



26 July 2019

Cultural Heritage Acts Review
Department of Aboriginal and Torres Strait Islander Partnerships
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This submission on the Review of the Cultural Heritage Acts (the Review) has been prepared by the Jinibara Aboriginal Corporation, the prescribed body corporate for the Jinibara.

The submission will commence by considering the questions posed in the Consultation Paper provided by the Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP) as basis for the Review, and finalise with other considerations that are relevant to the Jinibara.

Underpinning this submission is the Jinibara's desire for respect as the Traditional Owners and custodians of our traditional country, the descendants of our ancestors, the knowledge holders of our culture. The Jinibara sincerely request the Review team to consider respect as an important outcome of the *Aboriginal Cultural Heritage Act 2003* (the ACH Act). This concept will be discussed in more depth during this submission.

The Jinibara also wish to bring to the attention of the Review team the recent introduction of Queensland's *Human Rights Act 2019*. Elements of this Act will be discussed in more depth during this submission.

1.0 Questions Posed in the Consultation Paper

1.1 Defining Cultural Heritage

Is there a need to revisit the definitions of cultural heritage – if yes, what definitions should be considered?

The main **purpose** of the ACH Act is to achieve “effective recognition, protection and conservation of Aboriginal cultural heritage” (S. 6, ACH Act). The underlying **principles** of the ACH Act that guide the achievement of the main purpose of the ACH Act are as follows:

- (a) The recognition, protection and conservation of Aboriginal cultural heritage should be based on respect for Aboriginal knowledge, culture and traditional practices.
- (b) Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage.
- (c) It is important to respect, preserve and maintain knowledge, innovations and practices of Aboriginal communities and to promote understanding of Aboriginal cultural heritage.
- (d) Activities involved in recognition, protection and conservation of Aboriginal cultural heritage are important because they allow Aboriginal people to reaffirm their obligations to ‘law and country’.

- (e) There is a need to establish timely and efficient processes for the management of activities that may harm Aboriginal cultural heritage (S. 5, ACH Act).

The purpose and principals of the ACH Act should be the platform on which definitions of cultural heritage are based. Section 8 of the ACH Act defines Aboriginal cultural heritage as anything that is:

- (a) a significant Aboriginal area in Queensland; or
- (b) a significant Aboriginal object; or
- (c) evidence, of archaeological or historic significance, of Aboriginal occupation of an area in Queensland.

Section 9 of the ACH Act then defines a significant Aboriginal area:

An area of particular significance to Aboriginal people because of either or both the following –

- (a) Aboriginal tradition;
- (b) the history, including contemporary history, of any Aboriginal party for the area.

Section 12.5 states that “for identifying a significant Aboriginal area, regard may be had to authoritative anthropological, biogeographical, historical and archaeological information”.

However, despite Section 8 specifying that significant archaeological or historic evidence is a crucial component of the definition of Aboriginal cultural heritage, and despite Sections 9 and 12.5 together recognising that significance may be contingent on archaeological information, the definition of Section 10, meaning of significant Aboriginal object does not recognise archaeological evidence. Specifically, this definition states that:

A significant Aboriginal object is an object of particular significance to Aboriginal people because of either or both of the following –

- (a) Aboriginal tradition
- (b) the history, including contemporary history, of an Aboriginal party for an area.

To rectify this oversight, the following changes are suggested for Section 12 of the ACH Act.

- i. The name of Section 12 be changed to “Identifying significant Aboriginal areas **and objects**”
- ii. Section 12.5 is changed to: “For identifying a significant Aboriginal area **or a significant Aboriginal object ...**”.

What additional assessment and management processes should be considered?

1. Further comments about Section 12.5

Section 6(b), that Aboriginal people should always be recognised as the “primary guardians, keepers and knowledge holders” of their culture, is entirely supported by the Jinibara. However, like many Aboriginal parties, the Jinibara choose to seek “authoritative anthropological, biogeographic, historic and archaeological information” in the form of archaeological advice, assessment, research and report preparation. We choose to work with advisers whom we trust and who are knowledgeable about and respectful of our cultural knowledge and protocols. For the Jinibara, the meaning of the word “authoritative” is not confined to people with recognised degrees in archaeological information; “authoritative” must include knowledge of and respect for our cultural knowledge and

protocols, and to achieve this level of understanding requires a long-term relationship built on trust and respect.

One of the difficulties that the Jinibara have regularly encountered with proponents, particularly some state government departments and agencies, is the lack of acceptance of our protocols for including technical (archaeological) advice and reporting in cultural heritage assessment and agreement-making. Either no technical adviser is included in the budget offered by certain proponents, or they choose to enforce that only their archaeologist will be financed. As a result, the Jinibara are denied “authoritative” advice. To remedy this difficulty, it is recommended that Section 12.5 be further amended to:

For identifying a significant Aboriginal area *or a significant Aboriginal object*, regard may be had to authoritative anthropological, biogeographical, historical and archaeological information *from an authority nominated by or acceptable to the Aboriginal party*.

2. Tangible and Intangible Cultural Heritage

Currently Section 12.2 alludes to the fact that Aboriginal cultural heritage can be both tangible, i.e., of an archaeological nature, and intangible, i.e., landscapes, areas, places and/or cultural activities that are known through cultural knowledge but have no tangible evidence of human activity. However, the lack of clarity in Section 12.2 and the absence of appropriate recognition in the categories provided by the Cultural Heritage Duty of Care Guidelines result in confusion, lack of awareness in the wider community, and avoidance of acknowledgement in practical terms.

The Jinibara recommend that Section 9, Meaning of significant Aboriginal area is upgraded to reflect both the tangible and intangible:

9. (1) A significant Aboriginal area is an area of particular significance to Aboriginal people because of either or both of the following –
 - (a) Aboriginal tradition;
 - (b) the history, including contemporary history, of any Aboriginal party for the area.
- (2) **A significant Aboriginal area may include both or either tangible and intangible Aboriginal cultural heritage.**

A question posed by the Review asks whether intangible heritage should be defined and included in the assessment and management processes. Effectively it is already supported by the ACH Act and is in the Jinibara assessment and management processes. The definition of “Aboriginal tradition” in Sections 9 and 10 of the ACH Act includes “traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships”. A significant Aboriginal area does not have to include tangible, physical proof of human activity. A significant Aboriginal object can be a natural object, such as a plant, a rock, a mountain, a river that has particular significance.

An example of the concept of a significant Aboriginal area as used by the Jinibara is the area around and including most of the Glasshouse Mountains. The area holds particular significance for the Jinibara for many reasons. Tangible objects and areas such as ceremonial grounds with earthen features, camps, stone features and stone artefacts are present. Intangible cultural knowledge and areas, such as stories, ceremony places, birthing places, *mimburi* and connections with totems, are also present. Together, these make one

significant Aboriginal area which the Jinibara have now placed on the State's database, after mapping it within an external boundary.

However, despite the way in which the ACH Act can be demonstrated to provide protection of intangible heritage, for the sake of clarity the introduction of a definition similar in form to that for "Aboriginal Tradition" would be useful.

1.2 Identifying Aboriginal and Torres Strait Islander Parties

Is there a need to revisit the "last claim standing" provision – if yes, what alternatives should be considered?

As determined native title holders, the Jinibara are not affected by this provision. However, we recognise the injustices the "last claim standing" has brought to neighbours. Recommendations on the identification of Aboriginal parties below would assist in sorting out this issue.

Is there a need to revisit the identification of Aboriginal parties – if yes, who should be involved and what roles, responsibilities and powers should they have?

Based on our experiences of the native title process since 1998 when the first Jinibara native title application was submitted to the Commonwealth and our observations of our neighbours' circumstances, the Jinibara believe that Sections 34 and 35 require substantial changes.

There is a gulf of difference between being a native title claimant and a native title holder. A claimant may have a registered or an unregistered native title application. To gain registration requires an Aboriginal group to authorise its application, and provide sufficient information to meet registration testing, i.e., testing focuses on whether required information has been provided but does not assess for evidence of continuous connection. Unregistered native title applications can also be made, e.g., the Yuggera application that overlapped the Turrbal application.

The Jinibara are personally aware of the degree of specialist research and assessment that is required for the preparation of an independent connection report, negotiations with the State, and finally judgement by the Federal Court to achieve native title determination. By tying Sections 34 and 35 to aspects of the *Native Title Act 1993*, the ACH Act allows for people who have not been through the level of assessment required by native title determination to make decisions without the necessary support and knowledge of their group. In certain cases to date, some of these people have been found to have no connection with their claimed traditional country, effectively resulting in decisions being made about Aboriginal cultural heritage by individuals who have no traditional knowledge to support them.

In addition to the above, when native title is determined, a prescribed body corporate is established to hold given rights. How this body relates to the native title holders which it represents is dependent upon its Rule Book. A person or persons representing the body is also representing the group, and thus is bound by the Rule Book and any traditional or contemporary rights, responsibilities and protocols of that group. Therefore, a single person who becomes a native title party or an Aboriginal party should be viewed only as the representative of that group that has authorised this position.

The spokesperson for the Jinibara has always held that position through authorisation by the group, but the Jinibara are aware of many cases in other groups where a spokesperson is self-elected and does not hold traditional authority. This has caused many internal issues that cause great disruption to groups and have the effect of holding groups back from their own development.

For these reasons, the Jinibara propose the following definitions.

- 34 Native title party for an area
- (1) Each of the following is a native title party for an area—
- (a) a registered native title claimant for the area;
- (b) **subject to subsection 34(3)**, a person who, at any time after the commencement of this section, was a registered native title claimant for the area, but only if—
- (i) the person’s claim has failed and—
- (A) the person’s claim was the last claim registered under the Register of Native Title Claims for the area; and
- (B) there is no other registered native title claimant for the area; and
- (C) there is not, and never has been, a registered native title holder for the area; or
- (ii) the person has surrendered the person’s native title under an indigenous land use agreement registered on the Register of Indigenous Land Use Agreements; or
- (iii) the person’s native title has been compulsorily acquired or has otherwise been extinguished;
- (c) a registered native title holder for the area;
- (d) a person who was a registered native title holder for the area, but only if—
- (i) the person has surrendered the person’s native title under an indigenous land use agreement registered on the Register of Indigenous Land Use Agreements; or
- (ii) the person’s native title has been compulsorily acquired or has otherwise been extinguished.
- (2) If a person would be a native title party under subsection (1)(b) but the person is no longer alive, the native title party is instead taken to be the native title claim group who, under the Commonwealth Native Title Act, authorised the person to make the relevant native title determination application.
- (3) ***If a Court has determined native title does not exist over an area and as a consequence there is no and never has been a registered native title holder for the area, and in the course of that determination the Court finds that some or all of the persons who are members of the registered native title claimant who brought the claim are the descendants of apical ancestors who were once the native title holders for the area, those persons so found are the native title party for the area and subsection 34(1)(b) does not apply.***

The Jinibara also propose that section 35 be amended to provide for the following:

- The ability for a native title party to nominate one or more authorised representatives to act on their behalf as the Aboriginal party (and mechanisms for the withdrawal of such a nomination).
- A requirement that any individual person or persons who claim to be an Aboriginal Party under section 35(7) provide evidence that they hold the authority of their family or clan group to act as an Aboriginal party for an area.
- Clarification in subsections 35(3) and (5) that a native title party under subsection 34(1)(a) is the Aboriginal party for the whole of the area within the outer boundaries of the area in relation to which the application was made, irrespective of any previous determinations that native title is extinguished over areas within that boundary. Subsection 34(1)(b) should also be amended to make it subject to this additional clarification in these clauses.

Should there be a process for Aboriginal parties to apply to be a “Registered Cultural Heritage Body” to replace the current native title reliant model?

The Jinibara have observed how Registered Cultural Heritage Bodies have worked within some neighbouring groups, particularly in the areas around authorisation and removal of a body if circumstances change. For these reasons, the Jinibara propose that section 36 be amended to provide for the following:

- A streamlined arrangement for the registration of registered native title bodies corporate as Aboriginal cultural heritage bodies.
- Amendments to subsection 36(6) to provide that the Minister **must** cancel the registration of an Aboriginal cultural heritage body if no longer satisfied about the matters mentioned in subsection 36(4), **including in circumstances where the Aboriginal party has changed.**

1.3 Land User Obligations

Is there a need to bolster the oversight mechanisms for self-assessment and voluntary processes – if yes, what should this entail?

This discussion will be from two perspectives, that of the Cultural Heritage Duty of Care Guidelines and the use of voluntary agreements.

1. Self-assessment and the ACH Act

The ACH Act itself does not talk about self-assessment. This concept is only introduced by the Duty of Care Guidelines.

The ACH Act states that its purpose is to achieve “effective recognition, protection and conservation of Aboriginal cultural heritage” (S 4). The Oxford Dictionary provides the following definitions:

Recognition: Identification of a thing from previous knowledge; acknowledgement of the existence and validity of something.

Protection: The action of protecting. Protect – keep safe from harm or injury.

Conservation: The action of conserving something. Preservation and protection; preservation and repair of archaeological, historical or cultural sites and artefacts.

Also, as stated above, Section 6 of the ACH Act then states it achieves recognition, protection and conservation of Aboriginal cultural heritage through a range of actions (a – i), of which only two are relevant to this discussion:

- (g) ensuring Aboriginal people are **involved** [added emphasis] in processes for managing the recognition, protection and conservation of Aboriginal cultural heritage;
- (i) establishing processes for the timely and efficient management of activities to avoid or minimise harm to Aboriginal cultural heritage.

The three crucial words that describe the purpose of the ACH Act, namely recognition, protection and conservation, complement each other. In a practical sense, each assist in the overall achievement of the purpose. In addition, paragraph (g) that states it will ensure Aboriginal people are involved in processes also assists, especially as the ACH Act states that principles underlying its purpose include “respect for Aboriginal knowledge, culture and traditional practices”, and that “Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage” (S. 5(a), (b)).

Importantly, another principle of the ACH Act is that “there is a need to establish timely and efficient processes for the management of activities that may harm Aboriginal cultural heritage” (S. 5.e). Given the stated purposes and the principles of the ACH Act, this last principle can only be interpreted to mean that it is the activities that **may** (our emphasis) harm Aboriginal cultural heritage that need management through timely and efficient processes, such that the management will also meet the purpose and principles of the Act.

However, in the case of the Duty of Care Guidelines, how this intent of the purpose and principles is to be achieved is provided in Section 6(i) of the ACH Act, which states that processes should be established “for the timely and efficient management of activities to avoid or **minimise harm** (our emphasis) to Aboriginal cultural heritage. Effectively, between the stated purpose and principle of the ACH Act and the notions on which the Duty of Care Guidelines are based is a critical breakdown of intention. Against the interests of “recognition, protection and conservation”, the notion of acceptable “harm”, albeit “minimised” (whatever that means) has now transmuted into being the process that underpins the Duty of Care Guidelines.

In addition, if “recognition, protection and conservation” are to be achieved, then “ensuring Aboriginal people are **involved** in processes” for management is critical, especially as the ACH Act recognises that they are the “primary guardians, keepers and knowledge holders” of Aboriginal cultural heritage. However, the Duty of Care Guidelines only ensures involvement of Aboriginal people in certain circumstances:

- when a proposed activity may impact on an area or item on the State’s Database or Register;
- where an activity is best described by category 5 of the Duty of Care Guidelines;
- where an activity best described by category 4 is in association with landforms described in S. 6.2 of the Duty of Care Guidelines, requiring consultation with Aboriginal parties; and
- when a Cultural Heritage Find is made.

The Duty of Care Guidelines effectively allow compliance for other circumstances to be achieved through self-assessment.

The Jinibara refer to their previous submission on the review of the Cultural Heritage Duty of Care Guidelines. In addition to the points made in this submission, the Jinibara have repeatedly found that:

- self-assessment is being loosely interpreted, with a focus on land clearing (regardless of the way in which native vegetation was removed) as described in part in Category 4, and little application of Sections 6 and 7 of the Cultural Heritage Duty of Care Guidelines; and
- the Jinibara are not informed of many projects and other ground disturbing activities.

The Jinibara recommend that all self-assessments under existing categories 2 to 4 (or categories 2 and 3 as per the Jinibara submission) should:

- be placed on the State's Register as a condition of self-assessment and should be searchable by the Aboriginal parties; or
- alternatively, should involve, at the least, informing the Aboriginal party of the need for assessment, and its outcomes and findings.

If an Aboriginal party believe that a self-assessment has incorrectly categorised an area or will harm Aboriginal cultural heritage not on the database but known to them, a mechanism for mediation between those who undertook the self-assessment and the Aboriginal parties should be provided by DATSIP.

The Jinibara contend that there is an urgent need to update the Cultural Heritage Duty of Care Guidelines because of the harm these guidelines cause to both cultural heritage and to the **respect** of Aboriginal people as custodians of our culture. The need to update the guidelines has been apparent for some time, but now is further triggered by the introduction of the *Human Rights Act 2019* which specifies that a policy or statutory provision that "interferes with the relationship between Aboriginal ... persons and land, water and resources" and "relates to the protection of Aboriginal ... cultural heritage" should be reviewed as they interfere with the cultural rights of Aboriginal peoples (Section 28; Queensland Government's Guide: Reviewing policies and procedures for compatibility with human rights, p. 38).

In addition to the above, the Jinibara were granted certain native title rights and interests by the Federal Court when we became determined native title holders. In relation to this commentary on the Review, the following native title right is important:

- 3(b)(vii) Maintain sites, objects, places and areas of significance to the native title holders under their traditional laws and customs and protect by lawful means those sites, objects, places and areas from physical harm or desecration.

The Jinibara understand that this right exists in relation to the determination area – those areas where native title exists.

However, the point that the Jinibara make is this. Native title rights have been recognised over part of our traditional country, i.e., those parts where native title has not been extinguished. The *Human Rights Act 2019* recognises our right to protect Aboriginal cultural heritage generally over our traditional country. Section 13 of the ACH Act recognises our rights to ownership, enjoyment and access, and that the ACH Act will not prejudice our native title rights and interests. The ACH Act also recognises that Jinibara are the native title and Aboriginal parties for our traditional country. Collectively, these legal perspectives would suggest that the ACH Act should be supported by the Cultural Heritage Duty of Care Guidelines in its confirmation of our ability to maintain our sites, objects, places and areas of significance.

2. Voluntary Agreements

Currently, the only reference in the ACH Act to the ability to enter into voluntary agreements is in Section 23(3)(a)(iii), which states “under a native title agreement or **another agreement** with an Aboriginal party”. No guidance on requirements is provided. As a result, the Jinibara have repeatedly found that so-called “agreements” consisting of basic templates are being offered, especially by some state government departments, e.g., Queensland Parks and Wildlife Service (QPWS), and agencies, e.g., Ergon. The Jinibara have received legal advice that many of these templates do not protect our cultural heritage rights and interests and provide no avenues for dispute resolution or guarantees that those entering into the agreement will follow agreed outcomes. These concerns are a principle reason why negotiation of cultural heritage outcomes for the Jinibara, and indeed for so many Aboriginal parties, are regularly difficult. Outcomes can result in our cultural heritage often not being managed appropriately, a major lack of respect, hurt and negativity for us, and damage to our cultural heritage.

We ask the State to consider our human rights. Specifically, the ACH Act needs to give guidance on the fact that “an agreement” is just that – an agreement between two or more entities – and to reach agreement the perspectives of all parties should be considered as much as reasonable and possible.

A second point that requires amendment is the use of the singular term “an Aboriginal party” in Section 23(3)(a)(iii). This has allowed proponents to choose which individual they wish to enter into agreement with, often against the cultural protocols and responsibilities of groups. Where there are overlapping native title claims, a proponent may pick and choose between groups. In such circumstances, the impact on Aboriginal cultural heritage that is only known to select individuals or groups may be profound.

The Jinibara recommend that Section 23(3) be amended to:

- (a) a person is acting -
 - (ii) under a **cultural heritage agreement** or an approved cultural heritage management plan that applies to the Aboriginal cultural heritage; or
 - (iii) under a native title agreement with an Aboriginal party.

In addition, the Jinibara recommend that Part 7 of the ACH Act be amended to

Part 7 Cultural heritage agreements and cultural heritage management plans;

and that Division 1 Introduction be amended to include two subdivisions, namely “Cultural Heritage Agreements” and “Cultural Heritage Management Plans”; and that after the

existing Division 1 and before the current Division 2, a new Division 2 be inserted and called “Division 2 Cultural Heritage Agreements”.

An important consideration for the Review team is the usefulness of cultural heritage agreements. Such agreements are not limited to specific projects that may otherwise harm Aboriginal cultural heritage. Rather, the subject of an agreement ranges between a very small matter about a specific Aboriginal cultural heritage object or area through to a whole working relationship between a local government and its Aboriginal parties. It is important that the versatility of a cultural heritage agreement is not confined.

Taking this point into consideration, the Jinibara recommend this new Division 2 should include directions for the following:

- notification to the Minister of the intention to enter into a cultural heritage agreement signed by all parties to the agreement (to demonstrate that all parties have commenced consultation about the agreement);
- a requirement of all cultural heritage agreements to include a clause that states: if one of the parties is no longer a party (e.g., an Aboriginal party passes away or is no longer an Aboriginal party in accordance with Sections 34 and 35 of the ACH Act; or a proponent sells the project to a new entity), then the cultural heritage agreement must be amended to remove parties that are no longer parties and include new parties; and
- the minimum requirements for a cultural heritage agreement, including:
 - full description of the project, relationship, or matter that is the focus of the agreement;
 - if relevant, the area for which the agreement is relevant;
 - what has been agreed;
 - how this will be augmented into the future;
 - what happens if one of the parties does not follow the agreement;
 - a dispute resolution mechanism (see comments below);
 - commercial arrangements if relevant;
 - if relevant, ownership of, and rights to, intellectual property, e.g., knowledge that is only known to one of the parties but must be shared with the other party if cultural heritage is to be protected;
 - changing the agreement by consent of all parties.

Is there a need for dispute resolution assistance for parties negotiating voluntary agreements – if yes, who should provide these services and what parameters should be put around the process?

The Jinibara have had numerous experiences in which proponents have taken a heavy-handed approach towards agreement-making, e.g., a “take it or leave it” approach that does not allow for the Jinibara’s internal protocols and processes. Without an ability to seek dispute resolution assistance, the Jinibara have usually found themselves at a huge disadvantage in such circumstances. Based on such experiences, the Jinibara suggest that a staged approach be adopted:

- Stage 1 – Minimum Level of Mediation: Access to mediation similar to what the Queensland Civil and Administrative Tribunal (QCAT) provides, in which experienced mediators assist the parties to arrive at mutually acceptable outcomes;

- Stage 2 – Mid-Level of Mediation: Access to a judge in the Land Court for higher level mediation and a decision about the dispute, if mediation does not achieve an outcome.
- Stage 3 – Maximum Level of Mediation: Judgement by the Land Court on the cultural heritage agreement.

For many Aboriginal groups the costs of mounting legal challenges through the Land Court are beyond their ability to pay, effectively removing their capacity to access the Land Court. Nil cost access to Stages 1 and 2 should be offered by the State to all parties.

Is there a need to reconsider the threshold for formal cultural heritage assessments – if yes, what assessment and management processes should be considered?

Cultural heritage assessments should be required for high impact activities, mirroring the Victorian approach, e.g., all mining activities, subdivision of land, quarrying, all high impact activities that do not require an Environmental Impact Statement.

Assessment and management processes should be jointly agreed and commensurate with the nature of the project. The Jinibara perspective is that:

- the possibility of currently unknown Aboriginal cultural heritage is ever-present;
- the level of assessment should be sufficient to inform all parties of the presence or absence of Aboriginal cultural heritage;
- the Jinibara may wish to involve a person who can give authoritative archaeological advice;
- reporting should be prepared by the Jinibara or their authoritative archaeological adviser so that outcomes of the assessment and appropriate management recommendations can inform all parties.

1.4 Compliance Mechanisms

Is there a need to bolster the compliance mechanisms designed to protect cultural heritage – if yes, what needs to be improved and what additional measures should be put in place?

Compliance has several nuances:

1. a proponent undertakes an activity that damages or destroys cultural heritage without their cultural heritage duty of care in place; or
2. an agreement, ILUA with a cultural heritage component or a CHMP is in place, but a party does not follow it, resulting in a breach of the terms of the agreement; or
3. an agreement, ILUA with a cultural heritage component or a CHMP is in place, but a party does not follow it, resulting in damage or destruction of cultural heritage.

Each will be discussed in turn.

1 and 3. The ACH Act provides a mechanism for DATSIP to investigate such circumstances. Timeframes should be fixed in cases when a complaint is not immediately followed by a Stop Work order. The Jinibara recommend a timeframe of 30 days be adopted.

2. The Jinibara's experience is that agreements have, on occasion, not been followed procedurally, although no cultural heritage has been damaged or destroyed. This is the fundamental reason why the Jinibara recommend that the minimum requirements for an agreement (discussed above) include what happens if one of the parties does not follow the agreement.

On the question of penalties for breaches being paid to Aboriginal parties, the Jinibara recommend that each penalty may have two parts (depending on the facts of the case): one that is paid to the State as a fine (that covers the costs of investigation and proceedings); and one that is paid to the Aboriginal party to compensate for, and, where possible rectify, the harm.

1.5 Recording Cultural Heritage

Is there a need to make improvements to the processes relating to the cultural heritage register and database – if yes, what needs to be improved and what changes should be considered?

Register

As discussed above, self-assessments should be placed on a register so that Aboriginal parties can regularly search, to find out where these have occurred.

Database

The database is often out of date, and contains information collected over many years, from a range of sources, and with various levels of skill involved. For example, the Jinibara recently undertook an assessment of scarred trees listed on the database in that part of their traditional country that is within the boundaries of Sunshine Coast Council. They found that not one of the so-called scarred trees should be on the database, as some were no longer alive (and thus could not be assessed properly), and others were not actually scarred trees. For example, one was a scar most likely caused by a vehicle hitting the tree on a species of tree that was introduced into Australia in the early 1900s.

When a native title determination is made, the State currently gives the determined native title holders a copy of all information on the database. In addition, the Jinibara recommend that funding should also be provided for the native title holders to:

- assess, where possible and when access to private land is available, all sites and places for their traditional country that have not previously been entered on the database by the native title holders; and
- enter significant Aboriginal areas and known significant Aboriginal objects.

As new areas and objects are found through assessment, these should be placed on the database.

Sensitivities are often associated with significant areas and objects. In addition, some people in the wider community may rank areas and objects by concluding that one type is more important than another, when in fact the decision about significance is the responsibility of the Aboriginal party. The publicly available information on the database should be restricted to the position of each registered area and object – perhaps call each a “registered place”.

One of the great flaws in the current process of self-assessment, which requires a search of the database, is the assumption by some that if nothing is on the database, nothing of significance is present. The ACH Act needs to state clearly that this is not the case.

2.0 Other Matters

2.1 Cultural Heritage Studies

Part 6 of the ACH Act offers the opportunity to conduct cultural heritage studies which can be placed on the register. The Jinibara have considered conducting some cultural heritage studies but found the process of establishing and finalising them too onerous. At the commencement, written notification of the proposed study must be given to the chief executive, local government and each landowner or occupier. While notification to the chief executive and local government would not present an issue, depending on the size of the study area and the size and nature of local land holdings, notification of each landowner or occupier may be onerous.

In addition, Section 70(3) requires consultation with the “owner or occupier of land about obtaining access to the land if the access is reasonably required for carrying out the study”, and Section 73(d)(iii) requires that “documented evidence about whether recommendations included in the study for future management of Aboriginal cultural heritage have been agreed with affected land owners and occupiers”.

An example that demonstrates how onerous these requirements could be is found in the Glasshouse Mountains, which have already been cited above. From a traditional perspective, a cultural heritage study of one of the Glasshouse Mountains owned by the State and managed by QPWS would not be problematic to commence but would serve only limited outcomes. The reason for this is that each of the mountains are linked in intangible cultural ways, and to study only the area contained in a national park around one mountain would be to diminish the outcomes substantially. If the study was extended to an area that reflected traditional cultural perspectives, then hundreds if not thousands of landowners would require notification and consultation.

Collectively, these requirements meant that it was not feasible for the Jinibara to conduct a cultural heritage study of the Glasshouse Mountains. The only practical solution was to place an external boundary around the area containing significance and place it on the database as a significant Aboriginal area.

While a practical solution may not be available for this Review, the Jinibara wished to raise this issue as it may explain, at least in part, why Part 6 of the ACH Act has been relatively rarely used.

2.2 Early Involvement

The Jinibara have regularly found that planning for projects is often advanced or finalised before consultation commences. In other words, a proponent will come to the first discussion with what is considered a *fait accompli*, placing the Jinibara in an invidious position if what is being planned does not mesh with how cultural heritage should be managed.

For the many negative examples that could be provided to support the situation explained above, one example of excellent consultation - redevelopment of Mary Cairncross Park at Maleny - highlights the advantages of early involvement. As soon as a design team for this project had been chosen, consultation commenced. Traditional knowledge and cultural

input were included in the first architectural drawings and continued throughout the project in a spirit of collaborative partnership at very little additional cost. Outcomes are widely acknowledged as exceptional, reflected in massive visitation increases and various awards, but most importantly an on-going partnership between the Jinibara and the park based on respect and recognition has been forged. What in fact should be a usual outcome is unfortunately still the exception.

If the review of the ACH Act and the Duty of Care Guidelines is to achieve outcomes that are founded in respect for Aboriginal people, then emphasis on the need to consult and involve Aboriginal parties early in a project is required.



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on behalf of the Jinibara Aboriginal Corporation