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Department of Aboriginal and Torres Strait Islander Partnerships
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Dear Sir/Madam,

REVIEW OF THE CULTURAL HERITAGE ACTS

1. We refer to the above and confirm that we act on behalf of the following Nations and People (**Aboriginal Peoples**) with respect to these submissions:
 - Gergym-Kirkham-Kercumpan-Gorbenpan-Go'empul-Yerongpan People;
 - Yuggera Ugarapul People;
 - Gamilaraay People;
 - Kooma People;
 - The descendants of Kitty Sandy.
2. We write to you to make submissions on the review of the *Aboriginal Cultural Heritage Act 2003 (Qld) (Act)*.
3. We note that we were granted an extension until 16 August 2019, by the Department of Aboriginal and Torres Strait Islander Partnerships (**DATSIP**) to make submissions after the due date of 26 July 2019 by way of an email confirmation dated 23 July 2019.

SUBMISSIONS

4. We submit that the Act must properly interact with the *Native Title Act 1993* (Cth) (**NTA**). In particular, the *last man standing* principles must not apply to Aboriginal Cultural Heritage.
5. We submit that the Act requires significant amendments and those amendments must reflect the customs and protocols of Indigenous People.
6. We submit that the Act in its current form, fails to comply with the intent of paragraph 6 of the Preamble and section 28 of the *Human Rights Act 2019* (**HR Act**), nor with the purpose of the Act as outlined in sections 4 and 5 of the Act. Therefore, the Act must be brought into compliance with the HR Act.
7. We submit that a number of sections and parts within the Act must be far more detailed and reflect the terms and understanding of Aboriginal People. We have detailed these sections and parts below, however, these issues include but are not limited to:
 - a. The Land Court of Queensland must be a Court of Decision and not simply a Court of Recommendation;
 - b. The Land Court must be entitled to impose injunctions prior to an offence being committed;
 - c. Offences must be included in the Act and must be enforceable to reflect that Harm to Aboriginal Cultural Heritage is prevented not merely avoided;
 - d. The Cultural Heritage Registry(ies) must be run by and for the Aboriginal Parties and not by DATSIP;
 - e. The Cultural Heritage Registry(ies) must be accurate and regularly updated but only if under the control of the Aboriginal Parties, this is the methodology as set out within Victoria;
 - f. The State of Queensland must fully fund the Aboriginal Parties in ALL litigation with respect to the Act, thus allowing the Aboriginal Party to be represented not simply the State and the Sponsor.
8. We submit that the Act should reflect a similar methodology as set out in the *Victorian Aboriginal Heritage Amendment Act 2016*, which is a far superior act to the Act and the processes in place in Queensland.
9. The Act fails to appropriately interact and follow the procedures and measures as set out in the *Environmental Protection Act 1994* (**EP Act**) and the *Planning Act 2016* (**PA**).

10. We submit that, in particular, offences with respect to breaches of the Act must be clear and enforceable. These offences must be set out in a similar methodology and punishments to Chapter 8 and Chapter 9 Part 5 of the EP Act and similar offences under the PA.

The Human Rights Act 2019

11. The HR Act is a primary act in Queensland enacted to ensure the protection of human rights with respect to the actions of Government and its employees.

12. Paragraph 6 of the Preamble of the HR Act states that:

“6. Although human rights belong to all individuals, human rights have a special importance for the Aboriginal peoples and Torres Strait Islander peoples of Queensland, as Australia’s first people, with their distinctive and diverse spiritual, material and economic relationship with the lands, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition...”

13. Clearly the material and spiritual relationship with the land includes Aboriginal Cultural Heritage.

14. Section 28 of the HR Act states that:

“28 Cultural rights—Aboriginal peoples and Torres Strait Islander peoples

- (1) *Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights.*
- (2) **Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community—**
- (a) *to enjoy, **maintain, control, protect** and develop their identity and **cultural heritage**, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and*
- (b) *...;*
- (c) *...;*
- (d) **to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and**

(e) *to **conserve and protect the environment** and productive capacity **of their land, territories, waters, coastal seas and other resources.***

(3) ***Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture.***” [Emphasis added]

15. Section 28 of the HR Act clearly sets out strict requirements with respect to Aboriginal culture and Aboriginal Cultural Heritage, which are not complied with by the Act.

16. Nor does the Act contain effective procedures, measures or penalties to fully protect Aboriginal Cultural Heritage as required by the HR Act.

Native Title Act 1993 (Cth)

17. A number of the clients we represent as above are greatly concerned by the last man standing principle when it is applied to Aboriginal Cultural Heritage and instruct us that it must be stopped.

18. The Representative Bodies must also be prevented from representing the Aboriginal Parties in any matters in Aboriginal Cultural Heritage as they are conflicted and do not have the interests of Aboriginal People at heart.

19. An Elder of the Gergym-Kirkham-Kercumpan-Gorbenpan-Go'enpul-Yerongpan People makes the following submission:

“QSNTS should be held accountable for facilitating the misappropriation of our cultural heritage by historical residents through the native title process; by railroading us into a including historical residents of our country, they have enabled them to now legally call themselves native title holders (ie traditional owners) of our country.

It's the same with the Cultural Heritage Act and the last man standing provision – it not only allows people to legally lay claim to our cultural heritage – it promotes those people as the people speak to for cultural heritage matters (ie specifically land matters). The Cultural Heritage Act allows an entity (government) without cultural authority to bestow cultural authority on people that have no cultural rights to country. Enough is enough!!”.

Aboriginal Cultural Heritage Act 2003 (Qld)

1. Definitions – Part 1, Division 3

Definition of Cultural Heritage:

The definition of Cultural Heritage under section 8 of the *Aboriginal Cultural Heritage Act 2003 (Qld) (Act)* is extremely limited and includes only:

- (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.*

Limiting Aboriginal Cultural Heritage to a physical area or object is incorrect and ignorant.

Aboriginal Peoples' connection with Country and their Cultural Heritage cannot be defined by the physical, although it includes physical things, because it is founded on their history and story passed on through generations, among many other things. The Act's definition of Cultural Heritage must therefore be rewritten and must ensure to include intangible things and these things are to be listed and determined by Aboriginal People.

The definition of Cultural Heritage should not be a standard nor exhaustive definition. The definition should be open ended to include Cultural Heritage that is to be determined by the Aboriginal People of the applicable Country or land in which the Cultural Heritage is located. An Indigenous Nation should be able to define the Cultural Heritage of their own Country.

We have been instructed by our clients that their Cultural Heritage includes their Totems, and an example one of the YUP's Totems includes the Green Treefrog. The Indigenous Peoples' connection to their Totems are of high cultural importance to the YUP and yet there is absolutely no protection of this Cultural Heritage under the Act.

Schedule 2 of the Act needs serious amending and added definitions that are relevant to Aboriginal Cultural Heritage. This should be done under further consultation by the State with Indigenous Peoples. An example is the inclusion of "Sorry Business" and "Cultural Protocols".

2. Purpose of Act – Part 1, Division 2

Section 4 of the Act states:

"The main purpose of this Act is to provide effective recognition, protection and conservation of Aboriginal cultural heritage".

The Purpose of the Act is weak and needs to be narrowed specifically to protecting and preventing harm to Aboriginal Cultural Heritage.

Proponents attempt to use the current Purpose of the Act to limit Indigenous Peoples' ability to negotiate terms of Cultural Heritage Management Plans or Cultural Heritage Management Agreements by merely complying with this Purpose. This does not go as far as protecting or preventing harm to Cultural Heritage.

The Duty of Care Guidelines do not comply with the Purpose of the Act.

3. Ownership – Part 2

The Act in its current form entitles the Aboriginal Party to maintain ownership of Aboriginal human remains, under section 15, or objects under section 20, however ownership of anything else rests with the State. This conflicts with the Principles set out in section 5 of the Act, particularly:

“(b) Aboriginal People should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal Cultural Heritage”.

Ownership of all Cultural Heritage must pass to and remain with Indigenous People, particularly at the time of entering into a Cultural Heritage Management Plan or Cultural Heritage Management Agreement with a Proponent.

Section 21 of the Act conflicts with the Purpose of the Act. Section 21 states:

“Despite the existence of the Aboriginal cultural heritage, the owner or occupier or other person is entitled to the use and enjoyment of the land to the extent that the person does not unlawfully harm the cultural heritage”.

The intention of this section has some meaning however the section itself is poorly worded and does not provide for any enforcement or way of compliance. This section of the Act allows the Proponent to self-assess whether they are “unlawfully” harming Cultural Heritage.

4. Identifying the Aboriginal Party and the Last Claim Standing

The Act in its current form relies on the NTA to determine who the Aboriginal Party is for the purposes of consultation with respect Cultural Heritage on Country.

An alternative would be to identify a number of Elders in the local area and then to approach those Elders as to who is the Aboriginal Party with respect to Aboriginal Cultural Heritage.

5. Duty of Care, Duty of Care Guidelines and Proponent’s Ability to Self-Assess

The Duty of Care Guidelines (**DOC Guidelines**) conflict with the Purpose of the Act and with the requirements as set out in the HR Act.

Ironically, Duty of Care is mentioned in the Act under Part 3, Division 1 'Protection of Aboriginal cultural heritage'. Sections 23, 24, 25 and 26 give power to the Proponent by creating a 'tick the box' approach for them when dealing with Aboriginal Cultural Heritage.

Reference to the DOC Guidelines must be removed from the Act. Section 28 is to be removed.

The DOC Guidelines place power into the hands of the Proponent. The Aboriginal People must hold the power and must be the decision maker with respect to all Cultural Heritage.

The DOC Guidelines are used as a checklist by Proponents to fall back on in the event an issue is raised. If the Proponent has 'met their duty of care' they wipe their hands with a matter and move forward and the Indigenous People are often just pushed out of the equation.

There must be no self-assessment ability given to Proponents. The scope in which Cultural Heritage Management Plans are triggered under the Act must be significantly broadened and must not only be triggered by works that require an Environmental Impact Statement (**EIS**) pursuant to section 87 of the Act. Development that is code assessable or impact assessable fall through the cracks of the Act and rely on the self-assessment or voluntary willingness of a Proponent to reach out to the Aboriginal People of that Country.

A Cultural Heritage Study/Assessment must be compulsory for all levels of development. The Indigenous People must be consulted at the initial levels of planning/development and Cultural Heritage Studies must be required just as other types of permits, approvals and licences are required from the Proponent during initial planning stages, such as a State planning level Cultural Heritage Management Plan.

6. Development of Cultural Heritage Management Plan

Sections 102(1)(a) and 103(1)(a) of the Act flies in the face of the Purpose of the Act by stating:

"to the extent that harm can not reasonably be avoided, to minimise harm to Aboriginal cultural heritage".

Proponents use this subsection in Cultural Heritage Management Plans or Cultural Heritage Management Agreements to slip under the Purpose of the Act because this subsection allows the Proponent to effectively harm cultural heritage whilst also meeting their obligations under the Act. Proponents revert to the wording of this subsection when negotiating Cultural Heritage Management Plans or Cultural Heritage Management Agreements to ensure they do not breach the Act, even

when inadvertently harming Cultural Heritage. There are no regulations or assurances to be sure that the Proponent will take every possible step to prevent harm to Cultural Heritage.

7. Enforcement

All of Part 8 within the Act needs amending and strengthening to ensure enforcement and compliance with the Act by Proponents on site when dealing with Cultural Heritage.

The State needs to enact its powers under Part 8.

The onus is currently placed on the Indigenous People to demonstrate that there is or has been harm done to Cultural Heritage and under the Act in its current form, this can only be done reactively, not preventatively. An injunction or stop order may be sought but only after harm has been done to Cultural Heritage. Obtaining an injunction to halt development works, by the words of President Fleur Baingam, is “a rough tool” and hard to get.

The Proponent’s accountability with respect to harming Cultural Heritage must be significantly increased under the Act. If a Proponent breaches the Act, for example the Proponent harms Cultural Heritage that is listed on the DATSIP Registry, prosecution of the Proponent by the State is currently a difficult and long process through the Court and monetary penalties such as fines are an easy way out for the Proponent. On the spot fines issued for breaches by the Proponent are also an ineffective ‘slap on the wrist’ approach to enforcement. Corporate and large-scale Proponents support the current framework because it’s simple to buy their way out of trouble with harming Cultural Heritage.

Other avenues of enforcement and penalty need to be made available under the Act. Pecuniary penalties are irrelevant, Cultural Heritage is not worth more than money to Indigenous People because their Country is connection to their ancestors.

The Act must include the right for the Aboriginal People and/or Proponent to take any issue with respect to Cultural Heritage to dispute resolution to be dealt with by the Land Court of Queensland ADR Panel.

Indigenous Enforcement or Compliance Officers must be engaged and resourced by the State Government to monitor implementation of the Act and compliance with the new and improved ‘duty of care’ by the Proponent, on site or on Country and to commence proceedings under the Act for breaches of the Act.

The Offences must also be enforceable by the Land Court and offences must be set out in such a way as to prevent Harm.

8. Recording Cultural Heritage

It must be mandatory under the Act to record all Cultural Heritage. This responsibility could lie with the Aboriginal People of that Country and resourcing to enable this could be provided by the State or by Proponents. If Cultural Heritage Studies/Assessments are to become mandatory, so too should the recording of Cultural Heritage.

If there is Cultural Heritage recorded on the database in a particular area which a Proponent plans to develop, no development works or ground surface disturbance is to be planned without first having consulted the Aboriginal People of that Country and a Cultural Heritage Study/Assessment is completed. Indigenous People must be involved in the planning and not be the last point of contact or 'last box to tick'.

Significant sites or areas, and areas covering intangible Cultural Heritage (as will be defined under the new definition), must be recorded in their entirety in order to prevent or stop development or works destroying such Cultural Heritage.

The DATSIP database records and site locations must be reviewed by Aboriginal People for truthing purposes. Resourcing for this review should be provided by the State to enable the Aboriginal People to conduct such important investigation into the records on which their Cultural Heritage relies.

9. Resourcing Cultural Heritage Studies/Assessments

The Act must place an obligation on the Proponent to resource the Aboriginal Parties reasonable costs with respect to their Cultural Heritage associated with developmental works, including but not limited to Cultural Heritage Studies/Assessments, engaging legal representation, engaging archaeological and anthropological experts, negotiations, Cultural Heritage training, personal expenses and litigation.

Additional avenues of funding must be provided to enable Indigenous People to train and educate others with respect to Cultural Heritage.

Yours faithfully



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