Queensland's Review of the Cultural Heritage Act

Options Paper Submission

These comments are provided in relation to:

Under 3.3 'Improve cultural heritage protection' – proposal 4 'Provide a mechanism to resolve and deal with issues arising under the Cultural Heritage Acts' (and to some extent proposal 5).

The questions:

Do you support this proposal?

The comments below are broadly supportive of the idea of a dispute resolution pathway where agreement is unable to be reached by the parties.

Do you support this option?

The below attempts to discuss factors to be mindful of when considering mediation as a dispute resolution pathway. Some concerns about the nature of appointment of the mediator are covered in comments made at the end of this document in relation to under 5.2, proposal 1.

Any improvements?

The below comments are not so much intended as 'improvements' but rather as considerations when designing any dispute resolution or mediation process. This feedback may be premature in some respects for a process yet to be formally accepted – however early consideration of possible issues and considerations may also ensure the process design stage takes account of lessons already learnt from other mediation services, and lessons from the philosophy of mediation itself. The below is intended as such. It looks firstly at the two foundation elements which really underpin the philosophy of mediation - voluntariness (of attendance) and independence (of the mediator) and considers the perils of undervaluing these. In addition, the qualifications of the mediators as well as the realities of funding an effective and fit-for-purpose service (ie intake, logistics and time) are worthy of contemplation in the early stages of project design. And finally the below feedback will circle back to the importance of independence when considering the appointing of the mediator and other peripheral aspects of mediation service delivery.

Broadly:

Mediation is an excellent method for resolving disputes, with many benefits including allowing the parties to avoid the expense and delays of the court process, as well as allowing the reduction of pressure upon an often-overburdened court system. Also, because parties in mediation are designing their own agreements, rather than having an outcome imposed upon them, agreements tend to be more reflective of the parties' actual interests

(resulting in likely compliance) and parties tend to be more satisfied overall with the outcome (again resulting in likely compliance).

Mediation is used for these reasons – often very successfully - by the criminal courts (through restorative justice), the family court (where attempting mediation is a mandatory pre-requisite to lodging parenting applications) and by QCAT (where mediation is a mandatory step prior to a minor civil dispute application being heard).

It is therefore encouraging to see the review (of the Cultural Heritage Act) considering investing in mediation as a way of resolving disputes which may arise. The below are suggested considerations when embarking on the design of the mediation process.

Voluntary v Mandatory:

If it was intended that the mediation pathway (under the Cultural Heritage Act) would be a mandated process, it is worth considering the possible pitfalls of a compulsory, rather than a voluntary, process.

Mandating mediation is, as noted above, not uncommon, but that is not to say it is without pitfalls. Parties who are required – or mandated - to attend mediation often attend reluctantly and see the mediation as an exercise in 'ticking the box' in order that they can move on to the next stage (ie seek their remedy elsewhere, proceed to Court). This often results in parties attending the mediation disingenuously and without any intention to negotiate or compromise. This in turn tends to result in a very unproductive mediation, often one which worsens the relationship between the parties (which effects another principle of mediation - that the mediation should 'do no harm').

For example, parties who have been mandated to attend often tend to behave in ways to undermine or sabotage the process (being unreasonably argumentative, putting irrational and nonsensical arguments and putting unreasonable contingencies upon any concessions). Their lack of willingness to negotiate tends to materialise in the rejection of the other party's concessions and compromises, which then leads to an increase in frustration and mistrust on part of the other party. All of which may have left the relationship between the parties further damaged, the prospects of another mediation diminished and a dispute unresolved.

For these reasons among others, voluntariness is considered an important foundation requirement of mediation. However, that isn't to say that mandated mediations don't also produce positive outcomes for parties who may not have otherwise agreed to attend voluntarily. What it does say however is that mandating mediation should be carefully considered. Ideally an Intake session should precede the mediation and, where matters are identified as being highly likely to result in the poor outcomes noted above (ie they are 'unsuitable' for mediation), an alternate pathway identified for those matters.

Independence/Neutrality:

Whilst it is conceded above that a mediation can still have a good outcome despite lack of voluntariness on part of the parties, no such concession is possible in terms of the second foundation element of mediation – independence of the mediator (also often called neutrality, impartiality or the absence of bias). It is crucial and inescapable and indispensable. The mediator must be independent in every aspect of their dealings with the parties in order that both parties perceive the mediator as being entirely independent. That independence must be from the *parties* (they aren't 'on one person's side', or communicate in a way which could be seen to support one person's position or point of view). The independence must be from the *dispute* itself (they have offered no suggestions or opinions during intake or the mediation). The independence must be from the *outcome* (they aren't in any way invested in the outcome or have any interests which conflict with the interests of the parties). The independence must be constant and unwavering.

If one party considers that the mediator has a bias in favour of the other party, is involved in determining the outcome of the dispute or is somehow invested in the outcome, the mediation is, without doubt, destined to fail.

Such failure is likely to leave the parties relationship further damaged by the increase in mistrust that results, as well as leaving the parties feeling less willing to undertake mediation in the future because of that damaged trust. Noting there need not in fact be a lack of independence, but the mere perception of it is sufficient to create the conditions which will invariably result in these negative outcomes.

It would therefore be important to consider who the mediators are (to ensure they are independent from the parties), how the process including any Intake is conducted (to ensure they are independent from the dispute) and how mediators are recruited, renumerated, trained, monitored and developed (to ensure they are retaining high level mediation skills required to run a process independently).

Apart from voluntariness and independence, offering a mediation pathway to Cultural Heritage Act clients requires a consideration of various other factors, both theoretical and practical, if endeavouring to offer one capable of meeting the demands and expectations of its clients.

Skills:

Determining the appropriate skills that the mediator must hold in order to mediate disputes effectively is an issue as central as any when designing a mediation service. Without expert mediators who have an appropriate skill set no amount of otherwise good planning will result in good service.

It would be vitally important that the mediators have a high level of skills and experience in order to manage what are likely to be complex matters. Without suitably experienced and qualified mediators (who participate in continual monitoring, refreshing and expansion of those skills) mediations tend to be affected by those issues noted above (ie mediators appearing to lack independence) and thus provide a detrimental experience for the participants. In my view this would require mediators to be nationally accredited under the

Australian system known as NMAS (National Mediator Accreditation System) which is developed and implemented by the Mediator Standards Board. This system provides a standardised training and accreditation pathway, as well as ongoing requirements of professional development and minimum mediation hours per year once accredited.

Appropriate Funding:

Intake:

It is difficult to imagine a mediation that would not benefit from the conducting of an Intake process prior to the mediation. The Intake process is undertaken with each party to the mediation (and if necessary any ancillary parties). It is a vehicle for various things all of which contribute to the likely success of the mediation.

For example, the Intake familiarises the parties with what 'a mediation' is, the expectations of them in attending (behaviour, willingness to negotiate) and the role of the mediator as an independent third party. This sets parties expectations and promotes good behaviour.

The Intake also serves the purpose of allowing parties to consider the best and worst options if no agreement is reached in mediation – this provides parties with the motivation to compromise.

The Intake also assists the Intake Officer to clearly identify any risks of proceeding with the mediation, and whether there is any reason it should not go ahead (ie is unsuitable for mediation). This provides for the safety for all parties. It also helps the Intake Officer understand the conflict and evaluate who needs to be in the mediation – ensuring it proceeds with the correct decision makers and those central to the dispute.

Also, during the Intake parties are encouraged to seek any other information they need to gather prior to the mediation, such as obtaining legal advice, meaning they are attending the mediation fully prepared and ready to negotiate.

For all these reasons and more, it would fundamentally disadvantage any mediation if Intake was not provided as part of that mediation pathway. Therefore, these costs would need to be factored into the creation of a mediation process, as well as practical considerations such as the independence of the Intake Officer as well as their skill set.

Logistics & Costs:

If intending to provide this mediation pathway for indigenous parties located in far north Queensland (FNQ) - some real consideration would need to be given to logistics.

Most of the Indigenous communities in FNQ are a considerable distance from the nearest major centre (Cairns). Additionally, roads may be inaccessible during the wet season, and flights often very costly. There is also significant cost associated with ancillary things such as accommodation and car hire in the communities, with both facing availability issues due to the volume of 'fly-in/fly-out' service providers already visiting the communities.

The take up of online technologies for participation in mediations by those in Indigenous communities has been limited, and in my experience relates generally to the unreliability of the internet service, a strong preference for face-to-face communication (both from a cultural perspective and because many are using English as a second or third language) and a strong belief that decisions about country ought to be made on country. In which case - proponents participating in mediation may need to be prepared to travel to the Indigenous party's community or homelands in order to participate in the mediation; mediators would ideally have experience in working in remote communities and be willing and able to travel to them; and the coordinating/funding body would need to consider the logistics and also the costs of doing so. Without providing the mediation pathway in a way which the Indigenous parties feel is culturally appropriate the provision is unlikely to be seen as genuine and unlikely to result in high levels of participation.

Time:

Determining how much time is required for a mediation to allow thorough communication between the parties about the issues, an airing of points of difference and an eventual identification and then negotiation of options is a little like the 'piece of string' analogy. It will depend on various factors including the parties communication styles, the complexity of the dispute, the number of parties attending and the frequency of breaks required.

Often the issue with a mandated mediation process relates to funding which in turn relates to time. When a mediation is allocated a small amount of time (to reduce costs associated with renumeration of the mediators or expenses of venue hire) the effect upon the mediation is almost certainly going to be detrimental. That is because mediation is *all about communication*. When that communication is restricted, reduced, insufficient or incomplete so too is the ability of the parties to have their basic emotional needs met (ie feeling acknowledged) and in turn so is the ability of the parties to move on (to issue apologies, propose options for resolution and accept compromises).

This is the case with 'minor civil dispute' (MCD) mediations conducted by QCAT where restrictive time limits are placed on the mediation process. This tends to reduce the process to a 'settlement conference' more than a 'mediation' which does not allow for the addressing of any emotional needs of the parties and regularly results in no agreement being reached. The process is rushed, increasing the stress, and usually the frustration, upon both parties which in turn increases the likelihood of the disagreement remaining unresolved. This is an unfortunate outcome given the dedication of time (by the parties), resources (by QCAT) and skills of the mediator, none of which are able to counter the negative impact of insufficient time.

These comments are provided in relation to:

Under 5.2 Proposal 1 'Establish a First Nations led entity with responsibilities for managing and protecting cultural heritage".

The Questions:

Questions 4 (proposed functions of the entity) and

Question 7 (dispute resolution functions of entity) jointly:

Independence in Managing the Service Delivery:

Independence in the mediator and the meditation is crucial (as discussed above), and that importance applies similarly to the management of the mediation service in its entirety. For example, the developing of the policies, recruiting and training of mediators, provision of intake, decision making (for example deeming something unsuitable for mediation, or terminating a mediation), *allocation of matters to mediators/mediator appointment*, managing complaints and mediator development and support are all part of the 'mediation process', and should not be seen as distinct from it. Therefore, all these aspects to a mediation ought also project complete and unwavering independence to all potential parties.

The Options paper says, of the anticipated role of the First Nations entity, that it would have a role in 'providing support' and 'assisting' in a mediation context. For example, at 'functions' (under 5.2) the paper states that the entity would have the responsibility to 'provide dispute resolution support, assistance, advice', and later that it will be 'assisting with dispute resolution between proponents and ATSI groups through mediation and conciliation'.

If this means simply the entity assists and supports the Aboriginal and Torres Strait Islander parties - that is a logical part of their role. However, at 4.3 (under the heading 'dispute resolution') the first dot point states part of the role of the First Nations entity is 'appointing a suitable mediator'. This is a significant extension of the role to 'assist and support' and would be likely to have negative consequences.

The negative consequences become apparent when exploring the other facets of the role of the First Nations entity. The Options paper indicates this entity would also have a role in 'managing and protecting cultural heritage' – indicating its investment in a particular outcome and alignment with a particular party. Further the passage stating that the First Nations entity will be 'assisting local Aboriginal and Torres Strait Islander groups' with decision making infers that they will *not* be assisting proponents.

In this case it could be said there is an absence of independence in the mediator appointment process when being done so by the entity who also has responsibilities to assist one party (and not the other) and who is invested in the outcome (being to protect cultural heritage).

The First Nations entity's role in assisting Aboriginal and Torres Strait Islander parties and protecting cultural heritage are honourable and sensible outcomes of this review. Extending that role to the mediation service delivery (whether it be mediator appointment or any other aspect of the service) may cause more detriment than benefit to the entity as well as

the mediation service, given the negative effect an absence of independence causes to the mediation as a whole.

Note: The analogies made through out to other versions of mediation, for example MCD QCAT mediations are made with no intention of disrespect for those processes. The analogies are made for the purpose of contemplating a mediation process for the Cultural Heritage Act which takes lessons from those systems, acknowledging the existence of obvious differences between those examples and the cultural heritage landscape.

Submitted With Kind Regards,

T.Whitnell

Tanjil Whitnell

[redacted]

30/03/2022