



Cape York Land Council Aboriginal Corporation
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Cultural Heritage Acts Review
Department of Aboriginal and Torres Strait Islander Partnerships
PO Box 15397 City East
QLD 4002
By email: CHA_Review@datsip.qld.gov.au

Dear CHA Review Team

Cape York Land Council (CYLC) functions as the Native Title Representative Body (NTRB) for the Cape York region. In that NTRB role we fulfil statutory functions under the *Native Title Act 1993* (Cth) (NTA). In our broader Land Council role we support, protect and promote Cape York Aboriginal peoples' interests in land and sea to positively affect their social, economic, cultural and environmental circumstances and aspirations. In this capacity CYLC welcomes the opportunity to provide the following comments on DATSIP's Review of the Cultural Heritage Acts.

Ownership and defining cultural heritage

Is there a need to extend the definitions of what is protected under the Acts?

CYLC considers that the definition of cultural heritage in the *Aboriginal Cultural Heritage Act 2003* (the Act) is too narrow and can be interpreted to exclude things that should be rightly recognised and protected as Aboriginal cultural heritage. The definition in the Act should be amended so that it encompasses the full breadth and depth of cultural heritage, as understood by Queensland's Aboriginal people.

Aboriginal cultural heritage may include a range of tangible and intangible things that do not readily fit within the definition of an object provided in the Act, such as foods, a plant or animal, a totem, or intangible heritage such as knowledge, tradition or song lines. CYLC supports contemplation in the Discussion Paper that intangible heritage should be defined in the Act and included within assessment and management processes. CYLC supports that the United Nations Educational, Scientific and Cultural Organisation's convention definition (or similar) of intangible heritage should be adopted as the definition in the Act because it includes oral traditions, performing arts, rituals, festivals and traditional crafts, and these types of things are considered by Aboriginal people to be a part of their broader intangible cultural heritage.

Similarly, the definition of an area can be interpreted too narrowly and perceived as applying to a relatively small area such as a ceremonial place, a birthing place, a burial place or the site of a massacre, as per the examples given in the Act. However the perception that areas with Aboriginal cultural heritage significance are always relatively small is incorrect and the definition in the Act should be recast to recognise the significance of broader cultural landscapes. This would allow broad landscape features, songlines, connected areas, story places, etc to fall within the definition of an area. Story places (sometimes referred to as sacred sites) are afforded a great deal of significance in

Indigenous law and custom and reflect a far reaching and rich cultural heritage that should be both protected and enriched as a vital part of any cultural heritage management framework.

Identifying Aboriginal and Torres Strait Islander parties

Do the Acts provide an appropriate way to identify the right people to speak for country?

CYLC considers that the current hierarchy established by the Act to identify the Aboriginal party to be involved in the assessment and management of cultural heritage is, in some circumstances, unsuitable to identify the right people to speak for the cultural heritage. Specifically, CYLC considers that the “last claim standing” provision’s position in the hierarchy requires revision.

CYLC supports that the hierarchy to identify the appropriate Aboriginal party to consult about cultural heritage should start with registered native title holders, or if there are no native title holders, then registered native title claimants. However, if there are no registered native title claimants then previously registered native title claimants (“last claim standing”) should not be the next option as this may result in persons with stronger traditional connections actually being excluded from protecting their Aboriginal cultural heritage. This could be the result if the previously registered claimant’s claim has been contested by others who asserted an equal or stronger traditional connection to the area, and this contest has been the subject of adverse findings against the former claimant in native title determination proceedings in the Federal Court of Australia. Despite such an adverse finding, s.34 of the Act currently provides that the previously registered native title claimants would still be considered the appropriate party to consult regarding cultural heritage matters if there were no registered native title holders or claimants.

Where there are no registered native title holders or claimants, CYLC considers the Act should be amended to remove reliance on “last claim standing” and instead provide a role for native title representative bodies (NTRBs) to assist with the identification of Aboriginal parties. NTRBs should have a role to provide certification for Aboriginal parties akin to that found in s. 203BE(5) of the *Native Title Act 1993* for the identification of native title parties and their authorisation of Indigenous Land Use Agreements. NTRBs can successfully provide this service because of the body of anthropological knowledge that NTRBs build up over time, and have access to anthropologists who can help inform identification of the Aboriginal party. The provision of Aboriginal party certification by NTRBs would provide government officers administering the Act with the most certain assessment of the most appropriate Aboriginal party in circumstances where there is not a current registered native title claim or current registered native title holders pursuant to a Federal Court native title determination.

Where there is not a current registered native title claim or current registered native title holders NTRBs such as CYLC are in the best position to identify the most appropriate Aboriginal party. CYLC supports a growing role for Cultural Heritage Bodies (CHBs) and that they serve as the first point of contact for cultural heritage matters in their area. However, in the absence of registered native title holders or claimants, CHBs do not have access to the anthropological information, networks or resources.

Where there are registered native title holders, and a Registered Native Title Body Corporate (RNTBC) established, CYLC considers that the Act should be amended to provide that the RNTBC is recognised as the default CHB. This is consistent with the way that the Act recognises the NTA hierarchy to identify Aboriginal parties (notwithstanding the issue we have raised regarding last claim standing). RNTBCs as default CHBs complements the identification of Aboriginal parties under the Act because RNTBCs have determination-standard information about native title holders and a responsibility to identify these people as necessary for their RNTBC role. RNTBCs would use the same processes, information and knowledge about native title holders to identify Aboriginal parties for the

purposes of the Act. In addition, having different organisations as a CHB and a RNTBC for the same area is administratively inefficient and creates confusion and conflict about the roles of both organisations. Having both RNTBC and CHB functions within the same organisation is a much more appropriate, complementary and efficient arrangement. CYLC also considers that a RNTBC's CHB function should not extend beyond the determined area it has jurisdiction over. This is because the RNTBC does not hold relevant information or knowledge about Aboriginal parties for areas outside the RNTBCs determined area.

The hierarchy to identify Aboriginal parties therefore should be:

1. If native title determined and RNTBC exists – the RNTBC should be the CHB and identify the Aboriginal party for cultural heritage purposes;
2. If native title claimed but no RNTBC or CHB exists – the native title applicants, with assistance from the NTRB if requested, identify the Aboriginal party for cultural heritage purposes;
3. If native title not claimed or determined but CHB exists - the CHB identify the Aboriginal party for cultural heritage purposes, but with assistance from NTRB because the NTRB is likely to have relevant information;
4. If native title not claimed or determined and no CHB – the NTRB identify the Aboriginal party for cultural heritage purposes.

Land user obligations

Is the balance right in the Acts for assessing and managing cultural heritage?

CYLC considers that the balance in the Acts for assessing and managing cultural heritage is not right, and the emphasis of the duty of care should shift towards more mandatory protection of cultural heritage values, and with greater oversight of self-assessment and voluntary processes.

Amendments that should be made to the Act include:

- The threshold for a mandatory Cultural Heritage Management Plan (CHMP) should be lowered from projects that require Environmental Impact Assessment (EIA) to projects that involve undertaking high impact activities, as identified by a prescribed list. This would be consistent with the Victorian model which includes high impact activities such as mining, construction, residential development, subdivision of land and quarrying as activities that require a CHMP regardless of whether EIA is required. CYLC submits that the prescribed list should also include any activities that involve significant land clearing or excavation, especially in previously undisturbed areas. Therefore the 'self assessment' duty of care under the Act should not apply to high impact activities but consultation and agreement through a CHMP should be the only option for high impact activities.
 - The Act should be amended to identify a stricter range of offences associated with damage to cultural heritage, greater penalties provided for infringements, and DATSIP be more stringent in applying these penalties when offences occur. This would bring the Act more in line with cultural heritage legislation in other jurisdictions including Tasmania, Western Australia, Northern Territory and the Australian Capital Territory where offences are identified and penalties provide for infringements.
 - Investigation under the Act should not be limited to only where there is proof of harm to Aboriginal cultural heritage. The Act should be amended to provide greater power for investigation of potential harm (for example, if land was cleared without proper consultation and agreement in place), and for past acts that may have caused harm (for example, clearing land for dam construction without consultation).
 - Land users should be required to provide proof of consultation and agreement to the Department administering the Act before commencing works.
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- For land use activities that do not require a mandatory CHMP, and cultural heritage values are instead managed through self-assessment or voluntary processes, there should be improved mechanisms for oversight of these processes, including dispute resolution assistance for parties when negotiating voluntary agreements. CYLC agrees with the Australian Government Productivity Commission Inquiry Report that identified that facilitation of voluntary cultural heritage management agreements should be affordable, independent and not necessarily increase timelines.

Compliance mechanisms

Is there a way to bolster ways to protect cultural heritage under the Acts?

CYLC considers that mechanisms in the Act to protect cultural heritage need to be bolstered. In addition to improved processes for assessing and managing cultural heritage, as discussed above, government should be adequately resourced to provide a greater regulatory presence, intervene where cultural heritage values are at risk of damage, and proactively apply penalties where cultural heritage values have been damaged.

The Act should be amended to provide that:

- mechanisms exist to ensure land users follow the duty of care guidelines, with penalties for non-compliance; and
- mechanisms exist to monitor compliance with voluntary cultural heritage agreements, and to assist Aboriginal parties to ensure agreements are implemented as agreed.

CYLC considers that awareness by land use proponents of cultural heritage values and the ways in which they must be protected before land uses are planned is one of the most effective ways to protect cultural heritage. It is much better for proponents to plan their project around known cultural heritage values, and for land use assessment and approval agencies to consider cultural heritage values as part of the project approval and conditioning process, rather than to try to identify and manage cultural heritage values after the project is approved and committed to.

To support this approach, Queensland's *Planning Act 2016* was prepared with the objective to protect Aboriginal cultural heritage, but government has not yet articulated how this is to be achieved. CYLC advocates that planning schemes identify cultural heritage values so that land users, and land use approvers, are aware of these values when planning the location for a project, and implementation of the project. Planning schemes could be prepared in such a way as to indicate areas where cultural heritage values exist and the types of land use activities that may be compatible or incompatible with these values. For areas of high cultural heritage significance the planning scheme could indicate that no development would be compatible with protection of these values.

This would require the early involvement of Aboriginal parties in planning scheme preparation processes. If planning schemes were prepared in such a way all parties would be aware of and have greater capacity to manage and protect cultural heritage values. CYLC recommends that improved implementation of the *Planning Act 2016* is a potentially significant way to bolster the protection of cultural heritage. DATSIP should work with DILGP to identify how the Planning Act and Cultural Heritage Acts can operate together to achieve their mutual objectives.

Recording cultural heritage

Is there a need to improve the cultural heritage register and database?

CYLC considers that there is a need to improve the cultural heritage register and database. The register and database should play a more significant role in recording, protecting and managing cultural heritage, but issues with the register and database limit their effectiveness. Issues with, and possible improvements of, the register and database include:

- The database may in some cases be relied upon by land users as the complete and comprehensive point of truth about cultural heritage values in an area, despite the fact that information in the database and register is far from complete and comprehensive. The database and register need to be presented to land users as providing some information about cultural heritage values, but should in no way be considered complete and comprehensive, and in no way replace the need for consultation and agreement about management with Traditional Owners of the area under consideration.
- The fact that land users have consulted the database should not be a criteria taken into consideration when determining whether land users have satisfied their duty of care. CYLC considers the reverse should be applied: if the land user did not consult the data base, it should be considered as a breach of the duty of care, but database consultation should be a minimum mandatory step, and does not satisfy the duty of care.
- There are many sensitivities around the recording and making public of cultural heritage information. Cultural heritage information may also be the intellectual property of Aboriginal people and requires appropriate protection. However a database is also vitally important for Aboriginal people to securely record their cultural heritage information for their own purposes, and for this information to be used as they choose to protect and manage that cultural heritage. For these reasons the database needs to be upgraded so that Aboriginal people can securely and privately record their cultural heritage information, but also provide access to information as required. This may involve the ability to indicate in a publicly available information layer in the database that cultural heritage values exist in an area without pinpointing exactly where or what the values are. For further information, and to develop agreement and a management plan, a proponent would have to contact the relevant Traditional Owners and discuss how a proposal may affect the cultural heritage values, and whether the impacts of the proposed project could be managed in an acceptable way.
- The register and database are not suitable for mapping and recording all types of cultural heritage information. For example, only a GPS point can be recorded rather than an area, so cultural heritage values such as a story place, campsite, landscape, or song line cannot be adequately mapped. Tangible and intangible cultural heritage such as food, plants, a totem, a story or knowledge cannot be recorded either. The functional capacity of the database must be upgraded so that it can also securely record these types of information. The declaration of designated landscape areas was an option under previous versions of the Cultural Heritage Act and this allowed for the identification and protection of larger areas. The Act should be amended to reintroduce similar provisions to designated landscape areas to allow for the protection of larger areas.

Other matters

What aspects of the Cultural Heritage Acts do you think are working well and what could be improved?

CYLC provides the following additional points for consideration:

- Part 6 of the Act - Cultural heritage studies – this part does not provide any guidance nor processes for conducting a study;
 - When a proponent is required to go through an environmental impact assessment (EIA) process, the negotiation of a cultural heritage management plan with the Aboriginal Party should be required as part of the EIA process (see s 87(2) of the Act). To illustrate:
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- i. The trigger to require a cultural heritage management plan should be the same as the trigger that requires environmental impact assessment so that cultural heritage values are protected by a similar mechanism as environmental values. For example, for a mining lease application where high impact activities are authorised once granted, the negotiation of a CHMP should be part of the environmental impact assessment associated with the grant of the tenement, and required as a condition of and prior to the lease being granted, not a process that occurs after grant.
 - ii. There is a close connection between environmental and cultural heritage assessment and management. For example, flora and fauna are closely linked to, and usually part of, cultural heritage, so impacts to flora and fauna would also have flow on impacts to cultural heritage. This connectivity demonstrates the need for environmental and cultural heritage impact assessment and management to be conducted as part of the same process.
- The role of the Land Court is currently limited to:
 - i. Providing CHMP negotiation / mediation;
 - ii. If no agreement, the Land Court can make a recommendation to the Minister regarding what should happen; and
 - iii. Stop order / injunction when damaging activities are taking place.

The role of the Land Court should be more substantial and definitive. The Land Court should be empowered to arbitrate an outcome if there is no agreement about a CHMP following negotiations, rather than this role being a Ministerial power. The Land Court is preferred to avoid political considerations influencing cultural heritage management.

If you wish to discuss any matters raised in this submission please do not hesitate to contact CYLC.

Yours sincerely



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Cape York Land Council