25 July 2019

Department of Aboriginal and Torres Strait Islander Partnerships
1 William Street, Brisbane
PO Box 15397
City East Qld 4002

Dear Sir or Madam

SUBMISSION TO THE REVIEW OF THE CULTURAL HERITAGE ACTS

Thank you for the opportunity to make submissions to the review of the Aboriginal Cultural Heritage Act 2003 and Torres Strait Islander cultural Heritage Act 2003 (the Cultural Heritage Acts).

Introduction

Carpentaria Land Council Aboriginal Corporation (CLCAC) is the largest and most eminent corporate entity representing the rights and interests of Traditional Owners in the southern Gulf of Carpentaria. The corporation draws its membership from the nine Aboriginal language groups whose traditional lands and waters are located in the Gulf.

CLCAC understands and promotes the primacy of Traditional Owners' rights to manage and protect cultural heritage in accordance with traditional law and custom. Legislation, and the review process, must therefore recognise Aboriginal and Torres Strait Islander People as decision-makers in relation to their own heritage.

Review Process

Timeline

CLCAC is concerned that the proposed timeline of the review ambitiously moves towards legislative change at the expense of meaningful consultation, analysis and sufficient accountability to Aboriginal and Torres Strait Islander People and stakeholders. In reviewing the Aboriginal Heritage Act 1972 (WA), the Western Australian Department of Planning, Lands and Heritage has conducted public consultation and engagement for over a year. Meanwhile this review of the Cultural Heritage Acts plans to be complete within a year, with limited clarity about how and when consultation is to take place beyond response to the Consultation Paper. For these reasons, we urge the Department of
Aboriginal and Torres Strait Islander Partnerships (DATSIP) to extend the review process so that defined public consultation can be introduced to ensure that the review is thorough, responsive and productive.

CLCAC strongly suggests that DATSIP prepare a discussion paper following submissions on the Consultation Paper. A discussion paper should collate feedback to make specific proposals about revised Aboriginal and Torres Strait Islander cultural heritage legislation. DATSIP should facilitate forums for engagement with proposals and invite submissions in response. Further, a draft of any legislation should be released for public consultation with a genuine commitment to seek and incorporate feedback into the bill. It is imperative that consultation is conducted in a manner that ensures Traditional Owners’ voices are pre-eminent in the review.

The Guidelines

The Aboriginal Cultural Heritage Act 2003 - Guidelines (the Guidelines) will need to be reformulated if the standards, monitoring and compliance mechanisms under the Cultural Heritage Acts are altered. It is counterintuitive to review the Cultural Heritage Acts and the Guidelines disparately given their co-dependency.

CLCAC seeks clarification from DATSIP that review of the Cultural Heritage Acts will then inform fresh Guidelines, also following an accountable consultative process.

Ownership and Defining Cultural Heritage

Definition

CLCAC supports Indigenous definitions of cultural heritage and is thus supportive of including intangible cultural heritage in the definition, assessment and management processes as proposed in the Consultation Paper. Intangible cultural heritage is defined in the Burra Charter as well as the UNESCO Convention. Western Australia is looking to introduce a definition of cultural heritage that incudes intangible cultural heritage and cultural landscapes as part of its review of the Aboriginal Heritage Act 1972. Similarly, Victoria’s 2016 review of the Aboriginal Heritage Act 2006 (Vic) introduced a definition of Aboriginal intangible heritage. CLCAC is broadly supportive of this approach.

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2 Aboriginal Heritage Act 2006 (Vic) s 79B.
Legislative Cohesion

Aboriginal and Torres Strait Islander cultural heritage is intrinsically connected to other areas of legislation and regulation. The review must allow time to consider how interconnected legislative schemes interact so that any gaps and inconsistencies may be realised and addressed.

The following Acts, and accompanying subordinate legislation, are of particular interest:

- Heritage Act 1992 (Qld);
- Native title Act 1993 (Cth);
- Biodiscovery Act 2004 (Qld);
- Water Act 2000 (Qld);
- Nature Conservation Act 1992 (Qld);
- Planning Act 2016 (Qld);
- Racial discrimination Act 1975 (Cth); and
- The suite of Commonwealth intellectual property legislation and instruments.

Identifying Aboriginal and Torres Strait Islander parties

'Last Claim Standing' Provision

CLCAC submits that the 'last claim standing' provision has been problematic since introduction and should be repealed. The provision may provide convenience for government but lacks the nuance and flexibility to enable Aboriginal and Torres Strait Islander people to make culturally appropriate decisions about who speaks for country.

Who Speaks for Country

It is important that any cultural heritage framework is supportive of Traditional Owners speaking for country and determining who speaks for country in the instance of dispute. Revised Cultural Heritage Acts should establish a clear onus on proponents to consult with the appropriate representative group or groups for an area. Failure to do so should constitute a breach of the Cultural Heritage Acts that carries a penalty.

CLCAC supports further research on cultural heritage representative models from other jurisdictions, such as the Victorian scheme discussed in the Consultation Paper and Local Aboriginal Heritage Services model proposed for Western Australia. We invite further jurisdictional comparisons, consultation, and specific proposals to determine what might be suitable for Queensland.
Land User Obligations

Assessing Proposals

The current self-assessment system is fundamentally flawed in that a proponent is able to determine the impact of a proposed action on cultural heritage to the exclusion of Traditional Owner perspectives. Revised Cultural Heritage Acts must guarantee consultation of Traditional Owners on cultural heritage matters.

Agreement Making

It is wholly insufficient that the Cultural Heritage Acts only mandate agreement making where an environmental impact statement is required. No activity impacting cultural heritage should proceed without the free, prior and informed consent of Traditional Owners manifested as an agreement. CLCAC affirms the autonomy and self-determination of Traditional Owners to enter into agreements as they see fit without compulsory oversight, standard terms, or registration with the State. Instead, inequity between the bargaining power of proponents and Traditional Owners should be acknowledged and addressed through real, secure funding for Indigenous Corporations.

Compliance Mechanisms

Compliance data provided by DATSIP in the Consultation Paper demonstrates the inadequacy and underuse of compliance mechanisms under the Cultural Heritage Acts.

Monitoring & Compliance

There is a prevailing feeling that the Cultural Heritage Acts are legislation ‘without teeth’. Significant anecdotal evidence from CLCACs representative region in the lower Gulf suggests that land users are not concerned with requirements of the Cultural Heritage Acts or any penalties that may arise. CLCAC supports increasing penalties for breach of the Cultural Heritage Acts to reflect the gravity of unauthorised damage to Aboriginal and Torres Strait Islander cultural heritage.

Penalties are meaningless without the ability to investigate and prosecute breach. It is fundamental to the cultural heritage framework that DATSIP or another body is empowered and properly resourced to fulfil a compliance and monitoring role. There is clear desire amongst Traditional Owners for active monitoring of registered cultural heritage. Unlike comparable land or water management legislation, there is no ‘trigger’ in the Cultural Heritage Acts for checks on a registered site or inquiry about a proponent’s activity. The monitoring burden therefore currently rests entirely on Traditional Owners.
which is onerous and contrary to the purpose of a regulatory body with coercive powers. We therefore urge the review to make significant reform to monitoring and compliance mechanism under the Cultural Heritage Acts.

Duty of Care

The current 'duty of care' approach is reactive and inaccessibly legalistic, fostering a culture of arguing out of liability rather than proactive care for cultural heritage. Introducing requirements for proper consultation and agreement making creates far clearer standards of expected conduct and liability for breach.

Education

There is a poor understanding of the Cultural Heritage Acts amongst both Traditional Owners and proponents that must be rectified. CLCAC asserts that legislation has power to shift attitudes towards cultural heritage and change behaviours. Strengthened compliance mechanisms must therefore be accompanied by investment in education about the cultural heritage framework. Traditional Owners hope to be empowered by knowledge of their rights under legislation that provides clear mechanisms to protect country and cultural heritage.

Recording Cultural Heritage

CLCAC stresses the importance of the right of Traditional Owners not to record cultural heritage. We reiterate the fact that Traditional Owners own their cultural heritage and have the ultimate right to make decisions about their cultural heritage. This understanding must be embedded in cultural heritage legislation. The right not to record must be preserved in the Cultural Heritage Acts without prejudicing the ability to access compliance mechanisms.

Yours faithfully

Rachel Amini-Yanner
Chief Executive Officer