

25th March 2022

Cultural Heritage Acts Review

Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships

Sent via email only: CHA_Review@dssdsatsip.qld.gov.au

Dear Sir/Madam,

Submission to the review of the *Aboriginal Cultural Heritage Act 2003 (Qld)* and *Torres Strait Islander Cultural Heritage Act 2003 (Qld)* (the Cultural Heritage Acts)

Thank you for the opportunity to provide a submission on the Options Paper: Finalising the review of Queensland's Cultural Heritage Acts (**Options Paper**).

I am the Project Manager at Dawul Wuru Aboriginal Corporation and currently manage the Yirrganydji Land and Sea Ranger Program that operates along the coast between Cairns and Port Douglas in North Queensland. I am writing on the behalf of our program, Corporation, and as a Yirrganydji (Djabugay) Traditional owner member and draw on my cultural knowledge and relationship, and professional experience in cultural heritage, archaeological work, and land management in the Cairns to Port Douglas landscape.

Through our experience with the current cultural heritage process, we believe serious reform of the Cultural Heritage Acts in Queensland is needed so that cultural heritage can be better protected, and so that First Nations are better consulted on any activities that may impact their cultural heritage.

The Queensland Government has a duty to ensure that the Cultural Heritage Acts are reformed in a way that is consistent with the following:

- [The United Nations Declaration on the Rights of Indigenous Peoples](#), in particular the rights to self-determination and free, prior and informed consent
- The recommendations made in [A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge](#)
- The Best Practice Standards in Indigenous Cultural Heritage Management and Legislation set out in [Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia](#)
- The [Human Rights Act 2019 \(Qld\)](#), in particular section 28 which protects the right of First Nations to 'enjoy, maintain, control, protect and develop their identity and cultural heritage'
- The [letter](#) from a group of First Nations People to the UN Committee on the Elimination of Racial Discrimination (CERD) dated 30 August 2021, and the [letter](#) in response dated 3 December 2021, addressing allegations that the Western Australian Aboriginal Cultural Heritage Bill 2020, now the *Aboriginal Cultural Heritage Act 2021 (WA)*, does not incorporate the principle of free, prior and informed consent
- Principles and standards in the [BURRA Charter](#)

- The outcome and precedence of the [Timber Creek decision](#) and compensation
- Principles and standards of the [International Convention on Biological Diversity](#) including Articles 8 and 10 and Nagoya Protocol.

1. Experience with the Cultural Heritage Acts

We draw on our experience in cultural heritage through the following:

- Training in Cultural heritage including, but not limited to, Aboriginal Cultural Heritage Masterclass Training through the Australian Research Council Centre of Excellence for Biodiversity and Heritage delivered by Professor Sean Ulm and Dr Luke Godwin;
- Conducting Aboriginal cultural heritage surveys (pre-construction) and cultural heritage monitoring (during construction) for various types of projects including for Department of Transport and Main Roads; Department of Tourism, Innovation and Sport; Department of Environment and Science; Ports North; Cairns Regional Council; Ergon Energy; and Cairns Airport to name a few;
- Worked with a number of archaeologists, anthropologists, and cultural heritage practitioners;
- Involvement in workshops and drafting of Aboriginal Cultural Heritage Management Agreements; Aboriginal Cultural Heritage Management Plans; and documents such as Due Diligence Assessments/Preliminary Scoping Studies, Unexpected Finds Procedure, Cultural Heritage Guidelines/Protocols, and etc.;
- Development and implementation of Traditional owner community-based Aboriginal Cultural Heritage Management Plan (for whole of Traditional owner estate), cultural awareness, training and induction processes, and monitoring survey form to manage cultural heritage more holistically, effectively, efficiently, appropriately; and
- Representation and engagement in policy and high level advisory committees and events.

Through our experience, we have encountered a number of issues with the Cultural Heritage process and believe that significant improvements are needed to protect, manage and preserve our cultural heritage.

Issues and Challenges

Some of the issues and challenges are:

- a) ***Mandatory Business Checks*** ~ Some Corporations, who are registered Aboriginal cultural heritage bodies, do not have the capacity, capability or administrative systems in place to undertake cultural heritage monitoring services. Some continue to control and operate cultural heritage services for their respective Traditional owner regardless of their capacity and are putting their organisations and staff at risk. There needs to be duty of care on government agencies (and proponent) to ensure that the Cultural Heritage Party conducting cultural heritage services needs to be 'business ready' and compliant.
- b) ***Cultural Heritage Monitor Award*** ~ There is no formal award for cultural heritage monitoring. Although, this allows Cultural Heritage parties to negotiate and determine their own rates and

fees for cultural heritage, it would good to include an Award as a guide for cultural heritage monitoring services.

- c) **Inconsistent rate of payment** ~ Inconsistent rate of payment across different organisations, government and proponents;
- d) **Defer to Duty of Care guidelines** ~ Proponents deferring to the Duty of Care Guidelines to avoid engagement with Traditional owners;
- e) **Genuine consultation and engagement** ~ Proponents not genuinely consulting and engaging Traditional owners to ensure Free, Prior and Informed Consent;
- f) **Voluntary in-kind services** ~ Proponents expectation that Traditional owners to undertake meetings, cultural heritage surveys/monitoring, and deliver cultural awareness/induction training on a voluntary basis;
- g) **Lack of notice for cultural heritage monitoring & Finance and payment of cultural heritage services** ~ on one hand, there are many times where Cultural Heritage parties are informed about upcoming cultural heritage works at short notice with the expectation that there are Cultural heritage monitors on stand-by and ready to go. On the other hand, proponents are taking up to 30 days to process payments for cultural heritage monitors. In addition, some proponents do not allow individual cultural heritage monitors to directly invoice the proponent.
- h) **Construction taking place before cultural heritage monitoring** ~ Sometimes proponents commence construction prior to Cultural heritage surveys taking place. Therefore, impact to cultural heritage has already occurred.
- i) **Expand the definition of cultural heritage** ~ Cultural heritage is not just tangible heritage and objects, but includes bio-cultural values such as culturally significant or ‘totemic’ plants and animals and also critical habitat to a particular species of cultural significance;
- j) **Stronger protection needed for unregistered cultural heritage sites** ~ Many Traditional owners are hesitant to register cultural heritage sites due to the sensitive and confidential nature of sites and the fear of misuse and threat to those sites. Therefore, creates the perception of no cultural heritage sites and/or leaving sites unprotected and vulnerable to impact. “Just because there isn’t any recorded sites, does not mean they are not there” and “Just because there isn’t any native title claim or determination, doesn’t mean cultural heritage isn’t there”.
- k) **Cultural heritage can be anywhere** ~ There is a perception that infrastructure, roads, buildings, sugar cane fields and etc that were developed prior to the Aboriginal Cultural Heritage Act no longer have Aboriginal cultural heritage. There are occasions where new roads have been built on sugar cane fields (or over existing sites that had infrastructure) and have discovered Aboriginal Cultural Heritage and human remains. Unfortunately, Traditional owners were not engaged due to the deferring to duty of care guidelines and still impacting cultural heritage. Therefore, since no cultural heritage surveys had been conducted for existing developed or disturbed sites from over 50 years ago, there is still a possibility cultural heritage exists on the site. Unless verified by Traditional owners;
- l) **Cultural heritage buffers to broader landscape features** ~ Proponents require pin-point location of cultural heritage sites for development projects. But sometimes cultural heritage can apply to a whole landscape feature, which cannot be removed or relocated (e.g. a Mountain range, significant waterhole/spring, patch of forest or swamp, etc.);
- m) **Competent cultural heritage monitoring** ~ There are many Traditional owners undertaking cultural heritage surveys without any formal cultural heritage training or without cultural knowledge. This puts cultural heritage at risk and duty of care.

- n) **Multiple CHMAs with the same proponent for different areas within onw Traditional owner group's country** ~ There is a burden and time consuming to develop multiple Cultural Heritage Management Agreements (and Plans) with the same proponent for different areas on country.
- o) **Enforcement power and regulation** ~ Very little to no regulation and enforcement to proponents impacting on cultural heritage values. This includes the power and extent of the Aboriginal Cultural Heritage Act in the State Marine Park environment
- p) **Accredited training** ~ Very little registered training organisations (RTOs) delivering (and being resourced to deliver) cultural heritage training in our local region.
- q) **Other benefits** ~ Very limited benefits in the exchange of minor to intermediate impact to Aboriginal cultural heritage including compensation and offsets.
- r) **Intellectual Property** ~ Very little to no protection of Traditional owner intellectual property of cultural heritage and equitable benefits.

2. Opportunities to improve cultural heritage protection

The Options Paper sets out the following proposals to improve cultural heritage protection:

Proposal 1: Replace the current Duty of Care Guidelines with a Cultural Heritage Assessment Framework with greater engagement, consultation, agreement making and dispute resolution.

Proposal 2: Integrate the mapping of high-risk cultural heritage areas into planning processes, so that risks to cultural heritage are identified and addressed early in project planning.

Proposal 3: Amend the definitions in the Cultural Heritage Acts so that intangible cultural heritage, such as pathways or storylines, can also be protected.

Proposal 4: Provide a mechanism to resolve cultural heritage disputes, such as a First Nations body or advisory group, or increased dispute resolution powers and jurisdiction in the Land Court.

Proposal 5: Require land users to document and register all agreements and consultation under the Cultural Heritage Acts.

Proposal 6: Strengthen monitoring and enforcement capacity such as through rehabilitation and education orders, greater powers for authorised officers, or increased numbers of officers and specialised training.

Suggestions

We agree with the above proposals and wish to provide the following suggestions and recommendations (in reference to the list of issues and challenges listed above):

- (a) **“Single overarching cultural heritage management plans (CHMP) and agreements (CHMA)”** – In the event that working with the same proponent/landholder for multiple projects, instead of developing new CHMAs and CHMPs for each individual project site, there should be the ability to have a ‘Heads of Agreement’ with the proponent and to list all cultural heritage requirements as part of that agreement. For example, if we have two (2) or more different road projects with Department of Transport and Main Roads, it would be

easier to have one (1) CHMA and CHMP to cover both projects instead of separate. If any cultural heritage is found on Department of Transport and Main Road lands, these sites should be managed in the long-term and not just within the timeframe of the road project (and CHMA). This means there will be longer term agreements, covering multiple cultural heritage sites over country, and to ensure consistent standards of cultural heritage management across country as well.

(b) “Replacing duty of care guidelines with a Cultural Assessment Framework” – Engagement and consultation with Traditional owners should be mandatory/compulsory and recommended as the highest standard. There needs to be a sufficient timeframe for notification, consultation and engagement to ensure Free, Prior and Informed Consent. Traditional owners can then decide whether there is or isn’t any cultural heritage present at a proposed activity site, and whether cultural heritage inspections, monitoring, and/or management measures need to be conducted as part of an activity. In some cases and depending on the activity, Traditional owners may decide that no cultural heritage inspections or monitoring need to take place. Templates or generalised examples of CHMAs and CHMPs should be available as an Attachment to the Act or Regulations?

(c) “Cultural heritage definitions to protect broader cultural heritage values” - Cultural heritage definition to include broader cultural values such as:

- Intangible and connected cultural values such as storylines (e.g. that connect and associate with multiple locations/sites)
- bio-cultural values (e.g. culturally significant habitat and flora and fauna species), and resource/human use values (e.g. hunting, gathering and collection areas)
- Ongoing Traditional owner connection, interaction and use of the site including for hunting, gathering, collection, cultural or ceremonial use.

(d) “Protection of maritime and underwater cultural heritage” – there needs to be a framework, principles and standards, and clarity on the protection and management of maritime and underwater cultural heritage.

(e) “Changes to the Aboriginal Cultural Heritage body status” – there needs to be different levels of Aboriginal Cultural Heritage Body Status, which has different levels of function and ability such as:

i. Application to become an Aboriginal Cultural Heritage Body and mandatory accreditation training – Department needs to check the capacity, capability and competency of the Organisation who is applying to become an Aboriginal Cultural Heritage Body. Organisations that are unable demonstrate evidence of insurances, payroll systems, and/or administration should not be authorised to conduct cultural heritage monitoring and be restricted to a ‘consultative body’ instead. Organisations should be mandated to complete ‘Accreditation Training’ to ensure that the organisation is fully aware of the expectations and functions of a Cultural Heritage body including work health and safety and insurances in place, having correct arrangements

for contracting and employment of monitors, and criteria/requirements of cultural heritage monitors.

- ii. Level 1 (Consultative)** – this is for organisations or entities that do not have the capacity, capability or administration to operate cultural heritage services. These organisations should be restricted to a “consultative” body. Cultural heritage monitors to be undertaken through an alternative auspice arrangement? If organisations wish to advance to Level 2 Body Status, they would be required to complete ‘Level 2 – Aboriginal Cultural Heritage Body Accreditation Training’.
 - iii. Level 2 (Active)** – organisations who have completed the Level 2 Accreditation Training and can demonstrate to the Department that they are business ready (e.g. governance, administration, insurances, payroll, etc.) and have capacity and capability to operate cultural heritage services. These organisations are then able to employ and contract cultural heritage monitors.
 - iv. Level 3 (Advanced)** – organisations who completed level 3 accreditation training and wish to appoint compliance officers with powers under the Cultural Heritage Act. Other requirements is the ability to establish a Working Group/Committee to manage cultural heritage on country.
 - v. “Resources for Aboriginal Cultural heritage bodies”** – financial support to Aboriginal Cultural heritage bodies including but not limited to:

 - Employment of administration staff to respond to cultural heritage matters, facilitate consultation with proponents, and deliver cultural education and awareness activities;
 - Engage technical advice and services for cultural heritage management, protection and planning;
 - Essential training such as Construction Induction White Cards; and/or
 - Acquiring resources such as personal protective equipment.
- (f) “Transferability and delegation of Aboriginal Cultural Heritage body status”** – there should be the ability to transfer or delegate Aboriginal Cultural Heritage body status from one entity to another within the Traditional owner group. This is in the event an Aboriginal Cultural Heritage body is unable to perform or fulfil its function and/or if the Aboriginal or Torres Strait Islander party decides to re-direct or conduct cultural heritage activities from another entity.
- (g) “Cultural Heritage Monitors Award”** – there needs to be an Award to guide remuneration, procurement, contracting and employment of Cultural Heritage Monitors. This award to apply across all sectors (e.g. including Australian, State, Local government, private, and/or industry). The award to address criteria of cultural heritage monitors such as: fitness to work, working age requirements, drug and alcohol checks, criminal checks, promotion of equality and equity (where possible), cultural heritage monitors’ connection to country and level of cultural knowledge, and etc.

- (h) **“Training”** – Cultural heritage monitors to have some form of training or recognised cultural knowledge by their respective Traditional owner group. Therefore, developing an accredited Training certificate and/or supporting and subsidising registered training organisations to provide/deliver training for cultural heritage monitors.
- (i) **“Powers and regulation”** – The Department to employ authorised compliance officers to regulate and enforce the Cultural Heritage Act. This includes training and delegation of powers to Indigenous community based rangers (ranger positions that are funded by the State through the Queensland Indigenous Land and Sea Ranger Program; and/or Commonwealth through Working On Country/Indigenous Protected Area/Indigenous Advancement Strategy). Similar delegation of authority/powers has already occurred under the Nature Conservation Act (Qld) and Great Barrier Reef Marine Park Act (Cth).
- (j) **“Other social and economic benefits and Offsets to Traditional owners”** – Proponents to consider impacts to cultural heritage and providing other benefits or offsets and/or offsets to Traditional owners in the form of training, donating of plant and equipment, resources, employment, procurement of Traditional owners for environmental rehabilitation, maintenance, communications and interpretative materials (such as incorporating art and design on signs to educate about cultural significance of an area). These should be considered in the scope of cultural heritage management.
- (k) **“Amendments to the Act”** - the Act needs to align with, acknowledge, and incorporate the standards and outcomes of:
- The Timber Creek decision and framework or method to calculating or valuing the loss of cultural heritage;
 - Nagoya Protocol where cultural knowledge and intellectual property is protected and equitable benefits to Traditional owners for the use of their knowledge;
 - Archaeologists and technical advisors who are conducting cultural heritage research towards their degree must acknowledge Traditional owners as co-authors and seeking permission to share their cultural heritage information to public and academic community.

3. Reframing the definitions of Aboriginal party and Torres Strait Islander Party (removal of ‘last claim standing’ provision)

The Options Paper sets out the following options to reframe the definitions of Aboriginal and Torres Strait Islander Party:

Option 1: In areas where there is no registered native title holder or claimant, a previously registered native title claimant is not considered a native title party and the test of knowledge and connection and interest to an area or object under s 35(7) is removed. Instead, any First Nations person can request recognition as a party if they claim to have a connection to the area under Aboriginal tradition or Ailan Kastom, and a First Nations body is established to review applications for party status.

Option 2: Where the Aboriginal or Torres Strait Islander party is a previously registered native title claimant subject to a determination that native title doesn't exist, a previously registered native title claimant subject to a negative determination is not considered a native title party and s 35(7) still applies to determine who the party is by reference to the person's knowledge, traditional/custom responsibilities or being a member of a recognised family or clan group for an area or object in the area.

Our Interpretation

Our interpretation and views on the above options are as follows:

- (a) For areas subject to a negative determination (but the Aboriginal or Torres Strait Islander party is still recognised as having connection and/or being Traditional owners of the area of a proposed activity site), they should still be recognised as an Aboriginal Cultural heritage Party, especially if they have and can demonstrate recognised connection, authority, and knowledge to the area.
- (b) For areas that are not subject to a registered native title claim or determination, there should be a process for an Aboriginal or Torres Strait Islander Party (or Parties) to submit an application and demonstrate connection, knowledge, and recognised authority to the area of a proposed activity. Criteria for the application process would need to be developed to safeguard and ensure the appropriate Aboriginal or Torres Strait Islander Party (or Parties) are recognised engaged as Cultural Heritage parties.
- (c) A First Nations-led entity would be crucial for the assessment, decision making and advice on applications.

4. Promoting leadership by First Nations Peoples

The Options Paper sets out the following proposals to promote leadership by First Nations Peoples in cultural heritage management and protection:

Proposal 1: Establish a First Nations-led entity responsible for managing and protecting cultural heritage in Queensland. The entity could work with existing or future local Aboriginal and Torres Strait Islander groups who manage cultural heritage, and could provide dispute resolution support, assistance and advice for managing and protecting cultural heritage in Qld.

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

Our View

We agree that there needs to be a First Nations-led entity for Aboriginal Cultural Heritage across Queensland. It is important that the Entity to have power and authority over all Queensland Department Portfolios to ensure Aboriginal Cultural Heritage is protected across Queensland Government. Therefore, the Entity to have direct contact and influence with the Premier and Cabinet. The Entity can assist and undertake duties as outlined in proposal 1 and 2 including dispute resolution support, assessment of cultural heritage connection, and working with Aboriginal and Torres Strait Islander groups to manage cultural heritage.

Summary

Thank you for the opportunity to make submissions on the review of the Cultural Heritage Acts. We look forward to further consulting with the Queensland Government on how the Cultural Heritage Acts can be reformed to better ensure the protection of cultural heritage and to provide for the self-determination and free, prior and informed consent of First Nations.

Yours sincerely,

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