

# **Submission on the Review of the Aboriginal Cultural Heritage Act 2003 and Torres Strait Islander Cultural Heritage Act 2003**

July 2019

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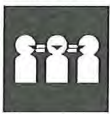
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Date	Name	Position	Action required (Review/endorse/approve)	Due
26/7/2019	James Smith	Manager (Cultural Heritage & Native Title)	Approved	26/7/2019

### Risk level

GACC major       GACC minor       High risk (but not GACC)       Medium risk

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**Project/program** Submission to the Review of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003*, July 2019  
**Project number** N/A  
**Project location** N/A  
**Status** Final  
**DMS ref. no.** N/A

# 1.0 Introduction

The following document provides a submission from the Queensland Government's Department of Transport and Main Roads (TMR) on the review of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003* (the Acts) currently being conducted by the Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP).

TMR moves and connects people, places, goods and services safely, efficiently and effectively across Queensland. We plan, manage and deliver Queensland's integrated transport environment to achieve sustainable transport solutions for road, rail, air and sea. Our integrated transport planning approach ensures we contribute to:

- people's quality of life
- Queensland's economic wellbeing
- a sustainable environment.

Central to our business is a proven commitment to actively listen and respond to Queenslanders. We then incorporate their views into decisions that may impact on people's lives. All Queenslanders, irrespective of where they live and work, can expect to have appropriate transport choices and fair access to the transport system.

TMR employs a group of full-time cultural heritage professionals across Queensland, with most staff based in regional locations. These staff focus on managing the impacts of transport infrastructure delivery and maintenance on Aboriginal, Torres Strait Islander and historical/European heritage. TMR operates under a Cultural Heritage Organisational Policy and Cultural Heritage Process Manual. More details are available here: <https://www.tmr.qld.gov.au/Community-and-environment/Indigenous-programs/Protecting-cultural-heritage>. It is envisaged that any amendments to the Acts will require TMR to review and update its internal policy and manual, including flow-on effects to projects, as such TMR has a keen and genuine interest in improving the cultural heritage legislation within Queensland.

TMR's submission is framed on the five components outlined within the *Consultation Paper: Review of the Cultural Heritage Acts* published by DATSIP, that being: (1) Ownership and defining cultural heritage, (2) Identifying Aboriginal and Torres Strait Islander parties, (3) Land user obligations, (4) Compliance mechanisms and (5) Recording cultural heritage. The submission provides responses to each of these components and the question/s posed with the *Consultation Paper*.

**Disclaimer:** Nothing within this submission document is official TMR or Queensland Government policy. The information contained within is based on the learnings and observations of various TMR staff members during their daily duties. Where comments from TMR staff are provided, names have been removed to ensure confidentiality.

## For any queries on this submission please contact:

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## 2.0 Ownership and defining cultural heritage

### Question

Is there a need to revisit the definitions of cultural heritage - if yes, what definitions should be considered? What additional assessment and management processes should be considered?

### TMR response

Yes. In addition to the comments below from TMR staff, the following should be considered:

- The Acts should more overtly recognise intangible heritage. The Acts currently attempt this (e.g. section 12), however intangible heritage should be overtly stated within section 8, namely cultural resources such as significant flora and fauna. Section 8 should also refer to examples/categories of cultural heritage (e.g. link to section 6 of the *Cultural Heritage Duty of Care Guidelines*).
- The review should also consider the importance of Aboriginal and Torres Strait Islander languages as a form of cultural heritage and include provisions in the Acts around how proponents can support the continuation of language during activities/projects. For example, link in with the whole-of-government Co-naming Strategy developed by DNRME in 2017.
- Currently the Acts provide limited guidance on who determines the significance of cultural heritage and this can result in conflicts on projects. It is unclear whether Aboriginal and Torres Strait Islander peoples, archaeologists, anthologists and/or other parties are responsible for assigning significance levels to sites. The Acts should include provisions that explain who is obligated to assign significance and how. Primary responsibility should be given to Traditional Owners, however a dispute process should be developed in the event that proponents believe that significance levels are poorly/excessively assigned.
- Regarding ownership, section 20(2) states that certain types of cultural heritage are owned by the State. This should be reconsidered, with a focus on *all* cultural heritage being owned by Aboriginal and Torres Strait Islander peoples. This would better address the principle of the Acts that Indigenous peoples are the guardians, keepers and knowledge holders of cultural heritage (i.e. how can Traditional Owners guard heritage if some is still owned by the State).

### Comments from TMR staff

*Consideration should be included to cover connection, i.e. between the people and the land (although does this constitute heritage?). Also natural resources relating ceremonial use or of significant importance i.e. an identified area of red ochre deposits, a certain tree used for smoking ceremonies or for medicinal purposes.*

*Levels of significance and who determines the level of importance. E.G. Does the industry determine if a scarred tree is significant even if a Traditional Owner doesn't see it as such due to the abundance or how the scar was created (sugar bag etc.).*

## 3.0 Identifying Aboriginal and Torres Strait Islander parties

### Questions

Is there a need to revisit the 'last claim standing' provision – if yes, what alternatives should be considered?

Is there a need to revisit the identification of Aboriginal and Torres Strait Islander parties – if yes, who should be involved and what roles, responsibilities and powers should they have?

Should there be a process for Aboriginal and Torres Strait Islander parties to apply to be a 'Registered Cultural Heritage Body' to replace the current native title reliant model?

### TMR response

Yes. In addition to the below comments from TMR staff, the following should be considered:

- There is a need to revisit the 'last claim standing' provisions. Where there is a positive Native Title determination, that group should be the Aboriginal or Torres Strait Islander party for the claim area. Parties could be re-defined as Registered Cultural Heritage Bodies, hence removing the current parties and cultural heritage bodies arrangement which can create confusion and multiple layers for proponents to negotiate through.
- In areas where there is a negative/rejected/discontinued Native Title claim or a claim still in process, another method of identifying the Aboriginal or Torres Strait Islander Party should be developed that is not reliant on the Native Title system. A Registered Cultural Heritage Body system is preferred, which could be chaired by leading members of the local Aboriginal or Torres Strait Islander community (maybe combination of current native title claimants, previous applicants, or other Traditional Owners).
- Registered Cultural Heritage Bodies could serve same function as current Aboriginal and Torres Strait Islander Parties under the Acts

### Comments from TMR staff

*Yes. If the 'last claim standing' people do not ever respond to repeated attempts to contact them, and there is an 'other Aboriginal Party' in the area who actively assert their ownership of the area, the latter Party should have precedence. (Maybe these 'other Parties' have to formally register their interest with DATSIP and then the Regional Co-ordinator then give out their contact details. If more than one 'other Party' registers, it is up to the DATSIP person to share it around (like what currently already happens when you call DATSIP about an area where there has never been under a claim). When I say 'formally register' I just mean call up and nominate yourself. It would take the burden out of having to apply for a RCHB for the groups who might not have the time/paperwork-know-how.*

*The current native title reliant model works well. However, perhaps the RCHB process could apply as an option for groups who can't/won't ever put in/get a NT claim registered (although I'd prefer an informal process like above).*

*Yes - the continuous chain of Native Title claims being registered and/or thrown out creates a lack of consistency over cultural management of a landscape when only consulting the last claimant. Receiving a negative determination on a Native Title claim should not be a precursor to validity as an Aboriginal Party. An alternative that could be considered is: in the vein of Victorian Legislation, creating a governing body (consisting of leading members of the Aboriginal community) to whom Aboriginal groups can develop and lodge a claim to be the nominated Aboriginal Party for a specific region. This claim could include testimonials from local Aboriginal Elders and or/proponents, evidence of efficiency to complete cultural heritage investigations, evidence of relationship to country etc.*

*Yes - similar to above, in the vein of Victorian Legislation, it may be effective to create a governing body (consisting of leading members of the Aboriginal community) to whom Aboriginal groups can develop and lodge a claim to be the nominated Aboriginal Party for a specific region. This claim could include testimonials from local Aboriginal Elders and or/proponents, evidence of efficiency to complete cultural heritage investigations, evidence of relationship to country etc. Once a party is identified for an area they can be listed on a central database which can be accessed by proponents who are seeking to consult for high risk projects.*

*Incorporating an element of cultural heritage capability in the determination of Aboriginal Parties will enable TO's to manage their heritage more effectively in house rather than relying on third party providers.*

*Yes, I have always been of the opinion that if a NT claim submitted for registration has been rejected or a registered NT claim deregistered, then the reasoning for such action should be considered, as this action should rule out the party/ies to speak for country. I don't think an alternative is required, just remove the provision.*

*The role of legal representatives and the Land Councils (if identified as the contact for the party/ies) must be clearly stipulated in the Act as purely that of a "conduit" for information flow when identifying the correct Party/ies.*

*I would suggest that the current Native Title reliant model continue and where a party/ies have Native Title Determination over country, they (the party/ies) should automatically be granted status/registered as the Cultural Heritage Body.*

## 4.0 Land user obligations

### Questions

Is there a need to bolster the oversight mechanisms for self-assessment and voluntary processes – if yes, what should this entail?

Is there a need for dispute resolution assistance for parties negotiating voluntary agreements – if yes, who should provide these services and what parameters should be put around the process?

Is there a need to reconsider the threshold for formal cultural heritage assessments– if yes, what assessment and management processes should be considered?

### TMR response

Yes. In addition to the below comments from TMR staff, the following should be considered:

1. The current system of self-assessment (e.g. the *Cultural Heritage Duty of Care Guidelines*) and allowing proponents to conduct assessments should be maintained, however there is a need for increased regulation of who is conducting assessments. A permitting system for cultural heritage service providers should be introduced, where anyone conducting cultural heritage work needs to register and provide evidence of qualifications and experience. The Acts should make it a requirement that only persons with a permit can conduct cultural heritage work in Queensland. This would help remove unqualified, unskilled operators from the industry.
2. Regarding dispute resolution, similar to the *Queensland Heritage Act 1992* that creates the Queensland Heritage Council, the Acts should permit the creation of an independent *Indigenous Heritage Council* (or similar) whose role it is mediate disputes, monitor and provide services to Traditional Owner groups and manage a permit system for cultural heritage service providers. An *IHC* would comprise members from industry and the Indigenous community, as well as an archaeological/anthropological expert panel.
3. The threshold for formal cultural heritage assessments could be clarified by finishing the review of the *Cultural Heritage Duty of Care Guidelines* that commenced in 2016 (i.e. by clearly stating what activity types require what level of assessment).
4. A minimum standard/template for assessments should also be developed to ensure consistency across the state (e.g. an assessment guideline).
5. A registration system for assessments should also be developed to increase accountability (i.e. assessments need to meet a minimum standard otherwise they are not registered).

### Comments from TMR staff

*All land users disturbing/developing parcels of land bigger than xxm2 (not sure what size this should be) should have to register their chosen DoC category on a publicly visible (or at least visible to DATSIP registered people) page on DATSIP website. All of them should already be doing a search of the DATSIP register already anyway, so it wouldn't be a particularly onerous new step. That way, it can hold land users to account and flag upcoming projects to Traditional Owners (so then those of us who are doing the right thing, don't get blamed for development we had nothing to do with because Traditional Owners can straight away see who is responsible for a dodgy DoC category call).*

*Yes. DATSIP should be resourced enough to provide dispute resolution assistance.*

*No. It should be left to the Aboriginal Party to decide what level of cultural heritage assessment is required.*

## 5.0 Compliance mechanisms

### Question

Is there a need to bolster the compliance mechanisms designed to protect cultural heritage – if yes, what needs to be improved and what additional measures should be put in place?

### TMR response

Yes. In addition to the below comments from TMR staff, the following should be considered:

1. DATSIP's Cultural Heritage unit requires increased field-based staff to conduct audits and issue notices. A compliance presence on projects would be a significant deterrent to unlawful conduct.
2. A mandatory requirement for anyone to report harm to cultural heritage should also be developed (similar to the Duty to Notify of Environmental Harm under the *Environmental Protection Act 1994*).
3. An ombudsman (possibly sitting under the *Indigenous Heritage Council* mentioned in section 4 above) to address complaints against people working in the heritage industry (whether they are consultants, Traditional Owners, government workers, etc) is required.

### Comments from TMR staff

*Yes. DATSIP should be resourced enough/have the powers to audit projects to ensure CH is addressed and managed (and not just after something bad has been reported). A stop works notice should be able to be put in place if no agreement in place/no documented evidence the DoC guidelines were followed (and not just if evidence CH has been harmed).*

*In order for cultural heritage to be protected it must first be identified, therefore the focus should be on preventative compliance mechanisms i.e. adopt a review/approval permit process to ensure that management recommendations/agreements meet industry standards/requirements. Breaches/non-compliance will need to be enforced, but I don't think DATSIP is the right Government enforcement agency. There should also be a compliance mechanism implemented to protect a compliant land user against the party/ies making unsubstantiated claims to stifle/delay projects without cause.*



## 6.0 Recording cultural heritage

### Question

Is there a need to make improvements to the processes relating to the cultural heritage register and database – if yes, what needs to be improved and what changes should be considered?

### TMR response

Yes. In addition to the comments before from TMR staff, the following should be considered:

- Mandatory reporting of all cultural heritage discoveries, regardless of whether they are chance finds on a project or the results of a formal survey/study.
- Simplified on-line reporting forms. Current forms are lengthy and feedback from some Traditional Owners is that they do not have time to fill in lengthy forms
- Increase the information that is automatically provided on sites after a search request. The current system of providing just coordinates & general site type is very limiting and having to e-mail DATSIP for additional information is not always practicable.

### Comments from TMR staff

*Yes - it should be mandatory for all Aboriginal Parties, Proponents and Cultural Heritage Units to register any finds of Aboriginal Cultural Heritage on the database. The database should be expanded to include greater specific information relating to each find, such as material, typology, stratigraphic context, morphology etc. Greater clarity of information relating to archaeological finds will assist with developing a broader understanding of the cultural landscape and will greatly assist with determining patterns and behaviours that shaped Australia's first people.*

*The Aboriginal Cultural Heritage Act should include a section relating to the curation and cataloguing of cultural material after it is collected/salvaged. A lot of effort is directed towards the initial collection of artefactual material to protect it from destruction during infrastructure development, however little is said or known about how this material is stored and catalogued. It is important that specific guidelines (developed in collaboration with archaeological/museum/heritage professionals) be developed to ensure that all artefactual material is appropriately recorded, catalogued and stored to a high standard so that it can continue to contribute to ongoing research and provide insight into Australia's prehistory.*

*Yes, the criteria for what needs to be recorded/registered requires clarification and made mandatory with the Party/ies consent.*

- 1. Government needs to provide adequate resourcing to ensure that compliance mechanisms can be enforced and support, guidance and assistance can be provided to both the party/ies and the Land user(s).*
- 2. Provisions included to ensure that an acceptable industry standard Payment Schedule is adopted and not become the main criteria for negotiation and dispute. \$\$ = level of service delivery required.*
- 3. Mechanism to provide training/assistance for ATSI corporations to become business entities in their own right. This would negate the need to engage 3rd Party Service Providers and would also provide protection to the identified Party/ies from unscrupulous operators.*

## 7.0 Other input

### Question

Do you have any other input, ideas or suggestions on how the Cultural Heritage Acts could be improved to achieve their objectives of recognising, protecting and conserving cultural heritage?

### TMR response

Yes. Please consider the following improvements to the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003*:

1. Maintain a *Cultural Heritage Duty of Care Guidelines* under the Acts and finalise the review/amendments of the *Guidelines* that commenced in 2016. Public submissions in response to the *Guidelines* review should still be considered.
2. Develop a Schedule of reasonable fees payable to Aboriginal and Torres Strait Islander Parties for their services provided during the management of their cultural heritage.
3. Develop a definition of “reasonable and practicable measures” as stated in section 23(1) to ensure consistency across proponents. Currently there is huge variation in what is reasonable and practicable across the industry and this leads to poor outcomes in some cases. Needs to focus on what is reasonable and practicable in respect to the basic principles of who, what, where, when, how and why.
4. Develop a entity (e.g. an *Indigenous Heritage Council*) that can provide advice and services to Aboriginal and Torres Strait Islander parties, so that they can build capability and better respond to proponents.
5. Clarify how far the duty of care extends (e.g. if an agency issues permits to an external party, does the agency have a duty of care to ensure that the external party has addressed cultural heritage?).

### Comments from TMR staff

*DATSIP needs to commit more funding/resources to educating Aboriginal Parties on what the CHAs entail/DoC guidelines/how these specifically are enacted/the difference between Native Title Acts/CHAs/why land users can't just engage with any Aboriginal person who calls them and asks to be engaged with. The further you go out of the south-east corner/mining areas, the less resourced and less knowledgeable about these legislative issues the Aboriginal Parties tend to be, and the more managing CH is just an after-hours exercise that the Parties have to try to juggle around their full-time jobs/families/volunteer activities/lives. These kinds of Parties desperately need a leg up to help them.*