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Review of the Cultural Heritage Acts

Introduction

1. Just Us lawyers represents a diverse range of clients including land users and Aboriginal Parties¹. In that capacity, we provide the following submission in response to the Consultation Paper released by the Department of Aboriginal and Torres Strait Islander Partnerships.
2. We note that a previous review of the Acts and of the Duty of Care Guidelines (**DCGs**) more recently has not resulted in any substantial amendments. It would appear therefore that the current review is unlikely to address issues and concerns previously raised by Indigenous Queenslanders and their legal representatives regarding the operation of the Acts as presently drafted.
3. Nevertheless, we provide the following submission in the hope that genuine reform will be made to the Acts which, in our view, have been increasingly used to facilitate development rather than the achievement of their main purposes.

Proposed amendments

Principles and main purpose

4. Sections 5 and 6 should be amended to reflect amendments which we suggest should be made to section 14 to ensure that Indigenous Queenslanders are recognised as being the owners of their cultural heritage.

Meaning of cultural heritage and significant object/areas

5. The meaning of cultural heritage relies upon subsequent definition of significant objects/areas, but crucially, also refers to evidence of archaeological or historical significance of Indigenous occupation. Whether an object or area is significant under Aboriginal tradition / Ailan Kaistom is a matter that most Indigenous Queenslanders are well able to determine. However, whether they are of historical or archaeological significance implies the need to employ professional expertise in

¹ Our Indigenous clients span the range of entities and persons deemed to be an Aboriginal Party under s34 of the ACHA.

either of these disciplines to make a determinative finding. The Acts should be amended to clarify that determining whether an object or area meets the definition in section 8 requires the application of both Indigenous cultural and historical or archaeological expertise – not one or the other.

6. Despite the reference to significant areas in section 9, our Indigenous clients often struggle to convince land users and resource managers that places and geographical features have intrinsic heritage value. Reconciling section 9 with section 21 exemplifies the difficulty facing Indigenous people seeking to protect significant areas in the face of historical and contemporary land use.
7. It is also clear that the Acts do not prohibit the appropriation and unauthorised use of traditional Indigenous knowledge, stories, songs and dances. In our experience, it is difficult for Indigenous parties to use the Acts to have intangible cultural heritage values recognised, much less protected.
8. We recommend that section 12 of the Acts and/or subordinate legislation are amended to provide further guidance as to what is required to demonstrate the existence of a significant Aboriginal area. Conversely, amendments could be made to include provisions setting out what is required to disprove an area is significant.
9. In relation to other forms of intangible cultural heritage, offences under intellectual property law could also be taken to be offences for the purposes of the Acts.

Ownership, custodianship and possession of cultural heritage

10. Although section 14(3) of the Acts state that cultural heritage should be protected by Indigenous Queenslanders with traditional or familial links to it, these key concepts remain undefined. This creates uncertainty and obscures the traditional custodians of cultural heritage. Definitions of “traditional” and “familial” must be added to clarify the operation of this provision.
11. Perhaps of greater concern is that ownership of cultural heritage vests in the State² except for certain limited categories³. This is unacceptable to most Indigenous Queenslanders. Section 20(2) of the Acts should therefore be amended to vest ownership of cultural heritage in Indigenous Queenslanders with traditional and familial links to it.
12. It also prevents civil action being taken by traditional owners for the theft, misappropriation, destruction, damage and unauthorised treatment of their cultural

² See s 20(2) ACHA

³ Section 14 (3) lists certain things such as human remain, sacred/secret object and heritage lawfully taken as exceptions.

heritage, leaving enforcement of the Acts in a criminal jurisdiction⁴ to an underfunded regulator. The Acts should be amended by creating in addition to the existing criminal penalty a right of action for traditional owner to seek damages against persons who unlawfully harm or possess heritage or breach the duty of care.

13. We also suggest that the Acts are amended to oblige land users and non-Indigenous persons to notify the regulator and relevant Indigenous Parties of the location of cultural heritage of which they are aware or of cultural heritage in their possession. Failure to do so should be a new offence within the Acts. Equally, they should be required to notify the regulator and relevant Indigenous Parties of the proposed sale of heritage in their possession with the failure to do so also being an offence.
14. Section 27 of the Acts provide that a Court may order costs for the repair or restoration of Aboriginal cultural heritage by a person convicted of an offence involving the unlawful harm or possession of Aboriginal cultural heritage. We submit that the obligation to pay the costs for repair or restoration of cultural heritage should not be contingent on securing of a criminal conviction. In our view, this should be established on the civil standard by application made by a relevant Indigenous Party. The Acts should also provide that the relevant Aboriginal / Torres Strait Islander Party should be consulted about how the repairs and restoration are to be done and afforded first opportunity to carry them out. If this occurs, the Acts should provide that they be recompensed.

Protection of cultural heritage

15. Significantly, the Explanatory Notes to the Acts state that: “the creation of a duty of care underpins the legislation” and that section 23 is “the cornerstone of the protection afforded under the new Act..... The intent of the clause is to prevent harm to Aboriginal Cultural heritage.”
16. However, in practice, we have found that compliance with section 23 takes many different forms employing varying degrees of rigour and involvement by Indigenous parties.
17. It is conceivable that a land user could undertake activities that have the potential to harm cultural heritage in compliance with the Acts without any reference to or consultation with Indigenous people. The Acts encourage self-assessment with little to no reporting requirements and insufficient oversight by the regulator. This, in our view, is allowing the destruction of cultural heritage to occur on a large scale, largely undetected and unpunished.

⁴ Where the standard of proof is beyond reasonable doubt.

18. As currently drafted, the Acts only allows the State to take action to enforce sections 23 – 26 where it is made aware of an offence committed under those provisions. Due to the availability of self-assessment as to whether harm is likely and what is reasonable and practicable to avoid such harm, coupled with an absence of any requirement to report the outcomes of any assessment, the regulator is generally unaware of harm until it has already occurred. This is shown by successful prosecutions having occurred when the terms of agreements with Indigenous parties have been breached rather than offences being detected before harmful activities are commenced or whilst they are taking place.
19. In our experience, local governments and state agencies / Government Owned Corporations (**GOCs**) routinely assess their proposed activities as permissible under the DCGs with little or no reference to, or consultation with, our Indigenous clients. Being immune from prosecution only encourages such entities to give cursory regard to their obligations under the Acts. It is highly unlikely that pastoralists and other agricultural interests undertake any assessment at all as to the impact of their activities and what measures they should take to avoid harming cultural heritage. In these ways, potential harm occurs without the State even being made aware of relevant activities. It is often too late when our Indigenous clients are alerted to them, making a request for investigation by the State pointless. In these cases, a stop work order and injunctive relief are not suitable remedies or even available when the damage is already done.
20. More fundamentally, the guiding concept of ground disturbance underpinning the DCGs is conceptually untenable. It fails to adequately recognise residual values that inhere in significant heritage areas irrespective of historical land use.
21. Furthermore, the DCGs completely overlook the possibility of heritage located in sub-surface areas. In our experience, the assurance given by s 23(f) is open to abuse by land users applying the DCGS, particularly category 4, to justify undertaking activities without any reference to or consultation with the relevant Indigenous party. Even worse, we have experienced cases where land users have applied the DCGS retrospectively – ie. the area was disturbed due to the previous activities and no harm was caused by their subsequent activities. How can this be proved or disproved after the event?
22. In our view, sections 23(a)(iv) and (v) should be amended so that compliance with the DCGs or the native title protection conditions only excuses breaches after a proper assessment has been undertaken to reveal the extent and location of cultural heritage. The Acts as drafted encourage land users to pursue compliance options that rely on self-assessment and the DCGs. This is not desirable if the objectives of the Act are to be achieved. Similar comments to those above can be made in respect to sections 25(2)(a)(iv) and (vi) and 26(2)(a)(iv) and (vi).

23. We have previously made submissions in relation to the DCGs. For the purposes of this submission, we refer to and rely upon our previous comments.
24. Given our comments above, the application of section 153 is circumscribed and insufficient. If traditional custodians are recognised as the owners of cultural heritage, amendments should consequently be made to allow them to seek civil damages against persons who commit offences under ss 23 – 26. Where they reasonably suspect that harm is occurring, traditional custodians should have a statutory right of access to areas of land and waters to ensure offences are not committed.
25. As we have observed, the dangers of self-assessment result from a lack of any requirement within the Acts for land users to report the outcomes of their deliberations or account for their actions. Although compliance with the duty of care may be a condition of development approval, there is no clear requirement for land users to demonstrate that they have taken adequate steps to engage with the Aboriginal/Torres Strait Islander party over managing the impact of their activities.
26. For the objects of the Acts to be achieved and its principles observed, cultural heritage compliance needs to be part of the mainstream development approval process. This necessitates amendments to link the Acts with the processes required by other legislation such as the Planning Act and Vegetation Management Act.
27. In our view, a person should be required to provide the regulator with a duty of care assessment if seeking or proposing: a development or other approval allowing a material change of use; rezoning an area to allow a material change of use; a permit to clear native vegetation; the declaration of a State/priority development Area and to obtain an environmental authority. The sufficiency of their assessment should be considered by the regulator, or preferably, an independent panel drawn from the government, private and Indigenous sectors.

Determining the Aboriginal/Torres Strait Islander party

28. Much has been said about the so-called “last man standing rule”. We do not intend to provide a detailed account of our views on the matter other than to say that it has and continues to result in unacceptable and anomalous outcomes. In short, we do not support section 34(1)(b) of the Acts.
29. In our view, the Aboriginal Party for an area should only be:-
 - (a) a registered native title body corporate (**RNTBC**) for an area (irrespective of whether native was determined to exist over that area);

or

- (b) a registered native title claimant (**RNTC**), if any;
or otherwise
 - (c) persons who satisfy section 35(7) of the Acts.
30. The recent *Nuga Nuga* decision highlights the need to consider the circumstances of dismissal or discontinuance of a registered native title determination application and any relevant judicial finding /determination. These, in our submission are relevant considerations in determining an Indigenous Party in the absence of an RNTBC and RNTC.
31. We also submit that persons who satisfy section 35(7) should be entitled to apply to the regulator for registration as an Aboriginal / Torres Strait Islander Party for that area along with persons who may assert that status in response to a statutory notice. In that regard, we suggest that where there is no RNTBC / RNTC, a land user must be required to publish a public notice inviting those registered Indigenous Parties for an area or such persons who assert that status to seek endorsement for the purpose of consultation over and development of “other agreements” and CHMPs.

Registered Cultural Heritage Bodies (RCHB)

32. The role of a RCHB is unclear to us, particularly where there is either an RNTBC or RNTC exist. It is also unclear whether an RCHB can validly identify itself as the relevant party for agreement making in such circumstances. In our view, an RCHB's role should be limited to identifying the relevant party in the absence of an RNTBC or RNTC. Amendments are required to clarify the role of RCHBs and the circumstances in which they may be the contracting party to statutory agreements.

Agreement making

33. A land user is taken to have complied with their duty of care if they are acting under and in accordance with an approved cultural heritage management plan (CHMP) or an “other agreement” with a Aboriginal / Torres Strait Islander Party. Despite both forms of agreement providing the same level of assurance, CHMPs are subject to scrutiny by the chief executive whereas “other agreements” are not.
34. The regulator has no knowledge of the existence of “other agreements”, is not empowered to consider whether their terms are reasonable and is unaware of the circumstances under which they were developed. This has led to unregulated agreement-making and inconsistent compliance outcomes. It also represents an obvious enforcement challenge for the regulator leaving implementation and compliance in the hands of the parties who in many cases have disparate capabilities. “Other agreements” should be provided to the regulator for approval

who should be empowered to make enquiries as to their adequacy and require information or amendment where it is deemed necessary.

35. Irrespective of whether an approved CHMP or other agreement is in place, we have observed tension between the role and responsibilities of heritage officers representing the Indigenous party to agreements and the wishes or views of the Indigenous Party as the contracting party with legislative responsibility for determining how cultural heritage should be recognised, protected and managed. If an agreement does not have detailed provisions setting out the process that must be followed "on the ground", we are aware of many cases where Indigenous heritage officers are expected to salvage and relocate cultural heritage without being free to confer with Elders or members of the Aboriginal/ Torres Strait Islander Party over whether that is appropriate.
36. The issues we have identified at paragraphs 19 and 20 above are perhaps best shown by the approaches of particular departments and GOCs who employ pro-forma "other agreements" to obtain assessments of, and clearances for, proposed activities. These are generally not subject to negotiation and certainly not "developed" with the assistance of the relevant Aboriginal/ Torres Strait Islander Party. Once executed, the agreements place Indigenous heritage officers in the invidious position of making important decisions over the management of cultural heritage without being able to confer with or obtain direction from the relevant Aboriginal/ Torres Strait Islander Party. Clearly, there is a need for greater oversight of "other agreements" by the regulator. However, there is a wider issue that what is occurring "on the ground" often departs from the cultural heritage management processes in many agreements, leaving best practice by the wayside.
37. At present, we understand that the regulator requires a Sponsor to resubmit the plan to the relevant Indigenous party for consideration if the endorsed party changes prior to provision to approval by the chief executive. In our view, the new party should not be able to insist upon the re-opening of negotiations without reasonable cause. If the terms of a plan are reasonable and appropriate, Sponsors are entitled to develop CHMPs with the party endorsed as at the time the plan was notified. Exceptions may exist, in which case the chief executive should have the discretion to remit the plan to the Sponsor to re-negotiate where its approval in the form submitted is shown to cause oppression.
38. Another grey area within the Acts is whether a CHMP will be approved if developed without the involvement of the relevant Aboriginal / Torres Strait Islander party who failed to respond to a notice within the prescribed period or at all. Amendments are required to clearly specify the consequences of late or no response.

39. Lastly, we consider section 108(2) does not provide sufficient clarity over what the chief executive should consider relevant to determining that a CHMP contains “enough provision” for the avoidance, and where this is not possible, the minimisation of harm. Nor do we think sub-section (3) provides enough particulars of what constitutes “effective dispute resolution arrangements” in mandatory CHMPs, a matter equally crucial to voluntary plans and “other agreements”.
40. We suggest amending section 108 to include matters that the chief executive must consider in forming relevant opinions. In addition, we also suggest that the CHMP guidelines prescribe basic features of an adequate CHMP and provide greater guidance to the parties over key issues such as: costs, meetings, the involvement of technical advisers and other matters which commonly become stumbling blocks in the agreement making process.

Dispute Resolution

41. Despite the reference to “effective dispute resolution arrangements” in section 108, we consider that the Acts and subordinate legislation fail to establish effective mechanisms for parties to resolve disputes prior to litigating. At present, the dispute resolution provisions of CHMPs and other agreements are often employed as a precursor to litigation. This has influenced the manner in which agreements are drafted and negotiations are conducted – the spectre of referral to mediation after the consultation period has elapsed and determination by the Land Court is often at the forefront of negotiations. This is not conducive to constructive negotiations conducted in good faith.
42. As well as amendments to the CHMP guidelines so that they prescribe certain elements of agreements and their development, we also consider practice directions need to be issued by the Land Court specifically directed to this jurisdiction. These will need to clearly identify what is required of the parties in preparation for and to participate in meaningful mediation. The Court could maintain a register of mediators drawn from the sector to assist the parties resolve disputes or at least narrow the issues that may ultimately be resolved at trial.

Resourcing

43. It seems to us that the regulator is not sufficiently resourced to proactively enforce the Acts. As a result, it is forced to adopt a largely passive stance in relation to exercising its investigative and enforcement powers. This, in our view, has created a vacuum in which some land users “run the gauntlet” of non-compliance as a cynical risk management strategy. The only way we can see this being addressed is for the regulator to be better resourced.

44. Another glaring deficiency in the operation of the Acts is the disadvantaged position in which most Indigenous parties find themselves vis-à-vis many land users. Perversely, they are often beholden to the other party (to exercise their statutory responsibilities). The capacity of Indigenous parties is as diverse as they are themselves. On one end of the spectrum, some are highly developed and sophisticated. On the other end, some are unequipped by comparison. Indigenous parties play a crucial role in achieving the purpose of the Acts. Accordingly, investment in their capacity can only contribute to achieving strong and consistent outcomes for all parties.
45. One option would be for penalties and fines awarded upon successful prosecutions being used to fund capacity building for Indigenous Parties. In our view, this is preferable to such funds being rolled into consolidated revenue. Although it may not necessarily involve amending the Acts, greater investment in the capacity of Indigenous parties is essential in our submission.

Conclusion and priorities

46. Whilst we support the main purpose of the Acts, we have found that practices that have grown around its operation since enactment that has led to undesirable outcomes. For this reason, we consider that the Acts require substantial amendment if they are to achieve their stated purpose.
47. In particular, we submit that amendments need to be made to ensure that:-
- a) Indigenous people are recognised as being the owners of cultural heritage;
 - b) land users are required to demonstrate that they have properly assessed the impact of their activities and the actions required to comply with their duty of care;
 - c) conceptual anomalies within the DCGs are removed;
 - d) indigenous parties are not solely determined by reference to discontinued or dismissed native title proceedings where there is no RNTBC / RNTC;
 - e) greater clarity is given over the what statutory agreements much contain and how they are to be developed;
 - f) the regulator has oversight of all statutory agreements;
 - g) effective dispute resolution mechanisms are included in all statutory agreements;
 - h) the regulator and Indigenous parties are resourced to better discharge their respective statutory duties; and

- i) Indigenous people can seek compensation for offences under the civil standard of proof.
48. We are encouraged that the Acts are being reviewed again and hope that there is a genuine willingness on behalf of the Queensland Government to make the amendments necessary to achieve their main purpose.

Yours sincerely,

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Ted Besley