

Cultural Heritage Review Team,  
Dept of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships.  
1 William Street  
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**Cape York Land Council (CYLC) submission to proposed changes to the laws for recognising, protecting, and conserving Aboriginal and Torres Strait Islander cultural heritage and the review of the *Aboriginal Cultural Heritage Act 2003***

CYLC is a registered native title representative body. Its role is to advocate for and empower Cape York Aboriginal people to continue to establish and manage their rights and interests in the land and sea to produce social, cultural, and economic benefits.

We support the Queensland Government's initiative to improve the protection of Aboriginal cultural heritage through increased consultation with Aboriginal and Torres Strait Islander people, recognising intangible cultural heritage, and strengthening compliance mechanisms. We applaud proposals that increase the role of Aboriginal and Torres Strait Islanders peoples in managing and protecting their cultural heritage.

While the proposed changes have high aspirations for the protection of cultural heritage we seek more detail about how these changes will be implemented.

CYLC highlights the following issues to be considered.

**1. A stronger alignment and consistency across all legislation and policy at a state and national level that puts cultural heritage protection of Aboriginal and Torres Strait Islander peoples first.**

CYLC stresses that at the current time when there is work being undertaken at the Federal level on improved protection of Indigenous Cultural Heritage there is a need to ensure alignment and consistency across legislation and policy at the state and national levels. The *Aboriginal Cultural Heritage Act 2003* (Qld) (the Act) needs to better align with other State and Federal legislation, including; *the Environmental Protection and Biodiversity Conservation Act 1999* (Cth), the *Mineral Resources Act 1989* (Qld) (MRA) and the *Native Title Act 1993* (Cth) (NTA), Queensland Planning Legislation and the Queensland Human Rights Act.

**2. Protection of cultural heritage is still bound to tangible items**

The protection of Aboriginal cultural heritage is still bound to tangible items such as artefacts and stone tools and does not address the very important but less tangible cultural heritage such as story places, dreaming sites, sacred sites, birthing places, and massacre sites.

### **3. Cultural Heritage Agreements**

Cultural Heritage Agreements are regularly used on Cape York and provide a strong foundation for the relationship between proponents, government agencies, mining companies and Indigenous groups. CYLC believes that on Cape York, cultural heritage agreements should be a prerequisite to the issuing of mining exploration permits and other activities that have the potential to impact cultural heritage, such as vegetation clearing.

### **4. Land Use Planning**

It is essential that there be a continuation of land use planning on Cape York to identify those areas that are of outstanding natural and cultural value which require broader landscape-scale protection and the development of a legislative scheme to ensure their protection through a Traditional Owner (TO) consent mechanisms.

### **5. Queensland Resource Industry Development Draft Plan**

In a recent response to the Queensland Resource Industry Development Plan Draft (QRIDPD), CYLC called on the QRIDPD to actively prevent the further erosion of traditional rights and culture. We believe the review of the *Aboriginal Cultural Heritage Act 2003* (Qld) should be finalised and prioritised first, to give further direction and guidance to the QRIDPD.

Stronger obligations should be imposed to ensure that comprehensive and enforceable cultural heritage agreements and recording processes are implemented at both the exploration and mining stages, and cultural heritage obligations must be enforceable and enforced by the State of Queensland.

### **6. A greater role for Aboriginal and Torres Strait Islander peoples in all cultural heritage matters.**

Engagement with Aboriginal and Torres Strait Islander peoples should be mandatory as the first step in all activities involving cultural heritage matters. This is of particular concern with mineral exploration permits. Cape York TOs are under increasing pressure from the mining sector, particularly with the growing national and international requirements for mineral sands and silica. CYLC believes the mining industry must negotiate with TOs and settle cultural heritage agreements before receiving exploration permits. The experience of CYLC has been that the Native Title Protection Conditions have significant deficiencies in relation to cultural heritage. The fundamental position in administering the protection conditions should be that all land on Cape York has cultural heritage significance and cultural heritage agreements must be reached before approvals are given for activities that may impact on cultural heritage - such as mining exploration permits.

CYLC supports the initiative of the First Nations Heritage Protection Alliance and Australian Government joint working group, to establish a national cultural heritage advisory body, made up of Aboriginal and Torres Strait Islander peoples to oversee cultural heritage

protection. It sees a similar role for the state in establishing an advisory body, working closely with its federal counterpart to resolve and deal with issues arising under the Cultural Heritage Acts.

#### **7. Aboriginal cultural heritage on pastoral leases and non-Indigenous land**

There must be stronger processes and protections given to Aboriginal cultural heritage on pastoral leases. Recent experiences on Cape York have seen extensive land clearing without consideration of the potential impacts on Aboriginal cultural heritage.

#### **8. Control of access to Aboriginal Land**

The government must speed up the development and implementation of mechanisms to enable Indigenous landholders to control access to their lands. Illegal access provides a real threat to Indigenous cultural heritage. Indigenous lands are increasingly being illegally accessed by hunters, fishers, tourists and others with few mechanisms for the practical control of access. The current trespass laws are inadequate to provide practical and enforceable solutions to illegal access.

Our specific responses to the proposals are:

#### **Proposal One - 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.**

CYLC supports a framework that requires greater engagement, consultation and agreement making with the Aboriginal party to protect cultural heritage. CYLC encourages the much greater use of Cultural Heritage Agreements. The proposed framework to replace the Duty of Care Guidelines (DCG) will require further obligations to be placed over the proponents. Section 23(3)(a)(v)<sup>1</sup> of the Act delegates obligations that should be considered under the Act to legislation subordinate to the MRA, namely the *Native Title Protection Conditions* (NTPCs). The delegation of Native Title and cultural heritage management to the MRA leaves the proposed amendments to the Act vulnerable to being sidestepped by the mining exploration and resource industry.

We propose that areas such as; areas with a registered native title claim or determination, freehold or leasehold land held by an Aboriginal corporation, and freehold land held granted under the *Aboriginal Land Act 1991* (Qld) should all be considered high-risk areas. We further propose that instruments such as the NTPCs should exist concurrently with the obligations of the new legislative framework rather than replacing a proponent's obligations under the Act.

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

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<sup>1</sup> (3) A person who carries out an activity is taken to have complied with the cultural heritage duty of care in relation to Aboriginal cultural heritage if—(a) the person is acting— (v) in compliance with native title protection conditions, but only if the cultural heritage is expressly or impliedly the subject of the conditions;

CYLC supports the greater integration of cultural heritage protection and mapping into land planning and has been an advocate of integration of cultural heritage protection into planning laws, local government and other planning schemes. CYLC also encourages broader scale planning on Cape York to identify and protect those areas of particular cultural and natural significance with Indigenous consent.

The cultural heritage register established under section 46 of the Act has been over-relied upon and under-managed. Judicial bodies, including the National Native Title Tribunal, have recognised its shortfalls when addressing matters of cultural heritage. Furthermore, we note that currently there are no further obligations in the State of Queensland for proponents to ensure this data is accurate, up to date, or consulted upon.

Mapping of cultural heritage is not a stagnate exercise that is undertaken once and is complete. Traditional knowledge is shared and passed on by various members of the Aboriginal party. The mapping of cultural heritage must be acknowledged as a dynamic practice. There must be greater Indigenous control of the cultural heritage register so that TOs are more confident of sharing information into the register.

**Proposal Three - Amend the Cultural Heritage Acts to expressly recognise intangible elements of cultural heritage.**

CYLC supports that an Aboriginal area or place may be sacred for intangible reasons. The recognition of intangible cultural beliefs is vital as it is these beliefs that make many areas on Cape York sacred to Aboriginal people.

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

CYLC supports the proposal of expanding the dispute resolution mechanisms made available under the Act for the Aboriginal party involved. Extension of the Land Court's jurisdiction into a tribunal / alternative dispute resolution (ADR) function would permit matters to be managed from within a single jurisdiction and permit the easier transition from ADR proceedings to judicial proceedings when required.

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

CYLC supports the State's acknowledgment that early engagement with the Aboriginal party is required. We note that the language in Proposal One is still vague and does not identify that a prescribed process will exist for proponents to ensure that ethical engagement with the Aboriginal party is undertaken. CYLC further recommends that a reporting and record-keeping obligation be inbuilt into the new framework. The proponent should also be accountable to the State and the Aboriginal party for its engagement. Safeguards must be implemented to ensure that proponents of projects cannot single out individuals to rubber stamp projects which affect the entire Aboriginal party.

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

Aboriginal cultural heritage is significantly bound to the land. For each instance a cultural heritage item/site/area is lost, it is lost permanently. We would seek that the Act provides for:

- an independent monitoring body;
- greater regulation and reporting requirements imposed upon proponents;
- significant financial penalties; and
- powers for the monitoring body to be able to issue stop orders if damage or destruction of Aboriginal cultural heritage is imminent.

The Cape York Land Council would be pleased to discuss this submission further.



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