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To whom it may concern,

I am writing to provide a submission to the Department of Aboriginal and Torres Strait Islander Partnerships' review of the *Aboriginal Cultural Heritage Act 2003 (Qld) (ACHA)*. QYAC thanks you for the opportunity to provide a submission.

On 4 July 2011, the Quandamooka People's Native Title rights were recognised by the Federal Court in *Delaney on behalf of the Quandamooka People v State of Queensland* [2011] FCA 741 (**Quandamooka Determination**). The Federal Court determined that the Quandamooka People have Native Title rights and interests in 54,408 hectares of land and waters on and around Minjerribah (North Stradbroke Island) and Moreton Bay. In particular, the Federal Court recognised that Quandamooka People have the following rights with respect to cultural heritage to "*maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas from physical harm*".

Mulgumpin Claim QC2014/006 QUD601/2014

The native title determination application, *Robert Anderson and Anor on behalf of the Quandamooka People Claim v Queensland (Mulgumpin Claim)* was registered by the National Native Title Tribunal on 25 March 2015.

Quandamooka Coast Claim QC2017/004 QUD126/2017

In 2016, the Quandamooka People lodged the Quandamooka Coast Native Title application, *Evelyn Parkin & Anor on behalf of the Quandamooka Coast Claim v State of Queensland (Quandamooka Coast Claim)* which was registered in May 2017.

Quandamooka Yoolooburrabee Aboriginal Corporation Registered Native Title Body Corporate is the registered Prescribed Body Corporate (**QYAC**) created in accordance with the *Native Title Act 1993*. QYAC acts as the agent for the Quandamooka Peoples Native Title rights and interests in land and sea country.

QYAC is the registered cultural heritage body and Aboriginal party under the ACHA. QYAC is responsible for cultural heritage management across the Quandamooka estate, a responsibility which we take very seriously. QYAC is therefore the Aboriginal Cultural Heritage Body (**ACHB**) for Minjerribah, Mulgumpin, Southern Moreton Bay Islands, and the area currently covered by the Quandamooka Coast Claim.

Fundamental Principal and Main Purpose of the ACHA

The main purpose of the Act is to “*provide effective recognition, protection and conservation of Aboriginal cultural heritage*” s4 ACHA and that the “*Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage*” s5 (b). However, since the enactment of the ACHA in 2003, and by subsequent amendments, it has become apparent that this is not the case.

Part 3 Protection of Aboriginal cultural heritage

Part 3, Division 1 and 2 of the ACHA is based primarily on the Duty of Care Guidelines. The Duty of Care Guidelines were supposedly reviewed in 2016, however no changes were implemented. The Duty of Care Guidelines are fundamentally flawed, as QYAC has previously submitted, and the issues will only be reiterated briefly here. The main issues in relation to the Duty of Care Guidelines are self assessment and consultation with the ACHB.

Part Two of the Guide is broken down into five categories of activities. All of which are self-assessed by the person undertaking potentially harmful ground disturbing works. An essential component missing in all but the fifth category, is that there is no provision for consultation with the Aboriginal Party of the area.

Therefore, if a developer ***self-assesses*** that the project they are undertaking is a category 1-4, then Aboriginal People are not notified and therefore cannot provide advice nor make an informed decision on whether there will be an impact to Aboriginal cultural heritage or the opportunity to protect that heritage should it be impacted.

Further, cultural heritage should be more expressly integrated into environmental planning approval systems such as the States Integrated Development Assessment System, so proponents are acutely aware that the ACHA and the Guidelines exist and what their responsibilities are. Education and awareness are key to making self-assessment a fair and transparent process.

Therefore, a direct link to the Guidelines and the ACHA needs to be introduced under the *Sustainable Planning Act 2009* (QLD) at the pre development application phase, and a clear notation on all development consents adverting proponents to the need to contact the Aboriginal Party or ACHB and to comply with the ACHA. This would increase awareness and compliance on the part of all development applicants in Queensland.

QYAC notes that the Victorian *Aboriginal Heritage Act 2006* employs a mechanism whereby land users are required to demonstrate that their development will not harm Aboriginal cultural heritage, not the

other way around, where as in Queensland, the onus is on the Aboriginal party to prove that cultural heritage will be harmed. The decision tree model of a web interface is successful in Victoria, and consideration should be given to implementing such a model in Queensland.

While QYAC does not propose DATSIP go back to permitting all harm to Aboriginal Heritage, we do propose to remove Category 4 from the Duty of Care Guidelines at a minimum and putting Aboriginal Heritage Protection and consultation with ACHB's as an essential part of the *Integrated Planning Act 1997 (Planning Act)* which would achieve both ecological and Aboriginal cultural heritage sustainability, which should be the main purpose of the Planning Act. In addition, the definition of significant ground disturbance does not take into consideration the sub-surface material which may still be intact, and noting that the deeper an archaeological deposit, the more scientifically and culturally significant the find is.

Further, it should be a duty for Cultural Heritage Managers and experts, to report sites and to report harm to Aboriginal cultural heritage if they know such harm is being undertaken. Currently, Heritage Practitioners, are not being held accountable should a developer harm heritage, to report such damage; they are often being held back from reporting such incidents by a developer under a breach of confidentiality.

Part 4 "Last Man Standing"

The native title environment has changed significantly since the implementation of the ACHA in 2003. QYAC acknowledges that the ACHA has been reviewed since this time, however it still failed to take native title and native title holders, or lack thereof, into consideration.

By omission of a clear definition of who the Traditional Owners are of Aboriginal cultural heritage in the ACHA, it allows for misinterpretation of who should be able to "*maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas from physical harm*".

To prove Native Title in accordance with Section 223 of the *Native Title Act 1993*, a group must prove that they occupied the lands and water prior to sovereignty and have continued to observe those laws and customs since that time. However, if a party has been unable to prove this continuous connection, clarity in the ACHA is essential to define who is the custodian for the cultural heritage, and by de-facto, the area, not simply the last native title claim that was registered. A group that cannot prove native title and has been ruled as to not have native title by the Federal Court of Australia, cannot possibly have the right or the mechanisms to *provide effective recognition, protection and conservation of Aboriginal cultural heritage*.

A possible solution would be that the connection between the registration of native title claims and the protection of cultural heritage be removed and replaced with a clear definition of the Aboriginal party for the region, precluding Aboriginal groups who have clearly been shown to not have familial links to an area.

This could be executed by way of an amendment and note to section 23 of the ACHA that clarifies that proponents may also need to satisfy the connection requirements of the *Native Title Act 1993 (Cth)*.

As a result, an Aboriginal group that can show traditional and familial links to an area should be considered as the new Aboriginal and Native Title Party for the area. QYAC notes that pursuant to s 36(6) of the ACHA the Minister may cancel the registration of a corporation as the ACHB if she “*is no longer satisfied about the matter in subsection (4) in relation to the corporation*” and this should be exercised in several cases rather than automatic reversion to “last man standing”.

Part 5 Collection and management of Aboriginal cultural heritage information and Part 6 Cultural Heritage Studies

The database was established to transfer details of Aboriginal sites of significance which were recorded under previous cultural heritage Acts in Queensland to a central repository. The database is not considered open to the general public, however a land use or a researcher may apply for information recorded on the database for research purposes and for the purposes of compliance for the Duty of Care Guidelines.

The Database is a result of past archaeological practices and technologies. Site location is often inaccurate which is a result of changing Datum’s as well as the old practice of recording sites on map sheets. For example, a recent event on Minjerribah has clearly indicated that a site on private property which is on the database, was not actually on their property. The issue with this is that the site is actually located on a neighbouring property, and should the neighbouring property owners wish to develop that land, their Duty of Care compliance if they search the database, has been satisfied as no sites would be located, however there is clearly a site located on their land once an investigation of the site information is undertaken. It appears that DATSIP do not have the resources to check each Database search request to determine the truth and accuracy of the information on the database.

Conversely, the Register is an accurate representation of sites located on country. The deficiency with the Register, is that it is difficult to get sites registered. Once again, the onus is on the ACHB, or the Aboriginal Party to convince developers to undertake a Part 6 Study. This deficiency in the current process is clearly apparent, as there are currently only six (6) studies on the register, two of which are from QYAC. The Register is meant to be a “depository for information for consideration for land use and land use planning, including, for example, for local government planning schemes and for regional planning strategies and a research and planning tool to help people in their consideration of the Aboriginal cultural

heritage values of particular objects and areas” s47 (2)(a-b). To have a Part 6 study registered, according to s73 (1)(b) the findings and other information included in the cultural heritage study, including the study’s recommendations, need to be consistent with authoritative anthropological, biogeographical, historical and archaeological information about the study area. This process employing experts, is expensive and once again, the onus is on the Aboriginal Party or ACHB to support their assertions that there are sites of significance in the project area. It is often difficult for poorly funded ACHBs or Aboriginal Parties to find the resources to fight large multinational or national companies when trying to protect their heritage. Further that should they take issue to the Land Court and the claim or stop work order fails, there is a possibility that the ACHB will have to pay court costs, which is certainly a deterrent and is certainly in the favour of corporations who can afford expensive Counsel. Aboriginal People are the best placed to determine whether a site is significant and should be included on the Register.

Moreover, the requirement that there needs to be “documented evidence about whether recommendations included in the study for future management of Aboriginal cultural heritage have been agreed with affected land owners and occupiers” (s74)(1)(d)(iii) is often a difficult requirement to achieve. QYAC has undertaken 36 Part 6 studies, with two currently registered, with another 5 which have been agreed to by all owners and occupiers. However, the issue arises when, for example, nbnco have agreed to the Part 7 Cultural Heritage Management Plan, which at this time is awaiting registration, however, as the occupier of the nbnco corridor is Transport and Main Roads (TMR), with Department of Natural Resources, Mines and Energy (DNRME) as the owner, QYAC has to negotiate with three separate Departments to achieve Part 6 registration for the highest level of protection for these sites located in the nbnco/TMR/DNRME corridor. The level of difficulty in achieving this is extreme and while these sites are not Registered, they are not being considered in future planning scenarios.

QYAC submits that the ACHA does not mandate that inclusion of information on the Register must reflect the outcome of a cultural heritage study that complies with the processes described in Part 6 of the Act. The current departmental policy to oblige a Part 6 Cultural Heritage Survey requirement appears to unfairly and unreasonably prejudice us, and many other native title holding groups in protecting our Aboriginal cultural heritage.

QYAC therefore suggests, that information contained on the Database should be able to be included in the Register at the request of an Aboriginal party. QYAC submits that this is inconsistent with the central tenets of the ACHA that Aboriginal Cultural Heritage is the property of Aboriginal people, and where there has been a finding of a competent court to determine who the Aboriginal Party is, such as a native title determination, the directions of such a party should be accepted and acted upon, subject to a later challenge to the inclusion in the Register of that site by a relevantly interested third party. That is, there ought to be a rebuttable presumption in favour of the native title holders as to the veracity of the

information requested to be included on the Register.

The Part 6 process is certainly slanted towards a bias for the developer and the State. There are a few possible solutions to the issues raised above.

DATSIP as the regulatory authority, needs to be appropriately funded to assist Aboriginal Parties and ACHB in protecting their sites in the manner the Aboriginal Owners determine.

DATSIP needs funding to either assist Aboriginal Parties or ACHBs to ground truth the database sites with the view of transferring those sites onto the Register or undertake the ground truthing themselves.

There needs to be an easier, more cost effective and less onerous method of including Aboriginal Cultural Heritage sites on the Register. Particularly without the need for State Departments, being a signatory to Part 6 studies as land owners or occupiers. It is the professional expertise of the Study authors that should be determinative, not people with a vested interest in minimising the Aboriginal cultural sites.

I understand that freehold property owners may have issues which have management conditions placed on their freehold land, however the State should certainly be in a position to accept expert management advice and to adhere to such advice in the future. Also, DATSIP needs to be funded to assist Aboriginal Parties and ACHB's in their governance and capacity to undertake Part 6 studies. Education for Aboriginal Parties and ACHB's as well as developers on the ACHA is essential.

Part 7 Cultural Heritage Management Plans

QYAC submits that having regard to the status of the Prescribed Body Corporate as agent or trustee for the common law native title holders subsequent to a determination of native title, the Act ought to be amended to require that any CHMPs extant at the date of determination are, unless express provision is made for novation in favour of the PBC on determination of native title, deemed to terminate and the 'proponent' be required to negotiate in good faith with the PBC to develop and conclude a replacement CHMP.

Compliance

Support needs to be given to a compliance team within the State, to support Aboriginal People when they know their cultural heritage is being impacted by ground disturbing activities. QYAC has had difficulty in the past ascertaining support and assistance when they are informed that Aboriginal Cultural Heritage is being impacted on the Quandamooka Estate and have alerted DATSIP to the fact.

According to Rowlands et.al. (2014¹) in the years between the enactment of the ACHA and 2014, the Compliance Information Register Management System recorded 79 notifications and included one

¹ Rowlands, M., and S. Ulm and J. Reid., 2014 Compliance with Indigenous cultural heritage legislation in Queensland: Perceptions, realities and prospects. In *Environmental and Planning Law Journal*, Vol 31 (5) pp. 329-351.

persecution for unlawful possession. Broken down, this means that there were:

- 2 pending prosecutions
- 1 under investigation
- 9 insufficient evidence
- 3 legislative exemptions
- 3 stop work orders issued
- 6 finalised
- 54 no further action taken²

Also, QYAC would suggest that the Statute of Limitations be extended to at least two years as per other jurisdictions, instead of six (6), and there should be an increase in coercive powers by authorised officers.

In summary, QYAC strongly believes that the Cultural Heritage Unit within DATSIP needs to be sufficiently resourced and staffed, so that auditing and compliance can be undertaken in a timely and effective manner, education programs be developed for land users, assistance given to Aboriginal parties or ACHBs for governance and management of the cultural heritage on their estate and resources for ground truthing for converting sites in the Database onto the Register.

Alternatively, the ACHA should enable Aboriginal Parties to commence proceedings to protect their Aboriginal Cultural Heritage and be able to commence prosecutions. Any fine, or restitution and remediation order should be paid to the Aboriginal Owner to offset the costs of that prosecution.

Should you like to discuss any aspects of this submission further, please do not hesitate to contact QYAC.

² The State of Environment Report, 2011 (DEHP, Brisbane, 2012) p247, does not provide any information as to why there was no further action taken in relation to these complaints.