

Wednesday, 06 April 2022



Cultural Heritage Acts Review Team  
Dept of Seniors, Disability Services and  
Aboriginal and Torres Strait Islander Partnerships  
PO Box 15397  
City East QLD 4002

Dear Cultural Heritage Review Team

Thank you for the opportunity to provide feedback on the Options Paper – Finalising the review of Queensland's the Cultural Heritage Acts Review December 2021 (Options Paper).

This submission is made on behalf of Energy Queensland Limited ACN 612 535 583 (Energy Queensland).

Energy Queensland is a Government-owned corporation which provides electricity to approximately 4.8 million Queenslanders. Electricity is distributed by its subsidiaries, Ergon Energy Corporation Limited and Energex Limited, via a network ranging from Tweed Heads up to the Torres Strait and from Brisbane across to Birdsville. This network consists of 33 isolated power stations, 72 bulk supply points, 571 zone substations and 205,000km of powerlines (overhead and underground). Energy Queensland's electricity network is the largest in Australia and is recognised in the State Planning Policy as a State interest which drives the economy and provides essential services and facilities to Queenslanders. Energy Queensland has a strong interest in the preservation of cultural heritage as its electricity network intersects many landscapes where cultural heritage may be present.

Energy Queensland notes that it operates successfully under the current duty of care guidelines – albeit frequently encountering issues with respect to rates of remuneration associated with engagement costs. Energy Queensland suggests, that rather than a full overhaul of the cultural heritage framework, that great improvements could be made just by updating the duty of care guidelines to include an agreed schedule of rates of remuneration and funding additional mapping resources and provide for the education of proponents in the use of the guidelines. Nonetheless, Energy Queensland supports the concept of the Cultural Heritage Acts Review of improving the legislative mechanisms currently in place to protect cultural heritage. However, Energy Queensland has concerns that some of the proposed changes and concepts laid out in the Options Paper could significantly increase:

- timeframes for connecting electricity to Queensland customers;
- the volume of cultural heritage assessments requiring engagement with Aboriginal Parties (APs);
- the cost of engaging APs; and
- the cost of constructing powerlines and other electrical infrastructure.

Energy Queensland's comments on, and questions with respect to, the content of the Options Paper are provided in the table marked *Annexure A* for your consideration.

We trust Energy Queensland's concerns and suggestions will be taken into consideration. Thank you for the opportunity to participate in the review of the Queensland Government's Cultural Heritage Acts.

If you would like any further information from Energy Queensland or have any questions with respect to Energy Queensland's submission, please contact Danny Markey [REDACTED]

Yours sincerely

A handwritten signature in blue ink that reads "Lynde Murray".

Lynde Murray  
**Environment and Cultural Heritage Manager**

## Annexure A

### ***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***

#### ***Question 1 – Do you support this proposal and option?***

Energy Queensland supports the concept of improving the legislative mechanisms currently in place to protect cultural heritage. However, it does not support proposal 1 in its current form, as Energy Queensland is concerned that the proposed definitions and concepts are ill-defined and ambiguous and will lead to confusion, time delays, lack of clarity as to process and increased costs for our customers.

#### ***Question 2 – Are there any improvements that could be made?***

Energy Queensland's specific concerns and suggestions are as follows -

**Activity** - limiting the framework to two categories of 'activity', being 'prescribed activity' and 'excluded activity', will lead to confusion as at this time the terms are subjective, ill-defined and ambiguous in meaning. If these categories are adopted Energy Queensland requests that the list of activities is comprehensive, regularly reviewed and includes specific reference and examples and exclusions relating to electrical infrastructure.

**Cultural Heritage Assessment** - does not appear to include timelines, assessment process or accepted risk mitigation measures. Meaning the proponent would have no visibility of the assessment process.

**Dispute Resolution** – in order for Energy Queensland to support a dispute resolution process - the process needs to clearly articulate what matters/disputes are in scope (for example a reoccurring issue Energy Queensland faces is disagreement on day rates / payment terms, timeframes, agreed costs) and be overseen by an objective and impartial arbitrator.

#### **Example Definitions –**

Prescribed Activity – as written, this definition would include Aboriginal Party engagement for the erection of any and every power pole leading to what can only be described as an astronomical increase in project costs which will flow directly into electricity prices across Queensland. Energy Queensland suggests that rather than having 'Prescribed' and 'Excluded' activities that the number of duty of care categories be reduced from 5 to 3 – consolidating categories 1, 2 & 3 into one (and provide examples) – ie, can all proceed with no further assessment/engagement and maintain category 4 as previous disturbance but assess landscapes/registered sites and category 5 as no previous disturbance.

Significant area or object – The Options Paper provides no clarity as to how a significant area or object will be identified prior to or during the undertaking of an activity. Is to be by the proponent or the AP? An example of where there is a discrepancy in what is viewed as 'significant' is trees. In Energy Queensland's experience trees are being more and more identified/nominated by APs as a cultural heritage resource. Energy Queensland respectfully suggests that such classification should be restricted to marked/scarred or resource trees that are mapped as endangered under the *Nature Conservation (plants) regulation 2020*.

**Question 3 – should consultation occur for all activities in high-risk areas so there is no excluded activity?**

This would depend on the geographic spread and expanse of land mapped as a 'high-risk area' (as there is a possibility that the area will be quite extensive).

It would also depend on level of consultation required ie, should every activity in a high-risk area require a cultural heritage assessment and field inspection it would be very time consuming and adversely impact on Energy Queensland's program of work. Or is there another mechanism proposed in the assessment process that will allow low impact (on land) projects to proceed without consultation?

**Question 4 – What are your thoughts on proactively mapping cultural heritage areas?**

Energy Queensland supports this concept but questions the quality and truthing of mapping, as to do so properly would be extremely expensive and onerous. Accuracy of mapping (in the current database) has been an issue in the past. Energy Queensland suggests a good starting point would be to review the existing mapping and amend.

**Question 5 – What type of activities and areas should be included in the definition...?**

Prescribed Activity - This could just remain as is – 'an activity undertaken in an area not previously disturbed but remove ground below the level of existing disturbance'.

High-risk area - This needs to be carefully considered as it could be quite an extensive area if landscape based. Currently it is not common practice for Energy Queensland to automatically engage the Aboriginal Party for work in a high-risk landscape where there has been significant previous ground disturbance. The proposal to include other tangible significance such as movement and hunting and gathering has the potential to encompass a large part of the state.

Excluded Activity – Energy Queensland would seek to have electricity infrastructure development (low impact) activities included.

Significant Area or Object – as per previous comments.

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

Does this question mean a separate consultation protocol for Aboriginal people and Torres Strait people or for each individual **Aboriginal party and each individual Torres Strait Islander** party? Currently there is no Duty of Care guideline in the TSICHA.

If it means the former, then 'NO' there should only be one 'Act' and one consultation protocol.

If it means the latter, then what would this look like and how would it work?

If it means to develop an agreement similar to an Indigenous Land Use Agreement (ILUA) with each individual party, the 'concept' is sound in theory but would be costly to develop, wouldn't deal with all parties across the state (only those where infrastructure is proposed to be constructed) and could lead to disputes for remuneration rates to be included in the agreement (how would these be resolved?). Energy Queensland operates well under the current duty of care guidelines - however Energy Queensland frequently encounters issues with respect to rates of remuneration, associated engagement costs (Tech Advisor, legal fees, coordinator fees), test pitting and construction monitoring requests.

**Question 7 – How should Aboriginal and Torres Strait Islanders parties be supported to manage increased consultation about cultural heritage protection?**

Area land use agreements (as opposed to project specific LUAs) would assist but would be timely and costly to set up.

Energy Queensland suggests that land use agreements and consultation should be set up directly with the AP ie not through a third party. In Energy Queensland's experience, involving a third party has adverse effects which ultimately impacts and slows down the process.

An entity (like the proposed First Nations entity) could be established to undertake all administrative duties on behalf of the Aboriginal or Torres Strait party. Not all Aboriginal and Torres Strait Islanders parties operate from an office or have staff to respond to requests in a timely manner.

**Question 8 – Should the development of a new assessment framework be led by a First Nations advisory group?**

Membership of this group would need to achieve the balance between cultural heritage protection & conservation and infrastructure development. Any new framework should specify and include remuneration.

***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.***

Energy Queensland understands this option to mean that a risk-based trigger would be introduced (similar to environmental legislative triggers) through cultural heritage mapping (as per early 'engagement step' above) into processes for both state and local government. The questions below are answered based on this understanding.

**Question 1 - Do you support this proposal and option? Why or why not? & Question 2 - Are there any improvements that could be made?**

Energy Queensland supports this proposal in principle on the proviso that the trigger is based on 'risk' not project cost / scale and that low impact and not long-lasting activities would not trigger provisions of this nature.

There would be a need to reform other existing legislation to include cultural heritage assessment triggers.

***Proposal 3 - Amend the Cultural Heritage Acts to expressly recognise intangible elements of cultural heritage.***

**Question 1 - Do you support this proposal and option? Why or why not? & Question 2 - Are there any improvements that could be made?**

Energy Queensland has a real concern as to how 'intangible elements' would be validated and verified. It would be difficult for Energy Queensland or any other proponent to challenge the validity of 'intangible elements' that isn't associated with a tangible site. If this option is pursued, Energy Queensland suggests that, until such time as a verification process is developed and vetted, 'intangible elements' should be limited to those sites already 'known' and be mapped as High-Risk area.

**Question 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?**

Energy Queensland is not aware of any alternative frameworks.

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

**Question 1 - Do you support this proposal and option? Why or why not? & Question 2 – Do you support these options? Why or why not?**

Energy Queensland supports the proposal in part in that an entity like the Land Court or Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships (DSDSATIP) should be empowered with a process to assist with resolving disputes. Energy Queensland would not support the First Nation entity being the final decision maker but would support the entity undertaking a facilitation or mediation role.

Energy Queensland often encounters disputes between parties which are not covered by provisions of the current legislation. How will these be dealt with under this proposal?

Will parties bear their own cost or how will this be funded?

**Question 3 - Are there any improvements that could be made?**

As stated above, some disputes arise from issues not provided for under the current legislation eg rates of remuneration. While this is not a resolution mechanism, if the legislation provided a schedule of remuneration rates and a payment regime for inclusion of other associated costs for this it would reduce the issue from arising.

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

**Question 1 - Do you support this proposal and option? Why or why not? & Question 2 - Are there any improvements that could be made?**

Energy Queensland supports the notion of reporting and data capture.

However, it is not clear from the information provided in the Options Paper how this reporting and auditing system will operate. Is the intention that it will be developed and maintained by the DSDSATIP? If so how will access be obtained/granted by / to other parties?

What information will be required to be reported and what will it be used for?

Will there be penalties for non-compliance? And if so what?

There is a risk that a 'reporting system' could become onerous and culminate in the collection of a lot of information with no foreseeable use or benefit.

Suggestion: Creating templates and forms to assist with reporting would ensure consistency at the very least.

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

**Question 1 Do you support this proposal? Why or why not? & Question 2 - Do you support these options? Why or why not? & Question 3 - Are there any improvements that could be made?**

Energy Queensland holds the view that a more logical and proactive approach would be to educate proponents in the application of the legislation prior to an infringement not as an order / penalty post infringement.

Authorised Officers should be employed by government.

What types of infringement would warrant an on-the-spot notice?

Incidents should be investigated prior to issuing of a notice, as the person receiving the notice may be working under direction and unaware that they are committing an offence.

#### Reframing the definitions of 'Aboriginal party' and 'Torres Strait Islander party'

**Option 1 - This option involves changes in areas of Queensland where there is no registered native title holder or registered native title claimant.**

**Option 2 - This option involves changes in areas where the Aboriginal party or Torres Strait Islander party is a previously registered native title claimant subject to a negative determination (native title does not exist).**

Energy Queensland supports the current provisions for the identification of the appropriate Aboriginal and Torres Strait Islander Party ie determined by the current Native Title claim status and with the inclusion of the 'last man standing provision'. This provides certainty in the proponent engaging the correct party.

**The below highlights some of the issues encountered currently which would be exacerbated should the options be considered.**

**Registered Native Title Party - Encountering issues of a Native Title Party having several family clans and requesting reps from each one be engaged for field assessments.**

**Determined NT does not exist - Does this then also extend to all NT claim areas for those land parcel where NT has been extinguished? Is this not the same as a negative determination or is it simply the inability to prove continuous connection to the land?**

**Existing cultural heritage body experience - Energy Queensland experience is the "Cultural Heritage body" is the native title party for the area and does not cover an area of multiply claims.**

**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.**

**Question 1 - Do you support the proposal to establish a First Nations-led entity? Why or why not?**

There would be benefits depending on their responsibilities but could also slow the cultural heritage assessment / management process down which could impact on program delivery.

**Question 2 - 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?**

Is there a role here for Reconciliation Queensland or DSDSATSIP?

**Question 3 - Do you think there should be two separate entities — one for Aboriginal cultural heritage and another for Torres Strait Islander cultural heritage?**

No - if a body is formed there should only be one for consistency.

**Question 4 -What are your views on the proposed functions? What other functions could this entity have?**

***Administering any proposed new legal frameworks of Cultural Heritage Acts***

- *No issue.*

***Assisting local Aboriginal and Torres Strait Islander groups with decision-making on matters such as applications for Aboriginal or Torres Strait Islander party status for an area where this is required (noting the entity would not override the status of native title holders and claimants), and determining whether to approve Cultural Heritage Management Plans and Cultural Heritage Studies***

- *Timeframe for approvals could be lengthy.*

***Managing and maintaining the cultural heritage register and database***

- *No issues but this should extend to verifying and correcting the current database.*

***Managing compliance (eg employing compliance officers and conducting audits and investigations)***

- *This should be independent-maybe DES or DSDSATSIP*

***Assisting with dispute resolution between proponents and Aboriginal and Torres Strait Islander groups through mediation and conciliation***

- *Depending on the dispute eg Land court when there is a potential infringement.*

***Providing recommendations and advice to the Minister and the Land Court with input from local Aboriginal and Torres Strait Islander groups***

- *How would Queensland ensure that it didn't experience a similar incident to Juukan Gorge?*

***Developing policy — including co-designing policies and guidelines with local Aboriginal and Torres Strait Islander groups to support administration of the Cultural Heritage Acts; and making recommendations for policy review (e.g. on compliance and 'party' definitions as discussed in sections 3 and 4 of this paper)***

- *This needs to be balanced. Proponents should have input.*

***Educating and raising awareness — including promoting education and awareness about First Nations peoples' enduring cultural heritage and appreciation of this heritage; and advising proponents about consultation.***

- *How would this work/operate? What is the plan for rollout? That is- how, when and who.*

**Question 5 - Should this entity have decision-making responsibility for approving 'party status' for an area and approving Cultural Heritage Management Plans?**

Yes - to approving party status on the proviso only one party is identified for engagement by the proponent through this process.

No - to the CHMP approval (if this is the only agreement type) due to timeframes.

Question – A CHMP is an agreement between the AP and proponent – why then would the new entity need to approve a CHMP? Or would this only occur where there is no AP (ie in place of the current practice of ministerial approval) or there is a dispute that cannot be resolved?

**Question 6 - Is it culturally appropriate for this body to have a role in cultural heritage management and protection?**

No.

**Question 7 - Should the entity have a dispute resolution function?**

No - the dispute resolution function should be independent eg Land Court

**Question 8 – Should the entity be independent of the government?**

No - the entity if established must be accountable to someone – presumably government.

***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.***

**Question 1 - Do you support this proposal on historical connection? & Question 2 - Why or why not?**

**It is unclear from the Options Paper what 'historical connection' means or how it is to be established.**