Options Paper - finalising the review of Queensland's Cultural Heritage Acts: Moreton Bay Regional Council Submission

Providing opportunities to improve cultural heritage protection

Moreton Bay Regional Council (MBRC) provides in-principle support for the proposal to consider a new approach to "providing opportunities to improve cultural heritage protection" as outlined in the Options Paper. The comments given in this submission acknowledge that **Proposals 1 and 2** are expressed at a high-level and are conceptual in nature. Notwithstanding the fact that more investigation will necessarily be undertaken on these proposals, MBRC agrees that there is a need to consider a potential alternative to the current Duty of Care Guidelines; particularly one that incorporates greater engagement, consultation and agreement making with Aboriginal Parties around protecting cultural heritage, and integrating cultural heritage protection and incorporating those values into land planning at an early stage in planning processes.

The proposals outlined above, if effectively implemented, have the potential to bring about changes that will strengthen the protection of Aboriginal cultural heritage. To ensure the workability of any new framework, the high-level concepts outlined in the Options Paper need to be further explored in terms of how they can be applied in a practical and timely manner, in the context of the development assessment process. It is acknowledged, however, that the complexity of this new system will require considerable investment of time and money to establish.

Additionally, as part of the implementation of any new framework, MBRC stresses that there will be an increased need for Aboriginal and Torres Strait Islander parties to be better *supported* and *resourced* to undertake the additional workload that the proposed new processes will create. Without this support, there are risks that these parties, particularly in high-growth urban council areas, will be unable to fulfil their roles as primary advisors for cultural heritage management, or do so in a timely manner. This in turn will affect the ability of landowners and land managers to confidently proceed with projects/developments in a way that ensures no harm to cultural heritage. Provision would also need to be made for resourcing and training of council officers responsible for assessing development applications for "prescribed activities" against the terms stated in a cultural heritage agreement.

Suggestions for Consideration Moving Forward

(1) The Essentials

Proactive planning which supports and refines the need for "mandatory consultation" and agreements with Aboriginal and Torres Strait Islander parties is viewed as an essential component of the flow-on changes to the development assessment process. Such a framework should include:

- mapping of "high-risk cultural heritage areas" which is evidence based and sufficiently defendable. It needs to have the necessary legitimacy to be confidently applied in development assessment processes. For example, the extent of buffers to cultural heritage objects/areas should be able to be readily justified and could vary in response to the different cultural heritage values sought to be protected;

- clarity on the scope of what constitutes an "excluded activity," so that anything outside of that scope can be regarded as a "prescribed activity". There is an opportunity to consider a sub-categorisation of "excluded activities" depending upon whether or not they are in a "high-risk cultural heritage area";
- a clear statement of where the agreement with Aboriginal and Torres Strait Islander parties fits into the development process (under the Minister's Development Assessment Rules), e.g. Is the agreement to be a mandatory component of a development application being accepted as "properly made" under the *Planning Act 2016*? Alternatively, can agreement be reached during the development assessment process and how is this best integrated into the Development Assessment Rules (considering trigger events linked to a relevant Part [or new Part] of the process for agreements to be reached, as well as default timelines)?

(2) Implications for Planning Schemes

MBRC anticipates that the focus of its development assessment role in relation to Indigenous cultural heritage values, will be limited to ensuring there is consistency between the proposed development and the terms of the agreement between the parties. Accordingly, there would seem to be no need to insert new planning scheme measures beyond just providing information on the need for a cultural heritage agreement where the development constitutes a "prescribed activity" or is an activity in a "high-risk cultural heritage area". That information could take the form of notes and overlay mapping of the "high-risk cultural heritage areas," which is provided for information purposes only. This would be similar to the function of the Transport Noise Corridor Overlay mapping provided in most Sustainable Planning Act compliant planning schemes. Schedule 10 of the Planning Regulation could then be used to trigger the need for an agreement under the new Cultural Heritage Acts and to trigger an assessment of consistency between the development proposal and the agreement.

MBRC is of the strong opinion that the protection measures outlined in the Options Paper cannot be effectively or practically applied by a planning scheme, beyond the information role outlined above.

(3) Dealing with the Impacts of "Accepted Development"

Further clarity is required on how the development status of "accepted development" under a local planning instrument (such as a planning scheme) may be varied for a "prescribed activity" or an activity undertaken in a "high-risk cultural heritage area." A suggested approach for consideration, would be utilising the *Planning Regulation* to prescribe "assessable development" status to trigger the requirement for an agreement for such an activity.

(4) Providing Guidance, Consistency and Compatibility

The development of supporting Guidelines around the assessment of impacts on Aboriginal and Torres Strait Islander cultural heritage values, as well as the form and content of a typical agreement, would be a beneficial component of any subsequent legislative package. This would provide a basis for consistent decision making and agreement preparation across the State. Consistency in decision making is regarded as a "State interest" under the *Planning Act 2016*.

While it is likely that a conciliatory and tolerant position would be adopted by all parties during the "bedding-in" of any expanded development assessment and cultural heritage agreement processes, the dispute resolution process may be widely used during this period. That process needs to be compatible with all other dispute resolution processes under the Planning Act.

(5) The Overarching Role of the State

The proposed framework, in part, is fundamentally linked to the detailed mapping of "high-risk cultural heritage areas." MBRC acknowledges the sensitivity in relation to existing State-held database and register information on cultural heritage matters. To address these sensitivity issues and to maintain consistency in methodology, interpretation and application, the State should retain responsibility for this critical mapping component. However, a particular issue which requires further consideration is adequately addressing "intangible cultural heritage", including the challenges associated with mapping this as part of the "high-risk cultural heritage area." MBRC would also like to recommend that where activities are proposed in a "high-risk area" that have been subject to *significant ground disturbance*, a method for demonstrating that the activity does not need further assessment may need to be developed- and due diligence reporting may be one such method

While the existing sites database and register would be a good starting point for the mapping process, consultation with Aboriginal parties and predictive modelling based on known areas of cultural heritage sensitivity, such as waterways and coastal areas, similar to what is undertaken in Victoria, should represent an essential component of the mapping process. Such predictive modelling would also serve to fill any gaps that may exist in the database, as mandatory reporting of previously unregistered tangible cultural heritage places is presently not required, and some Aboriginal parties may be reluctant to share their knowledge of places and report them to the State.

(6) Protocols for Consultation and Engagement

As in the current protection framework, any new system may potentially have early implementation issues associated with the consultation processes between developers and Indigenous people. MBRC supports the idea that generic protocols be developed in subordinate legislation (Regulations), although perhaps each Aboriginal party and Torres Strait Islander party could develop their own, and it is acknowledged that some parties already have their own consultation protocols. Further, the new Cultural Heritage protection framework could be enhanced by including appropriately qualified and experienced Heritage Advisors in consultation processes, after the Victorian legislative system.

(7) Providing Certainty to the Parties

The interaction between the *Human Rights Act* and the remodelled Cultural Heritage Acts also requires clarification, e.g. is an agreement under the latter deemed to meet the cultural rights under section 28 of the Human Rights Act? If so, this should be made clear. A similar circumstance has emerged in the interaction between the *Disability Discrimination Act* and approvals under the *Building Code of Australia* meeting disability access requirements, which required some legislative intervention.

(8) Proposals 3 to 6

MBRC supports the remaining **Proposals, 3 - 6,** with the following strongly recommended:

- Establishment of a new government fund to support Aboriginal and Torres Strait Islander parties to manage increased consultation regarding cultural heritage protection
- Establishment of Indigenous advisory bodies, such as an Aboriginal Heritage Council and a Torres Strait Islander Heritage Council, to lead the development of the new

assessment framework, as well as assist with mediating disputes and hold functions along the lines of those espoused in the Victorian legislation

- Recognition and protection of intangible elements of cultural heritage in new Queensland legislation (to the greatest extent practicable), using aspects of the definitions that appear in Victorian legislation, draft NSW legislation and WA legislation about cultural landscapes
- Provision of education to land users to enhance compliance with the revised legislation, rather than relying solely on enforcement and pecuniary measures
- Employment of authorised officers by government rather than a First Nations body or bodies
- Review of the current stop order process, which is currently too unwieldy and lengthy, and could be improved by delegating powers to the CEO, rather than the Minister. This would enable the stop order process to be used more frequently in the event of potential harm to cultural heritage or non-compliance with cultural heritage agreements.

Reframing the definitions of 'Aboriginal party' and 'Torres Strait Islander party'

MBRC has no position on either Option 1 or 2 for the changes to the definitions of 'Aboriginal party' in the legislation. We acknowledge that one of the current Aboriginal Parties in MBRC's region, the Turrbal Association, will be affected by both options.

Promoting leadership by First Nations peoples in cultural heritage management and decision-making

MBRC supports **Option 1**, which envisages the establishment of a First Nations-led entity with responsibilities for managing and protecting cultural heritage in Queensland to work with existing and future local Aboriginal and Torres Strait Islander groups who manage cultural heritage matters within their respective areas.

There should be separate Aboriginal and Torres Strait Islander entities, to mirror the separate pieces of legislation (i.e. the Aboriginal Heritage Council and Torres Strait Islander Heritage Council noted above). There are several functions for these independent bodies proposed in this option, all of which appear to be appropriate with the exceptions of:

- managing and maintaining the cultural heritage database and register, which should continue to be administered by the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships (DSDSATSIP), perhaps on behalf of the First Nations bodies, with reporting to those entities; and
- the management of compliance, for example. employing compliance officers and conducting audits and investigations.

The establishment of Indigenous Heritage Councils to administer the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* complements and is in keeping with the currently established Queensland Heritage Council established under the *Queensland Heritage Act 1992*, the primary piece of legislation in Queensland for the protection of historic cultural heritage.

Option 2 is also supported, in that 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 cultural heritage management. MBRC supports the notion that Aboriginal people are best positioned to make those decisions, rather than state government departments.