

15 August 2019

Hon Jackie Trad  
Minister for Aboriginal and Torres Strait Islander Partnerships  
CHA Review – Department of Aboriginal and Torres Strait Islander Partnerships  
PO Box 15397  
City East QLD 4002

Hon Jackie Trad,

**Re: Review of the Cultural Heritage Acts**

The review of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003* (referred to herein as the Acts) is a welcome opportunity to improve the effectiveness of legislation designed to protect and conserve Queensland's Indigenous heritage.

In preparing this submission, the National Trust of Australia (Queensland) [NTAQ]:

- Attended the University of Queensland's Cultural Heritage Acts workshop, which was well attended by Indigenous representatives as well as industry and academia;
- Consulted its Advocacy Advisory Committee to discuss the efficacy of the Acts and areas for improvement;
- Undertook discussions with Australia ICOMOS representatives, consultants and Universities; and
- Provided our draft submission to the NTAQ Reconciliation Action Plan Working Group for comment and discussion.

The National Trust of Australia (Queensland) is a member based, non-government, not-for-profit organisation that represents the interests of more than 18,000 members across Queensland. We are the custodians of heritage places across the state, including Currumbin Wildlife Sanctuary and Wolston Farmhouse at Wacol. Our mission is to protect, conserve and celebrate Queensland's environmental, built and cultural heritage.

**Executive Summary**

It is our view that the current Aboriginal and Torres Strait Islander Cultural Heritage Acts are deficient, they do not achieve their intended aims for Aboriginal and Torres Strait Islander people and they do not effectively protect or conserve Aboriginal and Torres Strait Islander cultural heritage in Queensland.

We recommend that a complete re-write of the Acts be undertaken by DATSIP following extensive consultation with Aboriginal and Torres Strait Islander people, as well as those who work with the Act and experts in cultural heritage.

Notwithstanding, should a review of the current Acts be the preferred option, the following discussions and recommendations are applicable to the specific discussion points raised in the DATSIP Discussion Paper for the Review of the Cultural Heritage Acts.

We recommend that further extensive consultation is undertaken by DATSIP to prepare a thorough review and re-drafting of the Acts. This process should be approached with the understanding and utmost respect toward these Acts which affect living peoples and living cultures – if the review is not undertaken thoughtfully and is not Indigenous -led, it can have unacceptable effects on living people and it will not achieve its aims.

### **Definition of Cultural Heritage: Intangible Heritage**

The current Acts' definition of cultural heritage represents an outdated view of cultural heritage based on geographical boundaries and physical (tangible) elements, such as objects, ceremonial places etc. Whilst the Acts do include 'areas' and recognise that these areas do not have to contain markings or physical evidence, this distinction is not clear enough.

It is widely recognised that heritage includes both tangible places and intangible practices – this is applicable to both historic and Indigenous heritage, however, it is particularly relevant to Indigenous, living cultures and their continued cultural practices.

The importance of specifically recognising intangible heritage is demonstrated by the recent UNESCO [\*Convention for the Safeguarding of the Intangible Heritage\*](#) (2003), which defines intangible heritage as:

*“... the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.”<sup>1</sup>*

This definition is a useful, internationally recognised definition of intangible heritage. Without a clear definition of intangible heritage within the definitions of the Acts, they will continue to fail to contain adequate provisions and mechanisms for the protection of Aboriginal and Torres Strait Islander cultural heritage.

#### Recommendation:

We recommend that the definition of cultural heritage within the Acts is expanded to include intangible heritage, preferably in accordance with the definition contained in the UNESCO *Convention for the Safeguarding of the Intangible Heritage*.

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<sup>1</sup> UNESCO. 2003. *Convention for the Safeguarding of the Intangible Heritage*.

## **Definition of Cultural Heritage: Cultural Landscapes**

Whilst the current Acts' definition of cultural heritage includes 'areas' they do not specifically relate to cultural landscapes. Indigenous communities and individuals have complex attachments and shared values relating to the landscapes around them – these landscapes hold myths, legends, spiritual and symbolic meanings.<sup>2</sup> The importance of cultural landscapes in Indigenous culture was recognised by the recent listing of the Budj Bim Cultural Landscape on the World Heritage List (2019), setting a standard for other areas of Australia to follow. Cultural landscapes and the interconnectedness of nature and culture in Indigenous heritage are at risk from a lack of identification and recognition of their values.<sup>3</sup>

Landscape values have been recognised and are continually maintained through cultural burning. Aboriginal tradition sees each landscape houses and ecosystem as fundamentally reliant on landscape intergradation. Across Australia, early Europeans commented again and again that the land looked like a park. With extensive grassy patches and pathways, open woodlands and abundant wildlife, it evoked a country estate in England. Bill Gammage has discovered this was because Aboriginal people managed the land in a far more systematic and scientific fashion than was earlier recognised (Bill Gammage, *The Biggest Estate On Earth*).

### Recommendation:

We recommend that, given the lack of recognition and identification afforded to Indigenous and Torres Strait Islander cultural landscapes, and the effect this has on their protection and conservation, the definition of cultural heritage specifically includes cultural landscapes. Further, we recommend that the definition clearly outlines the interaction between natural values and cultural values in these landscapes and this this is a continuing cultural tradition.

## **Identifying Aboriginal and Torres Strait Islander Parties: Issues with Native Title Definitions**

To identify Traditional Owners, the Acts rely on the definitions of native parties in the Commonwealth *Native Title Act 1993*. This in and of itself creates issues and tensions, particularly with regard to the recent last man standing provisions. This link and its mechanism for identifying Indigenous stakeholders is problematic; many Traditional Owners are either not able or not willing to enter into the native title claims process, yet have undisputed connections to place and heritage on their country. The current process thus disenfranchises considerable numbers of Indigenous people and denies them the opportunity to meet their cultural obligations to law and country.

There has been misuse of the traditional owner status with companies entering into an ILUA with Traditional Owners at time treating the word "Traditional Owner" as a tokenistic label for all Aboriginal people. This can result in those with legitimate cultural ties being overlooked on the basis

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<sup>2</sup> Australia ICOMOS National Scientific Committee on Cultural Landscapes and Routes. 2010. [Understanding Cultural Landscapes](#).

<sup>3</sup> Australia ICOMOS National Scientific Committee on Cultural Landscapes and Routes. 2010. [Understanding Cultural Landscapes](#).

that other Aboriginal people are the identified Traditional Owner even though they may be from another area and are then awarded opportunities (work).

#### Recommendation:

Given this tension, we recommend that DATSIP, in consultation with Aboriginal and Torres Strait Islander people, investigates other methods and mechanisms for identifying appropriate Indigenous stakeholders that go beyond the definitions contained in the *Native Title Act, 1993*.

#### **Land User Obligations: Consultation**

The Acts' mechanisms that require consultation with Aboriginal and Torres Strait Islander people are woefully inadequate. The point at which consultation should occur is set far too late in the process.

Whilst one of the Acts' underlying principles is to recognise that Aboriginal and Torres Strait Islander people are the primary guardians, keepers and knowledge holders of cultural heritage, it is counterintuitive for the Act to not recognise the need to consult these primary guardians, keepers and knowledge holders during the process of self-assessment, voluntary agreement and voluntary Cultural Heritage Management Plan (CHMP) stages.

This lack of a mechanism for early consultation, together with the inadequacies of the cultural heritage database (see later section, Databases) that the early self-assessment phases rely on, results in the irreversible loss of cultural heritage and cultural knowledge.

ILUAs (Indigenous Land Use Agreements) are entered into at the very end of the process and are a great example of a flawed process. The late aspect of ILUAs in the process means that water, land disturbance and land occupancy issues and designs have all been discussed and settled before traditional owners are brought into discussions.

#### Recommendation

It is impossible for adequate and thorough self-assessment and due diligence to occur without consultation mechanisms for early consultation which must be included in the Acts and must be mandatory. They should be based on the widely accepted [Ask First](#) principles developed by the Australian Heritage Commission.

#### **Land User Obligations: Assessment**

The process of how cultural heritage is assessed and managed under the Act via duty of care obligations and self-assessment is deficient and results in a loss of cultural heritage places, landscapes and practices in Queensland.

The self-assessment tool (that is, an assessment undertaken by a land user who may or may not have necessary skills or training, whose assessment is based on information contained in an incomplete database of sites and who has no requirement to consult Indigenous parties) does not adequately assess the real potential of land to contain cultural heritage values and it disenfranchises Indigenous parties from the process.

Furthermore, the point at which a mandatory study is undertaken in consultation with Indigenous parties and by those with training, occurs too late in the process (triggered by the need for an Environmental Impact Statement [EIS]). We acknowledge that at the EIS stage, a robust, thorough and comprehensive assessment and management plan needs to be developed – however a process to regulate their content (in a model form) and a transparent process for their approval should be developed.

#### Recommendation

There should be mandatory processes put in place to adequately assess the potential significance of cultural heritage and the impact of potential land use changes. This should include consultation with Indigenous parties, be undertaken by professionals and be incorporated as a trigger into the *Planning Act*, so that assessments are made during any impact assessable work.

DATSIP should consider establishing an Aboriginal Heritage Council that acts as an advisory body, similar in intent to the Heritage Council established under the *Queensland Heritage Act, 1992* for historic heritage places.

#### **Recording Cultural Heritage**

The Acts provide for a database and, whilst we recognise that no heritage database will ever be “complete” as they are evolving documents, the lack of blanket protection for Indigenous heritage places and the lack of mandatory reporting of sites greatly hinders the database’s efficacy. This issue is compounded by a process of self-assessment that relies only on this (incomplete) database.

Blanket protection and reporting of Indigenous sites and of damage to Indigenous sites will assist in the database being a more robust representation of an area’s heritage. Mechanisms for protecting data on culturally sensitive sites can be developed and there are models of other states that can be adopted (such as NSW) to ensure that the Indigenous parties have control of the available information about sites in their area.

#### Recommendation

To work towards a more complete and representative database, there should be mandatory processes put in place to report Indigenous heritage places. The Acts should incorporate mechanisms for blanket protection for Indigenous places should be incorporated into the Acts and it should be a mandatory requirement to report on any damage to known sites.

Due to the incompleteness of the databases, significance and impact assessment should look beyond the information contained in the database and include consultation and ground-validated predictive modelling.

Finally, mechanisms and documented processes for recording and protecting intangible heritage will need to be developed in consultation with Indigenous people.

## **Cultural Heritage Rights**

The United Nations Declaration of the Rights of Indigenous Peoples and the UN Special Rapporteur on Cultural Rights: Report (2011): Access to Cultural Rights are fundamental documents that benchmark the standards that should be used when approaching Indigenous Cultural Heritage. They clearly states that involvement in, protection and management of their own cultural heritage is cultural right and a fundamental human right for Indigenous people.

*UN Declaration of the Rights of Indigenous Peoples (2007)<sup>4</sup> – Article 31:*

Indigenous peoples have the **right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions** (our emphasis), as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. **They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions** (our emphasis).

*UN Special Rapporteur on Cultural Rights: Report (2011): Access to Cultural Rights<sup>5</sup>*

In her second thematic report, submitted to the Human Rights Council (A/HRC/17/38), the UN Special Rapporteur on Cultural Rights focuses on **the right of access to, and enjoyment of cultural heritage**. She stresses that cultural heritage is important not only in itself, but also in relation to its human dimension, in particular its significance for individuals and communities in terms of both their identity and development processes.

As set out in the report, the right of access to and enjoyment of cultural heritage finds its legal basis in various human rights norms. It includes the right of individuals and communities to, inter alia, know, understand, enter, visit, make use of, maintain, exchange and develop cultural heritage, as well as to benefit from the cultural heritage and the creation of others. It also includes the right to participate in the identification, interpretation and development of cultural heritage, as well as in the design and implementation of preservation/safeguard policies and programmes.

However, varying degrees of access and enjoyment may be recognized, taking into consideration the diverse interests of individuals and communities depending on their relationship to specific cultural heritages. In order to promote a human rights-based approach to cultural heritage matters,

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<sup>4</sup> [https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP\\_E\\_web.pdf](https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf)

<sup>5</sup> <https://www.ohchr.org/EN/Issues/CulturalRights/Pages/AccessCulturalHeritage.aspx>

the Special Rapporteur concludes her report with a number of recommendations addressed to States, professionals working in the field of cultural heritage and cultural institutions, researchers and tourism and entertainment industries.

Recommendation

We recommend that the United Nations Declaration of the Rights of Indigenous Peoples and the UN Special Rapporteur on Cultural Rights: Report (2011): Access to Cultural Rights are used as the basis for an review, amendments and policies contained in the legislation. The Acts affect living people and a human rights approach should be adopted for the Acts.

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Once again, thank you for the opportunity to review and comment on the Acts and we commend DATSIP for initiating this important review. Please contact us should you wish to discuss our recommendations in more detail.

Yours sincerely,



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The National Trust of Australia (Queensland)