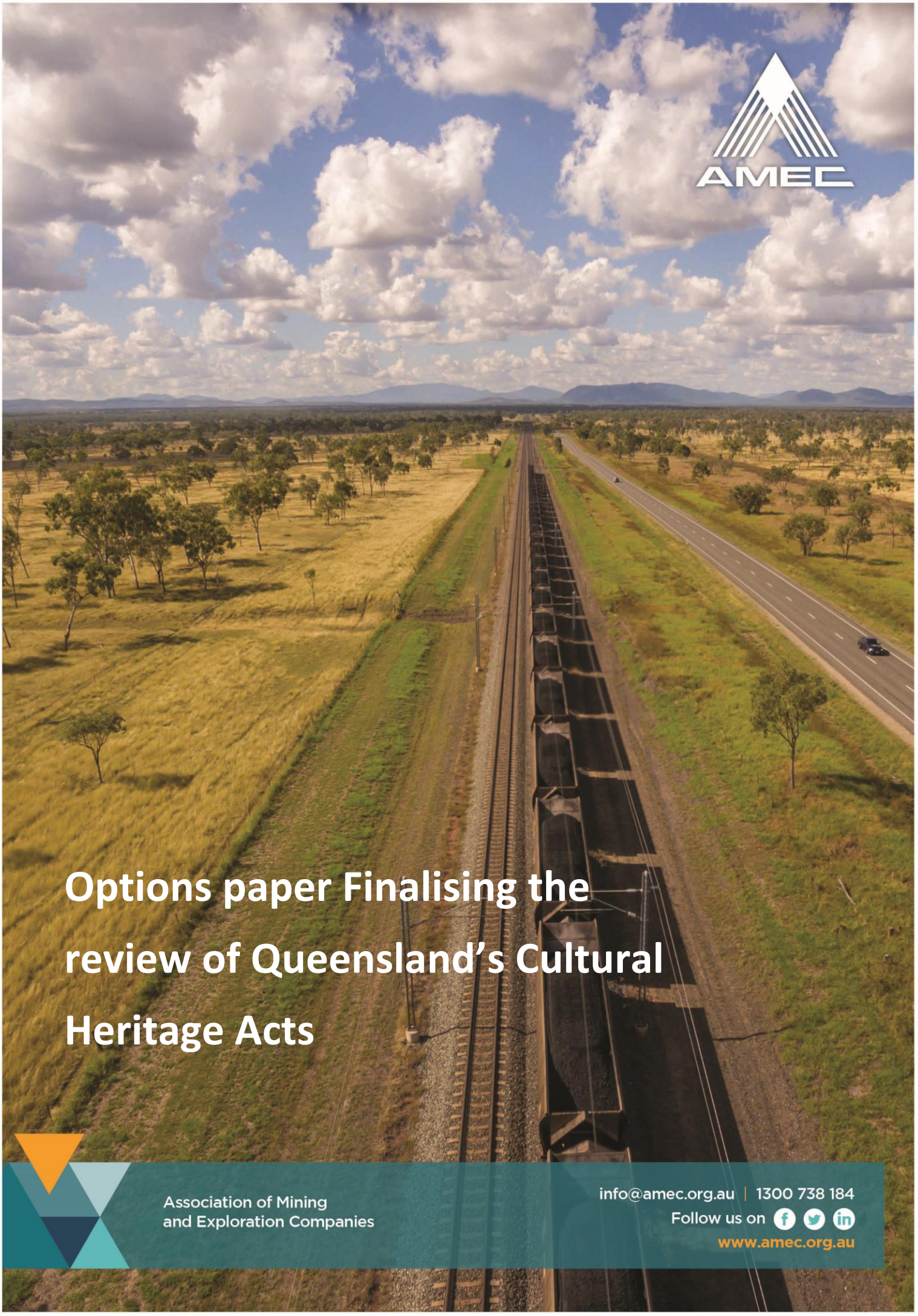
AMEC
Options paper Finalising the review of Queensland's Cultural Heritage Acts
Association of Mining and Exploration Companies
info@amec.org.au | 1300 738 184
Follow us on
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Introduction

The Association of Mining and Exploration Companies (AMEC) appreciates the opportunity to be consulted on the Options paper Finalising the review of Queensland's Cultural Heritage Acts. The process has taken some time and we appreciate the opportunity to articulate the real and potential operational problems that will arise for the mining and exploration industry.

About AMEC

The Association of Mining and Exploration Companies (AMEC) in the national peak industry body representing over 450 mining and mineral exploration companies across Australia. Our members are explorers, emerging miners, producers, and a wide range of businesses working in and for the industry. The AMEC Queensland membership base is dominated by companies looking for New Economy Minerals throughout Queensland. Our members and stakeholders in Queensland explore, develop and produce minerals including Antimony, Bauxite, Coal, Cobalt, Copper, Gold, Graphite, Lead, Lithium, Mineral Sands, Molybdenum, Nickel, Rare Earths, Silver, Tungsten, Vanadium, and Zinc.

State of the Industry

The mining and mineral industry make a critical contribution to the Queensland economy. In the 4 quarters to November 2021, the average people employed in Queensland Mining sector totalled 77,799, with a year on year growth of 13.1%. The Exploration part of the industry is thriving within this data, making up 29.1% of the jobs[1]. The current royalty projections for 2022FY indicate that Mining companies collectively will pay over $5.1 billion in Coal and Other(Minerals)[2]. In the 4 quarters to September 2021, Queensland mining and mineral exploration companies invested over $425 million[3] (not including petroleum) to discover the mines of the future.

Background

By way of background, the Queensland Government has been conducting the review of *the Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003 (Acts)* for some time. The original consultation process for this review was undertaken between May and July 2019. In addition, the Acts have been subject previous reviews including statutorily prescribed review in 2008. Despite these reviews, little progress has been made in achieving consensus regarding any amendments or improvements to the Acts. Any proposals to increase the efficiency of the system to allow faster approvals timeframes has been met with opposition from Traditional Owners whilst any

[1] Mining employment in Queensland
[2] Queensland royalties and land rents
[3] Mineral and Petroleum Exploration, Australia

proposals to address Traditional Owner concerns with the concept of “last claim standing” have been met with concern from industry groups in relation to an increase in uncertainty regarding the correct party to consult with in relation to cultural heritage matters.

Added to this, the destruction of the 46,000+ year old Juukan Gorge rock shelters by Rio Tinto on 24 May 2020 and the subsequent publication A Way Forward[4] – Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge by the Joint Standing Committee on Northern Australia of the Commonwealth Parliament (Way Forward Report) has placed increased focus on the regulation of development affecting First Nations’ cultural heritage.

With this background in mind, please see below our feedback on the Options Paper – Finalising the Review of Queensland’s Cultural Heritage Acts dated December 2021 published by the Queensland Government.

Options Paper – Finalising the Review of Queensland’s Cultural Heritage Acts

The options paper sets out proposals in relation to three key areas:

1. providing opportunities to improve cultural heritage protection;
2. reframing the definitions of “Aboriginal party” and “Torres Strait Islander party;” and
3. promoting leadership by First Nations people.

1 Proposals to improve cultural heritage protection

Proposal 1

> **Replace the current Duty of Care Guidelines with a new framework that requires greater engagement, consultation and agreement making with the Aboriginal party or Torres Strait Islander party to protect cultural heritage.**

This proposal amounts to a significant shift in the way an exploration or mining company is regulated in relation to its activities with regards to cultural heritage.

Currently, the Acts provide that it is an offence to damage or otherwise impact on cultural heritage. However, the Acts provide a statutory defense where a company has complied with its cultural heritage duty of care. As such, the Duty of Care Guidelines provide a defense in circumstances where cultural heritage has been damaged.

The proposal contained in the Options Paper will result in a shift to what is essentially a “strict liability” regime where a proponent will be guilty of an offence if it has not complied with the statutory framework, irrespective of whether that failure to comply has resulted in damage to cultural heritage. This is not supported in its current form.

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[4] A Way Forward - Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge by the Joint Standing Committee on Northern Australia of the Commonwealth Parliament

The framework usefully summarized in the flow chart set out of page 12 of the Options Paper does significantly changes the requirements for many exploration activities that are extremely unlikely to have any physical impact on cultural heritage. Such a substantive change would significantly impact the early stage exploration activities of mineral exploration. In order to address these problems, the 'excluded activity' definition would need to be made substantially wider. These changes, implemented in this way, would be a focus of concern.

The framework contemplates that mapping of high-risk cultural heritage areas in Queensland will be undertaken and publicly available. For this proposal to be workable the definitions of "Prescribed Activity," "Excluded Activity" and "High Risk Area" would need to be the subject of detailed consultation across industry and government, and broad enough to enable non-impactful activities to proceed without being captured by survey requirements.

Additional issues include:

1. it is likely that the identification and mapping of "high-risk areas" will be a process that will give rise to significant disputes between the various stakeholders in the cultural heritage process. Historically (and imbedded within culture), Traditional Owners are reluctant to register areas of cultural heritage significance on the current cultural heritage database operated by the Queensland Government. This database is only able to be accessed by undertaking a formal search of the register with The Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP). As such, Traditional Owners are likely to be reluctant to have their cultural information displayed on a public website. In addition, this process is likely to also cause disputes between different Traditional Owner groups in relation to who speaks for particular areas and whether areas have significance. Mapping of 'high risk areas' will raise concern from other non-Indigenous stakeholders in relation to the mapping of areas that are currently subject to development. Mapping add complexity, for example, if areas are publicly mapped in the absence of ground truthing a "high risk area" may be incorrectly identified and may impact future development of the site as well as expose areas that are subject to independent agreements; and

2. the example definition of "Prescribed Activity" refers to an activity that causes disturbance resulting in a lasting impact to the ground that has not previously been disturbed, or "***to the ground below the level of disturbance that currently exists***." The wording of this definition may be of significant concern to our members. This is due to the fact that, in most scenarios, that will result in any exploration drilling being determined to be a "Prescribed Activity" as drilling would normally be considered as causing disturbance that would result in a lasting impact below the ground level of disturbance that currently exists. This would mean that, for example, a drilling program that was conducted within an area that had been subject to significant previous ground disturbance such as areas that are subject to broadacre cultivation or areas of significant infrastructure would require consultation and agreement with the Aboriginal party or Torres Strait Islander. This is a significant change from the current process under the Cultural Heritage Duty of Care Guidelines, and will create significant new barriers and costs for explorers.

Proposal 2

> **Integrate cultural heritage protection and mapping into land planning to enable identification of cultural heritage at an early stage and consideration of its protection.**

This proposal is extremely vague and uncertain. It is unclear what "incorporate the mapping into the planning process for State and Local Government" means. Does this include amending the

Sustainable Planning Act and other planning legislation to provide that "High Risk Areas" require special approval for planning and development or is it simply proposed that the mapping referred to in Proposal 1 is publicly available to people undertaking planning processes. Without further information, it is difficult to assess whether this proposal should be supported or whether there are any improvements that could be made to the proposal.

Further, as indicated above, in comment on Proposal 1, there are significant concerns with the process proposed for mapping "High Risk Areas" and whether this process can be achieved within a reasonable timeframe.

Proposal 3

Amend the Cultural Heritage Acts to expressly recognise intangible elements of cultural heritage.

Intangible cultural heritage extends the definition of 'Cultural Heritage' beyond physical objects to other aspects of Aboriginal and Torres Strait Islander culture. For example, the *Aboriginal Heritage Act 2006 (Vic)* defines intangible heritage as "Any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts and environmental and ecological knowledge but does not include anything that is widely known to the public". It goes further to identify that it also includes intellectual creation or innovation based on anything or derived from anything comprising Aboriginal intangible heritage.

The proposal to recognise intangible elements of cultural heritage in the Acts is consistent with the *UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003)*, which has not been ratified by the Australian Government, and Recommendation 3 of the Way Forward Report[4].

The recognition of the intangible heritage is an essential component of any proper regulation of Indigenous cultural heritage in a modern legal system. It is an inevitable part of the development of the law in this area and forms part of international expectations in relation to the regulation of cultural heritage. Given the rise of Environment Social and Governance (ESG) requirements for modern mining and exploration practice, the inclusion of a recognition of intangible elements of cultural heritage will assist AMEC members in demonstrating ESG compliance.

The expansion of the definition of aboriginal cultural heritage creates a range of significant problems, and it is difficult to manage potential impact on intangible heritage short of complete avoidance. Consequently, practically managing the protection of intangible heritage is very difficult.

However, in recognising intangible elements it critical that this is done within a realistic operational framework. The new Western Australian legislation attempted to achieve this by requiring that an intangible element must be connected to a physical element of cultural heritage for it to receive protection.

Proposal 4

Provide a mechanism to resolve and deal with issues arising under the Cultural Heritage Acts.

Currently, the Acts provide that the Land Court can provide mediation services and resolve issues related to the negotiation and registration of a cultural heritage management plan under part 7 of the Acts. In addition, the Land Court has jurisdiction in relation to:

1. objections to the recording of the findings of a cultural heritage study in the register of cultural heritage pursuant to section 76 of the Acts; and
2. granting injunctions under section 32H of the Land Court Act 2000 for the prevention of an act that is a contravention of cultural heritage protection provisions.

As such, it would make sense for any mechanism to resolve and deal with issues arising under the Acts to provide that jurisdiction to the Land Court given the Land Court has existing expertise in that area.

That said, the number of matters that require court resolution under the Acts are relatively small and have been dealt with, whether by the Land Court under the existing arrangements or by, where there is no other specific referral of jurisdiction, the Queensland Court's.

As such, we do not see any specific need for the implementation of this proposal.

Proposal 5

Require mandatory reporting of compliance to capture data and support auditing of the system.

This proposal provides for mandatory reporting requirements to document agreements and consultation under the Acts. Whilst such a proposal, if implemented, may increase compliance costs for our members, this proposal will regulate actions that should already be undertaken by our members in complying with the requirements under the Acts and are necessary for quality assurance to ensure compliance.

AMEC would support the proposal provided adequate resources, such as templates and online lodgement systems, are implemented by Queensland Government to support compliance.

Proposal 6

Provide for greater capacity to monitor and enforce compliance.

This proposal provides for the insertion of provisions that allow enforcement and compliance actions to be undertaken by authorised officers under the Acts. Whilst this will result in the government having greater power to investigate and prosecute offences under the Acts, it is common practice in legislative enactments of this type such as environmental and safety legislation etc to imbue authorised officers with such powers.

Provided the introduction of these powers does not come with an associated increase in costs to our members to fund the implementation of the proposal, we see little basis for AMEC to object the proposed powers. Obviously, due regard would need to be had to the drafting of the provisions to ensure that the powers granted to the authorised officers under the amendments do not exceed what is reasonable and appropriate in the circumstances.

2 Reframing the definition of “Aboriginal party” and “Torres Strait Islander party”

The proposal in this section is to reframe the definitions of “Aboriginal party” and “Torres Strait Islander party” so that people who have a connection to an area under Aboriginal tradition or Ailan Kastom have an opportunity to be involved in cultural heritage management and protection.

The options paper outlines two options to satisfy this proposal.

Option 1

To provide that, for areas of Queensland where there is no registered native title holder or registered native title claimant:

1. an Aboriginal person or Torres Strait Islander person who claims to have connection to the area can request recognition as an Aboriginal party or a Torres Strait Islander party; and
2. the Acts are changed so that:
    a. a previously registered native title claimant is not a native title party of an area; and
    b. section 35(7) is removed (section 35(7) provides that where there is no “native title party” for an area, a person is an “Aboriginal party” for the area if they have particular knowledge about traditions, observances, customs or beliefs associated with the area and the person either has responsibility under Aboriginal tradition for the area or is a member of a family or clan group that is recognised as having responsibility under Aboriginal tradition for the area.

Option 2

To provide that, for areas of Queensland where there is no registered native title holder or registered native title claimant, a previously registered native title claimant that is subject to a determination by the Federal Court that native title does not exist in the area is not a native title party but section 35(7) of the Acts will continue to apply.

Comments

The two options outline four separate mechanisms:

1. an Aboriginal person or Torres Strait Islander person who claims to have connection to the area can request recognition as an Aboriginal party or a Torres Strait Islander party;
2. removal of the last claim standing rule;
3. modification of the last claim standing rule to not include a registered native title claim that has been subject to a determination that no native title continues to exist;
4. removal of section 35(7) of the Acts.

Option 1 adopts mechanisms 1, 2 and 4. Option 2 adopts mechanisms 3.

In our view, further options to be considered are:

1. mechanisms 1, 3 and 4;
2. mechanisms1 and 2 only; or
3. mechanisms 1 and 3 only,

and the Options Paper fails to identify why only two options are considered.

The identification of who is an 'Aboriginal party' is a matter for Traditional Owners and not a matter that, AMEC, our members or other stakeholder group should participate in. AMEC's only interest in this process is to ensure whatever process is adopted gives certainty to its members regarding who they should consult with preferably, only one group.

The current process provides that for all areas where there is, or has been, a registered native title claim or determined native title holders. However, some Traditional Owners have significant concerns with the last claim standing rule particularly in circumstances where there has been a Federal Court decision that the former registered native title claimants were not, and never had been, native title holders for a particular area.

However, it is relevant to note that just because a registered native title claim has been subject to a determination that no native title continues to exist does not mean the registered native title claimants (and the members of the native title claim group) are not the appropriate entity for cultural heritage purposes. In circumstances where that group are the Traditional Owners for that area, but have been unable to maintain the 'connection' or 'society' necessary for a determination that native title continues to exist, that group could still be the 'Aboriginal party' for the area.

As such, it should be considered that either the last claim standing rule should be entirely removed or there should be modification of the last claim standing rule to not include a registered native title claim that has been subject to a determination that no native title continues to exist due to the fact the Federal Court determined that the native title claim group never held native title rights and interests in the relevant area.

In relation to mechanism 1, there are clearly significant implementation issues. The First Nations Body is yet to be established and the process for applying has not been determined. This does not mean the process will not work, but it is likely there will be a significant period of implementation where the current provisions will continue to apply. This may give rise to some disquiet among Traditional Owners if our members undertake cultural heritage processes with the current Aboriginal party even though that party is unlikely to remain the Aboriginal party once the new process is implemented.

For member companies dealing with multiple groups that often have competing claims, can be extremely difficult. As much as possible, any new system should attempt to provide a framework that ensures that all appropriate traditional owners are included, but enable proponents to only deal with one recognised party representing these interests.

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

Proposal 1

> **Establish a First Nations led entity with responsibilities for managing and protecting cultural heritage in Queensland. The entity could work with existing and future local Aboriginal and Torres Strait Islander groups who manage cultural heritage matters within their respective areas.**

Similar to comments Option 2, this is a matter for Traditional Owners and not a matter that, AMEC, our members or other stakeholder groups should participate in. The establishment of such a body is consistent with the principles of self-determination for First Nations Peoples and with the Traditional Owner's ownership and custodianship of cultural heritage.

If conducted in good faith in a timely manner by well-resourced and dedicated representatives, this option will not hinder economic development. Unfortunately, there is a very real potential for the current proposal to create substantial problems by those seeking to use weaknesses in the process to leverage better commercial terms. The current realities of cultural heritage management see engagement with groups that are under-resourced, regularly fail to meet commercial timeframes and struggle to manage the often-differing views within their groups.

Proposal 2

> **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.**

The comments above in Proposal 1 apply equally to this proposal.

For further information contact:

Warren Pearce Chief Executive Officer

Or

Kate Dickson Queensland Director

Level 6, 307 Queen St, Brisbane, QLD 4000

0455 743 329