

CHA Review
Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP)
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Submission by:

NAME: Colin Verrall



Dear Madam or Sir

Review of the Aboriginal Cultural Heritage Act 2003

Thank you for the opportunity to comment on the review of the Queensland Government's *Aboriginal Cultural Heritage Act 2003* and the Torres Strait Cultural Heritage Act 2003 (Acts).

Reference is made below to the issues or areas of concern, raised in the 2019 'Consultation Paper – Review of the Cultural Heritage Acts'.

Introduction

(the framework and context of my submission)

Firstly, I want to make these compelling and overarching comments to set the framework and context of my submission.

An enduring legacy of the colonisation of Australia and following period:

- (1) Australia was discovered, invaded, occupied by non-traditional owners who were people that largely were unaware, uninformed, ill informed, unfamiliar, oblivious to the knowledge, culture and traditional practices of the historical and living Aboriginal cultural heritage;
- (2) These invaders, occupiers seemed not interested or perhaps unable to value the concept of Aboriginal and Torres Strait Islander peoples organized into Aboriginal/Torres Strait Islander tribes/nations unified individually and

collectively by language, knowledge, culture, traditional practices, governing law and trade boundaries, coming together ceremonies and relationships;

- (3) These relationships within and between tribal nations is becoming increasingly researched, documented and published perhaps with renewed vigour since about 1988 onwards to this day but it must be recognised that as early as the 18th century anthropologists published local, national and international articles about Aboriginal and Torres Strait Islander Australia having many separate nations likening it to Europe (France, Italy, Germany) and Scandinavian nation-states;
- (4) During the colonisation process, frontier wars and beyond non-traditional owner not all but significant parties of governments, stakeholders and communities of the days sought to alienate Aborigines from their land and because of their spiritual connection to the land and sea alienate them from their knowledge, culture, language and traditional practices and there by acting to destroy their governing law, trade boundaries, coming together ceremonies and relationships and thereby the Aboriginal/Torres Strait Islander culture itself.

The Uluru Statement of the Heart (2017) amongst other important statements conveys the following message:

- (1) Aboriginal and Torres Strait Islanders were the first sovereign Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs;
- (2) This our ancestors did, according to the reckoning of our culture, from Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago;
- (3) Aboriginal/Torres Strait Islander sovereignty, the basis of the ownership of the soil, or better, of sovereignty has never been ceded or extinguished, and coexists with the sovereignty of the Crown.

The Aboriginal and Torres Strait Cultural Heritage Acts 2003:

- (1) The are legislation passed by Queensland parliament, proclaimed by the governor as law, commencing in April 2004
- (2) A key feature of the Acts is their creation of a new legal responsibility or statutory 'duty of care' requiring all people, land users regardless of tenure, across the State to:

- (a) Respect, value and protect the State's Aboriginal/Torres Strait cultural heritage;
- (b) Be at risk of prosecution and substantial fines should they fail to take all reasonable and practical measures to ensure their activities do no damage.
- (c) The Acts did not fail the Aboriginal/Torres Strait people; but rather
- (d) The these people and those that advocate for them were failed at federal, State and local levels by governments, the public service, the judiciary and stakeholders of the communities fuelled by the excesses of:
 - (a) power, wealth, profit, control, privilege; and
 - (b) Lack of understanding, sympathy, compassion, responsiveness, identification (empathy); and
 - (c) Lack of even handedness, fairness, impartiality, justice, justness (equity); through
 - (d) Lack of good governance (efficient, effective, transparent, integrated, coordinated and accountable system); and
 - (e) Failure to implement the 'Rule of Law' (know the law, obey the law, be governed by the law); and
 - (f) Weaknesses in the Westminster system of government (government, opposition, governors, impartial public service, police, independent judiciary).

You must not let stakeholder submissions, to the Review of the Acts, in the context of subjective rhetoric about opinions, wants, likes, dislikes, desires subvert good governance, the Rule of Law and the Westminster System of government and in particular subvert the Acts' s4 Main purpose of Act, s5 Principles underlying Act's main purpose, s6 How main purpose of Act is to be achieved and Division 3 Interpretation.

You must only allow submission based on objective facts, good governance, the Rule of Law, the strengths of the Westminster System that will facilitate rational representation, debate and objective outcomes of agreement or at least agree to disagree that can be rationally tested for truth or the extent of likelihood to be true and that can alleviate continued acrimonious, biased, prejudiced argument and dissent that characterises subjective decisions.

Review Scope – Is the legislation operating as intended

I submit:

- (1) The Acts are not and perhaps never did operate as intended;
- (2) The Queensland Government is the regulatory body, the State, yet the Act s3(2) exempts the State from being liable to be prosecuted for an offence under the Act;
- (3) s3 (2) should be removed from the Acts;
- (4) The legislation will never operate as intended until the State establishes a regulatory body with sufficient personal, physical and financial resources that will ensure this Act s3 (1) binds all persons including the State and, to the extent the legislative power of the Parliament permits, the Commonwealth and the other States.

Review Scope – is the Legislation achieving outcomes for Aboriginal and Torres Strait Islander peoples and other stakeholders in Queensland

I submit:

- (1) The State needs to test both the effectiveness and the equity of outcomes for Aboriginal and Torres Strait Islander;
- (2) The equitable provision of effective recognition, protection and conservation of Aboriginal cultural heritage which is the main purpose of this Act has not, is not being achieved;
- (3) Development outcomes for governments, communities, landholders, lease holders and their representatives' activities, aspects of which have significant adverse impacts on the recognition, protection and conservation of Aboriginal/Torres Strait Islander cultural heritage far outweigh the outcomes for cultural heritage set out in s4 Main purpose of Act;
- (4) This will not be effectively corrected until the State establishes a regulatory body with sufficient personal, physical and financial resources that will ensure the Acts' s3 (1).

Review Scope – is the Legislation in line with the Queensland Government’s broader objective to reframe the relationship with Aboriginals and Torres Strait Islanders

I submit:

- (1) That rather than reviewing and changing the Acts to satisfy a perceived need to reframe the government’s relationship with Aboriginals and Torres Strait Islanders the Acts’ s4 Main purpose of Act, s5 Principles underlying the main purpose, s6 How main purpose of Act is to be achieved, s7 Definitions, s8 Meaning of Aboriginal/Torres Strait Islander cultural heritage, s9 Meaning of significant Aboriginal/Torres Strait area, s10 Meaning of significant Aboriginal/Torres Strait object, s11 Extension of evidence of occupation to surroundings, s12 Identifying significant Aboriginal/Torres Strait areas, s13 Interpretation to support existing rights and interests needs to be reaffirmed and the State regulatory properly resourced to ensure their implementation and achievement through effective planning, implementation, control and review for continuous improvement;
- (2) It is not so much the legislation needs to be revisited but rather the Acts’ Part 1 Preliminary sections need to be enforced through an effective and properly resourced regulator and that regulator needs to be prepared to take on stakeholders including governments, communities, landholders, lease holders and their representatives and indeed the courts.
- (3) Identifying Aboriginal and Torres Strait parties – I believe the submissions to the Queensland Parliamentary Economics and Governance Committee need to be carefully tested for adverse impacts on the achievement of the s4 Main purpose of Act.
- (4) Given the historical adverse outcomes for Aboriginal and Torres Strait Islander knowledge, culture and traditional practices, the recognition of their role as the primary guardians, keepers and knowledge holders of Aboriginal/Torres Strait cultural heritage, respect, preservation and maintenance of knowledge, innovations and practices, the promotion of understanding of Aboriginal/Torres Strait heritage, the importance of allowing Aboriginal/Torres Strait people to reaffirm their obligations to ‘law and country’ the Queensland Government and all stakeholders must be suspicious of attempts to reframe the Queensland

Government's or any other government with Aboriginal and Torres Strait Islanders. Any attempt must be driven by Aboriginal and Torres Strait Islander peoples in the context of their knowledge, culture and traditional practices.

Review scope - Land user obligations

I submit:

- (1) Care must be taken to ensure any outcomes from the discussion points of the discussion paper in this respect must be carefully tested to ensure they provide for the achievement of the Main purpose of the Acts and the implementation of the Principles underlying the main purpose and How main purpose of Act is to be achieved and the Definitions, s8 Meaning of Aboriginal/Torres Strait Islander's cultural heritage, etc. of the Acts;
- (2) Landholders and all other stakeholders including Aboriginals/Torres Strait Islanders, governments, commerce, industry must be effectively held account to the provisions set out in the Part 1 Preliminary parts of the Acts and in particular to the s3 Act Binds all persons, s4 Main purpose of Act, s5 Principles underlying Acts' main purpose, s6 How main purpose of Act is to be achieved;
- (3) These discussion points must be held over until an opportunity for the achievement of the main purpose of Acts, underlying and how the main purpose of Acts principles to be achieved through effective regulation through good governance, the Rule of Law and the Westminster System of government;

Review Scope - Compliance mechanisms

I submit:

- (1) This is the there is an urgent need to bolster the compliance mechanisms designed to protect Aboriginal and Torres Strait Islander cultural heritage;
- (2) Mandatory requirements of the Acts have historically been largely subverted so there should be little reason to expect self assessment and voluntary processes to achieve the Main purposes of the Acts and the implementation of Principles underlying the main purpose and How main purpose of Act;
- (3) The role of self assessment and voluntary processes should be diminished and all proponents of decisions and activities that affect Aboriginal and Torres Strait Islander cultural heritage must be required to have management plans with appropriate policy, mission statement, process, procedures certified against

legislated Acts, Regulations and Standards by entities accredited and appointed by the State regulator to certify such management systems;

- (4) The certifying entities and management systems and dispute resolution assistance and reconsideration of cultural heritage thresholds must all be subject to effective internal and independent external audit for aspects of good governance, achieving the Rule of Law, achieving high level purpose and principles of legislation, planning, implementing, controlling and review for the prospect of continuous improvement.

Review scope -Recording cultural heritage

Below I have attached an extract of an expert submission that I have read and largely agree with.

I submit:

- (1) There may be a need to make improvements of procedures relating to the cultural heritage database;
- (2) The most urgent needs are to respect Aboriginal/Torres Strait knowledge, culture and tradition and the historic subversion of it and the need for stakeholders to properly apply the contents of the database to the achievement of the main purpose and the implementation of the principles of the Acts;
- (3) You should objectively and rationally read and assess the contents of the attached expert submission by others for relevant objective factual aspects relevant to your review of Cultural heritage Acts;

Review scope – Other jurisdictions

I submit the Queensland Acts Part1 Preliminary chapters that have clear and precise sections on high level purposes and principles for the effective recognition, protection and conservation of Aboriginal/Torres Strait Islanders cultural heritage as does the Local Government Act 2009, Planning Act 2016, Environment Protection Act 1994 and the Environment Protection and Biodiversity Act 1999 references to Aboriginal and Torres Strait Islander knowledge, traditional practices, etc. to the extent that this review should not be diluted further by distractions of Acts from other jurisdictions.

Extract from an expert submission by others

Some of these issues, along with my own concerns and recommendations, are listed in the following eleven points:

1. That major project proposals (e.g. mining, exploration, construction, quarrying, land subdivision, infrastructure for aquaculture and water extraction, infrastructure for residential, industrial and water/energy/transport developments) requiring an EIS and/or are greater than one hectare in size, automatically trigger a need for a ACHA 2003 Part 6 (comprehensive) Cultural Heritage Study with the Aboriginal Party.

2. That the definition of *intangible heritage* within the ACHA 2003, in relation to the types or values of Aboriginal sites that can be submitted on the DATSIP database for site recording, must encompass the following:

- stories, story-places and song lines
- Dreaming tracks
- Law grounds
- Burials, reburials of ancestors and historical burials
- Massacre sites, post-contact conflict sites (e.g. the Frontier Wars)
- birthing places
- traditional and historical pathways, and places with Aboriginal names
- traditional hunting grounds and sources and species of plants and animals used in traditional foods and medicines (e.g. cultural resource areas)
- waterways, springs, groundwater and surface water sources and their associated catchments
- cultural landscapes, including mountains, hills, waterways and wetlands and their visual amenity
- intellectual property
- oral histories
- constellations
- old-growth trees and old growth forests (considered as family members by many Traditional Owners)
- any type of marked (mature) tree or scarred tree and uniquely shaped or (naturally) marked rock (crevices or hollows) can present (at times) in an especially meaningful way to Traditional Owners, and be of spiritual heritage significance, particularly when set in or along a well-known, traditional and ancestral site or waterway

3. That the process of *self-assessment* be reviewed and improved, as substantial areas and objects of Aboriginal cultural heritage are being disturbed and destroyed. I believe that a more extensive overview with monitoring, is needed by Traditional Owners and their appointed heritage consultants. Land-users making use of tree clearing laws at local and state government levels, are probably in most cases, not even aware of their 'Duty of Care' and self-assessment obligations in relation to the ACHA 2003.

4. Self-assessment by a land-user or development proponent is of concern as well. It may take at least a decade or more for a Traditional Owner to learn from the oral histories of their family Elders in gaining extensive knowledge about Country, and for a non-Aboriginal archaeologist or heritage consultant, they would have had to complete at a minimum, a four-year university course and then complete at least 3 to 6 years of project work, before they become competent at undertaking cultural heritage assessments. It is not logical for the ACHA 2003 to assume that self-assessment by non-Aboriginal people or lay-people, is undertaken in a knowledgeable and sensitively informed approach.

5. With the ACHA 2003, it is crucial to revisit the notion of prior ground disturbance (e.g. farming and tree clearing practices) as to leaving an area devoid of any Aboriginal cultural heritage values or artefacts (traditional or historical), and which leaves the project area devoid of any consultation with Traditional Owners.

6. The ongoing issues for Traditional Owners of '**Sorry Business**' and saying '**Goodbye to Country**' needs to be discussed and visited during the Review process. Such experiences, which are occurring across Queensland, leave a broad collective of Traditional Owner communities and their members, in various stages of Post-Traumatic Stress. This is a process which reverses any progress made with the *Closing the Gap* initiatives.

7. I strongly support any initiatives to help raise awareness on and implement or administer the ACHA 2003, and especially support ideas to seek extensive resources and collaborations, and that give agency to and empower Traditional Owners in Caring for Country. There is a huge disparity in the number of funded non-Aboriginal Ranger/Landcare/Environmental Officer roles, in comparison to the small number of Traditional Owner Ranger roles.

8. The Queensland Government needs to provide incentives to local councils across the State, for such councils to provide on their websites and at workshops, awareness raising and educational resources on the ACHA 2003 and 'Duty of Care', and the need to consult with Aboriginal Parties.

9. Staff of organisations such as the Queensland Parks & Wildlife Service need to be better trained in recognising the cultural heritage values of places like Mount Coolum on the Sunshine Coast. The recent draft (visitor and land-use) management plan for Mount Coolum National Park on the Sunshine Coast, failed to make any mention of the ACHA 2003 as an important legislative measure in land-use planning. While over \$900,000.00 has been spent recently in the construction of walking track and signage upgrades, no specific Traditional Owner consultation or Cultural Heritage Management Plan was undertaken for this project. The CAVE (major cave shelter) at Mount Coolum is currently defaced by over 300 carabiners (bolts and hooks for rock climbing), yet is a recorded site under the ACHA 2003. In effect QPWS have breached their 'Duty of Care' under the ACHA 2003.

10. That places like Ban Ban Springs (near Gayndah) having been subject to a ACHA 2003 Part 6 Cultural Heritage Study, need to have supporting legislation and programs in place to ensure that the local ground and surface water is not depleted or disturbed to the extent that the Ban Ban Springs remain dry for the majority of time i.e. cultural flows of water are required by law to be sustained, and it becomes unlawful for surrounding land-uses to deplete the water sources of significant Aboriginal sites. This situation also applies to the Bunya Mountains and Maidenwell Springs area and surrounds, under threat from mining and fracking proposals.

11. *State of the Environment Reporting*, which includes reporting on the *State of Aboriginal Cultural Heritage*, needs to periodically produce and provide an **inventory** of recorded, intact and disturbed and destroyed sites together, with a statistical breakdown of values and data, and made available to the relevant Traditional Owners.

Conclusion

Important issues with the CHA Review are complex and extensive:

I have done my best to draw your attention to several issues that strike a chord with me. Due to time constraints this submission may not be complete and may not be as well written and referenced as it might;

I apologize for any omissions, typos and poor grammar;

However I overwhelmingly submit the most oppression problem facing the recognition, protection and conservation of Aboriginal/Torres Strait Islander cultural heritage Acts is not the Acts themselves but rather problems of lack of good governance, the non achievement of the Rule of Law and short comings of the Westminster System of Government in the administration of the Acts by governments and stakeholders in the matter.

Yours sincerely

NAME Colin Verrall

