



North Queensland Land Council

Native Title Representative Body Aboriginal Corporation

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Reply to: Julia (Jules) Taylor

Our Ref: ACHA Review 2019

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CHA Review

Department of Aboriginal and Torres Strait Islander Partnerships

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Submission into Review of the Cultural Heritage Act 2003

North Queensland Land Council (**NQLC**) is the recognised Native Title Representative Body (**NTRB**) for the area from the Daintree in the north to Sarina in the south and Croydon in the north-west and Hughenden in the south-west. NQLC represents North and Central Native Queensland Native Title Holders¹ in the progression of their native title claims through to determination in the Federal Court and also in the post-determination environment by providing support and assistance to the Registered Native Title Body Corporates (**RNTBC**) who hold native title on trust for their groups.

The NQLC is engaged in projects that aim to further the economic, environmental, social and cultural aspirations of Native Title Holders and the protection of cultural heritage which can be best achieved through and leveraged from their native title rights and interests. The NQLC through our Engagement and Development Support Team (**EDST**) work with Native Title Holders to assist in the development of economic self-sufficiency through projects which aim to provide for example environmental services on country, involve Native Title Holders in emerging enterprises, and facilitate agreements between Traditional owners and third parties for mutually beneficial development on, or management of Country in a culturally appropriate way that protects Native Title Holders' Aboriginal cultural heritage.

We make this submission in the context that we support the primary, positive, purpose of the underlying principles and intention of the *Aboriginal Cultural Heritage Act 2003* (Qld) (“**the ACHA**”) to provide effective recognition, protection and conservation of Aboriginal cultural heritage within the State of Queensland. However, NQLC has concerns about the level of protection the

¹ The term “Native Title Holders” is used throughout this submission for the ease of referencing and is intended to include an “Aboriginal party” and “Aboriginal Cultural Heritage Bodies” as may be relevant.

proposed amendments to the ACHA are going to make to the protection of Native Title Holders' Aboriginal cultural heritage and the costs involved to them in enforcing rights under the ACHA.

BACKGROUND

As stated in DATSIP's Consultation Paper, *Review of the Cultural Heritage Acts 2019*, the underlying principles of the ACHA include:

- *recognising that Aboriginal and Torres Strait Islander peoples are the primary guardians, keepers and knowledge holders of cultural heritage;*
- *activities involving recognition, protection and conservation are important because they allow Aboriginal and Torres Strait Islander peoples to reaffirm their obligations to 'law and country';*
- *there is a need to establish timely and efficient processes for the management of activities that may harm Aboriginal and Torres Strait Islander cultural heritage.*²

Additionally, the The Honourable Jackie Trad MP states that:

*There have been significant developments with respect to cultural heritage in the native title sphere over the life of the legislation. In view of these changes, my department is undertaking a review of the Cultural Heritage Acts. This review is an opportunity to ensure the appropriate balance between protecting and conserving cultural heritage, and facilitating the business and development activity that is vital to our State. The review will also ensure the Acts operate in a way that is consistent with the government's broader objective to reframe the relationship with Aboriginal and Torres Strait Islander Queenslanders.*³

Since its introduction, the ACHA has not been subjected to a full and formal legislative review involving Native Title Holders and relevant stakeholders, despite continued calls for this to occur. Without a comprehensive review involving the Native Title Holders, Aboriginal cultural heritage in Queensland is at high risk of being destroyed and lost forever.

The ACHA remains fundamentally flawed as it fails in many respects to protect Aboriginal cultural heritage in Queensland and as such does not enable the underlying principles of the ACHA to be realised. This is ironic as one of the reasons it was enacted in the first place was because the previous legislation, The *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* was inadequate in protecting Aboriginal Cultural Heritage.⁴

² DATSIP, Consultation Paper, *Review of the Cultural Heritage Acts 2019* p4.

³ DATSIP, Consultation Paper, *Review of the Cultural Heritage Acts 2019* p3.

⁴ Explanatory Notes – *Aboriginal Cultural Heritage Bill 2003 Qld*, Reasons for the Bill p2.

This submission, in context of the review scope, identifies the fundamental flaws with the ACHA with its many shortcomings including but not limited to:

- lack of clarity of responsibility and processes for enforcement of duty of care provisions;
- lack of clarity in relation to monitoring of compliance matters;
- no veto rights for Native Title Holders;
- lacks contemporary relevance;
- the process to record cultural heritage studies on the cultural heritage register are not clearly set out in the legislation (only 6 recorded registered sites to date); and
- is seen by Native Title Holders to devalue their cultural knowledge and authority and thus the protection of their Aboriginal cultural heritage.

It is submitted the ACHA does not remain effective in the current native title landscape and may need to be replaced by a far more effective legislative instrument.

Any formal review that leads to either reform of the ACHA or the enactment of new relevant legislation must give Native Title Holders a much greater role in decisions that affect their Aboriginal cultural heritage. Any amendments or enactment of new legislation requires:

- a modern system of Indigenous heritage management with reference to working models from other jurisdictions;
- input from the owners of the Aboriginal cultural heritage as to what is important to them;
- practical processes for the whole community and industry to engage with; and
- the protection of Aboriginal cultural heritage as the fundamental operating part to the legislation with the power to enforce the protective provisions.

As stated in the Queensland Government's Reconciliation Action Plan 2018 – 2021 (**QGRAP**), under the heading of "Supporting the protection and value of cultures and heritage":

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*The Queensland Government Aboriginal and Torres Strait Islander Cultural Capability Framework commits all Queensland Government agencies to embed Aboriginal and Torres Strait Islander cultural capability practices within policies, programs and services.*⁵

Additionally, the Queensland Government accepted recommendation seven of the Reparations Taskforce Report: Reconciling Past Injustice to reframe the relationship between Indigenous Peoples and the Queensland Government.⁶

Recommendation 7

Negotiation of a document that reframes the relationship between Aboriginal and Torres Strait Islander peoples and the Queensland Government, with actions including:

- a. government convene a meeting of peak Queensland Aboriginal and Torres Strait Islander organisations (including taskforce representation) to begin discussions; and*
- b. government convene further discussions at the local level with Aboriginal and Torres Strait Islander peoples to identify local solutions.*⁷

During the consultation phase of the Queensland Stolen Wages Reparations Taskforce Report the taskforce heard many concerns from Aboriginal and Torres Strait Islander People about a range of issues unrelated to stolen wages.⁸ The protection of Aboriginal cultural heritage is one such concern high on the agenda that needs to be addressed.

It is submitted that if the Queensland government genuinely commits to protecting Aboriginal cultural heritage by either amending or enacting new relevant legislation it will go a long way in the discourse of reframing the relationship as stated in the QGRAP.

REVIEW SCOPE

1. IS THE ACHA STILL OPERATING AS INTENDED?

The fundamental principle of the ACHA is to protect Aboriginal cultural heritage.

⁵ Queensland Government Reconciliation Action Plan 2018–2021, p12.

⁶ Ibid, p13.

⁷ Queensland Stolen Wages Reparations Taskforce Report *Reconciling Past Injustice*, p25.

⁸ Ibid, p24.

One of the reasons for the introduction of the *Aboriginal Cultural Heritage Bill 2003 (ACHB)* as cited under the “Reasons for the Bill” was that:

*The Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987 fails to provide adequate protection to Indigenous cultural heritage by focusing on the protection of archaeological evidence of human occupation of Queensland. It fails to protect areas of Queensland, significant solely because of their significance under Aboriginal tradition or the history of traditional owners of country.*⁹

Additionally, under “Alternative ways of achieving the objective” of the ACHB it states:

*The Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987 is inadequate in both the protection it provides to Aboriginal cultural heritage as well as the guidance it provides to proponents to assist in addressing cultural heritage matters with certainty, in a timely and cost efficient manner.*¹⁰

It is clear that ACHA in its current form works best for proponents in addressing “cultural heritage matters with certainty” but fails to protect Aboriginal cultural heritage with the same level of certainty.

Duty of Care

Section 23(1) of the ACHA states:

A person who carries out an activity must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage (the ***cultural heritage duty of care***).

Proponents may discharge their duty of care obligations by:

- entering into a Cultural Heritage Management Plan (**CHMP**) approved by the Cultural Heritage Management Unit of the DNRME;
- entering into a voluntary cultural heritage management agreement pursuant to ACHA;
- entering into a native title agreement, or ancillary agreement that deals with cultural heritage;

⁹ Explanatory Notes – *Aboriginal Cultural Heritage Bill 2003 Qld*, Reasons for the Bill p2.

¹⁰ Ibid p6.

- adhering to cultural heritage duty of care guidelines;
- entering into an indigenous Land Use Agreement that addresses issues of cultural heritage; or
- where applicable complying with the Native Title Protection Conditions.

Compliance and enforcement is critical to valuing the cultural knowledge and authority of Native Title Holders and also for the protection of Aboriginal cultural heritage and is one of the largest issues facing Native Title Holders. While the QGRAP directive makes clear that all State agencies and proponents should as paramount address their duty of care obligations it does not transpire in reality when dealing with on country matters as it is often ignored or dismissed when engaging with Native Title Holders.

For example Future Act Notices (**FANs**) issued under the *Native Title Act 1993 (Cth)* (**NTA**) by various State departments often ignore the impact such notices have on Native Title Holders who are responsible for managing their cultural heritage on their country. The FANs often fail to:

- address what the specifics of the proposed activity will be;
- address what involvement the Native Title Holders will have;
- identify what particular area of their country will be impacted; and
- state what steps the relevant Department will take to ensure country is not harmed.

This failure to properly engage with Native Title Holders with the way FANs are issued devalues of Native Title Holders' cultural knowledge and authority and thus the protection of their Aboriginal cultural heritage.

Given the time and cost it takes for a Native Title Party to respond to FANs and given that cultural heritage matters are not addressed when the FANs are issued does little to demonstrate that Queensland Government agencies have embedded *Aboriginal and Torres Strait Islander cultural capability practices within policies, programs and services*.¹¹

Proposal 1

Repeal the ACHA and enact new relevant Aboriginal cultural heritage legislation and include the word 'Protection' in the name of the new Act to make it clear from the outset what the

¹¹ Queensland Government Reconciliation Action Plan 2018–2021, P12.

new Act is designed to do. New legislation on Aboriginal cultural heritage should reflect best practice heritage management and the rights of Native Title Holders under national and international law.

Given the ACHA is fifteen years old and the change politically in this time to the Native Title landscape the ACHA is out of step with the developments and expectations of Native Title Holders.

2. IS THE ACHA ACHIEVING OUTCOMES FOR THE ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES AND OTHER STAKEHOLDERS IN QUEENSLAND?

It is submitted the ACHA best serves the proponents in achieving access and carrying out their desired work on country rather than protecting Native Title Holders' Aboriginal cultural heritage. The ACHA facilitates a process where protection of Aboriginal cultural heritage and rights is dependent on the capacity of the Native Title Holders to negotiate a desired outcome. In some cases the ACHA undermines its own principles and disempowers the Native Title Holders.

The ACHA needs to be amended so that it consistently provides the basis to protect Aboriginal cultural heritage regardless of capacity of the Native Title Holder.

The ACHA currently fails in achieving desired outcomes for Native Title Holders as:

- the ACHA has limited enforcement and intervention powers;
- the CHMP statutory time frames for approval and complicated negotiations often place the Native Title Holder in a weak bargaining position which restricts the Native Title Holder's ability to fully participate;
- there is a lack of consistency on the cultural management protection process as some Native Title Holders may be more skilled at negotiating than others who may settle for less than their ideal preferred cultural heritage management strategy;
- protection of cultural heritage can be dependent on the capacity of the Native Title Holder in negotiating a desired outcome;
- The Duty of Care Guidelines provide land users with a self-assessment compliance tool to exclude Native Title Holders from managing their own cultural heritage¹² and ignoring their connection to country;

¹² DATSIP, *Aboriginal Cultural Heritage Act 2003* Qld, Duty of Care Guidelines 2004 ss 4.2, 4.5, 5.2 and 5.5.

- the Duty of Care Guidelines focus on ground disturbance and does not take into consideration the intangible or spiritual connection the Native Title Holder has with the land;
- projects can proceed without them being conditional on cultural assessments being provided by the Native Title Holders; and
- projects that have proceeded without cultural assessments have resulted in the destruction of Aboriginal Cultural heritage undermining the principles of the ACHA;¹³

It should be acknowledged that where the ACHA has worked to protect Aboriginal cultural heritage is where:

- proponents choose a best practice approach to engage with the Native Title Holders and enter into Section 23 agreements; and
- Native Title Holders have good negotiation skills and are able to put comprehensive cultural heritage management plans into place before proponents commence work on country.

However, there needs to be more consistency across the board on approving projects for those proponents who fail to engage.

The issue is that currently under the ACHA there is lack of reliability on the level of protection being afforded Aboriginal cultural heritage. A major project requires the parties to enter into a CHMP while projects that fall outside this major project scope the Duty of Care Guidelines have allowed proponents to proceed while complying with the ACHA but excluding the Native Title Holders from the process. This loophole has allowed proponents a legal legitimate pathway to the destruction of Aboriginal cultural heritage and thus devaluing the cultural knowledge and authority of the Native Title Holders.

Duty of Care Guidelines

While it may not have been the intention of legislators to create a loop hole for proponents the pathway to compliance exists under the Duty of Care Guidelines. This clearly creates an imbalance and a disconnect between the guidelines and ACHA placing economic development first with Aboriginal cultural heritage seeming to be an after-thought and only considered after the damage has occurred. This disparity clearly continues to undermine the principles of the ACHA.

¹³ DATSIP, Consultation Paper, *Review of the Cultural Heritage Acts 2019* p3.

Additionally, the powers contained in the ACHA are seldom used with prosecution for non-compliance matters and stop work orders being rarely enforced. Compliance and enforcement is critical to valuing the cultural knowledge and authority of Native Title Holders and any legislative review of the ACHA must address this issue.

Activities contained in the Duty of Care Guidelines in Sections 4.2, 4.5, 5.2 and 5.5¹⁴ operate to elevate the knowledge of the proponent over that of the Native Title Holders to identify and assess Aboriginal cultural heritage. Native Title Holders should be recognised as the primary guardians, keepers and knowledge holders of their cultural heritage and self-assessment by a proponent fails to meet this fundamental principal.

The practical implication of a self-assessment regime is that the proponent may not have the necessary knowledge to be able to identify Aboriginal cultural heritage and may not be in a position to identify spiritual or mythological Aboriginal cultural heritage without prior consultation and engagement with Native Title Holders.

Cultural Heritage Risk

It is submitted that proponents who commence work on country without first consulting and entering into agreements with Native Title Holders are not the type of proponent that can be relied on to “take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage...”.¹⁵

As noted previously in a submission from NQLC unfortunately far too many proponents do not view the need to undertake Aboriginal cultural heritage inspections in a manner consistent with the objectives and principles set out in the ACHA. To paraphrase, it is often expressed in words and/or deeds to Native Title Holders that the whole process is ‘... *a waste of time and money*...’. Any amendments to the ACHA, Duty of Care Guidelines or new enacted legislation must implement a clear and transparent process to shift the view of all proponents to follow best practice procedure:

- that it is in all the parties’ best interests to initiate the consultation process earlier rather than later;
- that cultural heritage assessments are standard for all projects on Native Title Holders’ country;
- that field inspections are required and ongoing long term assessments may be required depending on the extent of the project;

¹⁴ DATSIP, *Aboriginal Cultural Heritage Act 2003* Qld, Duty of Care Guidelines 2004

¹⁵ DATSIP, *Aboriginal Cultural Heritage Act 2003* Qld, Duty of Care Guidelines 2004, s4.9

- to provide a reasonable time frame before the project is due to commence to allow the Native Title Party sufficient time to consult on the proposed activity and respond in relation to its impact on Aboriginal cultural heritage and then respond to the proponent; and
- if disputes arise between the parties during negotiations of Aboriginal cultural heritage management that the activity cannot commence until such time the dispute has been resolved.

3. IS THE ACHA IN LINE WITH QUEENSLAND GOVERNMENT’S BROADER OBJECTIVE TO REFRAME THE RELATIONSHIP WITH ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES?

The ACHA is out of step with Queensland Government’s broader objective of reframing the relationship as the ACHA does not reflect the “*significant developments with respect to cultural heritage in the native title sphere over the life of the legislation*”¹⁶.

As mentioned above the ACHA is not conducive in providing a level playing field for all Native Title Holders as protection can be dependent on negotiation skills and capacity.

Protection needs to be afforded to all Native Title Holders regardless of their capacity and the focus should be on implementing best practice techniques in preserving all Aboriginal cultural heritage. Currently, the ACHA creates an imbalance favouring the proponent while devaluing the Native Title Holders’ authority.

Part 1, Division 3 of the ACHA is not conducive to reframing the relationship as the definitions and meaning of Aboriginal cultural heritage is too restrictive.

‘Site’ or ‘place’ are not defined.. Any new definition should include tangible as well as the intangible Aboriginal cultural heritage - for example areas of significance that contain Songlines which are tied to the landscape. Destruction of a landmark tied to a Songline means loss of that part of cultural heritage forever.

Proposal 2

*Any reframing of the relationship must include the Native Title Holders of the Aboriginal cultural heritage that the legislation is designed to protect. This can be realised by the establishment of an Indigenous Area Protection Authority (**Authority**) or Council.*

¹⁶ DATSIP, Consultation Paper, *Review of the Cultural Heritage Acts 2019* p3.

The Authority/Council could be a statutory body established under amended ACHA or new legislation and membership would comprise of a majority of Native Title Holders who would then be responsible to administer the ACHA or new Act including:

- preserving Aboriginal cultural heritage in Queensland in certain areas while enhancing aspirations of Native Title Holders and all other peoples in Queensland for economic; cultural and social advancement;
- approving and entering cultural heritage sites on the register at the request of Native Title Holders after sites are mapped and researched;
- review proposed work applications from individuals, government agencies and companies;
- determine that the right people are speaking for country when assessing proposed work applications by consulting with both Prescribed Bodies Corporate and relevant Native Title Representative Bodies about the project in their respective areas to identify the possible impact on Aboriginal cultural heritage sites on or near the proposed works;
- issue authority certificates with conditions under which the proposed work may be carried out which would define what type of work can and cannot be conducted;
- providing realistic frames to proponents on the issue of authority certificates ensuring that the consultation process is completed correctly and that cultural sites are protected before any works on Country can commence; and
- provide for enforcement powers where there is non-compliance with the Act or under an agreement with Native Title Holders where a process for the protection of Aboriginal cultural heritage has not been followed.

4. SHOULD THE ACHA BE UPDATED TO REFLECT THE CURRENT NATIVE TITLE LANDSCAPE?

The ACHA, in its current form, does not reflect the current and emerging native title landscape and needs to be updated.

The United Nations *Declaration on the Rights of Indigenous Peoples* provides for practical guidance in dealing with Native Title Holders and amendments to ACHA or relevant legislative changes should incorporate the principles of:

- self-determination;



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- participation in decision-making, based on concepts of good faith and free, prior and informed consent;
- respect for and protection of culture; and
- non-discrimination and equality.

Currently, the ACHA falls short of these principles as:

- Native Title Holders' authority and cultural knowledge is devalued particularly while compliance loopholes exist allowing the proponent to bypass engagement altogether;
- Native Title Holders must be allowed to play a more decisive role in the decision making process about their own cultural heritage and what happens on their own Country on a level playing field;
- the ACHA does not do enough to ensure that the right people are consulted and speak for Country in the protection of Aboriginal cultural heritage; and
- in its current form the ACHA creates an imbalance that empowers the proponent while disempowering Native Title Holders which erodes their rights in the management of their own country.

It is submitted that any change to legislation should include an Authority or Council as a funded body as stated above.

5. Other Issues

In consultation with NQLC clients, other issues have also been raised as detailed below.

- The ACHA is guilty of being sluggishly reactive rather than proactive in protecting cultural heritage. Compliance is a large issue and where there is not a head of power to enforce agreements entered into for the protection of Aboriginal cultural heritage and those agreements can in fact act as a bar to assistance under the ACHA then this needs substantial reform which may be in some ways addressed by the establishment of an Authority/Council. Without these changes it could be viewed as merely symbolic in its existence rather than acting as a real instrument that works genuinely for the benefit of Native Title Holders.
- The process to record cultural heritage studies on the cultural heritage register too complicated which is reflected in that only 6 sites have been registered in fifteen years.

- Some sites are sensitive and Native Title Parties don't want them available to all. Any registration of sites should only happen with the express consent of Native Title Parties and no amendment should provide for a regime of them to be recorded by any other third party.
- Recourse is onerous for Native Title Parties where there is non-compliance have to pursue others through Land Court.
- DATSIP should have substantially more funding so it has capacity to expand its services in the **protection** of Aboriginal cultural heritage and maintaining compliance under the CHMA.
- DATSIP should produce interactive maps that shows the boundary area of all registered CHMPs and the CHMP title and proponents names and contact details (similar to the Indigenous Land Use Agreement maps that can be viewed on NNTT website), without disclosing the agreement.
- DATSIP should include a mechanism by which Native Title Holders can advise that they have entered into an agreement, such as an ILUA or an Ancillary Agreement, provide the proponents name and address and advise DATSIP that the other party has agreed to enter into a cultural heritage management agreement and there should be powers for DATSIP to assist in their enforcement.
- A mechanism should be developed whereby the Native Title Holders can inform DATSIP that a Cultural Heritage Survey has been undertaken over a particular area, in satisfaction of CHMP requirements. Once such mechanism could be, for example if an application for cultural heritage survey had to be lodged with DATSIP in the first instance who would then coordinate surveys with the appropriate Native Title Holders, along with an approved anthropologists/archaeologists to compile report on the surveys and for registration to occur only where there is express consent from the Native Title Holders for it to be put on a public register.
- DATSIP should audit cultural heritage compliance. Miners and developers should not be allowed to self-assess their own compliance (or lack thereof) with Aboriginal cultural heritage requirements of the ACHA.
- At present, miners can complete a Standard application for a new environmental authority for a resource authority, declare in Section 3 of that application that they understand and can comply with the eligibility criteria and standard conditions for that

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Environmentally Relevant Activity (ERA) and obtain an Environmental authority. Eligibility criteria for a mining lease, for example, includes that the mining activity will not be carried out in Category A or B environmentally sensitive areas. Category B environmentally sensitive areas are defined in schedule 12 of the *Environmental Protection Regulation 2008* (Qld) to include, among other things, a place of cultural heritage significance under the *Queensland Heritage Act 1992* and areas recorded in the Aboriginal Cultural Heritage Register established under section 46 of the *Aboriginal Cultural Heritage Act 2003*. Native Title Holders have reported miners mining under an environmental authority and refusing to undertake any cultural heritage surveys at all and there should be complementary processes between DATSIP and DNRME/DES in relation to non-compliance and enforcement.

- Offence provisions should be included in the ACHA whereby it is an offence to enter a significant site, work on sacred site, destroy or damage sites, convey secret or confidential information about cultural heritage site without written authorisation, an offence to undertake any activities on an area without having first undertaken an Aboriginal cultural heritage survey, and an offence refuse Native Title Holders' access to Aboriginal cultural heritage sites. This could be framed in a similar fashion to the *Sacred Sites Act 1989* (NT).
- There should be no legislative requirement that Native Title Parties' share their Aboriginal cultural heritage with others.
- If non-Native Title Parties are allowed to self-assess cultural heritage compliance, with no external auditing by the State government then Native Title Holders (as well as the State and other landholders) would be exposed to risks that developers/miners and those accessing and utilising land and waters may undertake activities with no recourse available in the event of non-compliance.
- Lack of measures to monitor and mitigate impacts to cultural heritage are contrary to UNDRIP Article 32 (3) which provides 'States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environment, economic, social, cultural or spiritual impact.'
- It is also of concern to Native Title Holders that the State is streamlining efficiencies by cutting back on compliance monitoring.

These issues and their practical implementation need considerable thought in any review of the ACHA, many of which will only be addressed with amendments or the enactment of new legislation that has its fundamental premise in the **protection** of Aboriginal cultural heritage.

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