for example manage the cultural heritage database, managing compliance, assisting local Aboriginal groups with understanding the legislation etc.

definition that reflects Aboriginal concepts of connection to Country and culture. This doesn't mean that PBCs for example cannot be the Aboriginal party it just means that they have to satisfy the cultural heritage requirements to be nominated as the cultural heritage body. This has some significance for FNBGGGTB PBC as it is an amalgamation of four distinct nations and cultural groups so it may not be the appropriate for this PBC to deal with cultural heritage matters and rather it should go to each of the four nation's representative bodies.

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

The proposals under this objective are to either:

- establish a First Nations led entity with responsibilities for managing and protecting cultural heritage in Queensland. The entity would work with existing and future local Aboriginal groups who manage cultural heritage matters in their area; or
- establish a First Nations independent decision-making entity in partnership with ATSI peoples that explores the most culturally appropriate approaches for recognising historical connection to an area for the purposes of cultural heritage management.

The issue we have with both these proposals is that they are proposed on the basis that "First Nations peoples should have greater participation in the control, protection and administration of cultural heritage and decision-making about cultural heritage matters". Further the Options Paper states that option 1 would promote greater self-determination. This suffers from the misconception that self-determination can be enhanced by granting Aboriginal participation through an overarching body. This ignores the fundamental fact that there is no single Aboriginal nation or Torres Strait Islander nation in Queensland. It is not the Aboriginal people of Queensland as a collective that have a right to self-determination. The principle of self-determination applies to ***each individual Aboriginal nation***. Therefore a single body that purports to be an expression of self-determination of all the Aboriginal nations in Queensland is actually the antithesis of self-determination. As stated in the DN Standard on self-determination referred to above – only the affected Indigenous Community itself should be the ultimate arbiter of the management of the ICH aspects of any proposal that will affect that heritage. Therefore any entity that has responsibilities for managing and protecting cultural heritage or determining historical connection must be an entity led by the affected indigenous community itself. The Victorian example of RAPs is far more consistent with principles of self-determination.

That is not to say there could not be a First Nations led entity with responsibilities for administering the Act and associated policies and funding. It could be established to

this. Compliance with the Cultural Heritage Act carries a not insignificant cost for proponents. The size of the penalties need to deter proponents from electing to choose the lower cost of wearing the infringement notice vs the higher costs of complying with the Act. One option may be to set the level of infringement penalties according to the size/revenue of the proponent.

**Proposal to reframe the definition of Aboriginal Party so that people who have a connection to area under Aboriginal tradition have an opportunity to be involved in cultural heritage and protection**

This proposal specifically relates to areas where there is no registered native title holder or registered native title claimant. Our issue here is that native title is a construct of white man's law and does not reflect Aboriginal cultural heritage from an Aboriginal perspective. Whether a party does or does not satisfy white man's legal definition of what a native title holder is, does not change that party's connection with Country and culture.

While we accept that it does create an ease for proponents to know who to consult with on cultural heritage, there are other options and examples that could offer alternatives that decouple cultural heritage from the white man's construct of native title. For example:

- In NSW the draft Aboriginal Cultural Heritage Bill proposes decision-making be placed with Aboriginal people through establishing Local Aboriginal Cultural Heritage Consultation panels and an overarching Aboriginal Cultural Heritage Authority.
- In Victoria, the Aboriginal Heritage Council (AHC) decides who are the registered Aboriginal parties (RAP) for an area. A RAP is an independent body of native title holders (so could be a PBC), Traditional Owners or Aboriginal people with an historical or contemporary interest in cultural heritage. RAPs are funded by the Victorian government and are the primary source of advice and knowledge to the State and AHC on matters about cultural heritage in their registration area.

While either of these two models are more consistent with self-determination and empowerment than any of the current the Queensland proposals, the Victorian model does ensure that only the TOs of the particular area provide advice on cultural heritage matters relevant to their traditional lands directly to ministers and the State and through funding the RAPs ensures they are empowered to exercise their ICR.

It would be our contention that if the State is going to go to the trouble of reforming the definitions of what an Aboriginal party is for areas where there is no registered native title holder or claimant, it should reform the entire definition to make it more consistent with self-determination and empowerment principles and remove what is the convenient out of using the white legal conception of native title in favour of a

Cultural Heritage Act should expressly state that the ICR under the HR Act are to be taken into account in any such ADR processes.

**Proposal 5 – Require mandatory reporting of compliance to capture data and support auditing of the system**

This proposal would require all land users to document and register all agreements and consultation under the Cultural Heritage Act. We are broadly in favour of this proposal as it would assist with ensuring compliance by the land users with their obligations. However, there are a number of things we think could be included in this proposal to strengthen the rights of TOs by including:

- a requirement that all information and data provided or captured by the reports and audits in relation to cultural heritage compliance is shared with or accessible by the TOs.
- a requirement permitting TO designated authorised representatives to enter onto the land to monitor compliance;
- a requirement that the land user report any substantive changes to the land use that was originally proposed in the consultations with the TOs;
- a requirement that land users sign written representations that all the information they provide is true and correct and provide significant penalties for false reporting.

**Proposal 6 – Provide for greater capacity to monitor and enforce compliance**

The options proposed include introducing restorative justice principles and expanding powers of entry, investigation, infringement notices, ability to compel evidence. We are strongly in favour of all these suggestions. However, we have a concern that the paper suggests that infringement notices would be a "nominal figure" to encourage compliance. The DN Standard on 'Resourcing compliance and enforcement' outlines two relevant matters regarding the regime around compliance and enforcement of cultural heritage legislation:

- first wherever possible, affected Indigenous communities should be adequately empowered and resourced to undertake necessary compliance and enforcement functions. Any proposal around providing for greater capacity in this field should comply with this as it is consistent with the Queensland Government's commitment to empower indigenous people and it is also consistent with principles of self-determination. In addition, it would create greater opportunities for employment for TOs.
- Second, the structure of ICH legislation must ensure that proponents understand that interference with ICH without an authorisation or failure to comply with the terms of authorisation will result in ***significant*** sanctions. The option of "nominal" infringement notices is directly inconsistent with

access to expertise either from the government or from the relevant land users.

- The Options Paper does not outline the new framework in full and has mere suggestions of what it might look like. Any new framework would need to be developed with significant consultations with TOs and be consistent with the HR Act.

**Proposal 2 – Integrate Cultural Heritage protection and mapping into land planning processes for state and local governments to enable identification of cultural heritage at an early stage and consideration of its protection**

This proposal would assist both the state and local governments to comply with their obligations under the HR Act to consider impact on ICR in all their decision-making. We would suggest it be taken further and require each local government to have an agreement with the TOs in their Local Government Area on the protocols for engagement with the TOs in relation to cultural heritage aspects in their land planning and development approval processes. These protocols could then automatically be applied to the State government for their land planning and approval processes (eg grant of mining leases, exploration licences, agricultural and pastoral leases etc) or the state could be required to develop their own set of protocols with each individual TO group.

**Proposal 3 – Amend the Cultural Heritage Acts to expressly recognise intangible elements of cultural heritage**

We strongly support this proposal. First Nations' cultures in Australia are oral cultures and so much of their culture exists in the importance of storylines, practices, beliefs, rituals, knowledge and skills. Recognising this is essential otherwise some of the most significant aspects of First Nations' cultural heritage is ignored. Further, it is consistent with human rights obligations and the growing international recognition of traditional knowledge as an intellectual property right of indigenous people.

**Proposal 4 – Provide a mechanism to resolve and deal with issues arising under the Cultural Heritage Act**

The options proposed include a First Nations body or advisory group to assist with disputes; extending the Land Court's ADR function to allow it to mediate disputes; giving bodies such as the Land Court jurisdiction to hear disputes. We think the most important factor in this is that the body or group given the authority to deal with disputes are recognised state government entities that are bound to apply the HR Act and ICR in determining the outcome of the disputes. To this end we would prefer that there be a First Nations body or the Land Court given this jurisdiction as they are bound by the HR Act. If alternative ADR functions are proposed the

- The proposal then goes on to say the framework could involve various levels of consultations. For this purpose it categorises different types of activities – prescribed activities (eg an activity that causes disturbances that would result in lasting impact to the ground that had not previously been disturbed); excluded activities (eg clearing along a fenceline). Consultation is required for: all prescribed activities regardless of what area it is in and all activities in a high risk area that are not excluded activities. For all other areas/activities no consultation of TOs is required unless significant cultural heritage is identified during the activity. The issues we would like to raise with this proposal are:
    - True self-determination requires consultation for ***all activities*** on all traditional lands. Consultation protocols could be developed by each of the TO groups in Queensland to assist with this.
    - The definition of prescribed activities focuses on disturbances to the ground. This definition aligns with the current definition of ICH which is limited to tangible ICH. It is inconsistent with the recognition that there is intangible ICH that can be impacted.
    - The definition of prescribed activities only applies to ground that has not previously been disturbed. There are various levels of disturbance and impacts. Just because land has been disturbed previously does not mean additional disturbance automatically precludes an impact on ICH and a need to consult with TOs.
    - In areas with no consultation, it relies on the land user to identify significant cultural heritage during the activity. The land user does not have the skills or expertise to do this, particularly if:
        - there is no consultation in the first place so the land user has no idea about the cultural heritage of the TOs; and
        - the definition of cultural heritage is expanded as proposed to include intangible assets. How can a land user identify such assets?

      Even where cultural heritage is identified, it is in the land users best interests to determine it is not "significant". Further, it disadvantages the land user to make such identifications and report them so there is no incentive to do so and in fact significant incentive to cover up. To truly comply with the DN Standards, every project should have some kind of cultural heritage oversight to identify any cultural heritage impacts and penalties for non-compliance should be significant enough to outweigh the disincentives.
    - The new framework would require a lot more time and effort for TOs to participate in consultation and CHMP development, agreement and monitoring. This should be supported with financial assistance and

**General:**

The original consultations that took place were prior to the Human Rights Act (**HR Act**) coming into effect, which significantly changes the context surrounding this review. In particular, the HR Act requires parliament to consider the impact on human rights when proposing and scrutinising new laws. Therefore, all the options proposed need to be scrutinised through a human rights lens and specific consultation on the impact on indigenous cultural rights (**ICR**) of Traditional Owners (**TOs**) as conceived of under the HR Act undertaken.

The need for this is further strengthened by the proposals for a decision-making body (either as a First Nations led entity or the Land Court) as such a body would be bound by the HR Act (and specifically would need to take into account indigenous cultural rights) when making any decision.

**Proposal 1: Replace the current Duty of Care Guidelines with a new framework that requires greater engagement, consultation and agreement with the Aboriginal party to protect cultural heritage.**

While we are generally supportive of this proposal as it would give TOs a greater say in protecting their cultural heritage, there are a few issues we see with the proposed new framework as follows:

- The proposal is that the government would fund the mapping of high risk cultural heritage areas (**high risk areas**) in Queensland and the mapping would be undertaken in consultation with TOs. We see the concept of mapping cultural heritage areas as a positive. The issue with this we see is that the mapping process would be undertaken either by the government or a body created by the government (potentially the proposed First Nations led entity) in consultation with TOs. In the *Dhawura Ngilan best practice standards in indigenous cultural heritage management and legislation,* **(DN Standards)** the Best Practice Standard on incorporation of principles of self-determination refers to UNDRIP principles of self-determination and states that this principle requires the affected Indigenous Community itself to be the ultimate arbiter of the management of Indigenous cultural heritage (**ICH**) aspects of any proposal that will affect that heritage. Further, the Options Paper refers to the guiding principles in the Queensland Government's Statement of Commitment for reframing its relationship with Aboriginal People including self-determination, shared commitment, shared responsibility and shared accountability, empowerment and free, prior and informed consent. In line with this statement, it should be each TO group that maps its own areas of cultural significance. The government could and should provide them with assistance to do this but ultimately it should be the TOs who have the final say on what areas are culturally significant to them.

**SUBMISSION ON THE OPTIONS PAPER - CULTURAL HERITAGE ACTS REVIEW**

**ON BEHALF OF:**

**THE FIRST NATIONS BAILAI, GURANG, GOORENG GOORENG, TARIBELANG BUNDA PEOPLE NATIVE TITLE ABORIGINAL CORPORATION**

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