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Cultural Heritage Acts Review  
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## **Review of Queensland's Cultural Heritage Acts**

### **Submission of the Gur A Baradharaw Kod Torres Strait Sea and Land Council Torres Strait Islander Corporation**

#### **Background**

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The Gur A Baradharaw Kod Torres Strait Sea and Land Council ICN 7689 (**GBK**) was established in 2012 as the peak body of all Registered Native Title Bodies Corporates (**RNTBCs**) in the Torres Strait. GBK is a not-for-profit organisation that provides support to the native title holders in the region.

Our native title rights and interests recognise that our society has existed since time immemorial, governed by laws and customs unique to us. Those laws and customs govern our daily life, and the use and ownership of land and waters of our communities.

Each RNTBC within the five (5) nation groups of the Torres Strait - Gudaw Maluligal, Maluligal, Kulkalgal, Kemer Kemer Meriam and Kaiwalagal Kaurareg - are a member of GBK. Torres Strait and Aboriginal land trusts are also eligible to become members. GBK's membership base provides us with an unparalleled level of cultural authority in Australia, as being the only organisation that represents both Torres Strait Ailan Kastom and Aboriginal lore.

GBK is working with all the RNTBCs in the Torres Strait to build capacity and fulfil responsibilities to hold and manage their land and seas in accordance with traditional laws and customs. GBK fosters partnerships with the native title holders to achieve economic, social, and cultural development.



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The operation and review of the *Torres Strait Islander Cultural Heritage Act 2003* is of significant interest to GBK, its members, and the native title holders we support. Many of these RNTBCs are also registered cultural heritage bodies in the Torres Strait region.

This submission is made on behalf of GBK for the Queensland Government's consideration in its review of the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* ("**the Cultural Heritage Acts**").

## Introductory Comments

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As a fundamental consideration in the protection of Aboriginal and Torres Strait Islander cultural heritage, there is an interconnectedness of Aboriginal and Torres Strait Islander culture with the natural environment, Ailan Kastom, Aboriginal lore, and languages. Accordingly, any impacts on the environment (both land and sea) will have impacts on our languages, laws, customs and invariably our way of life.

In this submission, we focus on three (3) particular but interrelated concerns:

1. The uniqueness of the Endeavour and Torres Straits Region ("the Region").
2. How cultural significance is defined, including that of the islands, the waters, other features, and resources of the Region; and
3. The protection of stories about places and things which connect people to country and place.

In its current form, we consider that the *Aboriginal Cultural Heritage Act 2003* (Qld) and the *Torres Strait Islander Cultural Heritage Act 2003* ("**the Cultural Heritage Acts**") does not adequately protect our cultural heritage in the Region. About the region's extensive sea country, the unique nature of the Torres Strait region, and the cultural significance that the sea and islands have to Torres Strait Islanders and Aboriginal People in the Region, the Cultural Heritage Acts are deficient in providing appropriate mechanisms to protect our cultural heritage. Further comments in respect of the unique nature and cultural significance of the Region are provided throughout this submission and, in short, we submit that a new way of protecting cultural heritage in the Region needs to be designed and developed in partnership with GBK.

Presently, the Cultural Heritage Acts require anyone who carries out a land use activity to exercise a 'duty of care'. In summary, this duty of care requires land users to take



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all reasonable and practicable measures to ensure that their activity does not harm Aboriginal or Torres Strait Islander cultural heritage. In its implementation of the Cultural Heritage Acts, the Queensland Government has developed *Duty of Care Guidelines* in respect of the *Aboriginal Cultural Heritage Act 2003 (ACHA)* to assist land users in assessing reasonable and practicable measures for meeting their duty of care. However, we understand that no guidelines have been developed in relation to the TSICHA. In this regard, we submit that there are considerations in respect of the use of land and sea unique to the Torres Strait region and, in their present form, the *ACHA Duty of Care Guidelines* do not adequately consider or reflect the uniqueness of our Region. We consider that any such guidelines to support the protection of Torres Strait Islander and Aboriginal cultural heritage would require, for example, guidance for land and sea users to and consider the significance of the islands, reefs, cays and totems to Torres Strait Islander and Aboriginal people.

In its current Reconciliation Action Plan (**RAP**), the Queensland Government recognises (*inter alia*) that Aboriginal and Torres Strait Islander cultures are unique, and makes a commitment that our cultures will be respected as an invaluable part of the State. Critically, the Queensland Government's RAP recognises that the circumstances of Aboriginal and Torres Strait Islander peoples may differ significantly between regions, and that localised approaches are required to appropriately address issues which have impacts on Aboriginal and Torres Strait Islander communities, families, and people<sup>1</sup>.

GBK respectfully submits that a fulsome review of the TSICHA, along with community consultation on the development of region-specific guidelines, should be undertaken separately from the ACHA review. While the Torres Strait region incorporates both Aboriginal and Torres Strait Islander communities and heritage, we consider that the present review of Queensland's Cultural Heritage Acts provides an opportunity to develop legislation which appropriately reflects the significant and distinct connection between Torres Strait Islanders to their islands and seas. Again, the Torres Strait is a unique region for many reasons, not least of which being that is an area where both Aboriginal and Torres Strait islander communities, culture and heritage overlap and co-exist.

For completeness, we further note that the Queensland Government's current RAP commits to pursuing unique opportunities to respect Aboriginal and Torres Strait

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<sup>1</sup> Queensland Government (2018). *Stretch Reconciliation Action Plan 2018-2021*. "Our vision for reconciliation," p10.



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Islander peoples, cultures, lands, histories, and rights.

We have also had regard to the Queensland Government's *Statement of Commitment* to a *Path to Treaty* which commits, among other things, to reframe the State's relationship with Aboriginal and Torres Strait Islander peoples. This *Statement of Commitment* foreshadows that the next steps to reframing this relationship will be underpinned by the principle of self-determination, and actioned through truth-telling, empowerment, agreement-making and high expectations relationships<sup>2</sup>. GBK respectfully submits that if the Queensland Government genuinely commits to reframing its relationship with Aboriginal and Torres Strait Islander peoples, it must recognise the uniqueness of our Region.

## Observations and Submissions

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In the Region, there are over 120 islands that are dispersed, in the main, in a broad arc beginning immediately to the west of the tip of Cape York, running north to the Papua New Guinea (PNG) coastline and then south easterly to the northern end of the Barrier Reef. Coral reefs and sand cays abound, particularly to the north and more distantly, to the north-east of Cape York.<sup>3</sup>

There are five (5) traditional island clusters within the Torres Strait:

### Top Western Islands - Gudaw Maluligal Nation

- Boigu
- Dauan
- Saibai

### Western Islands - Maluligal Nation

- Badu (Mulgrave Island)
- Mabuag (Jervis Island)
- Moa Island (Kubin and St Pauls communities)

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<sup>2</sup> Queensland Government, Department of Aboriginal and Torres Strait Islander Partnerships (2019). *Statement of Commitment to reframe the relationship between Aboriginal and Torres Strait Islander peoples and the Queensland Government*, p3.

<sup>3</sup> *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* [2010] FCA 643 at [19].



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### **Central Islands - Kulkalgal Nation**

- lama (Yam Island)
- Masig (Yorke Island)
- Poruma (Coconut Island)
- Warraber (Sue Island)

### **Eastern Islands - Kemer Kemer Meriam Nation**

- Mer (Murray Island)
- Ugar (Stephen Island)
- Erub (Darnley Island)

### **Inner Islands - Kaiwalagal Kaurareg Aboriginal Nation**

- Keriri (Hammond Island)
- Muralug (Prince of Wales Island)
- Ngurupai (Horn Island)
- Waiben (Thursday Island) - TRAWQ<sup>4</sup> communities and Port Kennedy

To provide some appreciation of the dimensions of the Strait, the distance between Cape York and the southern PNG coastline is 165 kilometers; and that between the easternmost and westernmost inhabited islands (Mer and Badu) is 215 kilometers. Of the islands themselves, there are four (4) distinct geomorphological types. They have markedly different ecological conditions, hence potential for human habitation and utilisation.<sup>5</sup>

In respect of geological makeup, the eastern islands are of volcanic origin. The central cluster are either coral cays or, as in lama and Gebar, remnants of the old land bridge that connects Papua New Guinea and Australia. Badu, Moa, Mabuig, Dauan and the inner islands are also part of the land bridge.

The Maluligal Nation consists of the western group of islands and contains some of the largest islands in the Region. They are constituted by granite and volcanic rock dating back 300 million years and are a geological extension of Cape York.<sup>6</sup>

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<sup>4</sup> Tamwoy, Rosehill, Aplin, Waiben and Quarantine

<sup>5</sup> *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* [2010] FCA 643 at [19]-[20].

<sup>6</sup> *Ibid* at [20].



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The Gudaw Maluligal Nation is opposite the PNG coastline. Two (2) of the three (3) islands, Boigu and Saibai, are formed of the accumulated sediments brought down from nearby PNG rivers. Both have large areas of swamps and extensive mangrove areas. The third island of this group, Dauan, is a high, rocky, remnant of the land bridge.<sup>7</sup>

The Kemer Kemer Miriam Nation are the eastern islands near the north of the Barrier Reef, are basaltic rocks which may have formed within the last two million years. The three (3) now inhabited islands – Mer, Erub and Ugar – have stone fish traps on their fringing reefs.<sup>8</sup>

The Kulgal Nation forms the central cluster of the Region and contains some high rocky islets, but low sandy islets predominate. Four (4) sandy islets remain inhabited: lama, Masig, Poruma and Warraber.<sup>9</sup>

The Kaiwalagal Kaurareg Aboriginal Nation consists of the inner group of islands that lie close to the Cape York Peninsula and share a similar topography and geological history with the mainland. The topography of the islands includes hills and mounds of basaltic rock (highest point 112m).

In the Region, sea country is embedded in our history. The cultural history of Torres Strait Islander and Aboriginal Peoples in the Region has a strong spatial dimension. Events in the historical and mythical past occurred at places, not simply at specific dates. In travelling about our islands, waters and reefs, Torres Strait and Aboriginal people pass through our history, which is inextricable from our land and sea environments.<sup>10</sup>

Sea territories are not just bounded sea space, but areas named, known, used, claimed, and sometimes defended. A territory, whether terrestrial or marine, is more than simply spatially delimited and defended resources for the exclusive use of a particular group. A territory is social and cultural space as much as it is resource or subsistence space.<sup>11</sup>

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<sup>7</sup> Ibid at [20].

<sup>8</sup> Ibid at [21].

<sup>9</sup> Ibid at [22].

<sup>10</sup> Dr Y. Musharbash (2004). *Anthropological Report in relation to Native Title in Certain Torres Strait Seas*, p31.

<sup>11</sup> Ibid at p29.



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In the Region, a great majority of the Torres Strait and Aboriginal myths and legends contain sea references, and this reflects our ancestors' involvement with the sea. Local mythology mirrors this dependence on sea resources.<sup>12</sup>

In the Region, the Federal Court of Australia has recognised 26 determinations of exclusive native title rights and interests covering 18 inhabited islands, numerous uninhabited islands and 44,000 km<sup>2</sup> of non-exclusive native title rights and interests of sea country. Our native title rights and interests recognise that our society has existed since time immemorial, governed by our laws and customs unique to us. Those laws and customs govern our daily life and the use and ownership of land and waters of our communities.

Other than in the *Mabo [No 2]* proceedings, each of these determinations of native title have been made by consent.<sup>13</sup> As was recognised by Justice Finn in *Akiba (No 2)*, the native title holders in these determinations were characteristically found to be members of single island communities. In several instances, though, the title is shared by members of several island communities.<sup>14</sup> For example, in some native title proceedings concerning the Region, the rights in question were held collectively by members of two (2) or more island communities, all of which in each case belonged to a single "cluster" group of islands, such as the Central Islands.<sup>15</sup> Typically, each individual island community enjoys native title determinations not only in relation to its "home" island but also to some number of offshore islands – some close to, others remote from, the home island.<sup>16</sup>

In their current form, the Cultural Heritage Acts recognises (at ss9-10) that significant Torres Strait Islander and Aboriginal areas and objects hold their particular significance because of Island custom, Aboriginal lore and/or the history of any Torres Strait Islander or Aboriginal party for the area. At s12(5), the Cultural Heritage Acts provides that regard may be had to authoritative anthropological, biogeographical, historical, and archaeological information for the purposes of identifying a significant Torres Strait Islander or Aboriginal area.

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<sup>12</sup> Ibid at p35.

<sup>13</sup> *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* [2010] FCA 643 at [147]

<sup>14</sup> Ibid at [10].

<sup>15</sup> Ibid at [147].

<sup>16</sup> Ibid at [150].



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In this submission, we have outlined the cultural significance of island and sea country to Torres Strait Islanders and Aboriginal Peoples in the Region, and repeat our earlier observation of the interconnectedness of Torres Strait Islander and Aboriginal culture with the natural environment, Ailan Kastom, Aboriginal lores and languages. By way of examples of authoritative references contemplated by s12(5) of the Cultural Heritage Acts which illustrate places (and objects) of cultural significance in the Region, we note that:

- Both song and dance have an obvious marine orientation, and often embody maritime knowledge as well as a strong spiritual connection;<sup>17</sup>
- Within Torres Strait Islander and Aboriginal Peoples society in the Region, the value placed on the sharing of seafood, and on sharing in general as symbolised by seafood, is inscribed in ceremonial life, and in traditional rites of passage;<sup>18</sup>
- Marine imagery permeates Torres Strait Islander and Aboriginal culture, including religion, mythology, totems, art, music, song, dance, and storytelling, personal identity, the identification of life stages, home décor, fashion, tombstone design and everyday conversation;<sup>19</sup>
- Connection and entitlements to uninhabited islands are established through the continuous use of the islands and their resources. Torres Strait Islanders and Aboriginal Peoples in the Region regularly visit and use these islands during fishing trips, and otherwise for the purposes of camping, gardening, gathering wild foods and recreation;<sup>20</sup>
- Throughout the Region, Torres Strait Islander and Aboriginal Peoples identify places as simultaneously belonging to living people or groups and associated with mythological and legendary events. Places are named both on land and in the sea: islands, however small, and every large sand bank and many coral reefs are named;<sup>21</sup>

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<sup>17</sup> *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* [2010] FCA 643 at [317].

<sup>18</sup> *Ibid* at [313].

<sup>19</sup> *Ibid* at [373(g)]

<sup>20</sup> [Susanne Ogge (1999). *Masig Island Native Title Claim QC 96/53 and Damuth Island Connection Report QC 96/35*, p32.]

<sup>21</sup> *Ibid* at p33.





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- Across the Region, Torres Strait Islander and Aboriginal Peoples continue to hunt and gather wildlife (for example, fish, turtle, dugong, and birds) and plant life (such as bamboo and coconut) for consumption, ceremonial (weaving) and trade purposes. Trees also provide resources to make brooms, woven mats, and leaves for wrapping in the traditional preparation of foods.<sup>22</sup>

In short, neither areas nor objects of cultural heritage significance can exist in isolation. With respect to any proposed amendments of the Cultural Heritage Acts, we submit that any definitions of significant areas and objects must include intangible elements of cultural heritage. Any failure to properly recognise the relationship between the cultural significance of spatial, physical, and intangible heritage will also fail to recognise the interconnectedness between Torres Strait Islander and Aboriginal Peoples, places and areas, resources and objects, laws, customs and languages. All these elements are connected and cannot be separated in their significance.

In closing, we submit that each of the matters raised in this submission supports our request that the Queensland Government engage directly with GBK and Torres Strait Islander and Aboriginal Peoples in the Region, to develop a piece of legislation that is region-specific and fit for purpose to provide adequate protection to our cultural heritage. We thank the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships for the opportunity to provide feedback, and for its consideration of our submission.

Should you have any queries or wish to discuss the matter, please do not hesitate to contact our office.

Yours faithfully

**Ned David**  
**Chairperson**  
Gur A Baradharaw Kod Land and Sea Council  
(Torres Strait Islanders) Corporation

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<sup>22</sup> Ibid at pp38-40, p44.