



Environmental Defenders Office

10 February 2020

Cultural Heritage Acts Review

Department of Aboriginal and Torres Strait Islander Partnerships

Sent via email only: CHA_Review@datsip.qld.gov.au

Dear Madam/ Sir,

Submission to the review of the *Aboriginal Cultural Heritage Act 2003 (Qld)* and *Torres Strait Islander Cultural Heritage Act 2003 (Qld)* (the Cultural Heritage Acts)

Thank you for the opportunity to provide a submission on the Options Paper Review of the Cultural Heritage Acts, Stage 1 – Legislative Proposals (**Options Paper**).

Overall, we congratulate the government for seeking to take action on these two key issues for which options for reform are suggested in the Options Paper. We are disappointed to see that only two issues have been taken up for reform this term of government, of the many issues raised through submissions as needing attention in these Acts. However, we note that there is an intent to undertake further reforms next term of government. As stated in our original submission to this review, these Acts require substantial review, along with a review of the development frameworks that relate to these Acts, to ensure that the purposes of the Cultural Heritage Acts can be achieved.

We recommend the government introduces the reforms outlined in the Options Paper this term of government, and also releases the Stage 2 Options Paper this term of government, to maintain momentum in the review and reform of these important Acts.

Last claim standing

The Options Paper sets out the following proposal to reform this process:

1. The alternative approach would apply to areas the subject of a negative determination
2. There would be an opportunity for other Aboriginal or Torres Strait Islander groups to make an objection to the existing last claimant from continuing as the native title party under the Cultural Heritage Acts for that area (where there are no objections, the existing last claimant would continue as the native title party)
3. If there are objections, the parties are supported to endeavour to reach a negotiated outcome through dispute resolution assistance
4. If the parties cannot reach a negotiated outcome, a decision-maker considers the matter and decides on the way forward.

This proposed alternative approach would retain the reliance on the hierarchy in the *Native Title Act 1993* (Cth) for registered native title holders and registered native title claimants.

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We support the proposed course of action, if it is supported by First Nations peoples, in so far as the proposed way forward addresses the issue of areas with negative determinations in a way that allows other First Nations peoples to raise awareness of their interest in an area. However, the proposal does not address the broader scenarios that may arise, for example where First Nations people have not applied for Native Title. The current model does not enable any Aboriginal and Torres Strait Islander party not involved in the Native Title process to participate.

To address these issues, we support the submission of the Department of Environment and Science (**DES**) who recommend:

- that the last claim standing provision is replaced with a model not reliant on the Native Title framework, and to ensure any alternative model is co-designed and co-developed with First Nations people;
- the introduction of a process for registering a cultural heritage body, should this be desired by First Nations peoples;
- a sufficiently funded independent state-wide advisory body led by First Nations peoples should be appointed, similar to that which exists in Victoria and South Australia. This body could assist in identification of appropriate First Nations parties for consultation on cultural heritage matters, through accepting submissions, and providing dispute resolution facilitation.

We further strongly support the need for better communication and resourcing by the Department to ensure First Nations peoples are aware of the Acts, and are empowered to engage with the processes in the Acts.

Compliance mechanisms

As described in our original submission, to our knowledge there appear to be serious issues with non-compliance with the requirements of these Acts, due to lack of knowledge by proponents of their duties, respect for these duties and a failure by the government to adequately resource enforcement activities. In addition, there are insufficient powers held by First Nations peoples to take action where the cultural heritage matters of concern to them are under threat of damage or are damaged.

The Options Paper proposes to make legislative amendments to:

1. provide that land users are required to document their assessment of compliance with the duty of care requirements
2. provide for a new category of cultural heritage officer with powers to request information from land users and give on-the-spot fines for the failure to document decision making
3. provide for a rolling program of industry-specific audits that focus on identifying systemic issues that need to be addressed for different industry sectors, and complement the audit program with a coordinated education and awareness program
4. align existing prosecution provisions in the Cultural Heritage Acts with current legislative approaches e.g. timeframes for proceeding for an offence.

All four of the proposals in the Options Paper are essential for improving compliance with the Act and should be implemented as an absolute minimum to begin greater awareness raising and accountability to comply with requirements of the Act's frameworks.

We are concerned that these options do not sufficiently prevent future non-compliance from continuing, as they do not commence from the very start of assessment and approval processes for activities. They also don't provide First Nations peoples with sufficient powers to address non-compliance themselves, rather than awaiting the decision of the State Government to take action where there is non-compliance.

We re-iterate our submissions made with respect to options for improving awareness and compliance with the Acts:

- The Cultural Heritage Acts should be amended to provide more effective mechanisms by which First Nations parties can seek to prevent harm from occurring to Aboriginal or Torres Strait Islander cultural heritage, or seek redress from those who have harmed or destroyed Aboriginal or Torres Strait Islander cultural heritage, including the State. This must be coupled with resourcing to ensure First Nations peoples are meaningfully empowered to utilise these powers.
- The assessment of cultural heritage, and conditioning around cultural heritage, should be brought into line with the major permits and approvals for the activity, so that it is a clear, key part of upfront assessment.

We further support these submissions also made by DES:

- Consider stricter non-compliance and penalty enforcement options to bolster protection including:
 - Penalty Infringement Notices (PINs)
 - Enforceable undertakings
 - Executive Officer liability
 - Enforcement notice
 - Cost recovery
 - Education and public benefit orders (with penalties to be paid directly to the impacted community)
 - Emergency powers.
- In addition to penalty enforcement, mechanisms should be developed and funding provided to support First Nations peoples to seek redress for negligent or intentional damage or destruction of cultural heritage.

We look forward to seeing the reforms proposed introduced this term of government, along with the release of the second Options Paper dealing with the remaining issues identified through submissions.

Yours sincerely,

Environmental Defenders Office



Revel Pointon
Senior Solicitor