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Office of the President

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Our ref: HS-MR

CHA Review
Department of Aboriginal and Torres Strait Island Partnerships
PO Box 15397
City East Qld 4002

By email: CHA_Review@datsip.qld.gov.au

Dear CHA Review team

Review of the Cultural Heritage Acts

Thank you for the opportunity to provide comments on the Review of the Cultural Heritage Acts. The Queensland Law Society (**QLS**) appreciates being consulted on this important review.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Mining and Resources Law Committee whose members have substantial expertise in this area. With respect to the consultation paper we have addressed the following:

- the definition of 'cultural heritage' in the *Aboriginal Cultural Heritage Act 2003* (Qld) (**ACHA**) and the *Torres Strait Islander Cultural Heritage Act 2003* (Qld) (**TSICHA**) (**Cultural Heritage Acts**)
- the process for identification of Aboriginal and Torres Strait Islander parties
- land user obligations and compliance mechanisms
- updating the system of recording cultural heritage.

Defining Cultural Heritage

QLS acknowledges the importance of appropriately defining what items, areas and concepts constitute Aboriginal and Torres Strait Islander cultural heritage under the respective Cultural Heritage Acts. It is essential that this review consider the perspectives of Aboriginal and Torres Strait Islander groups about this definition. It is also important that the definition of 'cultural heritage' is readily understood by all persons with interests under the Cultural Heritage Acts so

as to ensure that the duty of care imposed by the Cultural Heritage Acts is understood and met by all project proponents in Queensland.

QLS considers that the current definition is adequate and clear from a statutory interpretation point of view. Importantly, the definition addresses the concepts of tangible and intangible Aboriginal and Torres Strait Islander cultural heritage (see the defined terms 'significant Aboriginal area' and 'significant Torres Strait Islander area'). The definition has not been the subject of litigation regarding any ambiguity in its drafting.

However, QLS has received feedback that the registrar appears to have developed a practice of requiring archaeological evidence that an area is a 'significant Aboriginal area' or 'significant Torres Strait Islander area' when there is no such requirement under the Cultural Heritage Acts. QLS also notes also that the consultation paper queries whether there should be more explicit reference to 'intangible heritage' in the definition of 'cultural heritage'. As stated above, QLS considers that the definition is sufficiently clear from a legal point of view. However, if departmental interpretation is improperly restricting the recognition of cultural heritage, further clarity or examples could be provided by inserting a notation in the Cultural Heritage Acts.

If any expanded definition is proposed through consultation with First Nations Groups, QLS considers that the definition should be accompanied by clear guidance about any new types of heritage that are captured by the expansion. Relevant guidelines will need to be updated to clarify how any new definition affects the rights of Aboriginal and Torres Strait Islander communities and affects industry in respect of the obligations and steps required to meet the duty of care.

Identifying Aboriginal and Torres Strait Islander Parties

There is a need for certainty when determining which Aboriginal or Torres Strait Islander party a project proponent should be engaging with, from both the First Nations and industry perspectives.

The current approach in the Cultural Heritage Acts refers to the Australia native title regime, defining 'native title party' under section 34 as a registered native title claimant, registered native title holder or, in certain cases, former registered native title claimant or registered native title holder under the *Native Title Act 1993* (Cth). 'Native title party' is then relied upon to define 'Aboriginal party' and 'Torres Strait Islander party' in section 35 of the respective Cultural Heritage Acts. The native title-reliant hierarchical system provides a clear mechanism for identifying the relevant parties based on who has claimed or been recognised as holding native title (even where the claim has failed). Removing the Cultural Heritage Acts' reliance on the registered native title claimant/holder regime by creating a State-specific process, has the potential to create uncertainty. It could also impact on past and existing arrangements between First Nations groups and project proponents.

However, there are concerns that reliance on the native title hierarchy and, in particular, recognition of the party with the 'last claim standing' as the Aboriginal or Torres Strait Islander party for the purpose of the Cultural Heritage Acts can result in the incorrect group of Indigenous people being engaged with. The purpose of the Cultural Heritage Acts is not fulfilled if the correct group of people is not involved in protecting the relevant cultural heritage.

The consultation paper raises the question of changing or removing the 'last claim standing' provision. QLS anticipates that the review team will receive submissions from relevant stakeholders in relation to that issue. QLS is aware that Native Title Representative Bodies hold a wealth of information and may be able to play an expanded role in identifying parties for the purpose of any proposed revised regime.

If, as a result of the review, it becomes apparent that the 'last claim standing' provision is resulting in unjust outcomes, then any replacement process for identifying the relevant Aboriginal or Torres Strait Islander party must be carefully designed to ensure that it provides certainty to First Nations people and project proponents. QLS looks forward to the outcome of this review as it relates to identifying parties and would be very willing to comment on any proposed change to the party identification provisions.

Land User Obligations

QLS supports reviewing the process for self-assessment and voluntary agreements, but any changes must be considered in light of available departmental resources. There is scope for the relevant department to have a greater regulatory and oversight role, for example by requiring project proponents to report on self-assessment practices or by recording of voluntary agreements. While these additional departmental functions may theoretically promote greater compliance with land user obligations, whether they ought to be enacted depends on the level of non-compliance (which QLS understands to be low) and the ability to properly resource the additional departmental functions.

QLS supports facilitated mediation for voluntary agreements. This underscores the importance of the Queensland Government's commitment to reframing the relationship with First Nations peoples, ensures efficient judicial resource allocation (if successful, mediation has the potential to alleviate the burden on the Land Court of considering such disputes), and promotes access to justice for First Nations groups who may not otherwise have the resources for more involved litigation.

Compliance Mechanisms

QLS appreciates the importance of optimal compliance with the duty of care in the Cultural Heritage Acts, especially in the context of protecting Queensland's First Nations cultural heritage. QLS advocates an evidence-based approach to any potential changes, that is, that any reforms should be introduced on the basis of current mechanisms being demonstrably inadequate. QLS does not have such data available, so generally supports retaining the current compliance scheme.

The Consultation Paper suggests more 'intermediate' mechanisms (as opposed to 'all-or-nothing'). This may take the form of improvement notices served to remedy cultural heritage management plan contraventions, cultural heritage audits for suspected contraventions, interim protection orders (for example, up to three months), or ongoing protection declarations over specified areas.

While these measures may support increased compliance, QLS emphasises the need for evidence-based changes to the Cultural Heritage Acts and the need for increased resourcing should changes be made to the compliance regime.

The issue of penalties imposed being paid to communities connected to the damaged heritage falls outside the usual philosophy of penalties as punishment for offences. Extra payments for repair or restoration may already be imposed by a court under section 27 of the Cultural Heritage Acts.

Recording Cultural Heritage

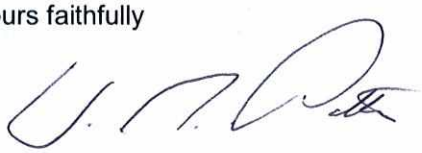
Mandatory registration of cultural heritage on the Cultural Heritage Database can be inappropriate where an Aboriginal or Torres Strait Islander group considers that information to be sacred, secret or otherwise not appropriate for public disclosure. If there were support for mandatory registration from First Nations groups, registration requirements should be kept simple to avoid overburdening stakeholders and careful consideration should be given to protecting sensitive information belonging to the First Nations parties. Provision should be made to exempt such information from the Database where appropriate, coupled with a right for stakeholders to request disclosure. QLS would have concerns if any mandatory registration requirement was made retrospective. Many Aboriginal land councils and native title groups may lack resources to comply with a requirement to place information gathered over many decades on the register.

Further consultation

QLS, and in particular the Mining and Resources Law Committee and Reconciliation and First Nation Advancement Committee, would be grateful for the opportunity to provide further comment on any proposed changes arising from the review. We would be pleased to comment on the consultation draft of any proposed bill or meet with you at any stage of the process.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our policy team by phone on (07) 3842 5930 or by email to policy@qls.com.au.

Yours faithfully



Bill Potts
President