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26 July 2019

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

BY POST/EMAIL – CHA_Review@datsip.qld.gov.au

Dear Sir/Madam,

RE: Review of the Cultural Heritage Acts – Consultation paper

The Urban Development Institute of Australia Queensland (the Institute) acknowledges the Aboriginal and Torres Strait Islander peoples as the Traditional Owners and Custodians of the State of Queensland and acknowledges Elders past, present and emerging.

Thank you for the opportunity to provide comment on the Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP) Review of the Cultural Heritage Acts – Consultation paper. The Institute supports the review of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003* (the Acts). The comments contained herein relate principally to the *Aboriginal Cultural Heritage Act 2003*, with which we are more familiar.

The Institute represents the Queensland development industry in its endeavours to deliver affordable housing for great communities. The Institute is committed to facilitating building of better, affordable, and diverse communities.

The development industry is a major contributor to the Queensland economy. As the third largest industry of employment within the state, it directly employs 10 percent of the Queensland workforce, and indirectly supports a further 13 percent. Underlining its importance to the state's economy, the development industry directly contributed \$26 billion to the Queensland economy in 2017, or 8 percent of Queensland's GSP, and a further \$35 billion through indirect economic impacts (11 percent of GSP).¹

The Institute considers the present legislation as effective in prioritising Aboriginal cultural heritage and believes that it provides for proponents and parties to identify and resolve cultural heritage matters. The Institute considers substantial change to the present legislation is unnecessary and could create substantial issues for

¹ Urbis, The Contribution of The Development Industry to Queensland, March 2018

practical urban development and the timely delivery of housing to meet the needs of a growing population. The proposed changes could also generate an excessive and inefficient call on the resources of Aboriginal parties, government, the development industry and impact housing costs and affordability. Any change would need to provide workable and resolved arrangements for urban development.

The present legislation is well founded on sound legislative principles. It encourages relevant groups to arrive at solutions that respond to the cultural heritage circumstances. There are also opportunities to provide non-legislative support via guidance material and support. The present legislation operates well in regard to:

- Enabling appropriate development to progress with mitigation measures
- Achieving agreement between parties
- Excluding external vexatious groups from misusing the legislation
- Delivering certainty regarding the agreements that have been reached with Aboriginal parties.

As a result, the Institute is concerned with proposed changes to the largely successful legislative arrangements such as broadening duty of care site application and making determination of relevant parties uncertain. These measures could vastly increase the requirement for detailed assessment and consultation on cultural heritage matters and thus the cost of affordable housing, without substantial improvement to cultural heritage outcomes.

In addition to the above, the Institute sees some opportunity for:

- Further clarification material on appropriate timeframes, costs, standards
- Resourcing and training opportunities for Aboriginal parties to allow them to effectively and efficiently engage with land users
- More efficient dispute resolution and a move away from the Land Court which is costly to utilise.

Further information on these comments and responses to some of the questions with relevance to the development industry are provided below.

Defining Cultural Heritage

Proposals to incorporate broader cultural landscapes and intangible heritage definitions in the legislation are not supported.

The Institute considers that the present legislation adequately provides consideration of broader intangible heritage matters through the defined term 'significant Aboriginal area'. The Institute is concerned that further expansion of the definition will lead to greater uncertainties in application of the Acts, in particular with respect to duty of care assessments. Additional uncertainty would impact on the industry's ability to deliver diverse and affordable housing to meet the needs of the community at the due diligence, purchase and financing stages of development. At this preliminary stage it could be very difficult to predictably define the impact on the site development yield, timing of development, and the costs involved. This additional uncertainty would result in difficulties in obtaining finance and resultantly the redirection of investment to development activity in other more competitive Australian states. We would suggest the present legislation, has been cast appropriately to specifically avoid creation of uncertainty in this definitional area.

Identifying Aboriginal and Torres Strait Islander parties

The Institute does not support changes to the 'last claim standing' provision.

The present arrangements provide a clear and robust method of determining the relevant Aboriginal and Torres Strait Islander parties for the Act, arrived at from Aboriginal parties' own actions. While it is recognised some parties may struggle with some of their responsibilities under the Acts this does not warrant increasing the number and options for involvement as there are other more efficient ways of addressing this issue. Some suggestions regarding assisting the parties to achieve their responsibilities are included later in this document.

However, we would welcome any changes that clarify and increase certainty as to the 'Aboriginal party' under the Act, particularly in circumstances where there has been a negative determination of native title.

We emphasise other options for identifying parties have the potential to substantially increase uncertainty in operation of the Act in the development context and thus increase costs to homebuyers. In particular it could lead to increased disputation between groups, delays in resolution of parties and decision-making that could have very substantial implications for the imperative to meet the need to provide homes for the community in a timely and affordable manner. We are aware of complications and costly processes in other states that do not necessarily result in better outcomes for any stakeholder.

Land user obligations

Duty of Care

The Institute does not consider there is a need to bolster the oversight mechanisms for self-assessment and voluntary processes if this involves:

- trigger only by inconsistency of the new land use against past use
- assessment of farming areas that have been entirely cleared and farmed intensively for decades
- duplication of the underlying duty of care requirement where monitoring for relevant objects and potential harm is required
- unnecessary administrative requirements.

Change could vastly increase the number of properties requiring substantial assessment and consultation with Aboriginal parties but with limited likelihood of identifying or addressing comparable increased impacts to cultural heritage.

The Institute notes that the large part of land supply for housing is derived from smaller holdings of less than five hectares in south east Queensland.² The small size of these projects makes it more important to have efficient processes in place for providing housing on these sites.

The Institute considers that evidence to demonstrate that changes are necessary has not been provided. Notwithstanding, it is recommended an improved approach could include early examination of areas prior to rezoning of land for urban development by state and local government with the Aboriginal parties. At that stage, areas of significance can be identified, respected and their protection incorporated into a structure plan. For areas already zoned for urban development Cultural Heritage Studies should be undertaken by the local government and in some cases Economic Development Queensland, to assess the level of significance of areas and objects in consultation with Aboriginal parties, to define areas for greater care in development.

It is acknowledged more should be done to be certain that landowners adequately identify and respect cultural and archaeological matters. The Institute is interested in assisting to increase the information on responsibilities that is made available to developers. In practice, professional and corporate development organisations generally seek expert advice and assessment of landholdings. There should however be greater communication to landowners regarding identifying and protecting cultural heritage. Additional information being available in the register is also recommended.

Voluntary agreements

The Institute is aware of a trend, particularly in South East Queensland, whereby Aboriginal parties are increasingly relying on legal representation to be the primary contact point throughout all aspects of the engagement and agreement negotiation process. The result of this trend is that a process that is meant to

² Urbis, Investigating broadhectare infill opportunities in SEQ, March 2017

primarily focus on the protection of heritage and empowerment of Aboriginal parties can become overly complicated and litigious.

We are advised of engagement processes where the legal representatives of Aboriginal parties have demanded legal fees of \$60,000-\$200,000 to undertake a Part 7 Cultural Heritage Management Plan (CHMP) process, which largely relies on established industry agreement templates, in addition to Aboriginal Party attendance fees. This is unfair on land users and wasteful of resources that could be better spent providing positive cultural and social outcomes to Indigenous communities.

A solution to these issues would be establishment of practice directions providing guidance to:

- o Methodologies
- o Efficient negotiation processes
- o Reasonable rates of payment to bring clarity to expectations of the cost of matters.

Dispute resolution

The Institute supports facilitated mediation or other assistance from an independent third party or a low-cost expert panel to provide for efficient dispute resolution processes for parties negotiating voluntary agreements.

The introduction of low-cost dispute resolution assistance is desirable as an alternative to the Land Court. In particular, having only the Land Court for dispute resolution processes imposes legal costs and fees on Aboriginal parties and developers that are very substantial and are actively avoided. The court processes can also put the proponent and the relevant Aboriginal party unnecessarily at odds which can negatively affect ongoing cooperation and interface between the parties.

Compliance mechanisms

The Institute does not support moves to bolster the compliance mechanisms that could increase the potential for misuse by litigious persons or groups to delay projects or increase settlements to parties resulting in increased costs to homebuyers. The discussion paper puts forward the proposal that 'penalties paid for breaches should go to the communities whose cultural heritage was destroyed'. This should be supported by improved register information of cultural heritage material on sites and further guidance on how to avoid impact on cultural heritage.

The Institute also considers that there should be greater setting of timelines for response from parties in notification and other steps that can be pursued.

Recording cultural heritage

The Institute reiterates the need for an improved Aboriginal cultural heritage database.

This information is very important to due diligence for site purchases and for avoiding impact on cultural heritage. While some information is presently excluded from the database for cultural reasons, it would be useful for proponents to have this flagged by the database (without disclosing what has been withheld), so that it is clear that engagement with the relevant Aboriginal party should be prioritised to understand the Aboriginal cultural heritage landscape of a proposed project site.

The Institute is aware that some material obtained following identification and lawful removal after development may be being stored inadequately. The Institute considers further best practice guidance and support by DATSIP may be warranted. There should also be further work done by DATSIP to support curation, ensure a clear practice guidance, as well as an accurate and up to date database.

Other issues

The Institute is aware that some Aboriginal parties are not resourced to undertake the tasks needed to adequately address cultural heritage duty of care, monitor developments, provide input into voluntary agreements, maintain resources, disseminate knowledge to the wider community, and proactively provide guidance on issues that can assist land holders and government to better plan for cultural heritage preservation.

We are advised by expert heritage consultancies that Aboriginal parties struggling to fulfil their engagement obligations under the Acts can charge proponents excessively to cover other costs. The Institute suggests that many of the submissions for changes to the Acts have been affected by the lack of group resources and time to actualise the present Acts. Perhaps some support should be provided by DATSIP to these groups. In any event there is room for improvement to the guidance and other materials that support the Acts. It is recommended additional guidance material is developed, with a particular focus on:

- Efficient negotiation processes
- Reasonable rates of payment on engagement, CHMP negotiations, and on-site investigations
- Expectations of standards in works that are carried out for the range of tasks that are performed
- Further detail of the standards of what is required in a 'duty of care' assessment of a property
- Voluntary agreements
- Interpretation of intangible heritage including peer review
- CHMPs
- Role for local governments in undertaking cultural heritage assessments prior to rezoning and for assessment of existing zoned areas
- A detailed map that clearly shows which Aboriginal party looks after which local government areas/properties.

In regard to the voluntary agreement process, the Institute is aware of significant uncertainty around what is required and of proponents and parties having significantly different expectations, leading to long negotiation processes. The provision of best practice or minimum requirement guidelines and other material would assist in improving understanding and communication.

Additionally, the Institute considers these matters should also be addressed:

- A clear timeframe for the Aboriginal party to respond to enquiries, negotiation, achieve a resolution with the developer, and to undertake/complete works
- Costs paid by developers in each LGA to Aboriginal parties should be publicly available, in line with increased community demand for more transparency across a range of payments made by developers including infrastructure charges
- Access to third party assessors if an estimate of costs by the group is considered high or increases above this during the process
- All sites requiring engagement and of known significance should be mapped by a state department to identify areas in which additional care should be taken
- Requirement and support of Aboriginal parties to provide regular education to the wider community on matters of significance in their area.

The Institute is aware of some calls for greater inclusion of triggers or other steps in the *Planning Act 2016* for Aboriginal cultural heritage. The Institute considers that cultural heritage is a matter most relevant to the plan making stage of planning scheme amendments rather than to individual developments, at which stage the zoning expectations for the land are set. Further, at the individual development application stage the lack of accurate available mapping of sites of significance and a register of sites makes planning legislative requirements difficult or impossible to trigger. Further, where *Planning Act 2016* referral triggers currently apply, such as to departments like the Department of Environment and Science or Transport and Main Roads, this referral

arrangement is not appropriate to DATSIP as the department is not the relevant centre of knowledge or decision-making for the Aboriginal parties.

Conclusion

The Institute recommends direction of action and funds to support valuable community building, engagement activities and intangible matters to respect and advance Aboriginal cultural heritage.

The Institute considers substantial change to the present legislation is unnecessary and can create significant issues for practical urban development and the timely delivery of affordable housing to meet the needs of a growing population. The changes could also generate an excessive and inefficient call on the resources of Aboriginal parties, government, the development industry and impact housing costs and affordability. Any change would need to provide workable and resolved arrangements for urban development and be subject to a regulatory impact statement.

The present legislation is well founded on sound legislative principles. It encourages affected groups to arrive at bespoke solutions that respond to the cultural heritage circumstances. There are however, opportunities to provide non-legislative guidance material and support to some Aboriginal parties.

Thank you for the opportunity to provide these comments. Please contact Martin Zaltron, Manager of Policy (mzaltron@udiaql.com.au) on (07) 3229 1589 if you have any questions.

Yours sincerely,

Urban Development Institute of Australia Queensland



Kirsty Chessher-Brown
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