

Review of the Cultural Heritage Acts Consultation Paper

QRC submission to the
**Department of Aboriginal and Torres
Strait Islander Partnerships**

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ABN 59 050 486 952
Level 13 133 Mary St Brisbane Queensland 4000
T 07 3295 9560 F 07 3295 9570 E info@qrc.org.au
www.qrc.org.au

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INTRODUCTION

The Queensland Resources Council (**QRC**) welcomes the opportunity to provide a submission to the Department of Aboriginal and Torres Strait Islander Partnerships (**DATSIP**) Consultation Paper, Review of the Cultural Heritage Acts (**the Consultation Paper**).

QRC is the peak representative organisation of the Queensland minerals and energy sector. QRC's membership encompasses minerals and energy exploration, production, and processing companies, and associated service companies. QRC works on behalf of members to ensure Queensland's resources are developed profitably and competitively, in a socially and environmentally sustainable way.

Indigenous cultural heritage policy and regulation has a very significant interest for, and impact on, QRC members given their broad application to and coverage of member activities. QRC's submission therefore represents the views of hundreds of individuals and companies who are direct stakeholders in the management of Indigenous cultural heritage in Queensland.

Partners in cultural heritage management

The resources sector recognises the importance of cultural heritage to modern Aboriginal and Torres Strait Islander culture, identity and connection to country. Heritage values exist across areas in Queensland that are important for QRC member operations and the resources industry understands it is imperative to avoid, minimise or manage its impact on Indigenous cultural heritage values.

The resources industry has a strong history and established track record of working in partnership with Aboriginal and Torres Strait Islander parties to protect cultural heritage for all Australians and future generations. QRC members recognise that Aboriginal and Torres Strait Islander people are the custodians of their heritage and the heritage regime should support their meaningful involvement in decisions affecting heritage values. Therefore, working in partnership with knowledge holders to protect cultural heritage is of utmost importance to QRC members and it continues to be an essential part of doing business in Queensland.

The effective recognition, protection and conservation of Indigenous cultural heritage also provides a gateway for meaningful engagement with Traditional Owner groups and delivers tangible socio-economic benefits, while also fostering cultural awareness and capability of resource companies.

Striking the right balance

QRC was actively engaged with the government during the four years that the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003* (**Cultural Heritage Acts**) were developed and has made extensive submissions on subsequent reviews and amendments to both the legislation and *Cultural Heritage Duty of Care Guidelines*.

QRC has always been a strong supporter of the Cultural Heritage Acts which broadly strike the right balance between protecting cultural heritage, and providing industry with a certain, achievable and practical framework. This fundamental intent of the legislation was supported by the industry during the legislation design and development and our endorsement of this approach remains unchanged. QRC members work across Australian jurisdictions, and broadly regard Queensland's Indigenous cultural heritage legislation as the best in the country.

However, with almost ten years since the last significant review, QRC welcomes the opportunity to reflect on the efficiency and efficacy of the Cultural Heritage Acts in protecting Indigenous

cultural heritage in a way that continues to meet the expectations of land users and the Aboriginal and Torres Strait Islander community. Importantly, QRC does not propose any wholesale changes to the legislation, instead our submission largely focusses on several parts of the Cultural Heritage Acts that could benefit from clarification.

Approach to reform

The Consultation Paper poses a series of questions on how the Cultural Heritage Acts currently operate to help determine their effectiveness and to encourage discussion and ideas for improvement. This submission is structured to respond to the questions set out in the Consultation Paper and in doing so draws on the resources industry significant on the ground experience implementing the legislation over 15 years. QRC's comments are directed at enabling Queensland as a whole to prosper from both responsible investment and the responsible management of Indigenous cultural heritage.

It is critically important that effective transitional provisions are considered during the reform process. This is to provide stability for the significant investment decisions made on the basis of the heritage regime that applies under the current legislation. The proposed transitional arrangements should be published for consultation ahead of the first draft of the legislation, along with ensuring agreements and arrangements entered into prior to the commencement of proposed reforms will remain valid.

QRC notes the Consultation Paper provides high level information that aims to facilitate *discussion* on the key themes identified. However, as is usually the case at this early stage, there will be a need for further clarification and a clear line of sight on the detail of any potential reform proposals. QRC considers that the detail of the reform is where the key elements of consultation lie.

To facilitate this, QRC recommends DATSIP establish a body of key stakeholders to review and work through any reform proposals, as they become available. Modelled on the successful Expert Technical Advisory Group (ETAG), such a group would bring Aboriginal and Torres Strait Islander people, industry and government to the table to provide constructive feedback on legislation reform.

1. OWNERSHIP AND DEFINING CULTURAL HERITAGE

KEY POINTS:

- QRC considers the current definitions of cultural heritage captures the concept of intangible heritage, and supports retaining the definitions for this reason
- If specific provision for intangible heritage is to be imported into the Acts, the legislation will need to make it clear how it is to be distinguished from the current definitions

Is there a need to revisit the definitions of cultural heritage – if yes, what definitions should be considered?

1. The Consultation Paper seeks feedback on definitions of cultural heritage, specifically the potential inclusion of *intangible* heritage in the assessment and management processes.
2. Resource proponents recognise the spiritual and cultural relationship between Traditional Owners and their country and that cultural heritage is broader than a collection of objects and areas. There are interlinkages between physical places of significance and intangible heritage such as stories, festivals and traditional crafts.
3. QRC considers the current definitions in the Cultural Heritage Acts capture these concepts and supports retaining the current definitions of Aboriginal and Torres Strait Islander cultural heritage for this reason.
4. Notably, taking just the Aboriginal Cultural Heritage Act by way of example, the definition of Aboriginal cultural heritage already includes "significant Aboriginal areas", which are defined to mean "an area of particular significance to Aboriginal people because ofAboriginal tradition [and/or] the history, including contemporary history, of any Aboriginal party for the area". "Aboriginal tradition" under the *Acts Interpretation Act (Qld) 1954* means 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".
5. QRC considers that to the extent an area may be of particular significance due to intangible heritage (such as traditions or rituals that may be associated with that area) the Act already has scope for such areas to be protected. Many resource proponents have already made meaningful strides towards the inclusion of intangible heritage in Cultural Heritage Management Plans within the current definitions. An example includes the *Rio Tinto Alcan Weipa South of the Embley Communities, Heritage and Environment Management Plan*¹
6. QRC suggests that the current definitions would benefit from clear criteria and standards so that significant Aboriginal areas and their intangible heritage value can be objectively identified based on evidence of the importance and special significance of the place to Traditional Owners and knowledge holders as a community. In addition, there should be clear guidance for how impacts on intangible heritage values are to be measured.
7. If specific provision for intangible heritage is to be imported into the Acts, the legislation will need to make it clear how it is to be distinguished from the matters for which the Cultural Heritage Acts already make provision.

¹ Available: https://www.riotinto.com/documents/RTA_CHEMP%20Report_0914.pdf

8. If intangible heritage is to be redefined, of particular importance to the resources sector will be (in addition to clarity) the nature of the obligations to be put in place for the assessment and management of such heritage. It would also be critical to provide certainty that compliance with negotiated processes for dealing with intangible heritage under existing ILUAs, CHMPs or other Aboriginal agreements would continue to discharge a proponent's obligation to avoid harm to such heritage.

2. IDENTIFYING ABORIGINAL AND TORRES STRAIT ISLANDER PARTIES

KEY POINTS:

- QRC supports retaining the link between the *Native Title Act 1993* (the NTA) and the Cultural Heritage Acts in relation to identifying an Aboriginal party or Torres Strait Islander party
- The resources sector supports certainty of process, in areas where there is no native title holder or registered native title claimant

Is there a need to revisit the identification of Aboriginal and Torres Strait Islander parties – if yes, who should be involved and what roles, responsibilities and powers should they have?

9. QRC supports retaining the link between the *Native Title Act 1993* (the NTA) and the Cultural Heritage Acts in relation to identifying an Aboriginal party or Torres Strait Islander party and considers it vital that the legislation continues to unify the interaction and operation of these frameworks, for the benefit of all stakeholders.
10. The main purpose of the Cultural Heritage Acts is to provide effective recognition, protection and conservation of Indigenous cultural heritage. Critical to achieving this is the ability of land users to identify the correct Aboriginal parties and Torres Strait Islander parties with whom to engage.
11. Land users, including resource proponents, cannot adjudicate or make an independent assessment of who holds rights and interests to a given area, and have to rely on guidance to identify parties who should be consulted and involved.
12. The Consultation Paper outlines how this is achieved in Queensland utilising the familiar native title claims process under the the NTA.
13. This processes recognises that it is reasonable to infer where all of the members of a native title claim group have authorised an applicant to lodge a native title claim on their behalf, and that claim has passed the registration test, they would have knowledge of, and responsibility under Aboriginal law and custom or Ailan Kustom for, cultural heritage within their claim area. This principle will apply with even greater force to registered native title holders after the making of an approved determination of native title.
14. In this way, the legislation avoids, as far as possible, a doubling up or duplication in relation to who should be involved in cultural heritage assessment and management, along with delivering certainty to land users as to the identity of the persons with whom they must engage.
15. Another matter that needs policy and possibly legislative clarification is the identification of parties to a CHMP in the circumstances dealt with in the *Mirvac* decision. The decision dealt with how a CHMP process would be impacted where the Aboriginal party endorsed to take part in developing the plan is superseded by a new registered native title claimant before the plan has been approved. This can be problematic where an agreement may have been negotiated in good faith and eventually reached with the initial party, and then a new claim is registered over the area just before the CHMP is approved.

Is there a need to revisit the 'last claim standing' provision – if yes, what alternatives should be considered?

16. The existing legislation facilitates the involvement of Traditional Owners in the assessment and management of cultural heritage, whether or not their native title continues to exist,

as recognised in the second reading speech for the *Aboriginal Cultural Heritage Bill 2003*, by the Hon S. Robertson,

'Underpinning this provision is the fact that the existence of Aboriginal cultural heritage value does not depend on the existence of native title in an area, just as any other heritage value is not dependent on the underlying nature of the tenure. If there is no registered native title claimant or holder for the land, cultural heritage does not disappear'.

17. QRC understands the intention of the last claim standing rule introduced under the *Natural Resources and Other Legislation Amendment Act 2010* was to enable certain identification of Aboriginal and Torres Strait Islander parties in areas with no current registered native title holders or registered native title claimants.
18. QRC also understands there are several areas of Queensland to which the last claim standing rule applies, from resource regions to Brisbane.
19. The resources sector supports **certainty of process**, in these areas. The last claim standing provision is one way to deliver such certainty for land users, and for that reason it is supported.
20. If any alternate process is to be promoted in amending legislation, it should be consistent with the original intent of the provision and ensure the principles underlying the Cultural Heritage Acts' main purpose, including section 5 (e) *to establish a timely and efficient process*, continue to be met.
21. Having said that, QRC acknowledges that the last claim standing rule is not without its own potential difficulties.
22. For example, under the Cultural Heritage Acts, the last claim standing party is the former registered native title claimant, and QRC anticipates complications may arise where claims were dismissed many years ago and the "last claim standing party" is no longer contactable and / or members are deceased. QRC is aware of such situations starting to come to light now that the legislation has been in operation for over 15 years (see *scenario: future implications of last claim standing*).
23. Therefore, an amendment that would deliver the same level of certainty as to the ready identification of the Aboriginal or Torres Strait Islander party, whilst guarding against these difficulties that will arise with the passing of time, is required and would generally be supported.

Should there be a process for Aboriginal and Torres Strait Islander parties to apply to be a 'Registered Cultural Heritage Body' to replace the current native title reliant model?

24. As stated above, QRC supports retaining the link between the NTA and the Cultural Heritage Acts in relation to identifying an Aboriginal party or Torres Strait Islander party.
25. Where an area is subject to a registered native title claim or determination, the existing position facilitates negotiations with a single group that can address both native title and cultural heritage issues as part of a holistic approach to agreement making (a concept recognised and important in the Cultural Heritage Acts – e.g. a separate CHMP is not required if an ILUA or a "Section 31 Agreement" deals with cultural heritage).
26. Divorcing the identity of the Aboriginal or Torres Strait Islander party for cultural heritage purposes from the native title party for native title purposes would potentially complicate that negotiating process, given that there will often be an inter-relationship between native title and cultural heritage. Further, QRC is concerned about the potential for this

separation of roles and responsibilities to provide a mechanism to either create, or reinforce any existing, Traditional Owner community divisions.

27. However, in instances where there are no current registered native title holders, registered native title claimants or last claim standing party (i.e. no "native title party"), a Registered Cultural Heritage Body (RCHB) may play a role.
28. In these areas resource proponents are often faced with competing claims for Aboriginal or Torres Strait islander party status, and cannot adjudicate or make an independent assessment about the respective individuals' knowledge about traditions, observances, customs or beliefs associated with a particular area.
29. The only function of RCHBs under the Acts is stated to be to identify "for the benefit of a person who needs to know" the Aboriginal/Torres Strait Islander parties for an area. However, where there is a native title party for an area, the Aboriginal party or Torres Strait Islander party for an area is already effectively known – by definition, the native title party is the Aboriginal Party or Torres Strait Islander party.
30. The practical reality is that most Cultural Heritage Bodies that have been registered to date generally restrict themselves to one particular native title claim or determination area, and are quite often closely aligned to the current native title party for the area. QRC understand many Traditional Owner groups may elect to manage Cultural Heritage separately to Native Title, however in some circumstances, the RCHB can lead to an unnecessary added layer of administration and complication.

Scenario: future implications of last claim standing.

In 2029 a resource proponent is required to develop a Cultural Heritage Management Plan. The area has no registered determination or claim. There have been two former claims over the area of the tenement, however, one was dismissed in 2005, and the other in 2004. In both instances the former registered claimant cannot be contacted, it's been over two decades since the dismissal of the claims and the members have either changed details and / or passed on.

To complicate matters, the land user is aware of a third group on the cusp of registering a new native title claim over the area.

Under the Cultural Heritage Acts the land user is required to engage the 2005 claimant as the last claim standing party.

3. LAND USER OBLIGATIONS

KEY POINTS

- QRC strongly supports the existing duty of care provisions
- QRC considers that investment in education and awareness are the key to making self-assessment a fair and transparent process
- QRC supports the inclusion of a voluntary dispute resolution process for voluntary agreements
- QRC strongly supports the current process for formal cultural heritage assessments

Is there a need to bolster the oversight mechanisms for self-assessment and voluntary processes – if yes, what should this entail?

31. The legislation establishes a cultural heritage duty of care. The duty of care requires a person carrying out an activity to take all reasonable and practicable measures to ensure that the activity does not harm Aboriginal or Torres Strait Islander cultural heritage. Substantial penalties support the duty of care, and penalties also apply if a person actually harms cultural heritage.
32. The duty of care obligation (and associated Duty of Care Guidelines) recognise that what is "reasonable and practicable" will vary according to the circumstances, including the activities involved and the land or area that will be impacted. This is necessarily so, given the duty of care has such broad application – it applies to anybody, and everybody, that undertakes "an activity". One would suspect there would be thousands, if not millions, of "activities" undertaken by people in Queensland every day.
33. The Consultation Paper suggests that one way to achieve greater oversight might be to have persons report on self-assessment practices and the recording of voluntary agreements. That may be possible, but QRC questions if that is likely to actually result in any greater identification of non-compliance. Those persons that are complying with the duty of care will simply report how they are doing it or lodge agreements they have entered. If somebody is not complying, they may not report at all or file any voluntary agreements.
34. Given that DATSIP would not know of every "activity" being undertaken, it seems unlikely that this reporting system would achieve any significant compliance result. It would however impose a greater administrative burden on people undertaking activities and on the Department to collate, and/or review, agreements or summaries of self-assessments that have been undertaken.
35. QRC considers that given the breadth of the application of the duty of care provisions, a significant degree of self assessment is required and unavoidable, and for this reason strongly supports the existing duty of care provisions. They put the onus on people and companies to take a risk management approach to cultural heritage management that is commensurate with the risk of the activities to cultural heritage, which QRC considers to be leading practice in legislation.
36. Resources companies generally have robust, formal cultural heritage management systems and guidelines, inductions and training and cultural heritage assessment procedures.
37. This reflects the practical reality that given the nature of the activities undertaken in the sector (often involving significant ground disturbance) and the location of those activities

(often in more remote, less developed areas) the risk of harm to cultural heritage is greater than many other activities or circumstances, meaning the industry is much more conscious of its duty of care than many others that undertake activities.

38. QRC considers that investment in education and awareness are the key to making self-assessment a fair and transparent process. QRC has long advocated for robust education programs for land users and the introduction of template assessment documentation (such as compliance checklists) as opposed to increasing government-intervention.

Is there a need for dispute resolution assistance for parties negotiating voluntary agreements – if yes, who should provide these services and what parameters should be put around the process?

39. QRC supports the inclusion of a voluntary dispute resolution process to provide additional guidance and assistance to parties where they are seeking a voluntary agreement on the management of cultural heritage.
40. Any dispute resolution process should be affordable, independent and timely, having regard to the voluntary nature of the agreement.

Is there a need to reconsider the threshold for formal cultural heritage assessments– if yes, what assessment and management processes should be considered?

41. QRC strongly supports the current process for "formal cultural heritage assessments" and does not consider that any amendments are required.
42. The threshold for requiring a "formal" CHMP under the Cultural Heritage Acts is also appropriate. CHMPs are mandatory for projects where an EIS is required. These are normally large projects involving significant ground disturbance.
43. A CHMP is often a lengthy document, commonly involving several months of negotiations (and potentially, a Court process), before ultimately requiring approval by the State (and that decision itself could be subject to judicial review proceedings). Therefore, a CHMP can take months, or even over a year or more, to negotiate and have approved.
44. A proposal that any activity associated with mining, or another industry, must be subject to a formal CHMP, would unnecessarily introduce an unwarranted regulatory and administrative burden on proponents, and the State, that will likely be out of proportion (in terms of time, cost and complexity) with the activity in question and the risk it poses to cultural heritage.
45. The practical implications of reconsidering the threshold are that significantly more formal cultural heritage assessments will be required.
46. As described in the Consultation Paper, amending the thresholds in the Victorian context has led to approximately 3000 CHMPs over five years (contrasted with 358 registered CHMPs in Queensland)
47. Of the 358 CHMPs registered in Queensland, QRC estimates resource companies and their associated infrastructure are parties to at least 220 of these.
48. The existing Acts allow for voluntary development of CHMPs where this is considered appropriate, and many resource companies do elect to proceed with a voluntary CHMP despite being under no obligation to do so, if it is considered an appropriate means to meet their obligations.

49. It is QRC's view that the current balance in the Cultural Heritage Acts between requiring some form of "formal" cultural heritage assessment and where some other means of meeting the duty of care is available is appropriate. It provides important flexibility and efficiency of process, proportionate to the risk of the activity involved.
50. QRC holds significant concerns that a proposed change, or a "one size fits all approach" would disrupt this balance, by burdening land users with unreasonable costs, delays and uncertainty in circumstances where the likelihood that cultural heritage will be impacted is low.
51. One such procedural challenge with CHMPs is the onerous nature of the landowner/occupier notification obligation. CHMPs developed in urban areas or in respect of long linear infrastructure in particular can have thousands of affected landowners and occupiers. Many of our members report that the administrative effort in compiling the relevant contact details and mailing individual notices can be more onerous than the process of negotiating the agreement itself. The legislation could benefit from revision to make it clear that letterbox leaflet drops or other measures short of individual notification will be acceptable (for example, publishing an advertisement in a local paper)

4. COMPLIANCE MECHANISMS

KEY POINTS:

- QRC does not consider there is a need to bolster compliance mechanisms under the Cultural Heritage Acts
- QRC submits that a focus on education is required, to support all land users to self-audit more accurately, improve performance and increase awareness of obligations to protect Cultural Heritage

Is there a need to bolster the compliance mechanisms designed to protect cultural heritage – if yes, what needs to be improved and what additional measures should be put in place?

52. The Consultation Paper identifies that the Cultural Heritage Acts already have several compliance mechanisms that are both pro-active and preventative (such as stop orders issued by the Minister or injunctions obtained by the Aboriginal or Torres Strait Islander Party) and reactive, in the form of offences and penalties that can be imposed on individuals and companies that breach the Acts. It also has existing investigative powers.
53. The penalties for individuals and companies are significant. A company is liable to fines over \$1 million dollars, along with the potential requirement to pay restoration costs in respect of any harm to cultural heritage that may have resulted from the breach.
54. QRC therefore considers that the non-compliance deterrents in the form of the offences and penalties, along with the powers to prevent breaches in the form of stop orders and injunctions, are already appropriate.
55. QRC therefore does not consider there is a need to "bolster" compliance mechanisms under the Cultural Heritage Acts, and is not aware of any evidence that suggests the requirements of the Act are not being complied with due to any perceived weakness in the existing provisions.
56. In addition, a concept underpinning the Cultural Heritage Acts is to create a mechanism for land users and Indigenous parties to reach agreement on cultural heritage matters while minimising government involvement.
57. Critical, is its focus on facilitating direct relationships between resource companies and Aboriginal and Torres Strait Islander people. Increased government involvement in respect of compliance measures is unlikely to be conducive to this.
58. Finally, QRC does not think increased compliance mechanisms, such as reporting and audits, are necessary given the resources sector has a strong history and established best practice in protecting cultural heritage (including working closely with relevant Indigenous parties) – for example Bradshaw. E. et al. 2011. *Why Cultural Heritage Matters. Rio Tinto*²
59. It is the QRC's view, as stated in its previous submissions, that a focus on education is required, to support all land users to self-audit more accurately, improve performance and increase awareness of obligations to protect Cultural Heritage, rather than focus on onerous government-led compliance action.

² Available: https://www.csr.com.au/media/docs/168/Why_Cultural_Heritage_Matters.pdf

5. RECORDING CULTURAL HERITAGE

KEY POINTS:

- QRC supports improvement in the operability and reliability of the database, particularly regarding the accuracy of reference points
- QRC is aware that not all Indigenous parties will see the extensive recording of information on the database and registers as a benefit and supports their involvement in the decision-making process about what and how much detail should be reported

Is there a need to make improvements to the processes relating to the cultural heritage register and database – if yes, what needs to be improved and what changes should be considered?

60. The Consultation Paper notes there are currently 50,804 recorded site locations in Queensland. During the second reading speech for the Aboriginal Cultural Heritage Bill 2003, the Hon S. Robertson noted *14,000 sites, places and objects* would be recorded in the newly established cultural heritage database. This appears to be a small increase over 15 years of the legislation's operation.
61. QRC suggests the current database is not an up-to-date record of the status of cultural heritage knowledge in Queensland. The quality of data that is provided to the database depends very much on who submits the information.
62. Absence of a reliable database makes planning for cultural heritage management difficult and broadly, QRC supports any recommendations which advocate improvement in the operability and reliability of the database. This resource should be 'fit for purpose', particularly for assessing the impact of activities that take place on developed land or land that has been subject to significant ground disturbance. A reliable database would enhance cultural heritage protection.
63. QRC also supports expanding access to the database as members have reported difficulties registering critical users within their business, and an absence of feedback from the Cultural Heritage Unit as to why an application has been rejected.
64. QRC is also aware of member feedback regarding the accuracy of reference points (coordinates) for the cultural heritage sites within the database. These should be improved to assist in the location, identification and protection of sites. QRC suggests a review or audit of historic data is required to ensure its integrity.
65. However, QRC notes the cultural heritage database is simply a *research and planning tool* and often not the only tool used – it is one step in meeting duty of care obligations. As such, it does not need to be an exhaustive list of cultural heritage sites in Queensland.
66. The Cultural Heritage Acts acknowledge the central role of Aboriginal and Torres Strait Islander people in the protection and management of their cultural heritage, and QRC supports their involvement in the decision making process about what and how much detail should be reported. QRC believes flexibility needs to be built into the Cultural Heritage Acts regarding reporting requirements.
67. QRC is aware that not all Indigenous parties will see the extensive recording of information on the database and registers as a benefit, and that there may be cultural sensitivity associated with the public recording of some cultural heritage and its location. This is a matter that needs to be agreed between the proponent and the Indigenous party.
68. As such, if a requirement to submit data to the register is implemented, there must be an exemption for companies that the requirement to submit data should not apply where the Aboriginal or Torres Strait Islander party has not consented to the disclosure.

QRC would welcome the opportunity to discuss any of the matters raised in this submission. The QRC contact is Andi Horsburgh, Manager Social and Indigenous Policy, andrea@grc.org.au

Yours sincerely

Ian Macfarlane
Chief Executive