinely protecting those values from 'significant ground disturbance' or 'surface disturbance', would prevent 'a lasting impact to the land or waters during the activity or after the activity has ceased' and would compulsorily 'incorporate the interests of Aboriginal people to assure the protection of their cultural heritage values'.

Identifying Aboriginal Parties and Cultural Heritage Bodies

It should be emphasised that cultural heritage is not a native title issue. Whilst native title may identify, under a western legislative construct, the determined holders of title to the land, it does not, across a cultural landscape, establish the Traditional Custodians with customary responsibility for that cultural heritage nor should it enable development activity to proceed 'unconsulted' with the rightful owners of that cultural heritage in the absence of native title being resolved (or for that matter the last claim standing) . This is supported by the intent of the Act to facilitate the involvement of Traditional Custodians in the assessment and management of cultural heritage, whether or not their native title continues.

For a number of years, I have been advocating, through numerous submissions, letters and meetings with government Ministers and officials, for clan-based mapping, developed and undertaken by Indigenous communities with appropriate support, to be incorporated into other spatial mapping products to inform proponents of development proposals and identify appropriate clans for consultation on those proposals. Such clan-based mapping would assist implementation of not only the Cultural Heritage Acts, but give certainty to many other processes across government and industry. It is long past time to excuse lack of appropriate engagement with the absence of knowledge of who can speak with authority for country, or to defer to an organisation that purports to speak for Traditional custodians or to use a "last claim standing" excuse to avoid free, prior and informed consent of the rightful Traditional Owner(s). The review of the Cultural Heritage Acts provides an opportunity to rectify this.

The current Act relies on the "definitions of native title parties in the *Commonwealth Native Title Act 1993."* The hierarchy as set out in the Native Title Act is wholly inadequate for identifying the relevant clan or Traditional custodians with customary responsibility for particular cultural heritage values. The hierarchy should be reversed in the Act review, to specify that the appropriate party to be consulted is "The Aboriginal or Torres Strait Islander people with

particular knowledge about traditions, observances, customs or beliefs associated with the area who have responsibility, or are a member of a family or clan group with responsibility" - as identified in clan-based mapping called up under the Act. If there is no 'mapped' clan or family with responsibility for the cultural heritage values of the area proposed for business or development activity identified, then (and only then), approaches would be made to the registered native title holders, registered native title claimants, previously registered native title claimants (as per last claim standing) or Aboriginal people that may be in the process of re-establishing their connections with clan and country, or claiming their native title rights and interests – so as to identify the people who have responsibility, or are a member of a family or clan group with that responsibility.

It is a current fault of the function of that Act that representative bodies provide feedback on proposals, not the Traditional custodians with responsibility for the values proposed to be impacted. In Cape York Peninsula, for example, this has sometimes resulted in projects going ahead without any or adequate discussions with the spokespeople for affected Clan lands. More grass roots community engagement is required, rather than 'top down' consultation, and the Cultural Heritage Acts should be amended to enable this to occur.

Where multiple values and/or clan groups are the subject of a business or development activity proposal, community interface panels comprising people with authority to speak for country from across the landscape must be brought together to discuss the values. Such a panel would be appropriate to provide advice on any assessments, disputes, conditions, approvals or otherwise to the Minister.

Approaches adopted in other jurisdictions, such as establishing bodies to act as the primary source of advice on Aboriginal heritage matters, to consider applications and permits, to approve or refuse cultural heritage management plans and enter into cultural heritage agreements, could have application in Queensland. While they would enable stronger 'representation' of Aboriginal interests in decision-making, they would be more effective in Queensland if established at a local level, where those bodies could consider and advise on cultural heritage applications/assessments, providing their decision to the Minister for authorisation. Nonetheless, those decisions would need to be made with the free, prior and informed consent of the people, clan or families with customary responsibility for those values (not simply through another costly, established process run by those who purport to speak for country - sadly I imagine yet another corporation established by a Land Council).

Consequently, it is **absolutely not supported** that the role of Native Title Representative Bodies to provide a certification for the identification of the Aboriginal or Torres Strait Islander parties - similar to that found in section 203BE(5) of the Native Title Act 1993 (Cth) - be extended, given the history of notification processes never making it to Traditional Owners, and the misrepresentation by those representative bodies with respect to free, prior and informed consent of Traditional Custodians with an interest in the land.

Any body similar to those in other jurisdictions would need to be established using traditional governance approaches, involving those persons who can speak for country. The Indigenous Reference Groups (IRG) established by the Bligh Government in Western Cape York provide a good example of how clan-based representation can provide supported, timely and informed responses to proposals, from those authorised to speak for country. These groups could be readily brought together, using clan-based mapping, called up in the Guideline. A process for the

establishment of an IRG, or Registered Cultural Heritage Body, needs to replace the current native title reliant model, but the absence of such a body, should not negate the need to identify the "The Aboriginal or Torres Strait Islander people with particular knowledge about traditions, observances, customs or beliefs associated with the area who have responsibility, or are a member of a family or clan group with responsibility".

Land user obligations

The way in which the assessment and management of cultural heritage is set out in the Act, and the level of significance of an activity, places the onus of proof on the land user or developer, with no involvement of Traditional Custodians or consideration of their desires for the land.

The current assessment process based on duty of care and voluntary processes requires much stronger underpinning by regulation (statutory code rather than a guideline) and requirements to record how that Duty of Care has been met, including notification to the relevant Traditional Custodians with an interest. For low level impact activities, a self-assessable statutory code may be appropriate, setting out requirements similar to the current guideline (but in consideration of an amended broader definition of Aboriginal cultural heritage).

The current threshold of an Environmental Impact Statement (EIA) triggering a mandatory Cultural Heritage Management Plan (CHMP) is too high and cannot give assurance that activities will not harm Aboriginal or Torres Strait Islander cultural heritage using voluntary processes. The fact there are only 358 CHMPs registered in Queensland, and some 3,000 over the last five years in the smaller land area of Victoria, is testimony to this.

For medium to higher impact activities, whether they trigger an EIA or not, there needs to be a statutory process of assessment that involves the Traditional Owners with an interest in the land, and either an exchange of letters, agreement or CHMP, depending on the extent of disturbance proposed (and the wishes of the relevant Traditional Custodians). I note that Victoria defines high impact activities such as mining, construction, residential development, subdivision of land, quarrying as examples, which defines the impact rather than an EIA requirement.

For projects that require an EIA, the Act (and the Code) must require the involvement of Traditional Custodians in the EIS process and negotiation of a binding CHMP, and any approval must be based on free, prior and informed consent, through an agreed governance process (such as an IRG). This would provide certainty for higher impact developments to both proponents and Traditional Custodians.

Any dispute resolution process would be negotiated between the parties by an independent, agreed arbitrator, within agreed timelines.

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Compliance mechanisms

There are a range of mechanisms in the Act aimed at promoting compliance. Whilst the use of stop orders provides a means for stopping harm once it has commenced and penalties can be imposed through successful prosecution after the harm, there are a number of constraints that limit effective compliance and enforcement under the Act, including:

- A lack of regulatory presence and resourcing to monitor compliance. Of course, without notification of works (whether low, medium or high impact), there is no way to determine if works are even being contemplated that may interfere with cultural heritage resources, making it very difficult for compliance officers to detect non-compliance or prioritise compliance monitoring. Stronger requirements to notify under a statutory code (replacing the voluntary guideline) would assist in this.
- The Act currently allows for only public servants to be appointed as "authorised officers" and there are woefully few of them in the wider community pursuing compliance. To monitor compliance and undertake enforcement more generally, increased dedicated resources are required. The provisions in the Act could be expanded to include Indigenous Rangers and/or staff of Aboriginal Shire Councils (or other local governments), to have more 'eyes and ears' for monitoring compliance (potentially as part of their current range of their duties). The appointment of more 'authorised officers" in government across the State would also assist compliance and enforcement action.
- It appears all enforcement action is through prosecution, with no scope for penalty infringement notices. This provides little disincentive for non-compliant low to medium impact activities, with little chance of enforcement action or a stop work order being issued (given the small number of compliance officers, only the highest impact offences would be pursued). It is recommended that a range of enforcement options, tailored to the seriousness of the offence, be introduced to the Act (such as Penalty Infringement Notices, show cause notices, etc).
- Currently any penalties (and it would be interesting to understand just how many penalties there actually have been), are payable to the State. There should be provision in the Act for a compensatory payment to be made payable to the Traditional Custodians for unlawful loss of cultural heritage values.
- Similarly, the Act provides that the Court may, if considered appropriate, order the person to pay to the State or another appropriate entity an amount for or towards—(a) the cost of any repair or restoration of the Aboriginal cultural heritage needing to be carried out; and (b) the cost of any repair or restoration of anything else that is not itself the Aboriginal cultural heritage, but that is associated with the Aboriginal cultural heritage and also needs to be repaired or restored because of the offence. The provision would benefit from an example of what another appropriate entity is - e.g. as being an Aboriginal organisation with an interest in the land to be repaired or restored. This would support the Court awarding payment to appropriate Aboriginal persons to do the work.
- Whilst the Act binds all persons, including the State, it clarifies that nothing in the Act makes the State liable to be prosecuted for an offence. Given one of the biggest land developers is the State (e.g. Department of Transport and Main Roads), not only must the State comply with the Act, it must be held accountable as it holds others accountable for compliance with the Act. This provision needs amendment to enable the State (where it is a development proponent) to be prosecuted.
- With respect to stop work orders, Traditional Custodians can also apply to the Land Court of Queensland for an injunction under the *Land Court Act 2000*. For most people, this would be unnecessarily onerous. A provision enabling a Traditional Custodian or other person to report a suspected offence for compliance action and a register of referrals would be beneficial, with an ability to apply to the Land Court should the State fail to take sufficient action.

Recording cultural heritage and Cultural heritage register and database

The current Cultural Heritage database and register is established to "assemble information about cultural heritage in a central and accessible location, and provide a research and planning tool for assessing the cultural heritage values of particular areas.

Whilst it holds information on particular sites and values, regulated designated landscape areas, cultural heritage bodies, reports, statutory Aboriginal and Torres Strait Islander parties and whether an area has a Cultural Heritage Management Plan, it is limited in its lack of information to be an effective planning tool and the absence of that information does not indicate there is no cultural heritage present in an area.

There are difficulties associated with ensuring more comprehensive information is available on the register. The process of adding information by Traditional Custodians is misunderstood and complex, and often occurs only when an impact is anticipated and the existence of the register becomes known. Whilst online information submission forms, with a dedicated log-in may make it accessible to some, it assumes access to technology, an ability to provide GIS mapping products and descriptions and a trust that the information will be appropriately utilised (and an awareness in the first place that it exists). There would be great benefit in improving awareness and facilitating comprehensive information gathering across Aboriginal and Torres Strait Islander communities.

Further, the Application for Special Access to the Aboriginal and Torres Strait Islander Cultural Heritage Database and Register, marginalises some "Aboriginal and Torres Strait Islander parties" by only allowing certain categories access through the online application and log in process. To request access, an applicant must be one of the following:

- Registered cultural heritage body under s36 of the legislation representing an Aboriginal or Torres Strait Islander party (please attach letter signed by an appropriate representative of the corporation)
- Registered Native Title Body Corporate (RNTBC) representing an Aboriginal or Torres Strait Islander party (please attach letter signed by an appropriate representative of the corporation)
- The named applicant for a registered native title claim
- The named applicant for a previously registered native title claim where no other claim has been registered for the area
- An authorised legal representative acting under instructions from the named applicant for a registered native title claim, or the named applicant for a previously registered native title claim, where no other claim has been registered.

This immediately excludes parties who do not fit into these categories from accessing their own cultural heritage information that has been registered on the database. We know of at least one Indigenous organisation who commissioned rock art surveys on their traditional lands which resulted in sites being registered on the database, but they cannot access the database as they do not fit into the categories that are defined by the Native Title Act. The categories need to be amended to include Aboriginal and Torres Strait Islander parties such as relevant Land Trusts established under the Aboriginal Land Act 1991 and incorporated Indigenous organisations

whose objectives include representing their Traditional country and cultural heritage management on their Traditional lands.

Other comments

As outlined in previous comments, a range of other (not necessarily publicly available) information, integrated with interactive planning tools, could assist a broader picture of the effect of the Act, including:

- Registered cultural landscapes, storylines and bio-cultural features
- A register of approved cultural heritage management plans
- Clan-based spatial mapping, developed in consultation with Indigenous communities, incorporated into other spatial mapping products to inform proponents of development proposals and identify appropriate clans for consultation on those proposals
- A register of notifications/referrals to Traditional custodians, with links to any development applications current being considered under the Planning Act or other State legislation (and timelines)
- A register of offences (stop work orders, prosecutions, etc.)

As the discussion paper suggests, there are sensitivities about some information, and an inappropriateness of placing such information on a register. Consequently, there should be **no mandatory requirement** to register cultural heritage – any suggestion to make registration mandatory would still not ensure a complete picture of cultural heritage exists, however convenient that may be for developers and consultants.

Recommendations

In summary, I make the following recommendations with respect to the review of the Aboriginal Cultural Heritage Act. As noted above these recommendations may also be applicable to the review of the Torres Strait Islander Cultural Heritage Act.

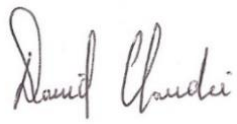
1. The definition of Aboriginal cultural heritage be amended to recognise the landscape and bio-cultural values of an area that are so intrinsically linked to Aboriginal cultural heritage, and peoples, and are so easily impacted by inappropriate activities.
2. That cultural heritage and Cultural Heritage Bodies and Traditional Custodians responsible for cultural heritage on their traditional lands, not be defined by native title. The appropriate party to be consulted on cultural heritage matters is "The Aboriginal or Torres Strait Islander people with particular knowledge about traditions, observances, customs or beliefs associated with the area who have responsibility, or are a member of a family or clan group with responsibility" - as identified in clan-based mapping.
3. Where multiple values and/or clan groups are the subject of a business or development activity proposal, community interface panels comprising people with authority to speak for country from across the landscape must be brought together to discuss the values. Such a panel would be appropriate to provide advice on any assessments, disputes, conditions, approvals or otherwise to the Minister.
4. The establishment of an the Indigenous Reference Groups (IRG) model, or Registered Cultural Heritage Body, needs to replace the current native title reliant model, but the absence of such a body, should not negate the need to identify the "The Aboriginal or

Torres Strait Islander people with particular knowledge about traditions, observances, customs or beliefs associated with the area who have responsibility, or are a member of a family or clan group with responsibility".

5. Increase resources, increase 'authorised officers' and widen the appointment of compliance officers to include suitably trained Indigenous Rangers and staff of Aboriginal Shire Councils to have more 'eyes and ears' on the ground for more robust monitoring and compliance.
6. A range of enforcement options, tailored to the seriousness of the offence, be introduced to the Act (such as Penalty Infringement Notices, show cause notices, etc.) in order to provide a disincentive for non-compliant low to medium impact activities.
7. There should be provision in the Act for a compensatory payment to be made payable to the Traditional Custodians for unlawful loss of cultural heritage values.
8. That the compliance provision be amended to enable the State (where it is a development proponent, such as Dept. of Transport and Main Roads) to be prosecuted for an offence.
9. The categories of Aboriginal and Torres Strait Islander parties that can register for access to the online Cultural Heritage Register portal should not be limited by the Native Title Act, but be broadened to include relevant Land Trusts established under the Aboriginal Land Act 1991 and incorporated Indigenous organisations.

Thank you again for the opportunity to comment on the review of the Acts. I would be happy to meet with you to discuss this submission, at your convenience.

Yours sincerely,



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