Options Paper – Finalising the review of Queensland's Cultural Heritage Acts

QRC Submission to the

Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships

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QUEENSLAND resources COUNCIL

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Introduction

Background

The Queensland Resources Council (QRC) welcomes the opportunity to provide a submission to the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships (DSDSATSIP) Options Paper – Finalising the view of Queensland's Cultural Heritage Acts (the Options Paper).

The QRC is a not-for-profit industry association representing the commercial developers of Queensland's minerals and energy resources. QRC is Queensland's peak body for the explorers, producers, and suppliers of resources including coal, metals, petroleum & gas, minerals processors and electricity generators. Therefore, this submission represents the views of over 170 individuals and companies who are direct stakeholders in the management of Indigenous cultural heritage in Queensland, and should be weighted accordingly during the review process.

The Queensland resources industry supports the effective recognition, protection and conservation of Indigenous cultural heritage. Queensland's resources industry and Aboriginal and Torres Strait Islander parties have a strong history and established track record of working in partnership to protect cultural heritage.

The QRC belives that, when genuine engagement is underpinned by respect and recognition, resources companies and Aboriginal and Torres Strait Islander communities can work together for mutual benefit.

This includes working to strengthen cultural heritage protection practices and processes to embed the lessons that arose from the destruction of the caves at Juukan Gorge, even though it is unlikely that such a tragic event would have occurred under the current Queensland regime.

Queensland Cultural Heritage Acts

We continue to endorse the fundamental intent of the *Aboriginal Cultural Heritage Act 2003 (Qld)* and *Torres Strait Islander Cultural Heritage Act 2003 (Qld)* (the Acts) to strike the right balance between protecting cultural heritage, and providing industry with a certain, achievable, and practical framework.

The Acts have achieved this intent and are positively regarded throughout Australia. This is enabled through their key features, which include:

- An overarching duty of care on all activities on land in Queensland, which requires all people to take all reasonable and practical measures to avoid harm to cultural heritage;
- A focus on consent of Traditional Owner groups, enabling Traditional Owners to make arrangements to protect cultural heritage directly with land users;
- Agreements can be reached by various means, usually through a cultural heritage management plan. A cultural heritage management plan is also required for an environmental impact statement/assessment to be undertaken;
- Strong compliance and enforcement powers. These include the ability for the minister, a delegate or an authorised officer to issue a stop order when needed and nvestigate breaches. Traditional Owners can also apply to the Land Court for an injunction; and
- Penalties up to $2 million for breaching a stop order and penalties for corporations for statutory offences.

QRC stands ready to work with the government and Aboriginal and Torres Strait Islander peoples on meaningful actions that further enable Traditional Owners to protect their cultural heritage and provide a certain, achievable, and practical regime that supports the state's prosperity.

These reforms add complexity without addressing the core issues that are often raised by Traditional Owners, being that heritage is not being adequately protected. The fact that the Acts have served their purpose well should not go unrecognised. Numerous significant and untested changes proposed in this review will have the potential to cause uncertainty, delays and disruption without achieving the objectives sought. The QRC's submission should be read in this context.

Options Paper

This submission follows and reinforces the industry position presented in our submission to the initial consultation paper and the first options paper and in doing so draws on the resources industry's significant experience and success in implementing the legislation for over 15 years.

The importance of ensuring a framework that provides for cultural heritage protection, as well as certainty and practicality for land users necessiates careful consideration. Further work is required to understand how to address the concerns of Aboriginal and Torres Strait islander stakeholders consulted in the process.

As well as our detailed submissions on each of the proposals, there are 3 common issues, outlined below, that underpin QRCs views on the effectiveness, practicality, and necessity of the Options Paper generally. These issues go to the heart of good legislative review practice and are essential to ensuring that any amendments meet the criteria of an effective regulatory impact assessment.

- Evidence provided during the review process has not shown that the current Acts are failing to achieve their aims of protecting cultural heritage. Further work is also required to understand concerns that the appropriate Aboriginal and Torres Strait Islander parties are not being recognised or consulted, as this is not the resources sector's experience.

- The Options Paper does not contain the level of detail required for QRC members to consider the implications of the proposals on their operations (other than at a high level). The Options Paper lacks the detail required at this advanced stage of the consultation process (when the next step is likely to be legislative drafting), having regard to the potential impacts of the proposals.

- The Options Paper fails to properly detail any transitional arrangements across all elements of the proposed changes. The need for appropriate transitional arrangements goes beyond "ensuring continuity for existing arrangements, including Cultural Heritage Management Plans", as mentioned on page 6 of the Options Paper, and should include all existing arrangements, consultation, and dispute resolution processes. The recognition of existing arrangements (and not just Cultural Heritage Management Plans) is essential for ensuring continuity of the operations to which the relevant arrangements relate. Not providing sufficient transitional provisions will also result in breakdowns in well established relationships, cause uncertainty and significant project delays.

In addition to our submissions on the Options Paper, we have provided a suggested change to section 91(1)(b) of the Acts that should be considered as part of the review process. We recommend that the Government repeal or amend this provision which imposes onerous requirements on proponents seeking to develop a Cultural Heritage Management Plans,

requiring them to notify in writing all owners and occupiers within the relevant area. Further detail about this recommendation is found in the section of the submission titled "Other issues"

The QRC would welcome a meeting with the DSDSATSIP to further elaborate on our submissions and to ensure that the potential impact on the industry and the protection of cultural heritage is fully understood. The QRC proposes the Department:

- Undertakes further analysis to understand key issues and develop solutions
- Work with Aboriginal and Torres Strait Islander parties and land users on a proactive heritage mapping program that operates in areas not covered by existing development areas (and therefore will not be subject to heritage surveys)
- Develop, with Aboriginal and Torres Strait Islander parties and land users, a proactive education campaign on challenges and expectations regarding heritage protection, leading practice and the enforcement and monitoring regime

Executive Summary

The Options Paper is broken into three key areas: providing opportunities to improve cultural heritage; reframing definitions of Aboriginal Party and Torres Strait Islander party; and promoting leadership by First Nations people in cultural heritage management and decision making. Across the three key areas, ten proposals/ options have been suggested. Broad comments on each proposal/ option are summarised below with more detailed feedback in the body of the submission.

The QRC believes the Acts have served indigneous people and land users, including the resources sector, well and are regarded throughout Australia as workable and enviable. Numerous significant and untested changes proposed in this review have the potential to cause uncertainty, delays and disruption without any demonstrable benefit to any stakeholders.

Key Area 1: Providing opportunities to improve cultural heritage protection

In providing comment, it is important to note that the QRC supports measures to improve cultural heritage protection.

Proposal 1

As further consultation on definitions is required, QRC does not support the replacement of the duty of care guidelines ("the current guidelines") with the proposed new Cultural Heritage Assessment Framework ("the proposed Framework"). The current guidelines work effectively at achieving a balance between protecting cultural heritage, effective consultation and providing certainty to all parties in agreement making. The proposed definitions of "prescribed activity", "excluded activity" and "high risk area" require more detailed consultation, and it is not clear how the framework will operate in relation to other compliance pathways under the Acts.

Proposal 2

Significant further detail is required regarding the mapping proposal, including how this would be undertaken in such a large state as Queensland. The mapping process will be very complex and when coupled with the proposals (7,8) to change the way in which parties are identified, this could result in significant time taken to properly complete the mapping task. More consultation is needed on the detail surrounding this proposal. However, if mapping is undertaken, QRC would be supportive of it being integrated into existing platforms (i.e. GeoResGlobe). There will also be a need for users to access historical mapping layers, or point in time mapping, if the mapping is to be subject to constant updates.

Proposal 3

The QRC considers that the current Acts sufficiently recognise and provide protection for intangible heritage, and it is unclear how this proposal would provide greater protection or scope than that already provided for in sections 9, 10 and 12 of the Acts. The QRC does not support further changes.

Proposal 4

The QRC supports the timely and cost-effective resolution of disputes and issues arising out of compliance mechanisms under the Acts and the jurisdiction of the Land Court to hear such matters. Any proposed mechanism should not require additional steps to be taken by land users to demonstrate they have complied with the duty of care. The proposal is not clear as to what issues the process will further aim to resolve and does not show the current process to be ineffective.

Proposal 5

The QRC supports reporting and recording of cultural heritage agreements, noting that further consultation is required to establish appropriate parameters (including when this would occur). As there is insufficient information about what additional data would be reported, recorded or how it would be kept private, the QRC does not support this proposal in its present form.

Proposal 6

The QRC does not support changes to compliance, monitoring and enforcement provisions or the scope of responsibilities and powers of government Authorised Officers under the regime. There is no evidence of substantial non-compliance or activities in breach of the current laws. Increased education and awareness of current provisions would provide confidence in compliance and enable parties to raise concerns.

Key Area 2: Reframing definitions of 'Aboriginal party' and 'Torres Strait Islander party'

Proposal – General comment

The QRC does not support the changes outlined in options 1 and 2 to the way in which the Aboriginal and Torres Strait Islander parties are identified and recommends that the current system is retained. Significant transitional arrangements would need to be considered to ensure the ongoing consultation and negotiation of existing agreements are not delayed or disrupted by any changes made because of these proposals

Option 1

The QRC supports the ongoing recognition of registered native title claimants and registered native title holders as the Aboriginal and Torres Strait Islander party under the Acts. Applying this approach respects the native title determination process and enables native title holders to self-determine who speaks for country. Therefore, the QRC does not support the option outlined in the paper, which provides for multiple and potentially conflicting parties being identified. The QRC would prefer a determination of a specific entity that is representative of all of those parties as the Aboriginal and Torres Strait Islander Party for the area.

Option 2

The QRC does not support this option as it will not assist to identify the right party in areas where there has been a negative determination. With many native title determinations in Queensland completed, there are very few situations where such an option would be necessary. It is QRCs view that that a failed registered native title claimant can still have traditional connection to the area to justify Aboriginal and Torres Strait Islander party status.

Key Area 3: Promoting leadership by First Nations people in cultural heritage management and decision making

Proposal 1

The QRC does not support this proposal as registered native title claimants and holders should be able to determine who the right person to speak for country is, without the need for a third-party entity. Significant further detail would be required to understand how such a proposal would operate in the Queensland context.

Proposal 2

The QRC does not support a proposal to establish a First Nations- led entity to further manage cultural heritage as there is no detail or evidence as to what the proposal will target, improve, or achieve. The Acts provide sufficient definition of what constitutes cultural heritage, and it is unclear as to what benefit there would be to having yet another entity taking part in what is already a complex consultation and agreement making process.

Key area 1: Providing opportunities to improve cultural heritage

PROPOSAL 1

Replace the current Duty of Care Guidelines with a new framework that requires greater engagement, consultation and agreement making with the Aboriginal party or Torres Strait Islander party to protect cultural heritage.

Summary

- The QRC does not support the replacement of the duty of care Guidelines with the proposed new Cultural Heritage Assessment Framework. The proposed framework has more limited application than the existing guidelines.
- The current guidelines work effectively at achieving a balance between protecting cultural heritage, effective consultation, and certainty.
- The QRC supports government investments in proactive activities to enable Traditional Owners to recognise their heritage. However, it is unclear how this proposal would interact with the heritage approvals process.
- The definitions "prescribed activity", "excluded activity" and "high-risk area" require more detailed consultation as they are central to the workability of this proposal.
- The proposal is not clear as to how it will operate for those areas where the identity of the party is determined by means other than "last claim standing".
- It is also unclear how the proposed Framework will operate in relation to other compliance pathways under section 23(3) of the Acts.

Duty of Care Guidelines work effectively

The QRC views the current Guidelines as providing appropriately to protect cultural heritage, and ensure certainty, timeliness, and flexibility for a project, and without the need for government involvement. Replacing the current Guidelines with a proposed Framework that has a more limited application or one that increases uncertainty seems counterintuitive.

The Acts and the current Guidelines already differentiate the level of consultation required depending on factors such as the proposed activity and the previous land use, so to replace this current arrangement with a whole new framework would be disruptive not only to land users but to the relationships that already exist between land users and Aboriginal and Torres Strait Islander peoples.

The QRC believes that the Guidelines in their current form provide land users with the ability to assess the necessary consultation on a case-by-case basis by taking account of those factors that a Court would ultimately be required to consider when determining whether a person has complied with the duty of care in carrying out an activity, including (relevantly):[1]

- the nature of the activity, and the likelihood of its causing harm to cultural heritage;
- the nature of the cultural heritage likely to be harmed by the activity; and

[1] Aboriginal Cultural Heritage Act 2003 (QLD) (ACHA), s 23(2).

- the nature and extent of past uses in the area affected by the activity.

This is consistent with the purpose of the Acts to provide effective recognition, protection, and conservation of cultural heritage.[2] The Acts also list the principles that support this main purpose,[3] and how the main purpose is to be achieved.[4]

While most of these principles relate to the protection of cultural heritage and the rights of Aboriginal and Torres Strait Islander people as the custodians of their cultural heritage, they also include the need for a timely and efficient process for the management of activities that may cause harm.

In his second reading speech for the Aboriginal Cultural Heritage Bill 2003, then Minister Robertson stated that "*the bill … will ensure that existing cultural heritage protections are improved and provide certainty and flexibility to all land users when addressing cultural heritage issues*".[5] Therefore, the legislative purpose of protecting cultural heritage is to be balanced against affording land users' certainty and flexibility with their developments. This is something that we know is being achieved under the current laws.

QRC concerns regarding the proposed "Cultural Heritage Assessment Framework"

The proposed Framework has more significant ramifications than simply being a replacement for the current Guidelines and may impact more broadly on the compliance pathways to satisfy the duty of care currently available under the legislation.

These concerns relate primarily to the proposed proactive mapping program, the relevant definitions, and the workability of this proposed framework in those areas where there is no native title party which is the Aboriginal and Torres Strait Islander party/ parties for an area (i.e. the proposals outlined in Key Area 2 of this submission or section 4 of the Options Paper).

Mapping

The QRC recognises the importance of Traditional Owners and custodians being able to recognise their heritage. This would also provide benefit to all Queenslanders by deepening understanding of the state's diverse Aboriginal and Torres Strait Islander cultures.

Given the size of Queensland, this is an incredibly ambitious proposal that significant resources would be required to achieve. The core issue for industry is ensuring that a proactive survey campaign works alongside mapping activities undertaken to protect heritage as part of land-based activities.

Under the proposal the government would be responsible for organising and carrying out of the mapping in consultation with, and with the consent of, the relevant Aboriginal and Torres Strait Islander parties. From a resources sector view, we would require significant additional detail on:

- How areas would be prioritised whilst avoiding targeting particular industries;
- Resourcing to support the process, including where these resources will be sourced from;

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[2] ACHA, s 4.

[3] ACHA, s 5.

[4] ACHA, s 6.

[5] Queensland, *Parliamentary Debates,* Legislative Assembly, 21 August 2003 at 3179 (S Robertson, Minister for Natural Resources and Minister for Mines)].

- How different views during the survey process would be addressed;
- How land users would be involved, including what resources would be required;
- How land users would access the information obtained;
- How differing views and issues between and within Traditional Owner groups would be addressed.

Whilst we believe there would be a benefit to having the whole state mapped so that land users know exactly what cultural heritage exists for any given area, without the details outlined above we cannot see how this will be achieved in a timely, reliable and useable way.

Additionally, even if full mapping can be achieved, without addressing the issues of how conflicting parties might be managed and an appeals process, it is unlikely that there will be any confidence in the process or certainty in the accuracy of the information over time.

There will also be a need for land users to access historical mapping layers, or point in time mapping, if the mapping is to be subject to constant updates. Also, protections for parties at a point in time will be required, if mapping changes during the life of a project.

Proposed definitions

The QRC does not support the proposed definitions in their current form. The definitions of "prescribed activity", "excluded activity" and "high-risk area" are central to the workability of this proposal, and we believe that they warrant more attention to ensure they are suitable for both the land users and the Aboriginal and Torres Strait Islander people.

The QRC recommends that there be further detailed consultation regarding these definitions. Based on the proposed definitions QRC is concerned there could be an oversimplified approach adopted, where all mining and exploration activities are included in the definition of "prescribed activity", which would not be practical or appropriate.

Identity of Aborigina and Torres Strait Islander parties

The QRC has concerns about how the proposed Framework is intended to operate for those areas where the identity of the relevant Aboriginal and Torres Strait Islander party will be determined by means other than the "last claim standing" rule (proposals outlined in Key section 4 of the Options Paper, and QRC comments within Key Area 2 of this submission).

Given the proposals in section 4 of the Options Paper regarding the identity of an Aboriginal and Torres Strait Islander party for an area, consideration needs to be given to the flexibility of the relevant mapping and how it will change over time and take account of differing views, new or additional parties and new information coming to light. This will mean that the mapping will lose the benefit of certainty and may be in a constant state of change.

Timeframes and certainty

The QRC has concerns about the lack of detail provided in the Options Paper regarding the timeframes that will apply to any consultation process which will be mandatory (i.e. if an activity is a prescribed activity, or an activity other than an excluded activity in a high-risk area). To avoid lengthy delays by parties in the consultation process, the QRC recommends that timeframes should be embedded in the proposed Framework for these responses and consultation processes.

Concerns regarding impact on other compliance pathways

The Options Paper does not outline how the proposed Framework is intended to operate in relation to the other compliance pathways outlined in section 23(3) of the Acts, including acting:

- under an approved cultural heritage management plan;
- under a native title agreement or other agreement with an Aboriginal party; or
- in compliance with the native title protection conditions.

For example, it is unclear whether the thresholds for a mandatory approved cultural heritage management plan under Part 7 of the Acts will remain, despite the application of the "prescribed activity" or "excluded activity" definitions to the project, or despite the project being within a "high-risk area", or not.

PROPOSAL 2

Integrate cultural heritage protection mapping into land planning to enable identification of cultural heritage at an early stage and consideration of its protection.

Summary

- The proposal for state-wide mapping lacks detail about how, when and who will undertake the task, and requires further consultation.
- If mapping is undertaken QRC would be supportive of the integration into existing platforms (i.e. GeoResGlobe).
- There will also be a need for users to access historical mapping layers, or point in time mapping, if the mapping is to be subject to constant updates.

As outlined in our response to proposal 1, the QRC has a significant concern regarding the Framework proposal. Notwithstanding the concerns raised above, in relation to proposal 2, QRC notes that:

- QRC members already proactively assess at an early stage of their project planning, necessitated by the fact that the duty of care must be considered, and a compliance pathway selected prior to any activities being carried out; and
- in most instances, QRC members enter into cultural heritage agreements prior to the key approvals for a project being granted.

However, if a mapping process is undertaken, the QRC would be supportive of the integration of that mapping into existing platforms (i.e. GeoResGlobe) in the same way that native title layers are currently incorporated. There will also be a need for users to access historical mapping layers, or point in time mapping, if the mapping is to be subject to constant updates.

PROPOSAL 3

Amend the Cultural Heritage Acts to expressly recognise intangible elements of cultural heritage.

Summary

- The Acts already sufficiently recognise and provide protection for intangible heritage, and it is not clear how proposal 3 would provide greater protection. For this reason, the QRC does not support this proposal.
- Sections 9, 10 and 12 of the Acts provide for adequate scope and protection of cultural heritage and the intangible elements that relate.

The QRC understands concerns that the Acts do not currently recognise and therefore may not provide protection for intangible heritage.

The QRC does not oppose the recognition of intangible elements of cultural heritage, in principle. Fortunately, the definitions of 'heritage' within the Acts sufficiently recognise and provide protection for intangible heritage, as areas and objects that currently constitute cultural heritage do so primarily because of the intangible heritage values they possess. Sections, 9, 10 and 12 of the Acts together provide for this, as outlined below.

Without any detail about what elements of intangible heritage are not believed to be covered by the current Act, it is not clear how the amendments highlighted in proposal 3 would provide greater protection for cultural heritage than is currently available under the Acts.

It is unclear what further amendments could be made to the Acts to further incorporate any values that are not already recognised by the sections outlined below.

To the extent that there may be concerns about who owns intellectual property rights in intangible expressions of cultural heritage (such as performing arts, stories, festivals and craft), the QRC would in principle support measures designed to confirm that such rights are held by appropriate Aboriginal and Torres Strait Islander parties. However, the detail of this is important and would need to be further considered, as the scope of intangible heritage should not be so broad that it could impact large areas, or in fact the entire state.

Section 9 of the Acts.

Sections 9 and 10 of the Acts principally define cultural heritage by reference to, as applicable, "Aboriginal tradition" or "Island custom" (Ailan Kastom), as well as to the history, including contemporary history, of any applicable Aboriginal or Torres Strait Islander party.

In each of the Acts, an editor's note confirms that these references bear the meanings given to them in the *Acts Interpretation Act 1954* (Qld) – specifically, the references are to the body of traditions, observances, customs and beliefs of Aboriginal people or Torres Strait Islanders (as the case may be). In other words, cultural heritage is defined to comprise areas and objects that are significant to Aboriginal people and Torres Strait Islanders because of intangible heritage values they possess.

Section 12 of the Acts

Section 12 of the Acts gives additional information about identifying significant areas.

Section 12(2) confirms that, for an area to be a significant Aboriginal and Torres Strait Islander area, "*it is not necessary for the area to contain markings or other physical evidence indicating [Aboriginal or Torres Strait Islander] occupation or otherwise denoting the area's significance*".

Subsection (3) then lists ceremonial, birthing and burial places, as well as sites of massacres, as examples of areas that can be significant. The significance attaching to all of these areas derives, in large part, from the types of intangible heritage values that proposal 3 suggests will not be recognised without amendment to the Acts.

PROPOSAL 4

Provide a mechanism to resolve and deal with issues arising under the Cultural Heritage Acts.

Summary

- The QRC supports the timely and cost-effective resolution of disputes and issues arising out of compliance mechanisms under the Acts.
- The proposal is unclear as to why an additional mechanism is required given current pathways under the Acts. The Land Court also currently has jurisdiction for matters relating to heritage protection.
- Any new mechanism should not require additional steps to be taken by a land user to demonstrate that they have complied with their duty of care.
- Further evidence is required that the existing process is ineffective before the QRC could support a new mechanism
- The QRC does not support a First Nations-led entity being responsible for dispute resolution without further detail provided on the establishment and scope of the entity.

The QRC supports the timely and cost-effective resolution of disputes and issues arising out of compliance mechanisms under the Acts. However, the lack of detail in the scope of the proposal does not make it clear as to exactly what is being proposed, how it is intended to work, and what failures in the current system it aims to address.

Although the options within the proposal suggest it primarily contemplates the resolution of disputes, this is confused by the use of the term "issues", however there is no specific defining detail that makes this clear. Once there is clarity around the scope of what the issues being address are, the easier it will be to recommend a specific solution.

To properly consider and respond to any proposed mechanism, the QRC needs to understand the key aim of the proposed mechanism and the disputes/ issues it aims to resolve.

Dispute mechanisms

In the QRC's experience, the nature of disputes relating to cultural heritage can be varied, including, for example:

- disputes between land users and Aboriginal and Torres Strait Islander parties (as that term is defined in the Acts) around discharging the duty of care;
- disputes between parties under existing agreements;
- expert or technical disputes between Technical Advisers; and
- disagreements between members of Aboriginal and Torres Strait Islander parties (as that term is defined in the Acts).

The QRC is generally supportive of measures that will assist parties in dispute. However, the QRC considers that any proposed mechanism should sit separate or adjacent to land users' primary obligation to discharge their duty of care. That is, any proposed mechanism should not require additional steps to be taken by a land user to demonstrate that they have complied with their duty of care.

Establishment of First Nations-led entity

QRC supports the involvement and improved participation in the management of cultural heritage by Aboriginal and Torres Strait Islander people. Given the uncertainty around the detail of the issues requiring management and subsequent lack of detail about what a first nations entity would look like and how it would run (as highlighted in 'Key Area 3 – proposal 1 and 2), we do not support this proposal as a solution for dispute resolution without further information and detailed consultation.

Refer to comments and feedback provided in "Key Area 3" proposal 1 and 2.

Role of the Land Court

The options included in proposal 4 contemplate the role of the Land Court in dealing with disputes arising from the Acts. The QRC notes that the Land Court currently has jurisdiction to hear certain matters under the Acts and we are not aware of any material and ongoing issues with how these have been managed or decided.

If it is proposed to give jurisdiction to a body to hear disputes about agreements, the QRC considers the Land Court the most appropriate, experienced, resourced and best placed to manage them effectively.

Whilst QRC would support alternative dispute resolution processes as an option for disputing parties, this should only be an option for cases where there is real potential for resolution from such a process, not to unnecessarily delay the process. To be effective, alternative dispute resolution processes require all parties to participate openly, to avoid them being timely and costly, and without leading an unacceptable outcome for all.

Appropriate transitional arrangements

As with any proposed amendment to legislation and particularly the Acts, the QRC considers that appropriate transitional arrangements should be included, to reflect the significant number of existing agreements and arrangements that currently exist between land users and Aboriginal and Torres Strait Islander Parties, which may already include processes for dealing with issues between the parties.

PROPOSAL 5

Require mandatory reporting of compliance data and support auditing of the system.

Summary

- The QRC does not support further mandatory reporting obligations as there is insufficient detail about what additional data would be required, confidentiality, timeframes or how it would be managed.
- The QRC would support the reporting and recording of actual agreements. Further consultation on how this would work and what constitutes an agreement would be necessary.

The QRC does not support further mandatory reporting obligations. The Options Paper refers specifically to recording of additional compliance data, without any detail about exactly what additional data is required, the extent to which it needs to be recorded or reported, nor any detail about how the privacy of the data can be protected (for example, where Freedom of Information rules may apply).

The Acts already require some data reporting and QRC would appreciate clarification as to why the current data is not sufficient. The proposal does not provide any supporting information about the perceived benefit of reporting additional data, how the data be used, confidentiality and exactly what data is required to be reported.

The proposal suggests that land users document and register all agreements and consultation. The consultation required for the establishment of an agreement and the ongoing consultation relating to that agreement throughout the life of a project is significant, it could be well into the hundreds of consultation activities. Recording and reporting on this information would be unduly burdensome on both the land users and the Aboriginal and Torres Strait Islander parties involved.

More detail on exactly what data needs to be reported, and specifically what constitutes "consultation" for the purpose of reporting, is necessary. Additionally, more detail is needed on how the data is reported, to whom and at what stage of the process.

Whilst we do not support this proposal, we do see some merit in the reporting and recording of actual agreements. This would be premised on having clarity about:

- what constitutes an agreement, especially when the agreement is not a Cultural Heritage Management Plan;
- whether the agreement is reportable without having received all signatures from all parties; and
- the exclusion of the need to report a decision about whether an agreement was needed or not (i.e. reporting should only be required where an actual agreement exists)

The QRC do not support a system auditing process, especially without any detail as to what the process entails. In the previous options paper, there was suggestion of a "*rolling program of industry-specific audits*" which QRC did not support.

PROPOSAL 6

Provide for greater capacity to monitor and enforce.

Summary

- Due to the strength of Queensland's regime, there is no significant evidence of non-compliance or activities in breach of the current laws.
- Focus should be on implementing the current enforcement and monitoring regime.
- The QRC does not support an increase to compliance, monitoring and enforcement of land users.
- The QRC does not support the increase of the scope of responsibilities/ powers of government Authorised Officers.
- The QRC would support a greater focus on education and awareness for all parties.

The QRC does not support an increase or alteration to the current compliance, monitoring and enforcment regime under the Acts or the increased capacity and scope of government authorised officers.

As stated in previous submissions on this topic, we are not aware of any evidence that suggests the requirements of the Acts are not being complied with due to any perceived weakness in the existing provisions. None of the current requirments need to be expanded.

There are also existing deterrents in the Act in the form of the offences and penalties, along with the powers to prevent breaches in the form of stop orders, injunctions and existing investigative powers.

As an alternative to increased compliance monitoring and enforcement, the QRC would support the implementation of "*a coordinated education and awareness program*". It is the QRC's view, as stated in its previous submissions, that a focus on education is required, to support all land users to self-audit more accurately, improve performance and increase awareness of obligations to protect cultural heritage, rather than focus on onerous auditing activities, or punitive methods.

A key concept underpinning the Acts is to create a mechanism for land users and Aboriginal and Torres Strait Islander parties to reach agreement on cultural heritage matters while minimising government involvement. Facilitating direct relationships between resource companies and Aboriginal and Torres Strait Islander people is central to this. Increased government involvement in respect of compliance measures and punitive approaches such as introducing infringment notices, is unlikley to be conducive to productive realtionships beween landusers, Aborignal and torres Strait Islander parties and Government.

The QRC also recognises that a number of issues were raised by Aboriginal and Torres Strait Islander parties through previous submissions. In these submissions several pragmatic, non-legislative options were presented and the QRC welcomes an inclusive engagement process which supports discussion on viable options for all parties.

Key area 2: Reframing the definitions of 'Aboriginal party' and 'Torres Strait Islander' Party

PROPOSAL

Reframe the definitions of 'Aboriginal party' and 'Torres Strait Islander party' so that people who have a connection to an area under Aboriginal tradition or Ailan Kastom have an opportunity to be involved in cultural heritage management and protection.

Summary

- The QRC does not support the changes to the way in which parties are identified as outlined in option 1and 2 and recommends retention of the current system.
- The agreement making model currently in place is only possible where there is certainty of the party to whom the agreement must be reached. The options do not provide this certainty.
- It would be logical to align the concept of a party under the Acts and the Native Title party under the Native Title Act.
- Managing transitional issues for either of these options is critical to ongoing delivery on the agreements already in place.

Option 1:

- The QRC supports the ongoing recognition of registered native title claimants and registered native title holders as the Aboriginal or Torres Strait Islander party under the Acts.
- Application of the current approach respects the native title determination process and enables native title holders to self-determination who speaks for country.
- The QRC is not supportive of an approach that provides for more than one Aboriginal and Torres Strait Islander Party for an area.
- Where multiple parties exist QRC would prefer a determination of a specific entity that is representative of all those groups as the Aboriginal and Torres Strait Islander party for the area.

Option 2:

- The QRC does not support this option as it does not provide improvement of outcomes in identifying the appropriate Aboriginal and Torres Strait Islander party in areas where there has been a negative determination.
- There are limited locations in QLD where this issue arises and therefore such a complex solution is unnecessary for something that is not a widespread issue.

General comments

QRC recommends the retention of the current system of identifying the most appropriate Aboriginal and Torres Strait Islander party for consultation and engagement, to meet obligations to protect cultural heritage. For reasons outlined below in these opening comments and comments on options 1and 2, we submit that no changes are required to this part of the Acts.

Feedback from proponents that operate in other jurisdictions repeatedly emphasise that the greatest difficulty they face is identifying who to negotiate with where legislation does not provide certainty in respect of the Aboriginal and Torres Strait Islander party and this leads to inefficient and ineffective processes, discourages agreement making, and ultimately delivers poorer outcomes for both heritage protection and project development. Given the proposed Options are also not without their faults, the current Acts are the preferred approach.

The mechanisms in the Acts for protecting cultural heritage is based largely on an agreement making model. That approach is only possible where the identity of the party with whom agreement must be reached is certain. If the Aboriginal and Torres Strait Islander party cannot be readily identified, the processes in the Acts for protecting cultural heritage breaks down, and the effectiveness of the Acts is diminished.

It is logical to align the concept of an Aboriginal or Torres Strait Islander party under the Acts and the 'native title party' under the *Native Title Act 1993 (Cth)*, as the current Acts do, because:

- logically, they should generally be the same party – the recognition of native title over an area almost always carries with it a recognised right of the native title holder to speak for and protect cultural heritage in the area the subject of a native title determination;
- the Acts recognise, correctly, that cultural heritage is something that might be addressed in a broader native title agreement (and indigenous land use agreement or a right to negotiate agreement), and such agreements do commonly address cultural heritage as well as native title issues;
- given the established process by which native title claims are first registered and then determined, it is efficient for the Acts to 'piggyback' off that established system where possible for identifying the relevant party to engage with on cultural heritage;
- the system will become quite complex and confusing, and ripe for disputes, if there was misalignment between the native title party and the Aboriginal or Torres Strait Islander party identified under the proposal; and
- For the same area of land, it is possible that there could be a different Aboriginal and Torres Strait Islander party for native title and cultural heritage. This would be unworkable and uncomfortable for both land users and Aboriginal and Torres Strait Islander parties.

The QRC acknowledges a concern that recognising the 'last registered native title claimant' as the Aboriginal and Torres Strait Islander party could, in some cases, lead to the party being recognised as somebody who may have questionable bona fides to speak for cultural heritage in the area. However, this is not necessarily so, and a 'failed' registered native title claimant may still be the Aboriginal and Torres Strait Islander party with the best traditional connection to the area to speak for cultural heritage, even if they were unable to satisfy the legal test to prove existing native title rights over the area.

Further, in cases other than where there has been a negative determination, there remains a means for other Aboriginal and Torres Strait Islander persons to obtain party status over the area by making a native title claim and having that claim registered by the National Native Title Tribunal.

Therefore, whilst it may not be a perfect system, the recognition of the last registered claimant over the area provides a means to identify with certainty the Aboriginal and Torres Strait Islander party that a land user is to engage with to protect cultural heritage, and often that is a party that does have some (if not majority) traditional connection to the area.

The complexity and necessary resourcing that would be required if an alternate body and system is to be established to determine the identity of the Aboriginal and Torres Strait Islander party should not be underestimated, and would be disproportionate to any perceived improvements, as the current process is working well.

In the absence of a better system, which is not offered in the options for the proposal, the current process remains an effective means for ensuring protections for cultural heritage are put in place.

OPTION 1

The QRC does not support option 1 in its current form. The proposal lacks significant detail which would be critical to how it operates in practice. Option 1 introduces considerable uncertainty in identifying the Aboriginal and Torres Strait Islander party in areas subject to former registered native title claims until 'new determinations' by the proposed First Nations- led entity are made.

QRC supports the ongoing recognition of previously registered native title claimants as the Aboriginal and Torres Strait Islander party under the Acts, in circumstances where there is no current native title claim or determination in respect of an area.

Specific comments

It is not clear how or if option 1 would improve upon the current arrangements where the previous registration of native title claimants is relied on to identify with certainty the correct Aboriginal and Torres Strait Islander party to deal with in circumstances where there is no current registered native title claim or determination in respect of an area.

The QRC has several concerns with the changes proposed under Option 1 as to how the correct party will be identified where there is no existing registered native title claimant and no existing registered native title holder.

The QRC is not supportive of an approach that provides for more than one Aboriginal and Torres Strait Islander party for an area determined under the new process proposed. If there are multiple people or traditional owner groups that have a traditional connection over a specific area of land, then the QRC would rather see a determination of a specific entity that is representative of all of those groups as the Aboriginal and Torres Strait Islander 'party' for the area.

The determination of a specific representative entity would have the desirable outcome of ensuring that there is a single entity/ person that represents the interests of all Aboriginal and Torres Strait Islander parties with a connection to the area but provides a single entity/ person with whom a proponent is to deal with. This is similar to the native title process that puts in place a registered native title body corporate that represents the native title holders collectively.

This facilitates the efficiency, effectiveness and certainty of the process – e.g. there is an identified entity with whom agreements can be put in place. Where there are multiple parties, there can be conflict between those Aboriginal and Torres Strait Islander parties when seeking to put in place an arrangement to protect cultural heritage and the agreement-based system breaks down. This places unnecessary burden on land users and would cause angst for Aboriginal and Torres Strait Islander parties.

The Options Paper also suggests that a First Nations-led entity would be established to decide who the Aboriginal and Torres Strait Islander party will be. However, there are several unanswered questions, noting that this would represent a substantial change in the current approach. These are outlined in Key Area 3 in this submission.

The Options Paper suggests that an Aboriginal and Torres Strait Islander party who is unsuccessful in obtaining party status may appeal but does not specifically identify to whom that

appeal may be made. The Options Paper says that where there is a 'dispute' under the Acts the First Nations entity, or the Land Court could arrange for mediation. However, this solution does not appear to address the situation where a party has sought recognition as an Aboriginal and Torres Strait Islander party and the entity has rejected that application.

In that circumstance, mediation or another form of alternative dispute resolution process is unlikely to be a suitable option given the matter would not constitute a 'dispute' relating to the Acts. Similarly, this particular issue is unlikely to be solved by referral to the land court, as determining whether a party has Aboriginal and Torres Strait Islander party status is not a matter involving an agreement or a dispute under the Acts. Further, if the Land Court was to hear appeals from a First Nations entity that did not recognise an Aboriginal and Torres Strait Islander person as the Aboriginal And Torres Strait Islander party, that may have substantial resourcing implications for the Land Court, or indeed any court, that was charged with hearing such appeals given the complexity of the issues and evidence likely to be involved in establishing a person as having the relevant traditional connection to the area.

Extreme caution would need to be exercised to avoid straying into the Federal Court's jurisdiction to determine native title claims and we refer to the comments above that such a process runs the risk of becoming akin to duplicating the native title determination process.

The native title claim registration process is still contemplated to override any determination by the First Nations entity as to the Aboriginal and Torres Strait Islander party status of the area (i.e. where a new registered native title claim is put in place, the registered native title claimant immediately becomes the Aboriginal and Torres Strait Islander party. This runs the risk that substantial effort and resources could be expended by the First Nations entity and applicants applying for Aboriginal and Torres Strait Islander party status, only to be rendered redundant by a later registered native title claim. It also begs that question that if this is to be so, where it remains possible to make a native title claim and seek registration of that claim (i.e. any area other than where there has been a negative determination), is it not preferable for that to remain the path to establish Aboriginal and Torres Strait Islander party status?

The proposal to simply remove section 35(7) from the Acts is problematic, in that there needs to remain some default process for there to be an Aboriginal and Torres Strait Islander party with whom to engage. It cannot be that there is a vacuum where there is no party with whom to engage – i.e. where there is no current or former registered native title claimant or holder and no current Aboriginal and Torres Strait Islander party that has been determined by the proposed First Nations entity. The Acts simply do not operate in many situations if there is no Aboriginal and Torres Strait Islander party with whom to engage.

Section 35(7) is by no means perfect and can promote uncertainty (discussed below), but in the absence of the entire State being covered by registered native title claims or determinations, or appropriate recognition of Aboriginal and Torres Strait Islander parties through some alternate body, it needs to remain, otherwise there will be areas that simply do not have an Aboriginal and Torres Strait Islander party with whom to engage.

OPTION 2

The QRC does not support Option 2 as it does not provide any guarantee of an improved outcome in identifying the 'correct' Aboriginal and Torres Strait Islander party in areas where there has been a negative determination. Option 2 simply allows any Aboriginal and Torres Strait Islander person to come forward to claim party status and leaves a proponent in the often-impossible position of deciding who is the correct Aboriginal and Torres Strait Islander person or

persons with the relevant traditional connection and responsibility for cultural heritage in the area that they should engage with.

As the Options Paper identifies, there are currently only a handful of areas in Queensland where this issue currently arises. It is therefore not a widespread issue or problem that needs a complex and impractical solution.

Specific Comments

The QRC understands that the premise behind this proposed amendment is that the failed registered native title claimant does not have a sufficient connection to the area to justify Aboriginal or Torres Strait Islander party status. The QRC questions that premise and whether it applies in all cases.

It's possible that a failed registered native title claimant still has the 'best' traditional connection to the area when compared to other Aboriginal or Torres Strait Islander persons, but simply not a sufficient connection to the area to establish native title (e.g. the native title claim may have failed because the claimant may have failed to establish a sufficient ongoing connection to an area since sovereignty, but not because it never had a traditional connection to the area at the time of sovereignty).

Section 35(7) is not necessarily a better solution to identifying the 'correct' Aboriginal and Torres Strait Islander party for an area. It is effectively a catch-all or default provision in the Acts which comes into play when the native title claim registration process cannot be relied on. It does not guarantee the party identified will have any better bona fides to speak for cultural heritage in the area than the former failed registered native title claimant. The identification of the Aboriginal and Torres Strait Islander party under s35(7) may first depend upon who sees and responds to a public notice (e.g if a Cultural Heritage Management Plan is sought to be developed) and in that sense may vary from project to project depending on who responds to the notice. There is also the real and likely chance of multiple Aboriginal and Torres Strait Islander parties responding to the notice claiming party status.

In practice it is extremely difficult for a project proponent to identify with any certainty who is an Aboriginal and Torres Strait Islander party for the purposes of section 35(7). That section effectively requires the land user/project proponent to make a call in identifying or attempting to verify that a person has the relevant traditional knowledge and traditional responsibility to speak for cultural heritage in the area, potentially in the face of competing claims for party status from multiple parties. The proponent is unlikely to have the skills, knowledge or qualifications to determine such a matter. A proponent, therefore, faced with no real ability to test or judge the bona fides of a person claiming Aboriginal and Torres Strait Islander party status for an area, will often have no real choice but to deal with any person who comes forward claiming that.

The proponent is potentially exposed to claims of breach of the Acts for not dealing with the correct party claiming Aboriginal and Torres Strait Islander party status, even though it may have acted in good faith and truly believed it had engaged with an Aboriginal and Torres Strait Islander party in the absence of any judicial, government or other formal or statutory guidance or direction.

The QRC does not agree that that what is proposed will result in a better outcome than recognising a failed former registered native title claimant as the Aboriginal and Torres Strait Islander party.

Transitional issues

If any changes are to be implemented under Option 1 or Option 2, it would be critical that transitional provisions are put in place:

- for Option 1, to provide ongoing certainty of the Aboriginal or Torres Strait Islander party that a land user is to deal with during the period in which any new First Nations entity is considering registering a new 'Aboriginal party' over that area (e.g until that happens, former registered native title claimants remain the Aboriginal or Torres Strait Islander party and otherwise s35(7) continues to operate);
- in relation to cultural heritage protection mapping; and
- to recognise any existing Cultural Heritage Management Plans, cultural heritage agreements and native title agreements that have been put in place for the purposes of the Acts with parties that were formally recognised as the Aboriginal or Torres Strait Islander party over the area.

Key area 3: Promoting leadership by First Nations people in cultural heritage management and decision making.

PROPOSAL 1

Establish a First Nations-led entity with responsibilities for managing and protecting cultural heritage in Queensland. The entity could work with existing and future local Aboriginal and Torres Strait Islander Groups who manage cultural heritage matters within their respective areas.

Summary

- The QRC does not support the proposal for the establishment of a First Nations-led entity.
- The proposal does not provide sufficient details about the operation, funding, and scope of responsibility of the entity.
- There are several unanswered questions that go to the centre of any success of the entity, in particular what sort of disputes will be handled, how they will be handled and what appeal mechanisms exist.

The QRC supports the inclusion, participation, and consultation with Aboriginal and Torres Strait Islander parties with regards to land use in the protection and management of cultural heritage.

However, QRC is unable to support the proposal for the establishment of a First Nations-led entity as the proposal does not provide enough detail about the operation funding, and scope of responsibility of the entity. Whilst there are some suggestions around what the entity may look like, these suggestions do not provide any understanding about why this proposal is being considered and where in the consultation process this has been suggested.

Some of our initial concerns would include the following matters:

- the membership of the First Nations-led entity is likely to be contentious, and questions may arise about the legitimacy of any decisions made by this entity - ie, will they be accepted by Aboriginal or Torres Strait Islander people where the entity is not compromised of people who speak for country;
- concerns about timeframes and processes associated with decisions that are to be made by this First Nations-led entity which could ultimately lead to project delay. These concerns are heightened by the fact there is very little detail as to what the decisions relate to;
- concern about appeal mechanisms for decisions made by this First Nations-led entity. Again, there is little detail about the processes for matters relating to this entity;
- lack of detail around identification and appointment of the decision makers that sit on the First Nations entity;
- concern about the fact that the decisions of this body have the potential to determine important rights and could be controversial; and
- concern about the potential for significant conflicts of interest between the persons involved in the entity and the Aboriginal parties involved in any conflicts or appeals.

In addition to the ability to make decisions about management of cultural heritage and disputes, there is also a suggestion that the entity will be able to make decisions on who are the Aboriginal and Torres Strait Islander parties. The proposal lacks detail and raises a significant number of unanswered questions. The QRC is concerned about this responsibility of the entity, in particular:

- On what basis will the First Nations entity decide who is the correct Aboriginal and Torres Strait party for areas?
- What criteria must a person wishing to be recognised as an Aboriginal and Torres Strait Islander party meet and what evidence will they need to provide to the entity to support their claim?
- What process will apply for that claim– e.g. will it be a semi-judicial process where submissions can be made and objectors heard?

There is a risk that the type of evidence required and matters that would need to be considered will not be dissimilar to those that are required to establish native title over an area and result in duplication of process. If so, it should be recognised that native title proceedings are complex and native title claims often take years to prepare and determine. This raises the question of resourcing the entity that must make the determinations of this nature.

PROPOSAL 2

The First Nations independent decision-making entity, in partnership with Aboriginal and Torres Strait Islander peoples, explores the most culturally appropriate approaches for recognising historical connection to an area for the purposes of the cultural heritage management.

Summary

- One third of Queensland is covered by native title with 25 per cent subject to ongoing native title claims. Traditional Owner custodianship is well-established in other areas.
- Native title claimants and holders are best placed to determine the right person to speak for particular country.
- Therefore, the need for such a body is unclear, given it would not work well alongside the native title regime.
- One option is to support native title claimants and custodianships with internal decision-making where needed through mediation support.
- The QRC does not support this proposal as there is no evidence as to what the proposal will target, improve, or achieve.
- The Acts provide sufficient definitions of what constitutes cultural heritage, and it is unclear as to why it is necessary to have a third-party entity taking a role in an already complex process.

QRC does not support this proposal on the basis that there is not a clear and logical justification as to why the proposal is necessary, nor enough detail to understand what the proposal would target, improve and achieve.

In relation to a specific definition of historical connection, we note that the Acts definition of "Aboriginal cultural heritage" already includes anything that is, "*evidence, of archaeological or*

historic significance, of Aboriginal occupation of an area in Queensland".[6] This definition is broad enough to consider the cultural appropriateness of the recognition process necessary for any party to identify a cultural heritage connection to an area.

It remains unclear why the First Nations-led entity would be required to assume a role in assessing historical connection which is already currently recognised under the legislation and would generally be asserted by the relevant Aboriginal and Torres Strait Islander party for the area.

[6] ACHA, s 8.

Other Issues

REQUIREMENT TO PROVIDE NOTICES TO OWNERS AND OCCUPIERS UNDER S91(1)(B)

If a sponsor wishes to develop a Cultural Heritage Management Plan under Part 7 of the Acts, section 91 of the Acts requires the sponsor to provide written notice to certain persons including the chief executive, the relevant Aboriginal cultural heritage body, and each person who is an owner or occupier of a part of the plan area. The written notice must contain certain prescribed information relating to the project, including the location of the project.

QRC members have raised concerns about the unnecessary administrative burden associated with issuing a section 91 notice to each owner and occupier of land under Section 91(1)(b). In some instances, a sponsor may need to generate hundreds or even thousands of these notices which are posted to the relevant owners and occupiers. The notices serve little purpose, and certainly do not contribute to better cultural heritage protection outcomes.

In fact, in some instances, members have reported that the notices can be alarming to owners and occupiers who do not understand the context in which the notices are required to be provided.

We are also aware of other circumstances where the administrative burden associated with issuing hundreds of these notices has in fact deterred proponents and Aboriginal and Torres Strait Islander parties from entering Cultural Heritage Management Plans under Part 7 of the Acts.

Our members are otherwise supportive of retaining the notice requirement in section 91 of the Acts, however, QRC recommends that the requirement to issue these notices to owners and occupiers in accordance with s 91(1)(b) be repealed or amended.