



Queensland Small Miners Council

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28th March 2022

The Hon. Craig Crawford,
Minister of Dept. of Seniors, Disability and Aboriginal and Torres Strait Island Affairs
PO Box 15397
CITY EAST QLD. 4002
Email: CHA_Review@dssatsip.qld.gov.au

Reference :- QSMC -Submission to Options Paper Finalising the Cultural Heritage Review

Dear Sir,

The Queensland Small Miners Council is a forum of the States five Small Scale Mining Industry representative groups, which collaborate to provide Industry representation for the States 4500 small scale miners to Government bodies which regulate these Gold and Gemstone producers.

The Queensland Small Miners Council support the Federal Native Title Act and also the current Cultural Heritage Act and the Duty of Care Guidelines, and in our context by and large, we believe they are still operating as intended and are achieving Cultural Heritage Protection outcomes for Aboriginal and Torres Strait Islander peoples.

Whilst the Queensland Government's broader objective is to reframe the relationship with Aboriginal and Torres Strait Islander people's, *this "political objective,"* no matter how pious, should not be at the expense of the human rights of Land owners, which according to the proposals of the options paper prepared by your departmental "Review team," have blatantly overlooked.

As the secretary of the QOMA, I have also previously provided a detailed submission to the Cultural Heritage Review Stakeholder Panel in 2021, which pointed out this departmental oversight, yet the current "Options" provided, seem to blindly continue down the same path without any attempt to address "Land Owner rights", or any legitimate alternatives which respect the rights of all parties.

The Queensland Government must provide a balanced and legitimate path to achieve its political objectives. This could be best achieved by collaboratively working with parties to developing legitimate workable option's, which respect the aspirations of ATSI peoples, Land Owners and Industry, as many of the proposals in the option paper, are invalid, lack detail or are alarming!

The QSMC appreciate the matter is complex, however with good will, mutual respect and consultation a solution can be achieved which balances the rights and aspirations of all parties.

For now the QSMC supply this supplementary submission in support of our previous submissions with the hope that our real concerns are listened to and finally addressed.

Kind regards

Kev Phillips

Kev Phillips QSMC delegate
Secretary Qld Opal Miners Assoc.



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Cultural Heritage Review Team

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QSMC - Submission to Options Paper Finalising the Cultural Heritage Review

The QSMC member groups support & promote the protection of “all” Cultural Heritage, including the protection of Cultural Heritage Sites of Queensland’s historic small scale mining industries.

The QSMC supports and respects the Queensland’s Human Rights Act 2019 (HRAct), and these rights afforded to all Queensland citizens and other peoples under this legislation.

This support includes the Cultural Heritage Rights of the Aboriginal and Torres Strait Islander Peoples and their descendants, which in part affords to them - *to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a “connection” under Aboriginal Tradition or Island custom as described under Section 28 d of the HRAct (Qld).*

The QSMC also fully support the Federal Native Title Legislation and processes, which affords the opportunity for ATSI peoples to support their “connection” to country claimed.

The NTAct processes have provided for the many genuine Native Title Land Claims, resulting in over **290** Native Title determinations with either “*Exclusive or Non Exclusive*” determinations & also has dismissed Native Title land claims, some of which were spurious land claims which have left these applicants as beneficiaries to the States “*Last Man Standing*” legislation under the current and now proposed Cultural heritage legislation.

The QSMC do not support the reintroduction of the “*Last Man/Claim Standing,*” provision in any revised legislation, which historically has been ‘introduced’, since removed and then reinstated by the State.

This Queensland government, utilising the Last Man Standing Provision, has provided a deeply flawed legislative provision which puts people in the position of speaking for country without any requirement or appropriate qualifications to do so, which undermines and makes a mockery of the Federal Native Title processes and the rights of the legitimate aboriginal peoples.

The QSMC additionally, and as equally, respects and observes the Human Rights Act 2019 (div 2 section 24), which also affords the land owners of land, “property rights”.

The property rights of these Land owners will be undermined by these departmental “Option proposals,” if legislated.

Miners, are able to provide lawful “mining related access” (MRAAct) to third party’s onto a Land Owners lands.

These option proposals places the miner is an unacceptable position, of being forced to provide access to Aboriginal party claimants, perhaps providing a back door access to the land, likely without the consent or knowledge of the Land Owner, with potential for Aboriginal parties to sterilise parts of the Land owners land, with either “Tangible or Non Tangible” claims of cultural heritage, without obtaining the consent, acknowledgement and acceptance of the Aboriginal Parties claims of Cultural heritage rights over these lands, from the Land owner/s.

As I alerted the department review team to in the “QOMA’s - Stakeholder Panel Draft options paper Submission in October of 2021, Land Owners of “Exclusive land”, have not been afforded the same opportunity to contest Native Title Claims as Non Exclusive land holders, as Exclusive land tenures were excluded from the Native Title processes, to determine the Native Title land Claim applications.

The vast majority of these Native Title Claim Determinations were, “Consent Determinations,” which naturally, respected the claim process which included- consultation, negotiation and then finally the consent by the non-exclusive lands Land holder/s.

This respectful process will be circumvented in the Options Paper proposals and tenders no legitimate means or rules for a Court or Tribunal to validate an Aboriginal Parties claim to substantiate that they are the rightful person with “connection” to Speak for Country for the preservation of Cultural heritage, as is afforded under the NTAAct.

Since the implementation of The HRAAct 2019, this departmental review into Cultural Heritage has either continued with disregard for the consideration of Land Owner property rights, which is reflected in the Departments Option paper & can no longer be passed over, particularly at this late stage when the development of legislation is pending.

For the department to continue this review and/or impose any of the current options without addressing this shortfall in any proposed “legislative bill” will likely lead to its ignominious demise, as it will be scrutinised by Parliamentary Committee who will surely be alerted to the shortfalls of the “Bill” by any proficient representative group or individual who cares about the protection of Property Rights which are preserved and afforded by Queensland’s Human Rights Act.

The States, “Options paper proposals,” tendered by the Department, currently do not respect the Landowner/s “Property rights,” extended in the Human Rights Act, or balance these rights with those Human Rights of the ATSI peoples, nor do they provide a valid pathway which the ATSI peoples to obtain legal & legitimate custodian rights of Cultural Heritage outside of the Native Title Determination arena, which invokes the confidence required to legitimise and scrutinise an ATSI person or group being the rightful persons, “Speaking for Country”, with Land Users, Land Owner/s and daresay, the general public.

Proposal 1

The QSMC does not support the removal of the current Duty of Care (Doc) Guidelines and in fact to the contrary, we actually support the DoC Guidelines and processes as it is the most prudent method to ascertain whether Cultural Heritage may be identified in an area, particularly on Exclusive Lands.

Aboriginal Cultural Heritage ***is not*** everywhere and moreover, tangible “Significant” Cultural heritage is even less likely to be located during the term of the vast majority of small scale mining operations, which also includes excavating in areas which have not been previously disturbed.

To assume that Aboriginal Cultural Heritage (ACH) is everywhere is woke, and only panders to this absurd hypothesis, which in the context proposed in the Options paper, will unnecessarily impose a regime of consultation, negotiation, agreement making, “or not”, hence invoking dispute resolution mediation and perhaps arbitration, prior to the evaluation of “whether or not” cultural heritage even exists on the land users, “area of interest”.

To entertain this notion is farcical.

If this proposition is imposed it will inflict unreasonable productivity delays and financial costs on small scale miners & other Land Users and even to the State & introduce productivity impediments which will make most small scale mining operations and other land use activities unviable, particularly on areas where there is no Cultural Heritage.

The current DoC guidelines (whilst still open for improvement) is the most beneficial mechanism for the participation by Land users in the day to day operations and the protection & preservation of Cultural Heritage.

The DoC guidelines potentially would provide more mutually beneficial outcomes if utilised and promoted correctly by the Department and the State.

Additionally in “Proposal 1,” the concept of mapping areas of areas of “High Risk Cultural Heritage,” conjures reasonable concerns to Land users & Land Owners of broad scale blanketing of areas, which is likely to be invoked on here-say without any supporting rationale or evidence that areas have ACH, and therefore sterilising land without substantiated Cultural Heritage ground studies or scrutiny when evaluating these lands.

The QSMC also have concerns regarding the definition proposed as ***Prescribed Activity, and the context of where this definition is used***, which extract is as follows:-

- ***Prescribed activity:*** *an activity that causes disturbance that would result in a lasting impact to ground that has not previously been disturbed, or to the ground below the level of disturbance that currently exists.*

The context where this definition is used is of concern as already stated, Cultural Heritage is not everywhere, so utilising this definition as the trigger for a regime of Cultural Heritage protection protocols will be overzealous in most day to day land user operations.

*Additionally this definition of **prescribed activity** does not allow for the geological reality that most subsurface geological depositions are likely hundreds of thousands if not millions of years old, and when and where disturbed are likely well deeper than the occupational limits of Aboriginal and Torres Strait island peoples where tangible cultural heritage can be anticipated to be located.*

The rationale of this proposed definition and the intent of the definitions “application” is definitely overzealous and fundamentally flawed, therefore the QSMC cannot support this proposed change.

QSMC summary Options Paper Proposal 1

Given the points raised above the QSMC do not support Proposal 1, and emphatically deplore the proposal which also takes away from the fostered good will intended in the reconciliation process in favour of a more prescribed arbitration processes & in many instances, where the aboriginal parties unfortunately may not have any legitimate rights over those lands, and even in some instances dismissed by the NNTT, and will in fact, as proposed, will impede on the Human Rights of Landowners.

It is noted that the Departmental options paper seems to have overlooked the Human Rights of land owners in all of these proposals and seems to dismiss the relevance of these rights out of the equation, and is unacceptable.

QSMC do however support the following proposal

In our context, the QSMC would support, as stated, a refined Duty of Care Guideline, as a self-assessment tool which is designed with input from all parties & implemented by Land Users where other Native Title Agreements (ILUA or RTN's) or other valid mechanism for a Cultural Heritage agreement are not in place.

Land users would be able to continue to utilise the DOC guidelines to undertake operations as it is the most pertinent balance of compliance through self-assessment and cultural heritage protection.

The current “DoC guidelines” information could be better updated and actually promoted better by the Department and Government in media leading to higher participation rate and support by the community and hence higher discovery and protection of Cultural heritage.

Any Cultural Heritage identified during the course of activities that have potential to be disturbed during the land users activities would require the regulatory authority being provided a “Notice” that Cultural Heritage has been identified.

The State would then identify the legitimate Aboriginal Party, which must be endorsed by the Land Owner by either (ILUA) or other Cultural Heritage agreement.

The parties through State mediation may then may proceed in good faith to provide measures to protect and preserve the Cultural Heritage identified.

Proposal 2

The QSMC does not support Proposal 2 as small scale mining currently does not require land development processes and would not support the introduction of another departmental regime being introduced as its slow enough already and undoubtedly would invoke more fees and charges for another departmental process, all which is preposterous.

Proposal 3

The QSMC does not support to amend the Cultural Heritage Acts to expressly recognise intangible elements of Cultural Heritage.

The concerns of this proposal will likely lead to broad scale claims of intangible cultural heritage over vast areas without any requirement to substantiate the claim by an Aboriginal Party and unable to be challenged by a land user or Land Owner, and hence, the possibility of being arbitrarily deprived of parts of, or all of, the Land Owners property and sterilising land from being used by other land users.

Proposal 4

The QSMC would like to see more detail on this Proposal before supporting this proposal, however the QSMC has always had confidence that the Land and Resources Tribunal are best placed to provide arbitration and deliberations based on the evidence provided.

Proposal 5

The QSMC do not support this proposal which would require mandatory reporting of compliance to capture data and support auditing of the system.

There would be no time left in the day to actually do any work with all the compliance hoops you would have to facilitate for all the regulatory regimes now controlling the small scale mining sector.

Proposal 6

The QSMC do not support the proposal to provide for greater capacity to monitor and enforce compliance, we take that this proposal is to be undertaken by the State?

Part 2 - Reframing the definitions of 'Aboriginal party' and 'Torres Strait Islander party'

The QSMC do not support either of the proposals put forward by the State which are still in an uncultivated format and is lacking any sound rationale and the detail for any party to make an informed choice or decision.

The QSMC provide the following statements to these options collectively below:-

Option 1 & Option 2

- ***The QSMC do support the Cultural Heritage Acts are changed so that a previously registered native title claimant is not a native title party of an area, and section 35(7) is removed.***

This rationale is based on the fact that on at least on exclusive land the Land owner has not provided "consent" (NTA) to the Land Claim as it was excluded from the determination or NT Claim application and the Land Owner has not been afforded consultation or legal representation to concur with or contest this NT land claim.

Also that a Tribunal (NNTT) has perhaps heard the NTA application and dismissed the Native Title Claim. The deliberation by the Tribunal (NNTT) for the negative determination should be investigated prior to making an aboriginal party in these instances, as the NT Claimant may not have substantiated they were the correct people speaking for country or be able to substantiate "connection" as required under the NTA and as protected under the Section 28 (d) of the Human Rights Act(Qld.

- ***The QSMC do not support the creation of a First Nations decision-making body as the parameters of the decision making framework has not been adequately tabled.***

Questions also arise what influence and powers will the decision making body have in dictating outcomes to the Government, the State, land owners and land users and even ATSI peoples and what redress is available to challenge these decisions!

QSMC believe the State must retain the responsibility and oversight for Cultural Heritage.

- *As was the case for the NT Claim process of the NTA, the QSMC do not support a State sponsored CH Aboriginal party process where another (or many other) Aboriginal or Torres Strait Islander person/s claiming to have a "connection" to the area under Aboriginal tradition could apply for recognition as an Aboriginal party and there may be more than one or many Aboriginal or Torres Strait Islander party for these areas.*

Particularly if a new registered native title claimant/holder would automatically become the native title party for the area & the previous Aboriginal party or Torres Strait Islander party would no longer have party status.

Intra-indigenous problems over land Claims have prolonged Native Title determinations by internal disagreement between Native Title Claimants, which will also be seen in this States Cultural heritage regime if this proposal is introduced.

Additionally costs imposed to Land Owners will be multiplied by the Aboriginal parties involved which would not be sustainable for our members and other land users.

The QSMC's recommendation ...the Legitimate Option

As previously stated, the QSMC would support that an Aboriginal Party or Individual may (and already can) opt to undertake an ILUA with the Land holder or Lands Leaseholder to facilitate recognition of the Aboriginal Party's Cultural Heritage.

This legal instrument is already a valid mechanism & already available under the Native Title Act.

Alternately a voluntary mechanism by way of a Voluntary Agreement, with the Land owner.

The QSMC vehemently supports the human rights of the Land Owner, in particular on "Exclusive Land," which must also be considered and respected by the State when considering the proposals and legislative changes for this Cultural Heritage Review.

An Aboriginal Party must undertake and register an agreement (ILUA or other) or Voluntary agreement with the Land owner/ Land holder should they wish to be recognised as the Cultural Heritage Custodian of those lands in the case where a NT determination has been unsuccessful on non-exclusive land or on Exclusive Land/s.

The State already has the qualified personal & resources to assist the ATSI peoples to achieve this outcome, as they facilitated this activity during the Consent Determination process of the NTAct.

Additionally the State owns specific lands, i.e.- State Forests, parks etc., the State could lead the way, by signing ILUA's with Aboriginal and Torres Strait Islander Aboriginal party's to afford them the Cultural Heritage rights that these people seek over these State Lands.

The adoption of these positions respects the Human rights of all parties whilst preserving the Cultural Heritage of ATSI Peoples.

Kev Phillips

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Kev Phillips
Secretary QOMA
QSMC Delegate

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