



**TORRES SHIRE COUNCIL**  
To lead, provide and facilitate a sustainable, safe and  
culturally vibrant community

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30 August 2019

Matthew Wilkinson  
Cultural Heritage Acts Review Team  
Legal Policy, Strategic Policy and Legislation  
Department of Aboriginal and Torres Strait Islander Partnership  
PO Box 15397  
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Dear Sir,

**RE: TORRES SHIRE COUNCIL RESPONSE TO THE CONSULTATION PAPER  
ON THE REVIEW OF THE CULTURAL HERITAGE ACTS**

The State of Queensland sought submissions on a review of the cultural heritage acts.

This submission addresses three issues concerning the review of the operation of the Cultural Heritage legislation:<sup>1</sup>

1. With whom should the Torres Shire Council consult with respect to its obligations under the Cultural Heritage legislation (and its interaction with the *Human Rights Act 2019 (Qld)*);
2. The considerations at a policy level for the rolling out of Cultural Heritage Management Plans (CHMP) and/or Cultural Heritage Management Agreements (CHMA) within Council's jurisdictional area; and,
3. The financial implications concerning points (1) and (2) above.

The Council's submission is in the particular context of its obligations under the *Planning Act 2016 (Qld)* and other environment protection legislation as a sponsor or decision-maker with respect to development applications for infrastructure proposals, or other building works undertaken for the care and maintenance of land and/or seas in the Torres Shire. To that end, the Council may wish to establish a CHMP and/or CHMA as a means of addressing cultural heritage issues in an orderly and appropriate manner.

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<sup>1</sup> *Aboriginal Cultural Heritage Act 2003 (Qld)*; *Torres Strait Islander Cultural Heritage Act 2003 (Qld)*.

## BACKGROUND

### The Council's jurisdiction

The Torres Shire Council (the Council) is the northernmost Queensland local authority; it comprises all of the State lying north of latitude 11 degrees south, save and except those areas within the local government jurisdiction of the Torres Strait Island Regional Council and the Northern Peninsula Regional Council. This includes the northernmost part of the Cape York Peninsula, together with the mostly inhabited islands of the south western cluster of the Torres Strait and numerous uninhabited islands of the Torres Strait.

The Shire's administrative centre is located on Thursday Island, which provides the primary service centre for the region. The Council's administration area comprises several islands and portions of the Cape York Peninsula. The major islands covered by the Council include: Albany Island; Aubusi Island; Aureed Island; Barney Island; Booby Island; Browne Island; Crab Island; Dayman Island; Deliverance Island; Dugong Island; Entrance Island; Friday Island; Gabba Island; Goods Island; Hawkesbury Island; Horn Island; Kaumeg Island; Little Adolphus Island; Molmi Island; Mount Adolphus Island; Packe Island; Phipps Island; Port Lihou Island; Possession Island; Prince of Wales Island; Sassie Island; Spence Island; Thursday Island; Turnagain Island; Turtlehead Island; Turu Island; Wednesday Island; Whale Island and, Zagai Island.

The vast majority of these island are uninhabited islands for which Council is responsible for the care and maintenance.

Though the Council is not an Indigenous Council, the population of the Torres Shire is overwhelmingly Indigenous, being Torres Strait Islanders and/or Aboriginal Kaurareg People.

### Native Title in the Torres Shire

All the Council's deliberations in relation to development applications and other land use decisions for the local government area are undertaken in the context of the recognition of existing native title rights and interests of the Aboriginal and Torres Strait Islander peoples in relation to the land and the sea, or the recognition of a potential native title rights and interests of the Aboriginal and Torres Strait Islander Peoples with respect to undetermined native title claims and 'future acts' in relation to land and seas.<sup>2</sup>

Commencing with the High Court decision in *Mabo*,<sup>3</sup> Federal Court of Australia native title determinations have long been in place for the islands of the Torres Strait on behalf of the Torres Strait Islanders, for Torres Strait islands held by the Kaurareg People,<sup>4</sup> as well as for part of the seas of the Torres Strait held by Torres Strait Islanders.<sup>5</sup> With respect to those determinations, there are a number of well-established Registered Native Title (Prescribed) Bodies Corporate (RNTBCs) in the Torres Shire that hold the relevant native title rights and interests in trust on behalf of the claim group.

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<sup>2</sup> *Native Title Act 1993 (Cth)*, Part 2, Division 3

<sup>3</sup> Commencing with *Mabo v State of Queensland* [1992] HCA 23, 3 June 1992 with respect to the Merriam Islands and Mer Island.

<sup>4</sup> *Kaurareg People v State of Queensland*, [2001] FCA 657, 23 May 2001, QG6026.

<sup>5</sup> *Akiba on behalf of the Torres Strait Regional Sea Claim Group v The Commonwealth of Australia*, [2013] HCA 33, 7 August 2013, 'Sea Claim A'.

Moreover, both the Torres Strait Islanders and the Kaurareg People have separate proceedings on foot in the Federal Court of Australia in relation to the seas of the Torres Strait and the seas adjacent to the Cape York Peninsula.<sup>6</sup>

Significantly with respect to the cultural heritage legislation, no native title rights and interests have been determined with respect to Wednesday, Thursday and Friday Islands, and many other inner Torres Strait islands of the south western cluster: these are subject to the Kaurareg People #3 native title claim.

## CULTURAL HERITAGE

### 'Intangible rights'

In 2003 the United Nations Educational, Scientific and Cultural Organisation (UNESCO) introduced the concept of 'intangible rights' by adopting the *Convention for the Safeguarding of Cultural Heritage* (the UNESCO Convention).<sup>7</sup> Article 2 of the Convention defines 'intangible cultural heritage' to mean:

'the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that **communities, groups and, in some cases, individuals** recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.

The 'intangible cultural heritage' is manifested *inter alia* in the following domains:

- (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
- (b) performing arts;
- (c) social practices, rituals and festive events;
- (d) knowledge and practices concerning nature and the universe; and,
- (e) traditional craftsmanship.

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<sup>6</sup> *Lui Ned David & Ors on behalf of the Torres Strait Regional Seas Claim v State of Queensland* (QUD 27/2019 ('Sea Claim B'); *Isaac Savage & Ors on behalf of the Kaurareg People #1 v State of Queensland* (QUD 26/2019); *Isaac Savage & Ors on behalf of the Kaurareg People #2 v State of Queensland* (QUD 10/2019); *Pearson Wigness & Ors on behalf of the Kaurareg People #3 v State of Queensland* (QUD 24 of 2019); *Victor Nona on behalf of the Badu People (Warral and Ului) v State of Queensland* (QUD 9/2019); *Bernard Richard Charlie & Ors on behalf of the Northern Peninsula Sea Claim Group* (QUD 114/2017); and *Bernard Richard Charlie & Ors on behalf of the the North Eastern Peninsula Sea Claim Group v State of Queensland* (QUD 115/2017).

<sup>7</sup> See: Text of the Convention for the Safeguarding of Intangible Cultural Heritage; <https://ich.unesco.org/en/convention#part2>, (accessed 7 August 2019). Australia is not a party to the Convention



The Queensland Parliament recently enacted the *Human Rights Act 2019* (the HR Act). While Australia is not a party to the UNESCO Convention, the HR Act could be said to reflect the concept of 'intangible rights' protected by the UNESCO Convention.

The HR Act requires public entities to act and make decisions in a way that is compatible with human rights. Section 5B of the Act makes it 'unlawful' (with exceptions and qualifications not here relevant) for a public entity to act or make a decision in a way that is not compatible with human rights; or, in making a decision, to fail to give proper consideration to a human right relevant to the decision. Section 9 of the HR Act defines the term 'public sector entity' to include a local government, a councillor of a local government or a local government employee.

Section 28 of the HR Act specifically addresses the protection of the cultural rights of Aboriginal and Torres Strait Islanders:

- (1) Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights.
- (2) Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community—
  - (a) to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and
  - (b) to enjoy, maintain, control, protect, develop and use their language, including traditional cultural expressions; and
  - (c) to enjoy, maintain, control, protect and develop their kinship ties; and
  - (d) to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and
  - (e) to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.
- (3) Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture.

However, the HR Act is not limited to protecting the intangible rights of Aboriginal and Torres Strait Islanders. Section 27 of the HR Act provides a general protection of cultural rights:

'All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy their culture, to declare and practise their religion and to use their language'.

### The Cultural Heritage legislation

The cornerstone of the Cultural Heritage legislation (the legislation) is to provide protection of cultural objects and areas of significance by means of a cultural duty of care, which requires a local government to take all reasonable and practicable measures to avoid harming Aboriginal or Torres Strait Islander cultural heritage.

A local government is not in breach of the cultural heritage legislation if it is acting under the relevant Act, or in accordance with a native title agreement, or other agreement (such as an

Indigenous Land Use Agreement, ILUA, or similar) with the Aboriginal or Torres Strait Islander party or an approved CHMP and/or CHMA is in place, or in compliance with the duty of care or the duty of care guidelines, or in accordance with native title protection conditions, or the person owns the cultural heritage or is acting with the owner's consent.<sup>8</sup>

The legislation defines the Aboriginal or Torres Strait Islander party by reference to the *Native Title Act 1993 (Cth)* (NTA) and recognises that the Aboriginal or Torres Strait Islander People who are the traditional owners of an area as the appropriate people to be involved in the assessment and management of the cultural heritage whether or not their native title continues to exist.<sup>9</sup>

The legislation allows for the development of voluntary CHMP and/or CHMA. It also mandates a CHMP where an Environmental Impact Statement (EIS) is required for a project, or for projects as prescribed by other laws.<sup>10</sup>

Section 34 of the cultural heritage legislation provides that the native title party for an area is:

- *the* registered native title claimant for the area;
- after the commencement of s.34 of the Act was *the* registered native title claimant for the 'last claim standing', or *the* person who has surrendered the person's native title under a registered ILUA; or *the* person whose native title has been compulsorily acquired or has otherwise been extinguished; but if that person is no longer alive, the native title party is taken to be the native title claim group who, under the *Native Title Act 1993 (Cth)*, is authorised to make the relevant native title determination application.
- *the* registered native title holder for the area;
- *the* person who was a registered native title holder for an area, but only if—the person has surrendered the person's native title under a registered ILUA, or the person's native title has been acquired or otherwise extinguished.

Section 35 provides that, subject to qualifications, the 'native title party' for an area is the 'Aboriginal' or 'Torres Strait Islander' party for the area. If, however, there is no native title claimant for an area, a person is an Aboriginal or Torres Strait Islander party for the area if—

- the person is an Aboriginal or Torres Strait Islander person with particular knowledge about traditions, observances, customs or beliefs associated with the area; and
- the person has responsibility under Aboriginal or Torres Strait Islander tradition for some or all of the area, or for significant Aboriginal or Torres Strait Islander objects located or originating in the area; or
- is a member of a family or clan group that is recognised as having responsibility for Aboriginal or Torres Strait Islander tradition for some or all of the area of for significant objects located or originating in the area.

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<sup>8</sup> *Aboriginal Cultural Heritage Act 2003 (Qld)*, s.23; *Torres Strait Islander Cultural Heritage Act 2003 (Qld)*, s.23.

<sup>9</sup> *Aboriginal Cultural Heritage Act 2003 (Qld)*, ss. 34, 35; *Torres Strait Islander Cultural Heritage Act 2003 (Qld)*, ss. 34, 35.

<sup>10</sup> *Aboriginal Cultural Heritage Act 2003 (Qld)*, ss. 86-88; *Torres Strait Islander Cultural Heritage Act 2003 (Qld)*, ss. 86-88.

Section 36 provides that the Minister may register a corporation (such as a registered native title prescribed body corporate) to be the Aboriginal or Torres Strait Islander body for an area.

Section 91 of the legislation is prescriptive as to the steps a sponsor of a proposal to establish a CHMP for an area.

The sponsor must give written notice addressing mandatory requirements simultaneously to a range of stakeholders, including any native title party. The written notice must set out details of the proposed project, its location in context with the topography of the area and must advise that the sponsor intends to develop a CHMP.<sup>11</sup>

In addition to the provision of the basic information about the CHMP, if the proposed CHMP is given to an Aboriginal or Torres Strait Islander cultural heritage body or an Aboriginal or Torres Strait Islander party, the sponsor is to advise that if the party wishes to participate in the development of the CHMP, the party must provide written advice to the sponsor within a specified period that the party wishes to participate. Similarly, if the sponsor provides written notice to a representative body, the sponsor must draw the attention of the representative body to the published, or to be published, public notice. The requirements for the public notice are extensive.<sup>12</sup>

Finally, the sponsor has the responsibility of seeking the agreement with the relevant parties by a process of consultation and mediation.<sup>13</sup>

### The *Timber Creek* decision

The Council is acutely aware of the High Court decision concerning the Northern Territory remote township of Timber Creek (*Timber Creek*).<sup>14</sup> The *Timber Creek* case concerned the payment of compensation to the Ngaliwurru and Nungali Peoples (the claim group) for loss, diminution, impairment or other effect of certain acts on the native title claim group's rights and interests over land in the area of the township of Timber Creek. Compensation was considered not only in the context of the objective economic value of the affected native title rights and interests, but also to recognise the claim group's sense of loss of traditional attachment to the land or connection to country caused by the loss, diminution, impairment of other effect of the acts on their native title rights and interests.

Ultimately, the claim group in *Timber Creek* were awarded compensation in the amount of **\$2,530,350.00** comprising \$320,250.00 for economic loss for the extinguishment of their non-exclusive native title rights and interests arising from the relevant acts; \$910,100.00 in interest on the economic loss; and \$1,300,000.00 for cultural loss. In addition, post judgement interest was payable in accordance with s.53 of the *Federal Court of Australia Act 1976 (Cth)*.

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<sup>11</sup> *Aboriginal Cultural Heritage Act 2003 (Qld)*, s.92; *Torres Strait Islander Cultural Heritage Act 2003 (Qld)*, s.92.

<sup>12</sup> *Aboriginal Cultural Heritage Act 2003 (Qld)*, ss.93-100; *Torres Strait Islander Cultural Heritage Act 2003 (Qld)*, ss.93-100.

<sup>13</sup> *Aboriginal Cultural Heritage Act 2003 (Qld)*, ss.104-106; *Torres Strait Islander Cultural Heritage Act 2003 (Qld)*, ss.104-106.

<sup>14</sup> *Northern Territory of Australia v Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples & Ors*, [2019] HCA 7, 13 March 2019.



The *Timber Creek* decision observed findings that Dreamings wandered over areas of country with the result that:

'[the native title claimants'] identity was not confined to bounded segments of the landscape, but were pervasive. The sites (of significance) were well understood (by the Ngaliwurra and Nungali Peoples) as focal points of Dreaming spirituality, but not easily bounded'.

The Ngaliwurra and Nungali Peoples connection to country is unique, deep and broad...<sup>15</sup>

The *Timber Creek* decision referred to what might now be called 'intangible rights' in relation to connection to land. Under ss.86(1) of the Native Title Act the trial judge received into evidence certain uncontested evidence and findings relevant to the determination of native title. The findings adopted in the earlier decision included findings that:

- (1) the native title holders were linked to the claim area through ancestral ties that go back to Lamparangana..., and well before his time;
- (2) the native title holders observe essentially the same rituals and ceremonies as were practised by their ancestors more than a century ago; and that those ritual and ceremonial practices are largely and inextricably bound up with the land and waters in and around Timber Creek;
- (3) examples of ritual and ceremonial practices included high-order ritual practice, initiating rites, head wetting ceremonies (Mulyarp), protection of Dreaming (Puwara) sites, traditional methods of hunting, fishing and gathering food, and ongoing practice of ritual and exchange (Winan);
- (4) the native title holders share a set of beliefs that govern the rights and obligations of Indigenous persons who wish to have access to, and use, the land and waters of the region and that those who were Yakpalimululu (senior owners of country) could deny access to certain foraging areas, and that if a white person wished to go onto Yakpali (country), that person would be expected to ask for permission; the purpose of such a request being to enable the protection of sites of importance to the Ngaliwurru and Nungali Peoples;
- (5) according to the traditional laws and customs of the native title holders, spiritual sanctions are visited upon unauthorised entry onto country or, as the Full Court in the native title determination application described it, the native title holders are the gatekeepers for preventing harm to others and avoiding injury to country;
- (6) certain restricted evidence, given before the trial judge in the native title determination application, pointed to a link between the symbols of the higher-order ritual, and proprietary interests in land. The rituals and ceremonies signal a right to country which stems from the Dreamings;
- (7) there is in place, in Timber Creek, a system of normative rules that governs a continuing ritual tradition which articulates an "owner's" right to country that passes through descent;

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<sup>15</sup> *Northern Territory of Australia v Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples & Ors*, [2019] HCA 7, 13 March 2019 [paragraphs 175-176].

(8) the laws and customs upon which the normative system rests are part of a conservative oral tradition that would be unlikely to be amenable to significant change; and

(9) the native title holders had a duty and concern to look after country.

The trial judge made extensive reference to an expert anthropologists' report by Kingsley Palmer and Wendy Asche ("the Palmer and Asche 2004 Report") on the rights and duties under Ngaliwurru and Nungali law and custom to look after and speak for country, which his Honour found was supported by the lay evidence of the claimants.

...Palmer and Asche reported sites of significance in and around the claim area and the travels of major Dreamings through the claim area. Palmer and Asche explained that Dreamings are spiritual beings that performed actions that resulted in physical and spiritual modifications to the countryside. As some Dreamings ranged widely over the landscape their spirituality is believed to encompass more than one country. The relationship between an individual and the Dreamings is a personal one. Dreaming is regarded as an absolute force and its requirements and mandates have about them the immutable quality of law'.<sup>16</sup>

## **COUNCIL'S CONCERNS**

### **The issues**

Council summarises the following facts and issues arising from the legislative framework and case law within which the Council is required to operate in sponsoring development applications for projects within its administrative jurisdiction, noting that its jurisdiction extends to uninhabited outer islands, which may be subject to maintenance proposals for such things as sea walls or jetties:

- much of the Torres Shire is subject to native title determinations; the land the subject of a native title determination may also be subject to ILUAs or similar agreements with respect to its use. In these cases a RNTBC holds the native title-holders rights and interests in trust on behalf of the native title holders, but in many cases it is not certain that the RNTBC is authorised to speak, or it is asserted that the RNTBC is not authorised to speak on behalf of the wider group of native title holders in relation to a development application potentially affecting their native title rights and interests.
- that there are significant parts of the Torres Shire for which native title applications or prospective applications have not yet been determined. In these cases, a claim group represented by an Applicant (one or more person(s)) or a potential native title claim group exists, but its scope may be indeterminate/ unclear until sufficient anthropology is conducted to define the class by apical ancestors or other criteria are established, with the result that there is no person or group who is 'authorised' to speak for the potential claim group while the claim is in an inchoate state.
- that native title is yet to be determined with respect to the most populated region of the Torres Strait, being the inner islands and seas being claimed by the Kaurareg People. It

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<sup>16</sup> *Northern Territory of Australia v Mr A Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples & Ors*, [2019] HCA 7, 13 March 2019 [paragraphs 168-170].



is the populated areas of the Torres Shire that are most likely to be the subject of development applications for infrastructure projects, and similar;

- that the cultural heritage legislation applies to land and seas in the Torres Shire.
- that the cultural heritage legislation applies to land and sea for which native title has yet to be determined and/or to which no ILUA or similar agreement applies.

#### With whom is the Council to consult?

Council is perplexed as to how it should go about the process of consultation for the purpose of exercising its cultural duty of care, or the consultative process for the development of CHMPs and/or CHMAs, under the cultural heritage legislation.

While there is a link between the cultural heritage legislation and the NTA as to the identification of the 'Aboriginal party' or the 'Torres Strait Islander' party, the definition in the cultural heritage legislation is insufficient to answer the question as to who is authorised to actually (as opposed to theoretically) speak on behalf of their people.

Despite the definition of Aboriginal/ Torres Strait Islander Party in the legislation it is often unclear that the executive of an RNTBC is entitled or authorised to speak on behalf of the holders of the native title rights and interests. The role of the executive of an RNTBC under the NTA is to be the trustee for the holders of the native title rights and interests. The holders of the native title rights and interests might have a view of a development application that differs from that of the executive of the RNTBC. This often may have the effect of putting the executive of the RNTBC as envisaged under the NTA and as Aboriginal/Torres Strait Islander Party as envisaged under the legislation, in conflict with their trust duty to the holders of the native title rights and interest.

Despite the definition of Aboriginal/ Torres Strait Islander Party in the legislation it is often equally unclear whether the 'Applicant' for a native title determination is entitled to speak on behalf of the claim group claiming the native title rights and interests. The 'Applicant' fulfils a specific function under the NTA, being the vehicle for the making an application for the determination of native title. As such, it is not a foregone conclusion that the 'Applicant' is entitled or authorised speak on behalf of the native title claim group with respect to a development application, even assuming the Applicant 'speaks as one'. The operation of both the NTA and the legislation may have the effect of putting the Applicant as envisaged under the NTA and as Aboriginal/Torres Strait Islander Party in conflict with their trust duty to the claim group.

The issue is even more fraught where there is a potential native title claim group and an inchoate native title claim. It cannot be said with certainty that any elder or traditional owner is entitled or authorised to speak on behalf of the potential claim group in relation to a development application, even supposing that it is possible to identify with certainty who is entitled to belong to the native title claim group.

#### The implications for Council

The uncertainties in identifying the appropriate persons for the purpose of consultation under the cultural heritage legislation poses significant dilemmas for Council.

- The uncertainties affect the notification process – to whom should the notices be addressed? How can the Council as a sponsor of a CHMP and/or CHMA be certain that it has identified the appropriate persons, noting that notice must identify the topographical location to which a CHMP and/or CHMA relates?

- Is it the case that, in practical terms, the cultural heritage legislation is such that Council is obliged to conduct consultative meetings that include the wider native title holders, claim group or the potential claim group to ensure the integrity of outcome of the consultation as having authority and legitimacy as the decision of the native title holders, claim group, or the potential native title claim group? If so, the costs implications could be prohibitive: native title holders, members of a claim group may need to travel to a consultative meeting, or meetings may be required to be held on the more remote outer islands of the Torres Strait? Who should bare the costs of such meetings?
- What are the risks for Council were it to confine the consultative process under the cultural heritage legislation to engaging with the executive of the RNTBC, or the Applicant in a native title claim, or putative Applicant in an inchoate native title claim? Would Council face a *Timber Creek* style compensation claim if a CHMP and/or CHMA resulted in a development application proceeding on the basis of a CHMP and/or CHMA agreed by the executive of an RNTBC or the Applicant or putative Applicant following a consultative process, where that CHMP and/or CHMA results in an act that infringes upon the native title rights and interests of a particular group within the wider group of native title holders or claim group who were not consulted? The *Timber Creek* decision makes it clear that connection to country is sacred and personal, and directly tied to ancestry – that is, each native title holder or member of the claim group’s descent from individual apical ancestors is the basis for ‘ownership’ and spiritual connection of particular areas within a landscape. It is clearly not the case the native title rights and interests held by native title holders or a claim group as a whole are identical for each native title holder or member within the claim group or that those rights and interests are held equally between all members.
- If the Council were to be the subject of *Timber Creek* style litigation arising from a circumstance as outlined above, who would bare the costs of the litigation, and any award of compensation.

#### The added complication of the HR Act

Council is also in a predicament as to how it should manage its obligations under the HR Act in the context of the consultative process to be undertaken for it to meet its cultural duty of care under the cultural heritage legislation, or for the development of a CHMP and/or CHMA.

Is it the case that the legislature has created a hierarchy of intangible rights? Are the rights of non-Indigenous communities (such as historic communities) or groups protected by the HR Act trumped by the specific cultural heritage legislation aimed at protecting Aboriginal and Torres Strait Islander’s intangible rights?

The cultural heritage legislation requires the Council to consult with the ‘Aboriginal party’ or the ‘Torres Strait Islander party’ in the exercise of its cultural duty of care, or for the development of a CHMP and/or CHMA. However, the HR Act provides that it is unlawful for the Council as a public entity to infringe upon the human rights of all persons in the Torres Shire, the obligation being to not deny persons with a particular cultural, religious, racial or linguistic background the right, in community with other persons of that background, to enjoy their culture, to declare and practise their religion and to use their language.<sup>17</sup>

Critically for present purposes, the HR Act does not address how a public entity is:

<sup>17</sup> *Human Rights Act 2019 (Qld)*, s.27.

- a. to identify who might be included in a community or group or is an individual whose intangible rights are required to be protected by the HR Act;
- b. to determine the authenticity of the community, group or the individual's claim of the intangible right(s), or the right for any particular person within the community or the group to speak on behalf of the community or group on those matters; and,
- c. to ascertain the existence and content of the intangible rights claimed by a community, group or individual; and

The Torres Shire has historic communities of South Seas and Pacific Islanders having lived on Torres Strait Islander lands for generations, and similarly with respect to the Kaurareg People's land. There are also historic communities with Chinese and Japanese and Filipino heritage, as well as Anglo-Saxon/Anglo-Celtic communities.

How is the Council to meet its obligations under the HR Act in circumstances of the competing rights of non-Indigenous communities and other historic groups located within and amongst Aboriginal and Torres Strait Islander communities, on lands and across seas which are the subject of native title determinations or potential native title determinations.

For example, a particular community or group living on land the subject of native title may have a long-established shrine in a location that is not a particular sacred site, but which falls within the broader landscape of a Dreaming story (*cf Timber Creek*). Or a community or group may have a long-established practice of conducting a traditional ceremony or ritual at a location that has since been identified as being of an intangible right of the Aboriginal or Torres Strait Islanders as a place where young people are taught traditional skills and lore.

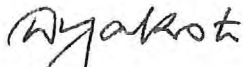
Does this circumstance give access to a *Timber Creek* style claim of compensation by the Aboriginal or Torres Strait Island People for past acts that have affected their intangible rights? If so, who bears the cost of the litigation and any compensation that might be awarded.

Is the Council obliged to consult with any non-Indigenous community or group in a location the subject of a native title determination or claim in the development of a CHMP and/or CHMA?

Council thanks the Department of Aboriginal and Torres Strait Islander Partnership for the opportunity to provide a submission.

[REDACTED]

Yours faithfully,



Dalassa Yorkston  
Chief Executive Officer  
Torres Shire Council

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