



Gur A Baradharaw Kod Torres Strait
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*Keriba Gesep; Ngalpun Mabaygal; Yumi Time
Our Homeland; Our People; Our Time*

30 August 2019

Cultural Heritage Acts Review Team
Department of Aboriginal and Torres Strait Islander Partnerships
By email- CHA_Review@datsip.qld.gov.au

To whom it may concern,

Re: Review of Cultural Heritage Acts – Consultation Paper

We refer to the above matter and welcome the opportunity to comment on the Queensland Government's Consultation Paper ('**Paper**').

Introduction

Gur A Baradharaw Kod Sea and Land Council Torres Strait Islander Corporation ICN 7689 ("GBK") was established in 2012 as the peak body of all Registered Native Title Bodies Corporates ("PBCs") in the Torres Strait. All the PBCs in the Torres Strait are recognised under the *Aboriginal Cultural Heritage Act 2003* or the *Torres Strait Islander Cultural Heritage Act 2003* ('**the Acts**').

GBK is not-for-profit organisation that works together with the PBCs in our region to provide support to the native title holders in the Torres Strait and to build PBC capacity to fulfil their responsibilities to hold and manage their land and seas in accordance with their traditional laws and customs. We foster partnerships with native title holders and stakeholders to achieve economic, social and cultural development.

The membership base for GBK provides us with an unparalleled level of cultural authority in the Torres Strait Region from both Aboriginal law and custom and Torres Strait Ailan Kastom regarding any amendments to the Acts. Implementation of any amendments would have direct impact on the day to day activities of all native title holders in the Torres Strait. To that end we consider it pertinent to provide this submission based upon our experience and that of our members.

Our Region

The Torres Strait consists of eighteen inhabited island communities. The islands are scattered over a geographic area of 48,000 square kilometres, from the tip of Cape York, north towards the borders of Papua New Guinea and Indonesia. The Torres Strait is made up of cultures of Torres Strait Islanders, and Kaurareg people who identify as Aboriginal Peoples.

It is well known, that 2 historic decisions from the High Court of Australia recognising native title rights originated in the Torres Strait. The first decision which accepted and

recognised native title rights and interests was in relation to the Meriam People in the decision of *Mabo v Queensland [No 2]* (1992) 175 CLR 1. That decision and the 21 Consent Determinations of exclusive native title made under the subsequently enacted *Native Title Act 1993* (Cth) have resulted in the recognition of native title in mostly all the inhabited islands of interest in this proceeding and in most of the uninhabited islands.

In the second landmark native title decision from the High Court of Australia in *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* [2010] FCA 643 the Court held that the Torres Strait Islander society holds native title rights and interests in the waters of the Torres Strait.

Our Submission

All land users must recognise and appreciate that the relationship between Aboriginal and Torres Strait People and their environment is one based on balance in harmony with nature and observance of their ancestral customs. Our suggestions are framed in this context.

Within our submission references to pages are those within the Paper (version available at the Queensland Government website¹ as at 1 February 2019).

1. Ownership and defining cultural heritage

Questions:

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?

a) **Definition**

- Broaden the definition of cultural heritage to include 'intangible cultural heritage' in line with the United Nations Educational, Scientific and Cultural Organisation's convention.
- It is important for land users to understand that our traditional knowledge is knowledge concerning the environment in which we live and is passed from one generation to the next in written and oral form based on our own cultural codes. The knowledge is intangible, inalienable, imprescriptible and non-seizable.²
- Both the Acts and the Guidelines must be amended to provide protection for Aboriginal and Torres Strait Islander people's traditional knowledge. Culture to Aboriginal and Torres Strait Islander Peoples is fundamental to identity. It is their past, their present and their future. Aboriginal and Torres Strait Islander Peoples need their culture to sustain them and keep them well. But most importantly they need their culture because it provides the fundamental essence of who they are. The International Council for Science (ICSU) define traditional knowledge as:

"A cumulative body of knowledge, know-how, practices and representations maintained and developed by peoples with extended

¹ <https://www.datsip.qld.gov.au/programs-initiatives/review-cultural-heritage-acts>

² United Nations Economic and Social Council (2015) *Study on the treatment of traditional knowledge in the framework of the United Nations Declaration on the Rights of Indigenous Peoples and the post - 2015 development agenda*, Permanent Forum on Indigenous Issues (fourteenth session), New York.

histories of interaction with the natural environment. These sophisticated sets of understandings, interpretations and means are part and parcel of a cultural complex that encompasses language, naming and classification systems, resource use practices, ritual, spirituality and worldview."

- Indigenous traditional knowledge generally means traditional practices and culture and the knowledge of plants and animals and of their methods of propagation. It includes:-
 - expressions of cultural values;
 - beliefs;
 - rituals and community laws;
 - knowledge regarding land and ecosystem management.
- The maintenance and protection of Aboriginal and Torres Strait Islander peoples' traditional knowledge is crucial to the maintenance of their culture. It is also valuable to development policy and operations and the advancement of understandings of sustainability on a global scale.
- We support the recognition of broader cultural heritage landscapes in assessing the impacts on cultural heritage arising from land use activities. These landscapes are often associated with dreaming or creation stories in our respective communities and are very significant under our laws and customs.
- Clarify in both the Acts and the Guidelines that both flora and fauna may constitute cultural heritage as these are often used as totems for Aboriginal and Torres Strait Islander people under our laws and customs. For most Torres Strait Islander communities their totems include marine animals.
- In the Torres Strait region, it is mandatory that any amendments recognise the significance of the relationship between Aboriginal and Torres Strait Islanders and the reefs and waters surrounding our islands. It also requires emphasis that, to the Aboriginal and Torres Strait Islander peoples, the land and sea are seamlessly and culturally associated - there is no "sea-land dichotomy".

b) Additional assessment and management process

- Emphasising on the important role Aboriginal and Torres Strait Island Parties have in managing their cultural heritage.
- There are no examples or templates that land users can access to understand the process of negotiating a cultural heritage agreement or what is involved in a cultural heritage assessment.
- The Cultural Heritage Unit could provide templates on their website for land users to use as a starting point. This information could include a summary of steps (like a flowchart) for a cultural heritage assessment or to negotiate an agreement.

2. 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?

- As explained above all the PBCs in the Torres Strait are also registered as Cultural Heritage Bodies.
- Where there is a determination of native title by the Federal Court then it is clear who the land user must engage with about cultural heritage.
- We do not support the idea of the Minister deciding who is the party where there is clear court evidence.
- In the event land users are unsure who to contact in the Torres Strait we suggest they contact us as the Peak Body for all native title holders in the Region.
- We do not agree with Registered Aboriginal Parties or Recognised Aboriginal Representative Bodies adopted within other states and territories. Any legislation should promote self-determination as per UNDRIP.
- It might be useful for land users if the Acts explain the role, function and obligation of the Aboriginal and Torres Strait Islander parties under the legislation. We would also suggest that a similar section be drafted that is applicable to land users.

3. 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?

- Land users must at all stages of activities engage and consult with the Aboriginal and Torres Strait Islander party for that area.
- Agree provision of access to affordable dispute resolution assistance for parties negotiating voluntary agreements would be of great assistance. We support the establishment a panel of qualified dispute resolution practitioners and experience experts in this field.

- For the Torres Strait, as the Peak body we would be in the best place to assist with any dispute resolution process. Otherwise we support use of the National Native Title Tribunal for their understanding of how our laws and culture connect us with our lands and waters and how that translates into the protection of cultural heritage.
- Agree reconsideration of threshold for formal cultural heritage assessments where high impact activities are contemplated.

4. Compliance mechanisms

Questions:

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?

- Recommend incorporate notice provision and different process for different types of activities. This could be similar to the s24HA/KA notices issued by land users under the *Native Title Act 1993* (Cth). We suggested a sliding scale of different rights and obligations which reflects the scale of the impact of works.
- Recommend greater fines for those land users who breach agreements.
- Recommend protection orders to be greater than 30 days.
- Where there has been a breach land user to demonstrate compliance before protection order lifted.
- Ability for audits to be undertaken by an independent expert if reasonable grounds for breach of agreement.
- Penalties paid for breaches should go to those whose cultural heritage was harmed or destroyed.

5. Recording cultural heritage

Questions:

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?

- Our members do not record any of our cultural heritage on the register or the database. In the Torres Strait we have a Traditional Ecological Knowledge program that records all our things that are important to us such as our language, our sites and our stories. With this program we have control over who can access the information and what we wish to share with them.

6. Other comments

Questions:

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?

- In the Torres Strait there is confusion around the fact that Aboriginal persons are traditional owners of some areas within the Torres Strait Region. This includes main areas of administration including Thursday Island and Horn Island. We can work with the Department to develop fact sheets to provide some clarity around these points.
- We would also encourage the Department to facilitate regular training for other State Government departments and entities so that they are equally aware of their obligations when overseeing projects.
- We also recommend incorporating a statement from the *Human Rights Act 2019* (Qld) recognising that protecting cultural heritage is a human right.
- Any amendments to the Acts must reflect the rights of Indigenous Peoples as set out in Articles 11, 12, 25, 27, 29 and 31 of the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"). In particular, explaining that it is recognised at an International level that cultural, intellectual, religious and spiritual property of Indigenous Peoples should not be taken without their free, prior and informed consent or in violation of their laws, traditions and customs.
- The Australian Government announced its support for the UNDRIP in 2009. Any revised version of the Guidelines must incorporate standards contained in the UNDRIP because:-
 - It is sourced from existing international human rights law.
 - It is widely supported by both governments and Indigenous Peoples globally.
 - It is the result of a democratic and open process.
 - It uses language similar to a treaty.

Conclusion

We thank you for your consideration of our submission. Should you have any questions in relation to our submission please do not hesitate to contact our office.

Yours faithfully



Ned David
Chair
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