

CHOORECHILLUM (NGADJON JII) RESPONSE TO THE QUEENSLAND CULTURAL HERITAGE ACTS REVIEW

This response is submitted by the Choorechillum (Ngadjon Jii PBC) Aboriginal Corporation RNTBC to the Options Paper issued in December 2021 by the Queensland Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships (DSDSATSIP).

In language, Jii means “people” so reference in this document to Ngadjon Jii refers to the Ngadjon people and relates to the Native Title Determination to Country located in Far North Queensland and based in the Malanda region.

Section 3:

The Ngadjon Jii are very concerned about the current situation in relation to the protection of Cultural Heritage on our Country.

At present under the Aboriginal Cultural Heritage Act 2003, the protection of Cultural Heritage is based on the *Duty of Care Guidelines* as included in the Act and failure to comply with these guidelines is not an offence.

As a result of this, land users and in particular Queensland Government Departments such as Queensland Parks and Wildlife Service (QPWS) do what they wish with our Country with no consultation or involvement with Ngadjon Jii at all.

By way of example, Commercial Agreements have been entered into by QPWS for periods of up to 15 years and allowing up to 250 tourists per week to come onto Country but there has been no consultation whatsoever. Future Action Notices (FANs) have been issued to the PBC and the PBC has responded to these FANs by way of objection. No response has ever been received and the appropriate accompanying invoices have never been paid.

Ngadjon Jii strongly believes that the current system of Guidelines is totally dysfunctional and provides Native Title Common Law Holders with absolutely no control over their Cultural Heritage.

The current system must be replaced by legally binding legislation so that the Common Law Holders (CLH) can protect their Cultural Heritage.

The Ngadjon Jii Country was originally heavily timbered rainforest and savannah woodlands. Most of the country has been extensively logged and much of the country cleared for grazing and agricultural purposes. Even the National Park areas have been extensively developed. Logged, mined and have had tourist facilities constructed. The Ngadjon Jii considers that the whole of their Country is a high-risk area and all activities undertaken thereon are prescribed activities.

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.

Questions:

1. Do you support this proposal and option? Why or why not?

Ngadjon Jii totally supports this proposal and option for reasons as outlined above.

2. Are there any improvements that could be made?

Ngadjon Jii believes that the definitions as specified on Page 13 of the Review need to be tightened.

We have described above how virtually all of our Country has been disturbed from original. As such, the whole of our Country is a “high-risk area” and all land use activities are “prescribed activities”.

We also believe that “excluded activities” should be absolutely minimal. In particular, all sub-divisions should be subject to a Cultural Heritage Study and a Cultural Heritage Management Plan and this plan should be enforceable on the acquirers of these sub-division lots.

When the legislation is enacted, the legislation must be retrospective and apply to all on-going agreements and land use activities. Existing Commercial Agreements must be suspended until Cultural Heritage Studies and Plans have been developed and compliance should be enforceable under sanctions.

3. Should consultation occur for all activities in high-risk areas so there is no excluded activity?

Ngadjon Jii adamantly agree with this proposal.

4. What are your thoughts on proactively mapping cultural heritage areas?

Ngadjon Jii support this proposal however, we have some concerns. This mapping **MUST** be undertaken in collaboration with Ngadjon Jii and such an extensive project will require considerable resources and take considerable time to complete. We also believe that there should be no holdup of the amended legislation such that the completion of this mapping causes the deferment of the commencement of the legislation.

5. What types of activities and areas should be included in the definitions for:

- **Prescribed activity?**
- **High-risk area?**
- **Excluded activity?**
- **Significant Aboriginal or Torres Strait area or object?**

For reasons outlined above, Ngadjon Jii firmly believe that all activities on our Country are “prescribed activities”.

Similarly, the whole of our Country is a “high-risk area”.

We also believe that there should be no “excluded activities”.

We believe that significant Aboriginal areas or objects must include tangible and intangible items primarily because, prior to settlement, Ngadjon Jii, and all other Aboriginal clans, had no written language so, in effect, the great proportion of our lore is intangible.

Ngadjon Jii also request consideration for freehold land that has been excised from Country. Many activities which can jeopardise Cultural Heritage occur on freehold land. A classic example which has been identified on Page 13 of the review is the sub-division of land. And later in the Review is the question of planning by government agencies/Councils. Many sub-divisions in our area have been the conversion of agricultural use land to housing development. In all cases to our knowledge, no Cultural Heritage studies have been undertaken and many sub-divisions are far greater than the “less than three lots” as described in the “excluded activity” definition on page 13 of the Review.

6. Should consultation protocols be developed for each Aboriginal party and Torres Strait Islander party?

Ngadjon Jii firmly believe that this must happen. The primary reason is the cultural differences between Aboriginal clans/families/language groups etc. Each determined Country is specific to the Aboriginal party – the Common Law Holders who are the Traditional Owners of the Country.

This aspect of the future legislation has a common thread through much of this Review. It is linked to Question 8 below and the Proposals as identified in Section 5 of this Review. We believe that these protocols **MUST** include and be driven by the Aboriginal party relevant to the Country under consideration.

7. How should Aboriginal and Torres Strait Islander parties be supported to manage increased consultation about cultural heritage protection?

Ngadjon Jii firmly believe that each Aboriginal party **MUST** be properly resourced and funded to be in a position to assist land use applications and the associated protocols that will be required. Further, should the proposed land use occur, compensation must be part of the contract as well as consideration for monitoring of the Management Plan and any remedial action that may be required.

8. Should the development of a new assessment framework be led by a First Nations advisory group (with other experts as required).

As mentioned above, Ngadjon Jii firmly believe that all activities relevant to the cultural heritage on particular Country **MUST** be under the supervision and control of the relevant common law holders.

This matter will be addressed further in our response to Section 5 of this Review.

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.

Questions:

1. Do you support this proposal and option? Why or why not?

Ngadjon Jii strongly agree with this proposal. Currently there is absolutely no consultation with Traditional Owners in any aspect of planning at state or local government area. Local governments tend to act with totally no regard to Country. The issue of freehold land also needs to be addressed for this proposal.

2. Are there any improvements that could be made?

Ngadjon Jii are concerned as to the extent of mapping and resources that would be required for the implementation of this Proposal. The time that would be required to implement this would be considerable and further damage to cultural heritage would still occur.

If the definitions as discussed in Proposal 1. Are amended to clarify that all of our Country is a high-risk area and all activities are prescribed activities and that all land use proposals, including on freehold land, fall into these definitions, then much of the land planning is already in place.

Proposal 3:

Amend the Cultural Heritage Acts to expressly recognise intangible elements of cultural heritage.

Questions:

1. Do you support this proposal and option? Why or why not?

Ngadjon Jii most definitely support this idea for the reasons outlined above in our response to Question 5 of Proposal 1.

2. Are there any improvements that could be made to the option or definitions?

Ngadjon Jii considers that the definitions and options as identified on Page 14 of the Review appear to be satisfactory especially when account is taken of the definitions as identified by other States and entities and identified on Pages 9 – 10 of the Review.

3. Is there an alternative framework or option that might better recognise intangible cultural heritage, instead of amending the definitions in the Cultural Heritage Acts?

The Ngadjon Jii response to this question is **NO**.

Proposal 4:

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

Questions:

1. Do you support this proposal? Why or why not?

Ngadjon Jii firmly support this proposal provided that the emphasis must be to the satisfaction of the common law holders or the traditional owners of the Country concerned. This mechanism must also have the ability to sanction land users for non-compliance with all components of the land use and Cultural Heritage Plan and to be able to force restitution and even to be able to remove the land use agreements.

2. Do you support these options? Why or why not?

The first option to establish a First Nations body or advisory group has already been addressed above and our concerns identified. This option is also addressed on Section 5 of this Review.

The second option concerning extending the Land Court's ADR function may have merit but mediation might not be the solution. If there has been a breach of the Cultural Heritage

Management Plan or any breach by the land user of any agreement, then mediation cannot be acceptable.

The third option giving the Land Court jurisdiction to hear disputes and enforce agreements definitely appears to have merit and Ngadjon Jii would support this option.

3. Are there any improvements that could be made?

Ngadjon Jii believe that there will never be a 100% satisfactory structure established from the beginning – there will always be room and need for change. So long as the prime aspect of these legislative changes is recognised as being the protection of cultural heritage on Country as identified by the traditional owners/common law holders and not the interests of the land user, then this mechanism could be successful.

Proposal 5:

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

Questions:

1. Do you support this proposal and option? Why or why not?

Ngadjon Jii are in agreement with this proposal and the options as identified in the Review. Of particular relevance to this proposal will be the mandatory reporting of all Commercial Agreements as entered into by agencies such as QPWS and all FANs that might be proposed for Country.

2. Are there any improvements that could be made?

We believe it should be specifically mandated that “Commercial in Confidence” cannot be used as an excuse for not reporting any agreement or FAN affecting Country. We also believe that there should be no impediment to a PBC or any common law holder being able to access any material that is filed within this system and to be able to use such material in pursuit of any action that might be relevant against any land user.

Proposal 6:

Provide for greater capacity to monitor and enforce compliance.

Questions:

1. Do you support this proposal? Why or why not?

Ngadjon Jii strongly support this proposal as any enforceable legislation must require the monitoring and enforcement of compliance.

2. Do you support these options? Why or why not?

In general, Ngadjon Jii is supportive of these options however, we believe there should be more consideration of the common law holders or traditional owners being included in this activity.

In the second dot point of the options at sub level 5, we firmly believe that the common law holders/traditional owners should be able to request any action. We also consider that the inclusion of a First Nations body needs careful consideration considering previous comments above concerning such a body and Section 5 of this Review. The same concern is applicable to the fourth dot point within the options. The authorised officers **MUST** include common law holders/traditional

owners. The employees of a First Nations body, unless they are common law holders/traditional owners of the Country will not have the knowledge and would most certainly not be acceptable as authorised officers by the common law holders/traditional owners.

3. Are there any improvements that could be made?

Ngadjon Jii strongly believe that the issues identified at question 2 need to be addressed before we can accept the proposed authorised officers' structure.

Section 4:

This section of the Review has minor significance to Ngadjon Jii because our Title to Country has been determined. Any subsequent Native Title Claims that Ngadjon Jii might make will be in full compliance with the Native Title Act 1993 (NTA).

Under the NTA, the claimants of Country for a Determination must have their Connection to Country established by an anthropologist prior to lodging a Claim. The apical ancestors are clearly identified and only blood descendants of these apical ancestors are legitimate common law holders.

Care must be taken to distinguish between legitimate descendants and people who may not be blood descendants but maybe spouse/partners of blood descendants and have a common family name. Such people are not common law holders. Similarly, people can have an historical connection to an area but are not blood descendants of the apical ancestors as identified in the Connection Report. Such people are often referred to as "historicals" because they have an historical connection to the Country but not a blood connection. This issue will be discussed further in section 5 of this Review.

However, we offer some comments on the Proposal and Options as identified in the Review.

Proposal:

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.

Option 1.

Ngadjon Jii does support this Option because the establishment of Connection to Country is a prerequisite for making any Claim for Country as identified above.

We do have concerns with the establishment of a First Nations decision-making body for reasons previously mentioned and which will be further discussed at Section 5. The establishment of Connection to Country must be established by an anthropologist not an untrained group who may have no knowledge of the lore or intangible cultural heritage that applies to the Country under consideration.

Option 2.

Ngadjon Jii does not support this Option as we do not have any negative determinations.

Questions:

1. Do you support option 1? Why or why not?

Ngadjon Jii does support this option but not the inclusion of the First Nations decision-making body. Refer to discussion above

2. Do you support Option 2? Why or why not?

Ngadjon Jii does not support this option. Refer to discussion above.

3. If you do not support either option, please explain why?

Refer to discussion above.

4. Do you think the Cultural Heritage Acts should be changed so that all previously registered claimants are not native title parties for an area and not just those subject to a negative determination?

Ngadjon Jii responds in the negative to this question – NO.

Section 5.

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.

Ngadjon Jii recognises that there is a need for an agency to be established that has overarching authority regarding management and compliance relating to all cultural heritage matters in the State of Queensland.

However, all decisions in relation to cultural heritage on our Country must be the sole responsibility of Nadgon Jii.

On review of the various legislative approaches existing or proposed across Australia, there appears to be acceptable aspects and unacceptable aspects across the various jurisdictions.

Victoria:

The Victorian legislation recognises Registered Aboriginal Parties (RAPs) and all decision-making responsibilities reside with the RAP which is comprised of the native title holders/common law holders/traditional owners of Country. Where a RAP exists, it has been approved by an overarching Council but the RAP has authority to approve Cultural Management Plans. The ability for a RAP to grant permits is unclear but this should be solely in the hands of the common law holders. Of interest, RAPs are funded by the government. It appears that RAPs can refer issues relating to non-compliance etc. to a Council for action. Such ability must be included in the terms of reference for such a Council with recognition that the native title holders have absolute control over all cultural heritage matters.

New South Wales

This model establishes entities known as Local Aboriginal Cultural Heritage Consultation Panels (LACHCP) who advise an Aboriginal Cultural Heritage Authority – a decision-making authority.

It would appear that the LACHCP may be regional groups.

This model poses major issues for Ngadjon Jii because it would appear that the common law holders do not have absolute control over cultural heritage issues relating to their Country.

Western Australia, South Australia & Western Australia

These jurisdictions have many aspects in common with Victoria and New South Wales but in all cases, the decision-making in relation to cultural heritage is on a regional basis and not with the traditional owners of the Country.

There is also other legislation – both State and Federal in relation to Rights of Aboriginal people.

Questions:

5. Do you support the proposal to establish a First Nations-led entity? Why or why not?

Ngadjon Jii is prepared to consider support for such an entity that Ngadjon Jii can refer issues, problems and other concerns such as compliance or non-conformity with Cultural Heritage Management Plans, to for remedy. But such an entity would have no authority over the cultural heritage aspects of Country which has been determined. All permits in relation to Cultural Heritage on Country would rest solely with the traditional owners as determined.

6. An alternative to establishing an entirely new entity for this purpose could be to incorporate the proposed First Nations-led entity's responsibilities into another already existing entity or body. Do you support this alternative approach? If yes, what existing entity or body could this become a part of?

Such an entity would necessarily be an entity without any conflict of interest and to only act within the guidelines outlined in our response to Question 1. For instance, this functionality could not be given to QPWS because they issue permits and enter into Commercial Agreements for third parties to access Country. Such an entity would need to be totally independent but responsible to government when sanctions are considered.

7. Do you think there should be two separate entities – one for Aboriginal cultural heritage and another for Torres Strait Islander cultural heritage

The Ngadjon Jii response is a definite YES.

8. What are your views on the proposed functions? What other functions could this entity have?

In general, the Ngadjon Jii response is that most functions appear to be adequate but the basic requirement must remain that sole responsibility for all cultural heritage decisions relating to Country must reside with the traditional owners and cannot be appealed, modified, over-ridden by any entity except the common law holders.

9. Should this entity have decision-making responsibility for approving 'party' status for an area and approving Cultural Heritage Management Plans?

The Ngadjon Jii position on this question is quite specific. The 'party' in relation to Country is specifically those descendants of the apical ancestors as confirmed by the Connection Report as attached to the Determination.

Cultural Heritage Management Plans must be the responsibility of the traditional owners of the Country. Perhaps this entity could provide advice to the traditional owners but they have a responsibility to act in good faith on behalf of the traditional owners.

10. Is it culturally appropriate for this body to have a role in cultural heritage management and protection?

Only at the request of and in support of the traditional owners of the Country.

11. Should the entity have a dispute resolution function?

We believe that the entity must have an enforcement capability. Once an agreement has been negotiated between land users and traditional owners, the only grounds for dispute will be non-compliance with the agreement – not any conditions within the agreement.

12. Should the entity be independent of the government?

From a practical point of view, such an entity would need to be able to use powers that are more appropriate for a government entity such as issuing of sanctions.

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.

Refer to our response at the Introduction to Section 4.

Questions:

1. Do you support this proposal on historical connection?

The Ngadjon Jii response is – NO

2. Why or why not?

As previously stated, the only people who are connected to Country are the descendants of the apical ancestors as specified in the Connection Report which is part of the Determination.