

2 August 2019

Department of Aboriginal and Torres Strait Islander Partnerships
PO Box 15397
CITY EAST QLD 4002
By email: Email: CHA_Review@datsip.qld.gov.au

Dear Sir / Madam

CHA Review – QELA Feedback

We refer to the consultation paper released by the Department of Aboriginal and Torres Strait Islander Partnerships (**DATSIP**) and the industry consultation undertaken in relation to the review of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003* (the **Acts**).

QELA is a non-profit, multi-disciplinary association. Its members include lawyers, town planners, and a broad range of consultants who represent and advise a miscellany of participants in the development industry.

QELA has sought feedback from its members on the consultation paper. The feedback received from a number of members in relation to the current processes under the Acts is summarised below. It is important to note that in doing so, QELA does not formally adopt or support any particular individual view point on this subject, but rather seeks to provide its members with an avenue to make valuable and constructive submissions on this topic.

1. Dispute Resolution

Independent panel of experts

Some of our members have expressed an opinion that there may be an advantage in having an independent panel of experts appointed (comprising both Indigenous and non-Indigenous experts) who could be engaged by the parties to mediate or determine disputes regarding the impact of activities on Aboriginal/Torres Strait Islander cultural heritage.

The current mechanisms in the Acts are heavily focussed on the Court resolving disputes, which is expensive and can be impractical given Court caseloads.

Jurisdiction of the Land Court

The current system has relatively clear processes at the low-impact levels (eg works that do not require consultation with an aboriginal party under the Duty of Care guidelines) and clear processes at high-impact levels (where a Cultural Heritage Management Plans (**CHMP**) or significant cultural heritage agreement is required), but provides less structure and certainty for circumstances that fall somewhere in the middle. For example, where a project has relatively low on ground impact but is large enough in a category 4 or 5 area requiring engagement with the aboriginal party, a relatively significant agreement and associated engagement and survey processes are usually required. In these circumstances, the Acts provide for no Court based relief.

At the Brisbane industry consultation session, President Kingham suggested that parties consider including in agreement a trigger for referral to the Deputy Registrar of the Land Court to appoint a mediator from the Court's ADR panel (rather than referring to the QLS for appointment).



Queensland Environmental
Law Association

ABN 82 337 273 393

Ph 07 3832 4865

Email info@qela.com.au

Web www.qela.com.au

Suite 9, Level 18
324 Queen Street
Brisbane QLD 4000

QELA, a not for profit organisation, consults with and educates interested professionals and government representatives about planning, development and environmental laws that apply, or are proposed to apply, in Queensland.

QELA provides a collegiate forum for multi-disciplinary interaction and collaboration.



Jurisdiction of the Land Court (cont.)

While some of our members have indicated support for this suggestion, there may also be benefit from the Land Court being provided with expanded jurisdiction to deal with other matters under the Acts. Presently, the jurisdiction of the Land Court is essentially in respect of offences against the Acts or in relation to a CHMP (and even then not about compliance with a CHMP). Compliance with an agreement as to cultural heritage (including a CHMP) is a way in which a person may demonstrate compliance with the cultural heritage duty of care or a way of demonstrating that no offence of harm to Aboriginal cultural heritage has been committed. Given that such agreements are of significant importance under the Acts, it would seem appropriate that where parties have disputes under such agreements, they ought to have the ability to refer that dispute to the Land Court if unable to be resolved. Instead, parties are left to take action in, largely, the Supreme Court which is a more costly process.

Some of our members have suggested that more active regulation and oversight is required under the Acts. The current system relies on land users and Aboriginal parties taking action in the Land Court. Unfortunately, the disincentives of taking such action to both sides (costs, time, adverse publicity) has resulted in most parties avoiding such action in the majority of instances.

Some of our members have further submitted that, whilst acknowledging that the solution to the above mentioned issues may take a number of different forms, one option may be:

- a. Provide DATSIP with a review role for duty of care assessments, tied into the *Planning Act 2016* (Qld) (see item 2 below);
- b. Establish an expert panel to provide for efficient dispute resolution processes, comprising both Indigenous and non-Indigenous experts; and
- c. Introduce a series of practice directions that would cover issues such as:
 - i. Intangible heritage interpretation;
 - ii. Methodological direction;
 - iii. Efficient negotiation processes; and
 - iv. Reasonable rates of payment.

2. Duty of Care Guidelines

It has been suggested by a number of our members that DATSIP could consider reviewing the Duty of Care Guidelines, in particular with respect to Category 4 and the concept of Significant Ground Disturbance. It has been suggested that this concept is too broad as most significant heritage sites are within lands that have been subject to significant ground disturbance.

Further, it is considered by some that self-assessment is not appropriate and should not be relied upon where complex cultural and archaeological issues are involved, as this can result in complex matters being assessed by non-qualified persons.

3. Funding and Resourcing

Aboriginal/Torres Strait Islander parties generally do not have the funds or resources to properly engage or be represented in agreement making or dispute resolution processes. This can lead to a request by the Aboriginal/Torres Strait Islander party for the proponents to fund the Aboriginal/Torres Strait Islander party's legal and other costs, including meeting fees. This can also place an unfair onus on proponents and can lead to significant costs and delays to projects. A number of our members have suggested that government funding could be considered to assist Aboriginal/Torres Strait Islander parties to properly and expeditiously participate in cultural heritage protection processes, including agreement making and dispute resolution.



3. Funding and Resourcing (cont.)

It has been further pointed out that Aboriginal Parties are also the only entities responsible for overseeing the self-assessment process and are generally not resourced to undertake such a task. Aboriginal Parties are generally poorly positioned to approach land users, who are often multi-million-dollar companies and corporations with substantial resources, in order to hold them accountable for a failure to exercise the cultural heritage duty of care. This can lead to Aboriginal Parties charging an excess for Proponents that do engage to cover the costs of regulating land users and monitoring developments and associated risks to their cultural heritage, and can result in an inequity where other proponents (who may not be complying with the duty of care and self assessment/ voluntary agreement obligations under the Acts) may not be funding these costs.

Further, it has been pointed out that the role of Native Title Applicant and/or Cultural Heritage Traditional Owner can be an onerous one that must be undertaken with little guidance and no resourcing. Additionally, Traditional Owners are sometimes forced to give up other forms of employment and remuneration to fulfil their engagement obligations under the Acts and perform a regulatory function they are not supported to sufficiently execute. It is submitted that an important pillar of a revised heritage regulatory system is to provide sufficient resources to Aboriginal Parties to allow them to properly fulfill their obligations.

4. Education and Awareness

It has been observed by some of our members that there is a general lack of awareness and are not always fully informed of the obligations and procedures to address cultural heritage. The following case examples in support of this contention have been provided and are summarised below:

- *Case Study 1:* A landowner cleared likely Category 5 vegetation in a landscape that had high potential for Aboriginal cultural heritage. The landowner had obtained a permit to undertake the clearing from the relevant council which guided them through an exhaustive list of statutory and regulatory obligations, yet cultural heritage obligations were not mentioned. The Aboriginal Party for the area was not in a position where they were adequately informed, organised or resourced to identify this action.
- *Case Study 2:* After providing advice to a developer to undertake a Duty of Care Assessment after being approached by an Aboriginal party for one project, the developer sought cultural heritage advice for several active projects in their portfolio, many of which were in construction phase. Despite being an active land user throughout the State, the first project had alerted them to their obligations under the Act where they were previously unaware.
- *Case Study 3:* Whilst working for a long-term client on a range of projects in NSW, we became aware of similar projects they were undertaking in Queensland. When we queried what they were doing to comply with the *Aboriginal Cultural Heritage Act 2003 (Qld)*, we were advised that they didn't require expert advice in Queensland and that heritage wasn't a factor in the planning.

Further, some of our members have suggested possible improvements for raising awareness in relation to cultural heritage obligations and procedures, including the introduction of a series of practice directions that cover issues such as:

- a) Intangible heritage interpretation;
- b) Methodological direction;
- c) Efficient negotiation processes; and
- d) Reasonable rates of payment.

Further, in order to increase awareness of land users and developers of the obligations to address cultural heritage, it has been suggested that integration of the requirements of these Acts into the broader planning and approvals processes under the *Planning Act 2016 (Qld)* could be considered.



5. Ownership and Defining Cultural Heritage

Whilst there is no doubt that intangible cultural heritage is important to Aboriginal and Torres Strait Islander peoples, extending the protection mechanisms within the Acts to intangible cultural heritage raises potential implementation difficulties including:

- a) Who owns intangible cultural heritage?
 - i. The Acts currently provides that the State is the owner of Aboriginal/Torres Strait Islander cultural heritage except in limited circumstances. Arguably it is not appropriate for the State to be the deemed owner of intangible cultural heritage.
 - ii. Oral traditions, such as stories are not generally owned by one individual Traditional Owner or even family. Stories are often shared by many different Traditional Owner groups. It is conceivable that the Aboriginal/Torres Strait Islander party that “owns” intangible cultural heritage will be different to the Aboriginal/Torres Strait Islander party currently recognised under the Acts for tangible cultural heritage.
- b) Given the above, how will a proponent be able to identify the correct Aboriginal/Torres Strait Islander party relating to protection of intangible cultural heritage?
- c) What are the intended protection parameters under the Acts of intangible cultural heritage? The Acts currently protect Aboriginal/Torres Strait Islander cultural heritage from activities causing physical harm. Will, for instance, the unauthorised publication or re-telling of a Traditional story constitute harm to intangible cultural heritage?

6. Identifying Aboriginal and Torres Strait Islander parties

The Acts prescribe a process for identifying the Aboriginal/Torres Strait Islander party by reference to the status of native title claims.

This process, including the reliance on the “last man standing” rule, whilst not perfect, arguably provides certainty from a proponent’s perspective.

However it is acknowledged that it can result in an Aboriginal/Torres Strait Islander party being “locked in” where a determination that native title does not exist is made (such as occurred in the case of the Gold Coast native title claim).

Rather than discarding the last man standing rule, it has been suggested by members that one solution may be to address the specific situation where a determination is made that native title does not exist by including a mechanism for challenging the Aboriginal/Torres Strait Islander party status.

Further, members have submitted that alternative models that involve appointment of an independent party to decide who is the Aboriginal/Torres Strait Islander party or a process for registering a cultural heritage body may not avoid disputes between competing Traditional Owner groups about who is the Aboriginal/Torres Strait Islander party for an area and could arguably duplicate or even result in a contrary outcome to the current native title process, which could cause anomalies from an engagement perspective.

7. Land User Obligations

It has been suggested by members that changes to the Acts could include a practical process for proponents to confidently and efficiently be able to undertake activities which are unlikely to cause harm to Aboriginal/Torres Strait Islander cultural heritage. By necessity this will involve at least some level of self-assessment.

The alternative is a requirement to engage with the Aboriginal/Torres Strait Islander party each time activities are undertaken. Some of our members consider that this may not be practical or reasonable, in terms of time and cost, in particular given that the Aboriginal/Torres Strait Islander party is often not adequately resourced to engage, as referred to earlier.



7. Land User Obligations (cont.)

Some of our members have submitted that in their experience many proponents, and in particular infrastructure and service providers, have already introduced robust assessment processes, including engaging their own experts to assist in assessments. It is further submitted that this approach should continue to be facilitated in a review of the Acts.

A number of members consider that the current option to voluntarily engage in a CHMP process is adequate. Parties currently have the option to develop either an agreement or a cultural heritage management plan (except where an EIS requires a CHMP). CHMPs are often chosen as an appropriate process as Part 7 of the Acts includes clear time frames for negotiation and approval. However, it has been noted that there are significant costs to a proponent in developing a CHMP, including legal costs, meeting costs and dispute resolution costs.

Proponents who undertake regular development or infrastructure activities generally have well developed processes for engaging with Aboriginal/Torres Strait Islander parties and reaching agreement on mechanisms to protect Aboriginal/Torres Strait Islander cultural heritage, that do not require a CHMP. A number of members have submitted that the option to negotiate an agreement should be retained in any legislation rather than introducing a compulsory CHMP process.

8. Compliance Mechanisms

A number of members consider that the existing mechanisms in the Acts to protect Aboriginal/Torres Strait Islander cultural heritage from harm with penalties applying for offences for breaching the duty of care and the other offence provisions are effective and adequate.

There are also existing mechanisms for payment of rehabilitation costs to the Aboriginal/Torres Strait Islander party as was applied in the recent case of *Dunn v Ostwald Construction Materials Pty Ltd* [2018] QMC 23.

9. Fees

Currently, there is no means of testing that the proposed rates for conducting site inspections, monitoring, attending to finds or other cultural heritage work are commensurate with rates paid elsewhere as the only party with the relevant knowledge is the aboriginal party.

Whilst it is acknowledged that this issue remains controversial, a number of members have submitted that the setting of maximum hourly or daily rates for this work could reduce disputes between proponents and Aboriginal and Torres Strait Islander parties.

10. Other Issues

A number of our members have suggested that it may assist to include legislative certainty in relation to the signing of cultural heritage agreements and CHMPs. It is understood that the current policy of DATSIP is to accept CHMPs that have been signed by a majority of the persons comprising the Aboriginal/Torres Strait Islander party. This position could be included in the legislation.

We trust that the above submissions made by a number of QELA members assist DATSIP in its review of the Acts. Should you have any questions regarding this feedback, please contact QELA Legislative Review Chair, Kelly Alcorn, on (07) 3000 8377, or QELA Executive Officer, Linda Cupitt, on info@qela.com.au.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Brent Lillywhite'.

Brent Lillywhite
President

