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Cultural Heritage Acts Review
Department of Seniors, Disability Services and Aboriginal and Torres Strait
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To whom it may concern,

**QUEENSLAND GOVERNMENT'S OPTIONS PAPER - FINALISING THE REVIEW OF QUEENSLAND'S
CULTURAL HERITAGE ACTS, DECEMBER 2021**

1. This letter is a submission made on behalf of the Bulganunna Aboriginal Corporation ICN 7761 and Barada Barna Aboriginal Corporation ICN 8343 to the *Queensland Government's Options paper - Finalising the review of Queensland's Cultural Heritage Acts, December 2021*.
2. Bulganunna Aboriginal Corporation holds the Jangga People's native title on trust in accordance with the determination in *McLennan on behalf of the Jangga People v State of Queensland* [2013] FCA 795.
3. Barada Barna Aboriginal Corporation holds the Barada Barna People native title on trust in accordance with the determination in *Budby on behalf of the Barada Barna People v State of Queensland (No 6)* [2016] FCA 1267 and *Budby on behalf of the Barada Barna People v State of Queensland (No 7)* [2016] FCA 1271.
4. Dillon Bowers Lawyers acts for:
 - (a) Barada Barna Aboriginal Corporation;
 - (b) Bulganunna Aboriginal Corporation;
 - (c) the Jangga Applicant in relation to both:
 - (i) Jangga People #2 QUD387/2018; and
 - (ii) Jangga People #3 QUD296/2020in relation to matters regarding the operation of the *Aboriginal Cultural Heritage Act 2003* (the **ACHA**).

5. Barada Barna Aboriginal Corporation and Bulganunna Aboriginal Corporation are each Aboriginal parties for the whole area included within the outer boundaries of the areas in relation to which their respective applications resulted in the determination in their favour were made: ACHA ss 34(1)(c), 35(1) and 35(5).
6. The Jangga Applicant is the Aboriginal party for:
 - (a) for the whole area included within the outer boundaries of the area in relation to which the Jangga People #2 and Jangga People #3 Part B applications were made: ACHA ss 34(1)(c), 35(1) and 35(3); and
 - (b) for the whole area included within the outer boundaries of the area in relation to which the Jangga People #3 application Part A was made and has now been dismissed: ACHA ss 34(1)(b)(i)(A), 35(1) and 35(3)].
7. The areas for which each of Barada Barna Aboriginal Corporation, Bulganunna Aboriginal Corporation and the Jangga Applicant are Aboriginal parties are subject to ongoing, significant developments, including in relation to pastoral and mineral development activities.
8. While each of Barada Barna Aboriginal Corporation, Bulganunna Aboriginal Corporation and the Jangga Applicant consider the ACHA's current:
 - (a) focus on agreement making between Aboriginal parties and development proponents; and
 - (b) recognition of the rights of First Nations peoples to protect and manage their Aboriginal cultural heritage valuesis appropriate, there are many opportunities for the ACHA to strengthen the effective protection and management of Aboriginal cultural heritage values.
9. Each of Barada Barna Aboriginal Corporation, Bulganunna Aboriginal Corporation and the Jangga Applicant consider the Options Paper raises a number of important issues in relation to the effective protection and management of Aboriginal and Torres Strait Islanders' cultural heritage values.

PROVIDING OPPORTUNITIES TO IMPROVE CULTURAL HERITAGE PROTECTION.

10. each of Barada Barna Aboriginal Corporation, Bulganunna Aboriginal Corporation and the Jangga Applicant considers there is a need to improve cultural heritage protection under the ACHA. They:
 - (a) consider improvements should be made to ensure early consultation between land users and Aboriginal parties and is concerned that the ACHA's current self-assessment framework has resulted in many land use activities proceeding without any such consultation;
 - (b) support greater oversight, monitoring and report on compliance, including active monitoring of recorded cultural heritage;
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- (c) consider compliance officers should be introduced to audit compliance by land users, particularly in relation to self-assessment, and issue fines where appropriate;
 - (d) support greater investment and presence by government in preventative compliance activities;
 - (e) support process to facilitate more effective prosecution of offences committed under the ACHA as well as stricter penalties for non-compliance
 - (f) agree that duty of care obligations should be integrated into planning legislation and government policy;
 - (g) would support additional Aboriginal cultural heritage preventative measures;
 - (h) strongly agree that the ACHA should afford greater protection for non-tangible Aboriginal cultural heritage values.
11. In relation to 10(h), each of Barada Barna Aboriginal Corporation, Bulganunna Aboriginal Corporation and the Jangga Applicant note the explicit reference to intangible cultural heritage in the *Aboriginal Heritage Act 2006* (Vic) and consider inclusion of a similar provision into the ACHA should be made.
12. Each of Barada Barna Aboriginal Corporation, Bulganunna Aboriginal Corporation and the Jangga Applicant strongly agree that to achieve best practice in relation to protection of Aboriginal cultural heritage:
- (a) Aboriginal parties need to be adequately empowered and resourced to undertake necessary compliance and enforcement functions to protect their Aboriginal cultural heritage values;
 - (b) proponents should not be permitted to interfere with Aboriginal cultural heritage values without the relevant Aboriginal party's authorisation; and
 - (c) such protections be extended to both physical and intangible Aboriginal cultural heritage values.

Proposal 1 - Replace the current Duty of Care Guidelines with a new framework that requires greater engagement, consultation and agreement making with the Aboriginal party or Torres Strait Islander party to protect cultural heritage.

13. Each of Barada Barna Aboriginal Corporation, Bulganunna Aboriginal Corporation and the Jangga Applicant support Proposal 1 and makes the following comments in relation to it:
14. Inclusion of references to intangible significance into the definition of **high-risk areas** is strongly supported. An expansive definition, consistent with the proposed definition, is supported. Such an approach is also considered best practice as would adopt a precautionary approach that favours consultation over self-assessment.
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15. Early mapping of **high-risk areas** is supported, however, as there is a number of reasons why Aboriginal parties may not wish to have their Aboriginal cultural heritage values mapped (e.g. for protection from vandalism or deliberate destruction), identification of high-risk areas should not require prior mapping that identifies the location of the Aboriginal cultural heritage at high-risk with any specificity.
16. Significant resources would likely be required to be provided by the Queensland Government in order to complete all mapping required to identify all **high-risk areas**.
17. The current Duty of Care Guidelines definition of Category 4 activities is deficient. In each of Barada Barna Aboriginal Corporation's, Bulganunna Aboriginal Corporation's and the Jangga Applicant's experience, areas that have previously been subject to significant ground disturbance can often retain physical and/or intangible cultural heritage values. Whilst the modification of the Category 4 definition to refer to "the ground below the level of disturbance that currently exists" is welcome, the proposal to not require consultation with Aboriginal parties in relation to **prescribed activities** (other than in limited circumstances), somewhat repeats this deficiency.
18. Each of Barada Barna Aboriginal Corporation, Bulganunna Aboriginal Corporation and the Jangga Applicant consider that the proposed definition of prescribed activities will result in development activities proceeding without consultation in circumstances where impacts on Aboriginal cultural heritage values may nevertheless occur. This would not constitute best practice.
19. Voiding the requirement for consultation in relation to **excluded activities** in high-risk areas is not supported. Maintenance of existing infrastructure has the potential to impact Aboriginal cultural heritage values and should take place in accordance with arrangements agreed to by Aboriginal parties.
20. The development of **consultation protocols** are supported. Any such protocols should be prescriptive and reference to the many, useful existing resources may assist. The right of Aboriginal parties to define how they wish to be consulted and requiring proponents to fit into their existing governance structures and processes is considered integral to promoting and achieving self-determination.
21. The establishment of a **First Nations advisory group** to guide development of assessment frameworks and consultation protocols is supported.

Proposal 2 - Integrate cultural heritage protection and mapping into land planning to enable identification of cultural heritage at an early stage and consideration of its protection.

22. This proposal is supported. Such an approach is also considered best practice as would adopt a precautionary approach that favours early consideration of Aboriginal cultural heritage values in development activities.
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Proposal 3 - Amend the Cultural Heritage Acts to expressly recognise intangible elements of cultural heritage.

23. For the reasons set out above, this proposal is strongly supported.

Proposal 4 - Provide a mechanism to resolve and deal with issues arising under the Cultural Heritage Acts.

24. Extension of existing **mediation** functions set out in ACHA s 106, to include mediation in relation to:

- (a) the establishment of “s 23 other agreements”; and
 - (b) the implementation of cultural heritage agreements
- is supported.

25. The establishment of a **First Nations advisory group** as one of the possible bodies who could appoint mediators to assist resolve disputes guide development of assessment frameworks and consultation protocols is also supported.

Proposal 5 - Require mandatory reporting of compliance to capture data and support auditing of the system.

26. **Mandated reporting** of agreements and consultations should be at the discretion of Aboriginal parties. There may be valid cultural reasons why an Aboriginal party does not wish to report an agreement or consultation. However, if such reporting is supported by the Aboriginal party, proponents should be required to comply.

Proposal 6 - Provide for greater capacity to monitor and enforce compliance.

27. Each of Barada Barna Aboriginal Corporation’s, Bulganunna Aboriginal Corporation’s and the Jangga Applicant’s experience is that the current legislation does not afford appropriate opportunities for proponents to compensate Aboriginal parties for actions that interfere with Aboriginal cultural heritage values in ways that have not been agreed. Measures that would improve the opportunities for **Aboriginal parties to be compensated for harm to their Aboriginal cultural heritage values** are supported.

28. Introduction of new types of orders that incorporate restorative justice principles allowing for rehabilitative and educational measures in parallel with pecuniary ones is supported.

REFRAMING THE DEFINITIONS OF ‘ABORIGINAL PARTY’

29. The linkages between the ACHA’s definition of Aboriginal party and the National Native Title Tribunal’s registration test are supported. Unlike other jurisdictions, Queensland’s model recognises that those persons who have bona fide claims to native title rights and interests are also likely to hold rights and interests in relation to the Aboriginal cultural heritage values within their claim areas.

30. The New South Wales “Registered Aboriginal Parties” approach is strongly opposed as it does not prioritise the rights of **First Nations** in protection of Aboriginal cultural heritage values.
31. The imprecision in ACHA s 23(3)(a)(iii) that, on its face, permits proponents to choose which Aboriginal party to consult with and only requires them to establish an agreement with one such party when there is more than one with equal status under the ACHA is a deficiency in the current ACHA.

Proposal 6 - Reframe the definitions of ‘Aboriginal party’ and ‘Torres Strait Islander party’ so that people who have a connection to an area under Aboriginal tradition or Ailan Kastom have an opportunity to be involved in cultural heritage management and protection.

32. Neither option is supported. Despite its shortcomings, the “last claim standing” provisions of the ACHA are supported. Queensland’s existing model recognises that those persons who have been assessed to have bona fide claims to native title rights and interests (even in circumstance where such claims have failed) are also likely to hold rights and interests in relation to the Aboriginal cultural heritage values within their claim areas.
33. Amendment to the ACHA to require **consultation with all Aboriginal parties** for areas where more than one is recognised is supported.

PROMOTING LEADERSHIP BY FIRST NATIONS PEOPLES IN CULTURAL HERITAGE MANAGEMENT AND DECISION-MAKING

34. Bringing administrative, regulatory and decision-making structures related to Aboriginal cultural heritage are under the practical control of First Nations is supported.

Proposal 1 - Establish a First Nations-led entity with responsibilities for managing and protecting cultural heritage in Queensland. The entity could work with existing and future local Aboriginal and Torres Strait Islander groups who manage cultural heritage matters within their respective areas.

35. The proposal to establish **separate First Nations advisory groups for Aboriginal cultural heritage and Torres Strait Islander heritage** is supported, and recognised as both culturally appropriate and an important marker of self-determination and protection of cultural rights. Additionally, the establishment of separate entities would acknowledge the separate rights and interests of the two groups of First Nations in Queensland.
 36. The bodies should be independent from government control, but also have clearly defined statutory powers.
 37. Proposals to conflate the roles of existing Land Councils or Native Title Representative Bodies would not be supported unless endorsed by the Aboriginal parties or Torres Strait Islander parties for the area.
 38. **Broad functions** for the bodies, bring the administrative, regulatory and decision-making structures related to Aboriginal cultural heritage are under the practical control of First Nations is supported.
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39. Assessment of whether to **approve Cultural Heritage Management Plans** should only apply in circumstances where the parties to a negotiation have failed to reach agreement. There should be no role for the bodies to refuse approval of a CHMP in circumstances where the parties have negotiated in good faith and reached agreement.
40. The proposal that the groups could assist parties in dispute by, say, appointing mediators to assist resolve disputes and guide development of assessment frameworks and consultation protocols is also supported.

Proposal 2 - The First Nations independent decision-making entity, in partnership with Aboriginal and Torres Strait Islander peoples, explores the most culturally appropriate approaches for recognising historical connection to an area for the purposes of cultural heritage management.

41. Maintaining existing linkages between the ACHA's definition of Aboriginal party and the National Native Title Tribunal's registration test are supported. Unlike other jurisdictions, Queensland's model recognises that those persons who have bona fide claims to native title rights and interests are also likely to hold rights and interests in relation to the Aboriginal cultural heritage values within their claim areas.
42. Approving Aboriginal party status for persons with historical connection should be a last resort, when all efforts to identify the First Nations people for a particular area have been exhausted.
43. Please do not hesitate to contact me to discuss further if required.

Yours faithfully

DILLON BOWERS LAWYERS



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