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CHA Review
Department of Aboriginal and Torres Strait
Islander Partnerships
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SUBMISSION - INDIGENOUS CULTURAL HERITAGE ACTS 2003 (QLD) REVIEW

P&E Law is a specialist planning, environment and native title legal practice that acts for Traditional Owners throughout Queensland and the Torres Strait Islands. Part of our core practice is advising clients and negotiating agreements relating to the protection and management of Aboriginal and Torres Strait Islander cultural heritage under the *Aboriginal Cultural Heritage Act 2003* (Qld) (**ACHA**) and the *Torres Strait Islander Cultural Heritage Act 2003* (Qld) (**Cultural Heritage Acts**).

We pride ourselves on working to achieve practical and innovative results for our clients. For example, P&E Law, acting on instructions from an Aboriginal Party, brought the first application for declarations and an injunction in the Land Court under the provisions of the ACHA which resulted in a negotiated agreement between the parties.

We welcome the opportunity to provide a submission to the Department for consideration as part of its review of the Cultural Heritage Acts. We encourage the Department to also consider our submissions from 9 August 2016, as they relate to the Duty of Care Guidelines.

Identifying Aboriginal and Torres Strait Islander parties – ‘Last man’ standing

The Cultural Heritage Acts currently identify the Traditional Owners for involvement in the assessment and management of cultural heritage based on definitions of native title parties in the *Native Title Act 1993* (Cth) (**NTA**). In most circumstances these definitions provide clarity and certainty for both proponents and Traditional Owner parties.

However, the ‘last man’ standing provision is not universally accepted as a useful approach by all Traditional Owner groups. This provision provides that previously registered native title claimants will continue to be engaged in the assessment of cultural heritage, even where a court has determined native title no longer exists in that area.

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One of the most relevant examples is the decision by the Federal Court in [Sandy on behalf of the Yugara People v State of Queensland \(No 2\) \[2015\] FCA 15](#) ('Sandy (No 2)').

In that matter the court held that:

- native title rights and interests would have been held by members of each clan with respect to their particular land and waters, e.g. the rights and interests in lands and waters to the north of the lower Brisbane River were possessed by members of 'the Duke of York' clan and rights and interests in land to the south of the Brisbane River were possessed by members of the Coorparoo clan;
- it was most unlikely that the critical Turrbal antecedent, Billy Isaacs (father of applicant Connie Isaacs) was a descendant of 'the Duke of York'.

Despite there being other Aboriginal people with spiritual and cultural connection and responsibility for the area (consistent with the requirements of s35(7) of the *ACHA 2003*), the Turrbal People remain the relevant Aboriginal Party for the determination area. There can be no further native title claims for the determination area. It is unjust for a party to have important decision-making rights over land and waters in these circumstances, to the exclusion of other Traditional Owners.

In our submission the "last man" standing rule is failing the protection and management of Aboriginal cultural heritage by excluding Traditional Owners from the consultation and agreement-making process, such as previous registered claimants, the Jagera People.

Land User Obligations – Self-Regulation Not Enough

The Cultural Heritage Acts impose a duty of care upon all people who carry out an activity to take all reasonable and practicable measures to ensure the activity does not harm Aboriginal or Torres Strait Islander cultural heritage. The management and protection of Aboriginal cultural heritage, especially intangible cultural heritage such as story places or places of spiritual significance, goes largely unregulated by an independent regulator. The Queensland Government does not, as a matter of procedure, independently audit compliance with the Cultural Heritage Acts and the Duty of Care (**DOC**) Guidelines.

Some developers (including government) self-assess whether harm might occur. In numerous examples provided to us by Traditional Owner clients, this process has failed Aboriginal and Torres Strait Islander Parties resulting in the destruction of sites of significance and loss of cultural objects.

Since the Cultural Heritage Acts' commencement there have been very few prosecutions for offences, despite numerous valid complaints that Aboriginal cultural heritage has been harmed. Contrast, for example, the significant number of prosecutions and fines for unlawful clearing of vegetation under the *Vegetation Management Act 1999* since its commencement or the significant number of proceedings brought for development offences under the *Sustainable Planning Act 2009*. Where prosecutions have occurred for non-compliance with the Cultural Heritage Act, they have been predominantly regional mining matters, not urban development. It is in urban environments where most development and construction is occurring in Queensland.

A significant component of the self-regulation regime under the Act is the DOC Guidelines. Compliance with the guidelines provides a complete defence or strict compliance with the cultural heritage duty of care. The DOC Guidelines are therefore a fundamental component of the current regime.

One of the benefits of the planning regime in Queensland is that assessment and approval of development applications, including the consideration of appropriate and reasonable protection and mitigation measures

where there are potential impacts on the environment or the community, is undertaken by an independent tribunal. In most cases, development assessment is undertaken by local government authorities. Higher order planning decisions made by a local government authority are subject to appeal in the Planning and Environment Court by people who have lodged properly made submissions.

In our view, regulation of Aboriginal and Torres Strait Islander cultural heritage protection needs to be included as part of the development assessment framework in Queensland, with oversight by the Minister. State government should regulate major projects and local government should regulate smaller development assessment to ensure the proper protection and management of cultural heritage.

The regulator must assess what steps have been taken to manage Aboriginal and Torres Strait Islander cultural heritage and whether the relevant Traditional Owner groups have been involved in developing and implementing any mitigation and management strategy. If satisfied the proponent has taken all reasonable steps, then the regulator can approve the relevant development proposal. If dissatisfied, an Aboriginal or Torres Strait Islander Party can exercise third-party appeal rights to ensure effective decision-making and transparency.

Current Duty of Care Guidelines

The current DOC Guidelines should be amended to require cultural heritage clearance on lands that have been previously disturbed, in recognition of the fact that farmed land or land subject to previous ground disturbance such as forestry plantations, agriculture, grazing or pastoral land may have significant Aboriginal or Torres Strait Islander cultural heritage values, such as varied artefacts or intangible cultural significance. Archaeologists confirm that previous land clearing or disturbance invariably results in the movement of tangible cultural heritage items but generally does not result in their destruction.

Furthermore, a Cultural Heritage Study (**CHS**) with the full involvement of the relevant Aboriginal or Torres Strait Islander Party should be undertaken for all major projects, such as those that involve ground disturbance on a material level, such as greater than 10,000 m², and not just those that require an environmental impacts study.

Very few Cultural Heritage Studies have been undertaken since the Acts commenced. Engagement of the relevant Aboriginal or Torres Strait Islander Party to conduct the CHS must be done early as part of the initial feasibility, so that the project infrastructure can be designed to avoid Aboriginal or Torres Strait Islander cultural heritage, in the same way that other studies such as ecology, traffic, stormwater and hydrological are undertaken to assist the project design to reduce impacts and avoid harm. Very often project proponents engage with Aboriginal or Torres Strait Islander Parties at the end of the project planning and at a time when project timeframes put unfair pressure on the Aboriginal or Torres Strait Islander Parties to reach an agreement. Early engagement would avoid these conflicts and assist project design to better protect and manage indigenous cultural heritage.

Yours faithfully



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