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Karingbal People – Submission in response to the Consultation Paper – Review of the Cultural Heritage Acts

The Karingbal People are grateful for the opportunity to make a submission in relation to the Queensland Government's review of the *Aboriginal Cultural Heritage Act 2003* (Qld) and the *Torres Strait Islander Cultural Heritage Act 2003* (Qld) (the **Cultural Heritage Acts**).

Whilst the Consultation Paper released by the State on these matters covers various important issues for consideration as part of a broader review, our submission relates only to the "last claim standing" provisions of the Cultural Heritage Acts.

Previous submissions

The Karingbal People made extensive written and verbal submissions in September 2018 to the Queensland Legislative Assembly's Economics and Governance Committee (the **Committee**) in relation to our concerns regarding the "last claim standing" provision.

The Karingbal People were deeply distressed when the Queensland Parliament subsequently legislated to enshrine the purported intention of this provision, notwithstanding the real and genuine concerns raised by the Karingbal People and other Queensland Traditional Owners and their representatives before the Committee.

However, the Karingbal People take heart that this was done in the context of the Deputy Premier's commitment to a broader review of the Cultural Heritage Acts, including of the "last claim standing" provision, which is now the subject of the Consultation Paper.

For the purposes of this submission, the Karingbal People reiterate the matters stated in our submission to the Committee, where we set out in detail why the "last claim standing" provision is an arbitrary measure that poses significant risk of harm to Aboriginal cultural heritage.

Our submission to the Committee can be located at
<https://www.parliament.qld.gov.au/documents/committees/EGC/2018/RevenueOLA2018/submissions/002.pdf>

The Karingbal People also support the matters raised in the submissions to the Committee by Queensland South Native Title Services,¹ the Yugara/Yugarapul Aboriginal Corporation² and the Queensland Law Society.³

We submit that these submissions should all be reviewed and considered again in detail as part of this consultation process. In light of the issues raised in these submissions, retention of the “last claim standing” provision would constitute lazy, ineffective and counter-productive policy.

Ongoing risk of harm to Karingbal cultural heritage

Since the passage of the *Revenue and Other Legislation Amendment Act 2018* (Qld) which enshrined this provision, it has become abundantly clear the Karingbal People’s concerns were justified. Proponents continue to carry out activities that pose the potential to harm Karingbal cultural heritage on our country, without any involvement from Karingbal People. These proponents continue to engage with other people who have no knowledge, authority or connection in relation to Karingbal cultural heritage.

In this regard, U&D Mining made written and verbal submissions to the Committee, in which it made extensive reference to that company entering into and implementing a cultural heritage management plan (CHMP) with the Karingbal People. U&D Mining also asserted it had taken a best practice approach to cultural heritage, had consulted extensively, and had a commitment to working with traditional owners for the area of its project to achieve optimal cultural heritage outcomes.⁴

Despite these and U&D Mining’s verbal claims before the Committee that our members were “the very group we had engaged”,⁵ that company omitted to state in either its written or verbal submissions that it has excluded the Karingbal People from participation in the implementation of its CHMP, despite repeated requests from the Karingbal People for involvement. Instead, U&D Mining have engaged only those people that the Federal Court found are not Karingbal People in the implementation of its CHMP.

The recent legislative changes to enshrine the “last claim standing” provision have facilitated this continued approach by U&D Mining and perpetuated the ongoing risk of harm to Karingbal cultural heritage in the area of the U&D Mining project site, by allowing that company to involve only people who have no traditional knowledge or responsibility to manage Karingbal cultural heritage.

The Karingbal People are aware of two other resource proponents carrying out activities on Karingbal country since the legislative amendments were made to the Cultural Heritage Acts, which did not involve Karingbal People in cultural heritage management. The Karingbal People have written directly to these proponents.

One proponent responded and indicated their frustration at how the “last claim standing” provision worked, given the uncertainty of who to deal with where the proponent needs to just pick from a list on the register. That proponent has taken a responsible approach and is now in a dialogue with the Karingbal People regarding future activities.

Unfortunately, the other resource proponent has indicated they are dealing with the Bidjara People (who the Federal Court held have no current or historic connection over Karingbal country), and has not taken up our invitation for a meeting. This leaves Karingbal cultural heritage at risk of harm on their site, because the Bidjara People have been found by the Federal Court to have no traditional knowledge or responsibility to manage Karingbal cultural heritage.

¹ <https://www.parliament.qld.gov.au/documents/committees/EGC/2018/RevenueOLA2018/submissions/014.pdf>

² <https://www.parliament.qld.gov.au/documents/committees/EGC/2018/RevenueOLA2018/submissions/003.pdf>

³ <https://www.parliament.qld.gov.au/documents/committees/EGC/2018/RevenueOLA2018/submissions/012.pdf>

⁴ <https://www.parliament.qld.gov.au/documents/committees/EGC/2018/RevenueOLA2018/submissions/013.pdf>

⁵ <https://www.parliament.qld.gov.au/documents/committees/EGC/2018/RevenueOLA2018/trms-ph-17Sep2018.pdf> at page 5

Way forward

The "last claim standing" provision of the Cultural Heritage Acts entrenches harmful practices in relation to Karingbal cultural heritage. It is an arbitrary approach which focuses solely on certainty for proponents and has no regard to the merits of a person's rights or qualifications to speak for country.

It is poor policy that denies the Karingbal People any form of prior and/or informed consent regarding impacts on cultural heritage on our country. The amendments made to the Cultural Heritage Acts last year in relation to 'the last claim standing' were a band aid solution which neglected the much broader policy imperatives, that directly impact Karingbal cultural heritage.

Other Australian jurisdictions have pursued legislative and commercial settlement arrangements to alleviate the deleterious effects of unsuccessful native title claims. Various jurisdictions are considering the potential for treaties with indigenous Australians. The status quo for cultural heritage in Queensland is at odds with the motivations for such initiatives, as it merely cements the failures of the native title system against what is left for affected Traditional Owners, namely their ability to care for cultural heritage.

The "last claim standing" provision is also in direct contravention of section 28(2)(a) of the *Human Rights Act 2019* (Qld), as it establishes a situation whereby the Karingbal People are prevented from exercising their traditional authority and responsibility to care for their cultural heritage. This section states as follows:

- (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;*

The Cultural Heritage Acts must be reformed in relation to this issue.

The Karingbal People's preference is for amendments to the Cultural Heritage Acts to abolish the last claim standing provision. In circumstances where the remaining aspects of section 34 of both Acts are not applicable (i.e. essentially where there is no current or former registered native title holder and no current registered native title claimant), the Karingbal People submit that it is sufficient for section 35(7) of the Acts to apply, such that the Aboriginal Party is a person with relevant knowledge and responsibilities.

There is no policy justification in the context of the objects of the Cultural Heritage Acts for any failed native title claimant to have any primacy of rights to manage cultural heritage over persons who legitimately have the particular knowledge about traditions, observances customs or beliefs associated with an area, and responsibility under Aboriginal tradition for the area or for significant Aboriginal objects located or originating in the area.

Indeed, it is the retention of superior rights in the hands of failed native title claimants (irrespective of the grounds for the failure) over persons who legitimately have the requisite knowledge and authority that is entirely inconsistent with the main purposes of the Cultural Heritage Acts, particularly the fundamental principles in subsections 5(a), (c) and (d) of each Act that:

- the recognition, protection and conservation of Aboriginal cultural heritage should be based on respect for Aboriginal knowledge, culture and traditional practices;
- it is important to respect, preserve and maintain knowledge, innovations and practices of Aboriginal communities and to promote understanding of Aboriginal cultural heritage; and
- activities involved in recognition, protection and conservation of Aboriginal cultural heritage are important because they allow Aboriginal people to reaffirm their obligations to 'law and country'.

To support the greater application of section 35(7), it would be useful to establish forums for the objective identification of persons who legitimately have the requisite knowledge and responsibility (or to make objective determinations between competing claims), rather than just accept that any person asserting such knowledge and responsibility has those qualifications.

This could take the form of a judicial application process (such as through the Land Court), or an administrative decision by a specialist committee appointed by the Minister (similar to that adopted or proposed in other Australian jurisdictions). Evidence put before either forum could include Federal Court decisions in native title claims, as well as traditional owner oral histories and expert evidence.

We consider such forums and processes could readily be established and carried out without negatively impacting the fundamental principle of the Cultural Heritage Acts in section 5(e), regarding the need for timely and efficient processes for the management of activities that may harm cultural heritage. On the contrary, such an approach, once put into effect, will give certainty for all concerned going forward.

The outputs of such a process could also provide a meaningful purpose for the approval of Cultural Heritage Bodies, which are otherwise somewhat redundant under the current Cultural Heritage Acts.

The Karingbal People do not consider reforms of this nature are too ambitious. Indeed, they would be consistent with developments in other jurisdictions, whilst retaining those aspects of the Queensland approach that work well. If however, this approach was not considered acceptable, the Karingbal People consider at the very least the Cultural Heritage Acts should be reformed to remove the arbitrary application of the "last claim standing," in circumstances where a claim in question is clearly without basis or merit.

The Karingbal People support a mechanism such as that suggested by the Yugara/Yugarapul Aboriginal Corporation in its submission to the Committee, to achieve such an outcome (see paragraph 31 of that submission, referenced above). The Yugara/Yugarapul proposal is both simple and effective.

If this approach were adopted, we submit that additional provisions to improve the application of s 35(7) suggested above should still be adopted to cover circumstances where the application of section 34 is exhausted as a consequence. However, the frequency of such provisions being put into effect will obviously be substantially less than where the "last claim standing" is abolished altogether.

In either case, the Karingbal People support appropriate transitional provisions being included, to ensure that existing arrangements are not adversely affected.

The Karingbal People would welcome the opportunity to work with the State Government to develop these options further. Please contact [REDACTED] admin@karingbalpeople.org if any further information is required in relation to the matters raised in this submission.

Yours sincerely



Charles Stapleton



Rebecca Scheske