

29th March 2022

Cultural Heritage Acts Review
DSDSATSIP
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Attention: Cultural Heritage Acts Review Team,

Jabree Ltd Submission – Finalising the Review of Queensland’s Cultural Heritage Acts -Responses to Options Paper Proposals

This submission has been prepared by Jabree Limited as the Registered Aboriginal Cultural Heritage Body for the Gold Coast Native Title Group (GCNTG). Jabree Ltd has been entering into negotiations and agreements under the *Aboriginal Cultural Heritage Act 2003* (ACHA) and Duty of Care Guidelines (DOCG) since 2010. The nature of agreements reached with public and private developers over the past twelve years has depended on variables including (but not limited to) the Aboriginal cultural heritage being protected and the scale of the development.

Jabree Limited (Jabree) would like to thank DSDSATSIP for the opportunity to comment on the Cultural Heritage Acts Option Paper released in late 2021. Responses to the proposals identified in the Options Paper are detailed below based on practical experience working with existing cultural heritage laws and their interpretation by public and private developers.

1. Providing Opportunities to Improve Cultural Heritage Protection

Proposal 1 - Replace the current Guidelines with a due diligence process that requires greater engagement, consultation and agreement making with the Aboriginal party and Torres Strait Islander party to protect cultural heritage.

- The existing DOCG do not provide appropriate protection for Aboriginal Cultural Heritage. The assessment of an activity’s potential impact to Aboriginal cultural heritage is open to wide interpretation and few developers understand the concept of “additional surface disturbance” and “consistency of disturbance”.
- This proposal for a new framework with two categories of activity, “prescribed” and “excluded”

has merit providing definitions are clear and many practical examples are provided. For example, the following would be prescribed activities:

- Residential development on land previously cleared of trees and used for grazing purposes
 - Duplication of a two-lane road within a preserved road corridor where only historic maintenance and tree clearing has occurred
- Mapping of high-risk cultural heritage areas would be a great initiative provided appropriate predictive modelling parameters are considered in the mapping algorithm. For example:
- Within 200m of (or the feature itself):
- a waterbody or watercourse (including existing watercourses, prior waterways, but does not include man-made bodies of water such as dams)
 - a river, creek, stream, channel or watercourse including prior, perennial, intermittent and ephemeral watercourses)
 - a natural lake, lagoon, swamp or marsh (including ancient lakes),
 - a natural depression through which water can be collected, or which forms part of an intermittent channel
 - Coastal fringe high water mark (dune systems, rocky points, areas of coastal vegetation)
 - Dunes (inland, riverine or coastal)
 - Ridges (including ridgetops and saddles, stony rises, promontories)
 - Declared Ramsar wetlands
 - Remnant vegetation
 - Caves and rock-shelters
 - Sand hills
 - Unique landscape features such as *inter alia*: the Great Barrier Reef, waterfalls, gorges, escarpments, stony rises, volcanic plugs, lava flows.
- A bias exists for users of mapping tools. Users look for a “yes” or “no” answer to satisfy their research. If they find a “no” response, they see a green light to proceed with the development. This currently exists with searches of the DSDSATSIP Cultural Heritage Database. The development of a mapping layer of high-risk cultural heritage areas (with appropriate levels of access for different users) would hopefully encourage developers to think more broadly about the potential risk of harming Aboriginal cultural heritage.
- The flow chart on page 12 of the Options Paper needs refining. The opportunity to “*Proceed – but consult and seek agreement if cultural heritage is found*” is problematic for the following reasons:
- It is unlikely construction workers would be able to identify a cultural heritage ‘find’
 - Once a development activity has commenced, the pressure of project deadlines and associated financial gains does not encourage stopping a project to make an assessment about a cultural heritage ‘find’
- The development of a new assessment framework should involve a collaboration between First Nations People and industry experts with extensive experience in cultural heritage assessment and

agreement making. The framework development could benefit from the use of a practical or hypothetical case study.

- Aboriginal and Torres Strait Islander parties should be provided with Qld Government funding support to establish businesses to manage their own cultural heritage. Funding could include (but not be limited to) budgets to establish governance processes, insurance cover, office space, IT equipment and staff training.

Proposal 2 - Integrate cultural heritage protection and mapping into land planning to enable identification of cultural heritage at an early stage and consideration of its protection.

- The most appropriate way to integrate cultural heritage protection into land planning is to create a trigger in the *Planning Act 2016* (and / or associated regulations) to ensure compliance with the *Aboriginal Cultural Heritage Act 2003* forms part of the Development Approvals Process.
- Jabree Ltd has been responding to advertised development notices (under the relevant planning acts) for the past twelve years. Correspondence is forwarded to private developers and their town planning consultants to inform them of the development's potential harm to cultural heritage. Mention of compliance with the ACHA is usually met with silence. Few medium and small tier residential developers have ever heard of the ACHA and they are quite sure that when the City of Gold Coast issues their Development Approval, they have complied with enough legislation to proceed with their development. With no policing of compliance and no fines for non-compliance these developers see the ACHA as optional and not necessary compliance.

Proposal 3 - Amend the Cultural Heritage Acts to expressly recognise intangible elements of cultural heritage.

- The Options Paper (pages 9-10) provides definitions and best practice standards from other jurisdictions which would be very worthy of consideration in amendments to the ACHA.

Proposal 4 - Provide a mechanism to resolve and deal with issues arising under the Cultural Heritage Acts.

- Any mechanism considered for resolving disputes would need to be appropriately funded and staffed with individuals highly skilled and experienced in cultural heritage assessment and agreement making.
- Skills and experience should embody a working understanding of cultural heritage laws, how they apply in the field and the challenges faced by Aboriginal parties and land users in ensuring their interests are protected.

Proposal 5 - Require mandatory reporting of compliance to capture data and support auditing of the system.

- The Options Paper proposes a requirement for land users “to document and register all agreements and consultation” under the ACHA. Land users should also be required to document how they assessed their activity was “prescribed” or “exempt”, in a “high-risk area” or not.
- The creation of templates and forms would likely assist land users with compliance and storing completed documents in a secure central system would encourage transparency in decision making.

Proposal 6 - Provide for greater capacity to monitor and enforce compliance.

- Existing enforcement provisions in the ACHA are not sufficient to ensure compliance
- The options outlined in the Options Paper would go a long way to ensuring the development industry considers compliance with the ACHA as necessary not optional.

2. Reframing the Definitions of ‘Aboriginal Party’ and ‘Torres Strait Islander Party’

Previously Registered Native Title Claimants that are “The Last Claim Standing” should not be bundled together into one homogenous grouping.

Negative determinations of Native Title handed down by the Federal Court differ across Queensland. If Part 4 of the Cultural Heritage Acts is amended, a distinction should be made between previously Registered Native Title Claimants where the Federal Court has:

- made a decision native title does not exist on the grounds of native title being extinguished by the grant of freehold land; versus
- a decision that native title does not exist based on a hearing of comprehensive evidence regarding continued connection to the land and waters the subject of the native title claim.

3. Promoting Leadership by First Nations Peoples

The most important goal in amending the Cultural Heritage Acts is to ensure improved protection of Aboriginal and Torres Strait Islander Peoples’ cultural heritage. Once legislative provisions are established to achieve this goal, the development industry need to be informed of the changes and how they will affect their operations / business.

Communicating and presenting amendments to the Cultural Heritage Laws will be key in ensuring

meaningful change within the development industry. For some organisations this may be the first time they are exposed to Queensland's Cultural Heritage Laws.

The entity set up to communicate cultural heritage policies and advice should:

- Draw on office-based and field-based skills and experience in cultural heritage management from:
 - First Nations People
 - DSDSATSIP Cultural Heritage Unit
 - Mapping specialists
 - Heritage consultants
 - Cultural Heritage Officers from Qld Government Departments such as TMR
- Attend forums convened by organisations such as the Planning Institute of Australia, National Farmers Federation, Mining Companies, AAA
- Engage an experienced presenter / facilitator who can weave a compelling narrative into the concept of recognising, protecting and conserving Aboriginal & Torres Strait Islander People's Cultural Heritage.

The Jabree Ltd team looks forward to ongoing updates from DSDSATSIP as part of the Cultural Heritage Acts Review process.

Yours sincerely



Jim Gamack
General Manager