

Your Ref:

Our Ref: LC:049400



**Marrawah Law Pty Ltd**

Looking after you and your country

30 August 2019

Cultural Heritage Acts Review Team  
Department of Aboriginal and Torres Strait Islander Partnerships  
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To whom it may concern,

### **Re: Review of Cultural Heritage Acts – Consultation Paper**

We refer to the above matter and welcome the opportunity to comment on the Queensland Government's Consultation Paper ('**Paper**').

Marrawah Law is a Supply Nation certified Indigenous legal practice recognised nationally as a leader in advising Aboriginal and Torres Strait Islander peoples ('**Traditional Owners**')<sup>1</sup>. Our lawyers have significant experience in advising and representing both Traditional Owners and proponents in matters concerning property, particularly native title and cultural heritage, and commercial matters. We provide legal services to a large number of individuals, corporations (including prescribed bodies corporate), trusts and other corporate entities, as well as to numerous government entities.

Any amendments to either the *Aboriginal Cultural Heritage Act 2003* or the *Torres Strait Islander Cultural Heritage Act 2003* ('**the Acts**') if implemented would have an impact on the day to day activities of our clients. To that end we consider it pertinent to provide this submission based upon our experience and that of our clients.

Within our submission references to pages are those within the Paper (version available at the Queensland Government website<sup>2</sup> as at 1 February 2019).

#### **1. Ownership and defining cultural heritage**

<sup>1</sup> Doyle's Guide 2019- Leading Native Title Firm (second tier) and Leading Native Title Practitioners (recommended).

<sup>2</sup> <https://www.datsip.qld.gov.au/programs-initiatives/review-cultural-heritage-acts>



*Questions:*

*Is there a need to revisit the definitions of cultural heritage - if yes, what definitions should be considered? What additional assessment and management processes should be considered?*

- We support the recognition of broader cultural heritage landscapes in assessing the impacts on cultural heritage arising from land use activities. These landscapes are often associated with dreaming or creation stories in Aboriginal and Torres Strait Islander laws and customs.
- We support the broadening of cultural heritage to include 'intangible cultural heritage' in line with the United Nations Educational, Scientific and Cultural Organisation's convention.
- We recommend clarifying that both flora and fauna may constitute cultural heritage as these are often used as totems for Aboriginal and Torres Strait Islander people under their laws and customs.

## **2. Identifying Aboriginal and Torres Strait Islander parties**

*Questions:*

*Is there a need to revisit the 'last claim standing' provision – if yes, what alternatives should be considered?*

*Is there a need to revisit the identification of Aboriginal and Torres Strait Islander parties – if yes, who should be involved and what roles, responsibilities and powers should they have?*

*Should there be a process for Aboriginal and Torres Strait Islander parties to apply to be a 'Registered Cultural Heritage Body' to replace the current native title reliant model?*

- We recommend the abolishment of Registered Cultural Heritage Bodies under the Acts. In our experience they are often under resourced and/or not sufficiently aware of their roles and responsibilities.
- We do not support the concept of the Minister deciding who is the relevant party where there is clear court evidence. In our view linking the protection of cultural heritage with the native title regime provides greater clarity for all concerned.
- We do not support extending the role of Native Title Representative Bodies. It is not appropriate for an organisation to play adjudicator where they are likely to possess confidential information relating to all parties arising from their participation in native title determination applications before the Federal Court of Australia.
- We do not agree with the concept of Registered Aboriginal Parties or Recognised Aboriginal Representative Bodies adopted within other states and territories. Any legislation should promote self-determination of individual traditional owner groups as per the United Nations Declaration on the Rights of Indigenous Peoples.

### 3. Land user obligations

*Questions:*

*Is there a need to bolster the oversight mechanisms for self-assessment and voluntary processes – if yes, what should this entail?*

*Is there a need for dispute resolution assistance for parties negotiating voluntary agreements – if yes, who should provide these services and what parameters should be put around the process?*

*Is there a need to reconsider the threshold for formal cultural heritage assessments– if yes, what assessment and management processes should be considered?*

- We agree that there should be a greater level of oversight relating to self-assessment. This could be achieved through integrating cultural heritage assessments within existing planning systems.
- We agree that access to affordable dispute resolution assistance for parties negotiating voluntary agreements would be valuable. A panel of qualified dispute resolution practitioners could be established and overseen by the Land Court perhaps with assistance from the National Native Title Tribunal.
- We agree that the threshold for formal cultural heritage assessments for high impact activities should be reconsidered.

### 4. Compliance mechanisms

*Questions:*

*Is there a need to bolster the compliance mechanisms designed to protect cultural heritage – if yes, what needs to be improved and what additional measures should be put in place?*

- In our view a greater regulatory presence should be established including a hotline which is available on the weekend between 8 am and 6pm.
- We suggest that penalties paid for breaches should go to those whose cultural heritage is damaged.
- We recommend incorporating notice provisions to the relevant party with the level of detail required determined by assessment of potential impact.
- We recommend the creation of factsheets relating to processes in negotiating a cultural heritage agreement and cultural heritage assessments.

### 5. Recording cultural heritage





*Questions:*

*Is there a need to make improvements to the processes relating to the cultural heritage register and database – if yes, what needs to be improved and what changes should be considered?*

recommend that anyone accessing the database is clearly notified that any information or a lack of information on the database cannot be relied on in meeting the duty of care.

**6. Other comments**

*Questions:*

*Do you have any other input, ideas or suggestions on how the Cultural Heritage Acts could be improved to achieve their objectives of recognising, protecting and conserving cultural heritage?*

- in the Torres Strait there is confusion by some individuals/organisations and government around the fact that Aboriginal persons are traditional owners of some areas commonly known as the Torres Strait. This includes main areas of administration including Thursday Island and Horn Island. It would be useful if the Department produced fact sheets to provide clarity.
- We would also encourage the Department to facilitate regular training for other Departments so that they are equally aware of their obligations when overseeing projects. We frequently find that cultural heritage considerations are placed last, if at all, when boots hit the dirt. We would encourage consideration of cultural heritage matters at the earliest stage, including pre-tender to allow time/cost considerations to be factored in.
- We also recommend incorporating a statement from the *Human Rights Act 2019* (Qld) recognising that protecting cultural heritage is a human right.

**Conclusion**

We thank you for your consideration of our submission. Should you have any questions in relation to our submission please do not hesitate to contact our office.

Yours sincerely

  
Leah Cameron  
Principal Solicitor



