

31 March 2022

Attention: Hon Craig Crawford MP, Minister for Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships  
Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships  
PO Box 15397  
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Hon Craig Crawford MP,

## **Review of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003***

Thank you for the opportunity to comment further on this legislative review. I provide this letter as a submission on behalf of Extent Heritage Pty Ltd. It responds to the December 2021 Options Paper (*Finalising the Review of Queensland's Cultural Heritage Acts*).

Extent Heritage is one of Australia's largest specialised heritage consultancies with highly-skilled teams based in Brisbane, Melbourne, Sydney, and Hobart. Our core business involves the identification, assessment and management of Indigenous heritage places within an active development context.

### **General Comments**

Our Brisbane-based director, Dr Andrew Sneddon, is presently an Office Bearer on the Australia ICOMOS (AICOMOS) Executive Committee. He has had the benefit of seeing the submission made by AICOMOS. Extent Heritage supports the recommendations provided in that submission, being:

**Recommendation 1: The review should be refocused on significance instead of risk, in accordance with *Burra Charter* principles and international heritage management best practice.**

**Recommendation 2: Embed objective heritage assessment criteria in the legislation so that the heritage significance of places can be fully understood and appropriately responded to in impact assessments and management planning.**

**Recommendation 3a: Embed 'social significance' and 'spiritual significance' in any revised legislation so that places that embody these things can be identified and conserved.**

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**Recommendation 3b:** In future Options Papers and Discussions Papers, look to define ‘intangible heritage’ to align with international practice and conventions, to distinguish heritage that exists independent of physical places from places that embody spiritual and/or social significance (if there is interest from Indigenous people in Queensland for this heritage to be protected under legislation).

**Recommendation 4a:** Provide absolute clarity in future legislation on the critical dimensions of Free, Prior and Informed Consent, to minimise adversarial interactions between Indigenous parties and proponents. This must include clear statutory timeframes for phases of consultation, and prescriptive guidance on the kinds of information that are sufficient for a party to be appropriately ‘informed’. All parties should be given certainty about what constitutes ‘consent’, including the grounds for its withdrawal where that is appropriate (e.g. when the nature or significance of a place has changed or increased).

**Recommendation 4b:** Continue to investigate the form, scope and function of a future First Nations Advisory Body and how it will relate to the Government's role in heritage management.

Extent Heritage has additional comments about some of the critical aspects of the Options Paper. These are discussed below.

### Heritage Mapping

The proposed proactive mapping of cultural heritage areas across Queensland as either ‘high risk’ or not is a large undertaking and possibly an unrealistic aspiration. The Options Paper does not provide sufficient clarity about its implementation which may create uncertainty and ambiguity. Where there is uncertainty or ambiguity, there is an elevated risk of poor heritage outcomes.

Some points that might be considered include:

- The Options Paper does not demonstrate *how* such proactive state-wide mapping would be achieved. For example, would it be through the application of a reliable predictive model, or through consultation with Aboriginal and Torres Strait Islander parties (or a combination of both)? Both approaches, when applied on their own, have their shortcomings.
- What timeframes are proposed for the mapping program? And how would the mapping program be resourced? In relation to the latter question, we note that the sites Register presently maintained by the Department is not a reliable indicator of the presence or absence of Aboriginal heritage, partly as a result of the way the present legislation is drafted.
- If Indigenous community consultation is the key determinant of what places should be mapped as ‘high risk’, what mechanisms would be in place to resolve disputes? In our experience, Aboriginal parties, understandably, commonly describe all of their country as being of high significance and at high risk. A mapping program based solely on Indigenous consultation may result in a map that provides no-one with certainty.

- These questions raise other related questions: Would consultation occur with Aboriginal and Torres Strait Islander parties on country as part of the mapping process upfront? Or would consultation only occur once baseline mapping by heritage practitioners had been completed? How would challenges associated with establishing who speaks for country be resolved, especially where there is internal disagreement within a group or where native title status or group membership is in flux?
- The Options Paper also asks whether consultation protocols should be developed for each Aboriginal party and Torres Strait Islander party (Question 6 under Proposal 3.1). This seems to imply that there will be no one, single approach to consultation across the state, but potentially a new approach for each party being consulted. If so, this would create considerable uncertainty for proponents, technical experts, and regulators, who would need to become familiar with potentially dozens of different consultation requirements. It is also important to consider how Aboriginal and Torres Strait Islander parties may need to be supported to manage increased consultation about cultural heritage protection. These matters require government oversight to avoid creating uncertainty, additional costs, and resentments between parties in the process.
- The Options Paper does not make it clear what method would apply while the relevant cultural heritage mapping was being undertaken and finalised; for example, would there be a defined transition period or would the existing Duty of Care Guidelines be in effect until all of the relevant mapping was completed? It is imperative that there is certainty for all parties around the production and use of such data.
- The Options Paper does not make it clear what types of activities and areas should be included in the definitions for ‘prescribed activity’ and ‘excluded activity’. As expressed in the AICOMOS submission, controlling heritage by reference to ‘risk’ and ‘activity’ leaves out the critical first step: assessing significance.
- The proposal to undertake mapping of ‘sensitive’ areas across the state reflects a similar approach in Victoria; however, in the case of the latter, a search of the relevant mapping software also provides access to *all* site records and previous cultural heritage reports for the corresponding area (‘grey’ literature). This allows qualified practitioners to build on previous investigations and ensures that critical data are placed in a central and complete repository. The Queensland system would benefit from a similar approach. The present system, which does not require all sites and reports to be registered, should be rectified in future iterations of the legislation.

**Recommendation 5: Reconsider the basis for the proposed mapping program with a focus on significance rather than ‘risk’ and ‘activity’. Provide clarity in relation to the methods that would be used to map heritage places, to identify who speaks for country, and to resolve disputes.**

## Data Management

It is imperative that future legislation clearly defines *how* cultural heritage data will be integrated into existing systems and planning processes, including *who* will have access to this information. Where there is uncertainty or ambiguity around the use and management of such data, there is an elevated risk of poor heritage outcomes.

Future Options Papers would benefit from a consideration of the following questions:

- Who should have access to cultural heritage data? How should access to those data be obtained?
- What if consent is given by an Indigenous party for access to cultural heritage data (including potentially culturally sensitive information) but that consent is later withdrawn? For example, when the composition of an Indigenous group's decision-making body changes.
- What level and kind of data or information should be made available in government planning systems, such as local planning scheme schedules and overlays? For example, will site specific data be included, or only general categories of 'high-significance' and 'no-significance'?
- What happens if there is disagreement within an Indigenous community about *when* cultural heritage mapping data and information is to be provided to third parties?

**Recommendation 6: Maximise access to cultural heritage data insofar as cultural sensitivities allow, including for proponents and local government.**

## First Nations Advisory Body

Extent Heritage supports a 'First Nations advisory body' in principle, because the current legislation lacks an effective mechanism for resolving disputes.

However, Extent Heritage is concerned that this may place Indigenous people who may wish to be part of the body in a 'double bind'. It would effectively be inviting Indigenous people to speak for another group's country, which runs against traditional decision making processes, and may create tensions between communities and individuals.

Considerable care will need to be taken in devising this body, with the involvement of a wide range of Indigenous stakeholders. Further, it would be necessary to retain both government and judicial oversight.

Future iterations of the Options Paper would benefit from addressing the following questions:

- How would members of the First Nations Advisory Body be selected? Who would oversee the body's activities? What would be the role of the government and judiciary relative to the body? How long would members be appointed for? What rules would be in place to manage actual, potential or perceived conflicts of interest?

It is the position of Extent Heritage that the Queensland Indigenous heritage management system requires more government oversight, not less.

**Recommendation 7: Continue to refine the form and function of the First Nations advisory body while exploring the best ways of integrating it with the role of government and the courts.**

### Reporting and Compliance

In principle, Extent Heritage supports the reporting and compliance requirements described in the Options Paper. It agrees with the proposal to create templates to assist with meeting such requirements. This may make the process less adversarial and law-bound.

The proposal might be expanded to include templates for CHMPs, and due diligence assessments.

Those templates should focus on *heritage management* compliance rather than a form of *contractual* compliance.

Future legislation in Queensland would benefit from detailed guidelines concerning the form and content of CHMPs and ‘other agreements’. There is room for a more active governmental role in this process.

**Recommendation 8: Provide absolute clarity on the required reporting and compliance requirements for Aboriginal cultural heritage management, while seeking to remove those things that presently create an adversarial environment in agreement making.**

### Who speaks for country?

In principle, Extent Heritage supports Option 1 i.e. reframe the definitions of ‘Aboriginal party’ and ‘Torres Strait Islander party’.

However, Indigenous parties in Queensland have grown familiar with the present system and to change it without an appropriate transition period has the potential to create serious disputes between groups and individuals.

If a ‘Registered Aboriginal Party’ (RAP) system is to be introduced, the grounds for registering as a RAP must be clearly prescribed, and dispute resolution processes put in place.

**Recommendation 9: In reframing the definitions of ‘Aboriginal party’ and ‘Torres Strait Islander party’, consider the introduction of a new system based on the Registered Aboriginal Party (RAP) model for areas where there is no registered native title holder or native title claimant. The process for identifying RAPs must be prescriptive, including clear processes for resolving disputes.**

### Qualifications

The present legislative frameworks have resulted in adversarial interactions between Indigenous parties and proponents. This has resulted in the costly involvement of lawyers and

the exclusion of qualified heritage practitioners from the identification, assessment and management of heritage places.

Future legislation should be supported by guidelines that prescribe the necessary qualifications and experience that heritage practitioners should have obtained. Ethical standards should be imposed. These matters should form the grounds for both Indigenous parties and proponents to object to the involvement of technical advisers.

**Recommendation 10: Clearly define the skills, experience and qualifications of heritage practitioners to be engaged in Indigenous cultural heritage. Ethical standards should be introduced. Grounds should be established for both Indigenous parties and proponents to object to the involvement of practitioners who fail to meet these standards.**

Thank you again for your consideration of the views of Extent Heritage in this important issue.

Yours sincerely,

**Dr Andrew Sneddon**



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