Environmental Defenders Office

Submission on the Options Paper: Finalising the review of Queensland's Cultural Heritage Act

14 April 2022

Environmental Defenders Office

Acknowledgment of Country

The EDO recognises the Traditional Owners and Custodians of the land, seas and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through law.

In providing these submissions, we pay our respects to First Nations across Australia and recognise that their Countries were never ceded, and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonisation.

A Note on Language

We acknowledge that there is a legacy of writing about First Nations without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. In the international law context, we have used 'Indigenous Peoples' as is appropriate. In the domestic context, where possible, we have used specific references. Further, when referring to First Nations in the context of particular Country we have used the term 'Traditional Owners'. More generally, we have chosen to use the term 'First Nations'. We acknowledge that not all Aboriginal and Torres Strait Islander Peoples will identify with that term and that they may instead identify using other terms or with their immediate community or language group.

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About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Work with First Nations. These submissions are based on EDO's experience in working with State, Territory and Commonwealth laws designed to provide some level of protection to cultural heritage. We have worked with First Nations clients who have interacted with cultural heritage laws in many different ways, from litigation and engaging in law reform processes, through to broader First Nations-led environmental governance projects.

EDO is a legal centre dedicated to protecting the environment and upholding First Nations justice.

www.edo.org.au

Submitted to:

Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships

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A statement by Jiritju Fourmile - Gimuy Walubara man from the Yidinji Nation, March 2022:

"Our cultural heritage is everywhere. Gimuy as a whole needs protection. We need the Act to work for us and First Nations People.

Across Gimuy are many sites that are gone or which we can no longer access. We have lost ceremonial grounds to casinos, hotels, real estate and other development. We are trying to protect what is left, holding that small place that is dear to us, that connection to Country, to the physical landscape where our ancestors lived. If we lose that connection to that part of Country, we lose a part of our heritage and ancestry that would forever be gone.

In Edmonton, we have a fighting ground site, where young men go to age and where mob go to resolve disputes. There is a naval base on that site now, we cannot access it anymore, we cannot perform those ceremonies. We are restricted to what we can do as aboriginal people.

There's another site in Gimuy, one of men's and women's business that is moderately preserved. It is different to the fighting ground. The fighting ground is common knowledge, but this site has different protocol. It is more connected culturally and spiritually with the land. We keep it secret not just because of protocol, but because we don't want anyone disturbing it, knowing it is already surrounded by development.

Generations hear less and less of the stories. My children are growing up, same with the other families. Gimuy is still our stories and place, but our physical connection is cut off, we cannot go there and do what we need to do. I might tell my kids "We used to practice ceremony out there, now we do it like this." It's a total displacement of the story when it is being told off Country. Where it has been developed, where it's covered in concrete, you don't have physical connection. Concrete is a static object, you can't care for it.

Ceremony sites are not interchangeable. We might move to another area, but we can't move around much on our country, we might find it is someone else's country. If you go to another part of the country, it becomes another story.

White law is changing our story lines. Even with Native Title, the boundaries don't match actual ancestorial boundaries. We are told "A couple hectares here or there don't matter"; but to us, that's Country, that's our home, our family, our culture, our connection. When we say culture, we mean reality. We cannot separate the two worlds, it is who we are, it is our Lore, it is what we practice.

Our Country is our connection to our culture, to who we are. We need the Act to work for us, to empower us to protect what we have left."

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Summary of Recommendations

Recommendation 1: We support the replacement of the Duty of Care Guidelines with a new framework for protecting and managing cultural heritage which is developed in direct consultation with First Nations in Queensland, and is underpinned by principles of FPIC and self-determination. Such a framework should include, as a minimum:

a) Culturally appropriate statutory timeframes.
b) Requirement to consult with First Nations broadly, not just native title parties, for all activities that may impact significant cultural heritage.
c) Requirement for proponents to search the cultural heritage mapping prior to commencing work and to undertake site specific walks with First Nations with cultural connection to the land to verify cultural heritage that may have been missed during mapping, or where First Nations did not feel safe to list the heritage on the mapping.
d) Right for First Nations to revoke or alter consent if cultural heritage is discovered or better understood, with continued check-ins and renegotiation as the project moves through a landscape.
e) Creation of a template consultation protocol with sufficient protections for cultural heritage, which is available for First Nations to either adopt or adapt.
f) Adequate resources provided to First Nations to allow them to undertake increased consultation and assist with mapping of Country.

Recommendation 2: We support the registration of cultural heritage and listing on mapping being linked to planning and development decision making so that cultural heritage is brought into the major decision making, and approvals are not granted which would impact significant cultural heritage. Agricultural activities must also be subject to heritage assessment.

In addition:

a) Mapping of cultural heritage in Queensland should be conducted proactively, and in direct consultation with First Nations with cultural connection to the relevant area, not just the native title parties. It must not be limited to high-risk areas, and must be open to changes.
b) Officers must go out on land and walk it with the appropriate First Nations to undertake mapping, it cannot occur solely via desktop research. This will take time and resources but it will result in more meaningful and helpful maps going forward.
c) Such mapping should ensure both tangible and intangible cultural heritage are identified.
d) First Nations should have control of mapping and access to information.

Recommendation 3: We strongly agree with the proposal to amend the definition of Aboriginal and Torres Strait Islander cultural heritage in section 8 of the Cultural Heritage Acts so that intangible heritage is protected. Intangible cultural heritage should be recognised and protected in the same manner as tangible cultural heritage, and ownership of that intangible heritage vested in First Nations. The definition must include recognition of the interconnectedness between culture and the landscape broadly.

Recommendation 4: A First Nations-led entity responsible for assisting with the resolution of cultural heritage disputes should be investigated and explored in direct consultation with First Nations. Dispute resolution powers and jurisdiction in the Land Court should also be expanded, and First Nations should be able to seek dispute resolution in the Land Courts in relation to cultural heritage without costs risks, and with financial support from the State for experts and legal assistance. Dispute resolution should also be enabled to assist renegotiation where required.

Recommendation 5: We support the proposal to require proponents to document and register all agreements and consultation that occurs in relation to cultural heritage, with such information able to be accessed for auditing and compliance purposes, as well as by relevant First Nations with cultural connection to the relevant cultural heritage. This includes CHMPs and other agreements relating to the protection and management of cultural heritage, with any confidential or secret information redacted as necessary. First Nations should have control over access to this information in being able to decide what information should not be made public, in accordance with principles of FPIC. De-identified information should be available publicly to ensure access by all First Nations and interested parties to the database.

Recommendation 6:

a) We strongly support the strengthening of resourcing and capacity in the Department to undertake proactive compliance and enforcement activities to better empower First Nations to protect their cultural heritage.
b) Greater enforcement rights must be provided to First Nations, so that they can seek to protect cultural heritage without reliance on the State. First Nations should be able to seek enforcement and compliance in the Land Court without the risk of costs, and financial support for such proceedings should be provided by the State.
c) Where there has been statutory compliance but harm still occurred, an investigation should be triggered to determine whether adequate consultation occurred and whether there was any misconduct by the parties involved, including the Department, the proponent, or the Cultural Heritage Committee appointed under a CHMP.
d) Proponents should be prohibited from using non-objection and non-disparagement clauses in CHMPs or agreements, and Traditional Owners who are parties to such agreements should have the ability to revoke consent if new information arises in accordance with the principle of FPIC.
e) Annual public reporting should be required by the Department of the number of complaints received and number of investigations conducted by the Department, to ensure greater transparency for all who are engaged with the operation of the Cultural Heritage Acts.
f) An audit of the Department should be undertaken each year, with clear KPIs measured which prioritise the protection of cultural heritage and empowerment of First Nations. This audit function could be undertaken by the independent First Nations led body.

Recommendation 7:

a) We strongly support the revision of the definition of 'Aboriginal party'. However, we note that it should be amended so that it does not rely on native title. Instead, First Nations with particular knowledge about traditions, observances, customs or beliefs associated with an area should be able to be recognised as a party and consulted on cultural heritage management and protection, regardless of whether there is already a native title party recognised for that area.
b) A First Nations-led entity could be responsible for determining, in a culturally competent manner, who should be consulted in relation to particular cultural heritage where there is a dispute, including internally in a native title body or between different First Nations groups.
c) We support the removal of the last claim standing provisions, and the inclusion of a power to appeal decisions to either the Department or the independent body as to the most culturally appropriate people to speak for heritage.
d) Regardless of which entity assists in deciding the culturally appropriate person to speak for Country or heritage, there must be clear legislative requirements which ensure that people with conflicts of interest with respect to Country, heritage, family connection or development, are not able to be part of this decision-making process.

e) It should also be reinforced, either within the Cultural Heritage Acts directly or through guidelines, that where the native title party for an area is the relevant Aboriginal party, that fiduciary duties are owed to the native title claim group by the native title applicant. The Department should ensure that native title applicants understand that these fiduciary duties extend to cultural heritage protection and management, such as through clear guidelines or education.

Recommendation 8:

a) A First Nations-led entity that is responsible for managing and protecting cultural heritage should be investigated and explored in meaningful, direct consultation with First Nations. Its role could include providing dispute resolution, both between proponents and First Nations, and between different First Nations groups that claim to have cultural connection to an area where this is in dispute. Such an entity could assist in determining who are the 'right people' to speak for Country where there are disputes and could also investigate how to recognise historical connection as a result of colonisation and displacement. However, this entity must be representative of all First Nations, and must recognise and respect cultural laws and traditional decision-making.
b) There must be provision to avoid conflicts of interest occurring in the functions of the body.
c) A First Nations-led entity could also have an audit role of the Department, which may greatly improve trust in the cultural heritage framework.

Recommendation 9: In order for the Cultural Heritage Acts to be consistent with UNDRIP, and in particular the principle of free, prior and informed consent, First Nations must have the ultimate decision-making power with respect to whether interference with cultural heritage is acceptable. Therefore, any dispute resolution mechanism must allow for the withholding of consent by First Nations if an agreement cannot be reached.

Recommendation 10: Section 20 of the Cultural Heritage Acts should be amended so that ownership of cultural heritage, both tangible and intangible, is always vested in First Nations rather than the State.

Recommendation 11: Section 153 of the Cultural Heritage Acts should be amended so that First Nations are able to access land upon which their cultural heritage is located for any purpose, not only to carry out a 'cultural heritage activity'.

Recommendation 12: Part 5 of the Cultural Heritage Acts should be amended so that cultural heritage can be registered by any First Nations person or group with a cultural connection to an area, regardless of their status as a native title party, with more transparency and accountability as to how the Department (or new independent body) is making the decision to register heritage or not.

Recommendation 13: To ensure the Acts are effective and to assist in rebuilding trust of First Nations in the government and the operation of the Acts, a full scale review is needed of the Department to ensure that Department staff and processes are supporting and not hindering the operation of the Act to protect cultural heritage, as well as to ensure staff do not involve themselves in decisions about which they have a conflict of interest, and are trained to be culturally appropriate, aware and respectful.

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INTRODUCTION

We provide these submissions on the *Options Paper: Finalising the review of Queensland's Cultural Heritage Acts* (**Options Paper**) which concerns the review of the *Aboriginal Cultural Heritage Act 2003* (Qld) and the *Torres Strait Islander Cultural Heritage Act 2003* (Qld) (**Cultural Heritage Acts**) currently being undertaken by the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships (**the Department**).

Meaningful reform of the Cultural Heritage Acts in Queensland is needed so that cultural heritage can be better protected, and so that First Nations are empowered and meaningfully consulted on any activities that may impact their cultural heritage.

In particular, we call on the Queensland Government to ensure that the Cultural Heritage Acts are reformed in a way that is consistent with the following:

- The United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), in particular the rights to self-determination and free, prior and informed consent
- The *Convention for the Safeguarding of Intangible Cultural Heritage 2003*
- The recommendations made in *A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (**Juukan Gorge Final Report**)
- The Best Practice Standards in Indigenous Cultural Heritage Management and Legislation set out in *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia* (**Dhawura Ngilan Report**)
- The *Human Rights Act 2019* (Qld), in particular section 28 which protects the right of First Nations to 'enjoy, maintain, control, protect and develop their identity and cultural heritage'
- The letter from a group of First Nations People to the UN Committee on the Elimination of Racial Discrimination (**CERD**) dated 30 August 2021, and the letter in response dated 3 December 2021, addressing allegations that the Western Australian Aboriginal Cultural Heritage Bill 2020, now the *Aboriginal Cultural Heritage Act 2021* (WA), does not incorporate the principle of free, prior and informed consent. The letters reinforce the importance of incorporating the rights of Indigenous Peoples, in particular the principle of free, prior and informed consent, into cultural heritage legislation.
- The *Statement of Commitment to reframe the relationship between Aboriginal and Torres Strait Islanders Peoples and the Queensland Government*

We recommend reference also be had to the findings in the court matter between Waratah Coal Pty Ltd and Youth Verdict Ltd and The Bimblebox Alliance Inc, which is set to be heard in the Land Court of Queensland from mid-April to May 2022.[1] This matter will involve taking of evidence from First Nations witnesses on Country about their culture with respect to the land, sea, fauna and flora.[2] While this court matter relates to objections to applications for a mining lease and environmental authority, and not the Cultural Heritage Acts, the evidence that will be taken from the First Nations witnesses will likely provide further context regarding the significance of both tangible and intangible cultural heritage, as well as broader cultural landscapes that extend beyond individual artefacts which are

[1] See File NOs MRA050-20 (ML 70454) and EPA051-20 (EPML 00571313).
[2] See *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 5)* [2022] QLC 4.

currently the main focus of the Cultural Heritage Acts. The cultural protocols being implemented to hear from First Nations about their Country and their cultural heritage and the impacts experienced to date can also be utilised as guidance for how the Department may consider engaging with First Nations in the implementation of the Cultural Heritage Acts going forward, to ensure that Departmental engagement is culturally appropriate and that there is sufficient engagement on Country with First Nations directly.

EDO's submissions are provided based on our experience working with the Cultural Heritage Acts and the experience and opinions of our First Nations clients impacted by these Acts and other First Nations we work with, who we consulted with widely in preparing these submissions.

CONTEXT OF THIS REFORM PROCESS FOR STRENGTHENED CULTURAL HERITAGE PROTECTION

Since submissions were made to the Cultural Heritage Acts Review in 2019, there have been a number of developments with respect to cultural heritage in Queensland and Australia.

On 24 May 2020, the Juukan Gorge Aboriginal heritage sites in Western Australia were tragically destroyed by Rio Tinto, causing the loss of 'two rock shelters of great cultural, ethnographic and archaeological significance – along with evidence of continued occupation and cultural knowledge stretching back 46,000 years'.[3]

This destruction, which was not prevented by Western Australian cultural heritage legislation, led to the *Inquiry into the destruction of Indigenous heritage sites at Juukan Gorge* undertaken by the Joint Standing Committee on Northern Australia. The inquiry's Final Report demonstrates the need for a significant shift in the approach to the protection of cultural heritage in Australia, and the recommendations made in the Final Report provide clear guidance for the reform of cultural heritage legislation in Australia.

EDO emphasises the importance of the Juukan Gorge Final Report, and reiterates its submissions made to the Juukan Gorge Inquiry, particularly in relation to Australia's international obligations to protect cultural heritage, which can be found **here**.[4]

The Queensland Government has duties to reflect Australia's international obligations to protect Indigenous cultural heritage

UNDRIP provides a starting point in relation to the protection of the cultural heritage of Indigenous Peoples. Australia adopted UNDRIP in 2009, and although UNDRIP is not legally binding, the rights (and consequential obligations on States) contained within it are derived from pre-existing human rights and international law developed under treaties that are binding on Australia. The rights and obligations on States contained in UNDRIP 'constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world' (Article 43). The rights contained in the UNDRIP are not the ceiling, they are the floor.

[3] Joint Standing Committee on Northern Australia, 'A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge' (Final Report, Parliament of Australia, October 2021) [1.1] (**'Juukan Gorge Report'**).
[4] Environmental Defenders Office, Submission No 107 to Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (14 August 2020).

Cultural heritage legislation must be consistent with Australia's international obligations and UNDRIP. This includes an obligation on the State to allow and encourage the participation of Indigenous peoples in the design and implementation of laws and policies that affect them, which would include the reform of the Cultural Heritage Acts in Queensland.[5]

Therefore, the Queensland Government must ensure that any reforms to the Cultural Heritage Acts are done in direct consultation with First Nations in Queensland, in accordance with the rights of Indigenous Peoples protected under international law.

Reforms must uphold the rights recognised in the Human Rights Act 2019 (Qld)

The *Human Rights Act 2019* (Qld) has commenced since consultation on the Cultural Heritage Acts began. The Human Rights Act recognises the cultural rights of Aboriginal and Torres Strait Islander Peoples under section 28, stating at subsection (2):

> Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community—
>
> (a) to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and
> (b) to enjoy, maintain, control, protect, develop and use their language, including traditional cultural expressions; and
> (c) to enjoy, maintain, control, protect and develop their kinship ties; and
> (d) to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and
> (e) to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.

The Queensland Government must ensure that the amendments to the Cultural Heritage Acts truly reflect these rights. Currently the provisions of the Cultural Heritage Acts and the way it is being enforced by the Department are not upholding the protection of this human right.

[5] Committee on Economic, Social and Cultural Rights, General Comment No. 21, para 55(e).

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SUBMISSIONS ON OPTIONS PAPER

EDO reiterates its submissions made to the Cultural Heritage Acts Review on 9 August 2019, which is available here.

Further detailed submissions are provided **below** in response to the proposals and options set out in the Options Paper, with a summary provided above. We have also provided submissions on various issues outside of those raised in the Options Paper which require attention in ensuring the effective operation of the Cultural Heritage Acts.

The foundation of our submissions rest on ensuring the main purpose of the Cultural Heritage Acts is achieved through this reform process.

The main purpose of the Cultural Heritage Acts is to provide effective recognition, protection and conservation of Aboriginal and Torres Strait Islander cultural heritage.[6]

It is clear from our work with First Nations who are seeking to protect their cultural heritage in Queensland that this purpose is not being achieved, as exemplified in the case studies we have documented below. We are hopeful that the government's work on this reform will meaningfully reset the operation of the Cultural Heritage Acts and the governance administering the Acts, so that this purpose can be achieved.

[6] Cultural Heritage Acts s 4.

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Proposals to improve cultural heritage protection

Proposal 1: Replace the current Duty of Care Guidelines with a Cultural Heritage Assessment Framework with greater engagement, consultation, agreement making and dispute resolution

Recommendation 1

We support the replacement of the Duty of Care Guidelines with a new framework for protecting and managing cultural heritage which is developed in direct consultation with First Nations in Queensland, and is underpinned by principles of FPIC and self-determination. Such a framework should include, as a minimum:

a) Culturally appropriate statutory timeframes.
b) Requirement to consult with First Nations broadly, not just native title parties, for all activities that may impact significant cultural heritage.
c) Requirement for proponents to search the cultural heritage mapping prior to commencing work and to undertake site specific walks with First Nations with cultural connection to the land to verify cultural heritage that may have been missed during mapping, or where First Nations did not feel safe to list the heritage on the mapping.
d) Right for First Nations to revoke or alter consent if cultural heritage is discovered or better understood, with continued check-ins and renegotiation as the project moves through a landscape.
e) Creation of a template consultation protocol with sufficient protections for cultural heritage, which is available for First Nations to either adopt or adapt.
f) Adequate resources provided to First Nations to allow them to undertake increased consultation and assist with mapping of Country.

EDO supports the replacement of the current Duty of Care Guidelines with a new framework which provides for greater engagement and consultation with First Nations.

EDO acknowledges and commends the fact that the proposed Cultural Heritage Assessment Framework improves significantly upon the Duty of Care Guidelines, and appears to be drafted in accordance with the *Best Practice Standards in Indigenous Cultural Heritage Management and Legislation* set out in the Dhawura Ngilan Report.

However, EDO ultimately submits that any framework that is to replace the Duty of Care Guidelines should be underpinned by the principle of free, prior and informed consent (**FPIC**), so that issues relating to sufficient consultation and consent are properly addressed. As stated in the Juukan Gorge Final Report:

> *Problems occur in cultural heritage protections where proponents and industries are permitted to self-regulate and develop their own protocols for consultation and consent with traditional owners.*[7]

We commend the Queensland Government for providing the S*tatement of Commitment to reframe the relationship between Aboriginal and Torres Strait Islander Peoples and the Queensland Government*, which supports the provision of FPIC and self-determination for First Nations as key guiding principles for this work.

[7] Juukan Gorge Report [7.49].

FPIC requires that in any consultation, the relevant First Nations are provided with adequate information and adequate time to consider that information when making decisions about cultural heritage, and that First Nations have the ultimate decision-making power with respect to whether interference with cultural heritage is acceptable.[8]

Currently, FPIC and true self determination are not being provided under the Cultural Heritage Acts framework and administration. The experience of clients the EDO has worked with shows that First Nations are pushed into fast time frames; that the most culturally appropriate people for particular cultural heritage or Country are not the ones that are engaged to speak for that Country and to negotiate with developers; and that full disclosure of the extent of impacts and activities on Country is not occurring, or not occurring with sufficient time for decision making processes and intra-group consultation to occur.

With respect to excluding activities, even clearing for fence lines may impact significant cultural heritage if regard is not given to where the fence and clearing occurs. Proactive, well-resourced mapping should assist landholders to be able to understand where cultural heritage is on the land and to avoid this heritage in all activities – meaning no activity should be excluded from the duties and offence provisions with respect to impacting cultural heritage. Ideally landholders should walk Country with the appropriate First Nations to ensure that cultural heritage is understood and avoided on the site.

EDO therefore submits that the following are essential elements of a Cultural Heritage Assessment Framework to ensure that it is in accordance with principles of FPIC:

a) Consultation with First Nations should be required where there is significant cultural heritage for all activities, regardless of whether they are 'prescribed activities', and there should be no excluded activities.
b) Proponents should be required to undertake a search of the cultural heritage mapping to determine whether the proposed activity will impact significant cultural heritage prior to commencing.
c) Statutory timeframes must be culturally appropriate and reflect traditional decision-making processes to allow First Nations to be adequately consulted without undue pressure.
d) A template consultation protocol should be co-designed by the Department and First Nations, such as a First Nations advisory body. This template protocol should have sufficient protections for cultural heritage, and be available for First Nations to either adopt or adapt when being consulted about cultural heritage.
e) First Nations should be provided with adequate resources to allow them to undertake increased consultation and assist with mapping of Country, including through the availability of government funds, access to pro bono or government funded legal assistance, and support from a First Nations-led body and experts.
f) First Nations must have the ultimate decision-making power with respect to whether interference with cultural heritage is acceptable, and consent should be able to be revoked or altered if any new information arises throughout the life of the activity, with continued check-ins and renegotiation as the project moves through a landscape.

[8] Victorian Aboriginal Heritage Council, 'Best Practice Standards in Indigenous Cultural Heritage Management and Legislation' in *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia* (March 2021, Heritage Chairs of Australia and New Zealand) 36 (**'Dhawura Ngilan Report'**).

The development of a new assessment framework should be led by First Nations, such as through First Nations-led bodies, and there should be appropriate consultation with First Nations in Queensland who have an interest in the protection of cultural heritage, regardless of whether they are currently considered an Aboriginal or Torres Strait Islander party for an area under the Cultural Heritage Acts.

Proposal 2: Integrate the mapping of high-risk cultural heritage areas into planning processes, so that risks to cultural heritage are identified and addressed early in project planning

Recommendation 2

We support the registration of cultural heritage and listing on mapping being linked to planning and development decision making so that cultural heritage is brought into the major decision making, and approvals are not granted which would impact significant cultural heritage. Agricultural activities must also be subject to heritage assessment. In addition:

(a) Mapping of cultural heritage in Queensland should be conducted proactively, and in direct consultation with First Nations with cultural connection to the relevant area, not just the native title parties. It must not be limited to high-risk areas, and must be open to changes.
(b) Officers must go out on land and walk it with the appropriate First Nations to undertake mapping, it cannot occur solely via desktop research. This will take time and resources but it will result in more meaningful and helpful maps going forward.
(c) Such mapping should ensure both tangible and intangible cultural heritage are identified.
(d) First Nations should have control of mapping and access to information.

As discussed above, there should be proactive mapping of cultural heritage in Queensland, in direct consultation with First Nations with cultural connection to the relevant area. Such mapping should not be limited to 'high-risk' areas, and should ensure that both tangible and intangible cultural heritage are identified in a culturally appropriate manner.

This mapping should not just be limited to the planning process, as many pastoralists are currently able to conduct activities that may harm cultural heritage without being required to notify or consult with First Nations because they are not required to seek planning approval for such activities.

EDO adopts the following recommendation made in the Juukan Gorge Final Report with respect to mapping:

> *This cultural mapping should be undertaken by walking on country with traditional owners not by desktop survey. The control of mapping and information should be in the hands of the traditional owners.*[9]

The necessity of proactive mapping done in direct consultation with First Nations that are connected to the area can be seen in the attempts of First Nations to protect cultural heritage at the Djaki Kundu sacred site.

[9] Juukan Gorge Report [7.32].

Case Study: Djaki Kundu sacred site

Djaki Kundu is located in Gympie and is an area of particular significance to Kabi people due to the site's use for Aboriginal tradition including Kabi ceremonial and spiritual observances. There was extensive significant Aboriginal cultural heritage on the site, including a sacred Bunya forest, Bora Rings, multiple Scar Trees and acres of dry stone walls commonly known as the Gympie Pyramid. The site is protected by the Guardians of Djaki Kundu, who have been tasked by Kabi elders with passing down stories related to the site and protecting the area.

*The Djaki Kundu site was threatened by a proposed upgrade to the Bruce Highway undertaken by the Department of Transport and Main Roads (***TMR***). The Guardians of Djaki Kundu made an application to register the sacred site under the Cultural Heritage Acts in 2013. However, they were informed that it couldn't be registered, because there had already been reports done on the site which proved that there was no Aboriginal cultural heritage. This assertion was incorrect, as at that time studies had only been conducted about European cultural heritage, and no Aboriginal people connected to the area were interviewed.*

While later surveys and studies were conducted on the Djaki Kundu site, they were conducted with the native title group, who advised TMR that at least one of the Guardians of Djaki Kundu had 'intimate knowledge of the site'. However, despite TMR being on notice of their connection to the area, the tribal knowledge regarding the site was disregarded and the Guardians of Djaki Kundu were not consulted or asked to participate in further surveys that occurred in 2017 and 2018.

The failure to consult with the First Nations that had a connection to the site led to the eventual destruction of significant Aboriginal cultural heritage, including scar trees and sacred Bunya trees. If proactive mapping and surveys had been conducted with the Guardians of Djaki Kundu, the Aboriginal cultural heritage may have been identified and protected. This case study also demonstrates the importance of consulting with the people who have a continuing connection to the area in question, rather than relying on native title to determine who to consult with, which is discussed further below.

Some First Nations have expressed concerns that mapping could be used by proponents to justify destruction of cultural heritage on the basis that it was not accurately mapped. There are also concerns regarding how such mapping will be funded, particularly in remote communities that do not have the resources to conduct detailed cultural heritage mapping.

Case Study: Kowanyama region

This case study is provided by Viv Sinnamon. Viv Sinnamon has worked on Country with Traditional Owners in the cultural heritage and land management space in the remote Kowanyama region for over 30 years. As manager for the Kowanyama Aboriginal Land and Natural Resource Management Office he pioneered consultation between Traditional Owners, local government and interest groups. He reflects on the challenges faced in Kowanyama presently and during previous attempts to map cultural heritage.

Cultural heritage is dependent on the local community to protect it. The Native Title Act is framed in white fella's way and has very specific ideas of how and what connections are. There is little ability in the community to actually know how to protect Country, sites, prohibited places under white law. We know how to do it under our lore, but white law does not reflect that, and we do not have the resources to list, defined and protect as required by white law. Without leadership and empowerment how can they know how to traverse the legislation to protect their heritage?

There is a huge concern in the community that if a cultural heritage map is developed, it will do away with proper consultation on Country. The current power structures are inequitable. A lot of proposed developers, including government departments, will search the cultural heritage register at Kowanyama and find nothing there. Will developers only consult us if they find something on the map?

Aboriginal remote communities like Kowanyama are unique from more urban regions where sites have already been lost to development. We have always taken the stance that our whole landscape is dotted with cultural heritage sites. Previous attempts of geographic mapping systems have not progressed because of failures in funding and leadership.

To comprehensively map the cultural heritage in Kowanyama is a huge job, one that requires resources and leadership that the community currently lacks. If we were to provide information or develop a map with cultural heritage sites on there, it would be an enormous task. Further, some sites and knowledge are not to be shared. The fear is that missing out sites and objects and story lines could see them being destroyed just because the community lacks the resources to be able to fully document and report on all sites, when most of the land has heritage.

EDO submits that the Queensland Government should be responsible for funding a broader mapping process, which would provide an overview of cultural landscapes across Queensland, rather than simply parcel by parcel mapping of individual tenures which does not recognise the interconnectedness of Aboriginal cultural heritage to the broader landscape.

More specific mapping could then be undertaken under approvals processes, to ensure that more granular detail on specific sites is accurately recorded. This more specific mapping should be funded by proponents who are seeking to undertake activities on Country, and could be negotiated under a cultural heritage management plan (**CHMP**). All cultural heritage mapping should be undertaken in direct consultation with First Nations, with First Nations having control of mapping and access to information in accordance with principles of FPIC and self-determination. All mapping should also be done on Country with First Nations, rather than relying on a desktop study. The significance of cultural heritage, and the potential risk of harm, cannot be assessed merely through a desktop study.

Proposal 3: Amend the definitions in the Cultural Heritage Acts so that intangible cultural heritage, such as pathways or storylines, can also be protected

Recommendation 3

We strongly agree with the proposal to amend the definition of Aboriginal and Torres Strait Islander cultural heritage in section 8 of the Cultural Heritage Acts so that intangible heritage is protected. Intangible cultural heritage should be recognised and protected in the same manner as tangible cultural heritage, and ownership of that intangible heritage vested in First Nations. The definition must include recognition of the interconnectedness between culture and the landscape broadly.

EDO supports the proposal to amend the definitions of 'significant Aboriginal and Torres Strait Islander areas and objects' in the Cultural Heritage Acts to recognise intangible cultural heritage.

As highlighted in EDO's submission to the Cultural Heritage Acts Review made in 2019, the Cultural Heritage Acts currently do not protect intangible cultural heritage such as knowledge, stories, song and dance, with definitions of cultural heritage currently limited to significant areas or objects.[10] Ownership of intangible heritage should also be vested in First Nations who are the guardians or keepers of that cultural heritage.

There is no recognition within the Cultural Heritage Acts that cultural heritage extends beyond individual artefacts or sites, and is embedded in often vast landscapes. Inclusion of intangible cultural heritage within the remit of the Cultural Heritage Acts requires protection of cultural landscapes. This means moving away from a granular, archaeological or historical perspective of cultural heritage as physical artefacts, towards a holistic perspective that recognises that culture is alive and being practiced on Country, and extends beyond the physical to include protection of the lands and waters in accordance with First Law and traditional customs.

A failure to recognise that cultural heritage includes broader landscapes can lead in the worst case to the destruction of immensely significant sites, which occurred with the destruction of the Juukan Gorge caves. Rio Tinto took a site-focused approach to cultural heritage protection, rather than a landscape or regional approach, which led to a focus on obtaining expedited approvals rather than engaging in thorough cultural heritage management processes.[11] Ultimately this failure to consider the cultural landscape led to the destruction of an immensely significant site.

The inclusion of intangible elements of cultural heritage in the Cultural Heritage Acts, as well as the vesting of ownership of cultural heritage in First Nations, is also necessary to align with the rights of Indigenous Peoples, specifically articulated in art 31 of UNDRIP as follows:

> Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

[10] Cultural Heritage Acts ss 8-10.

[11] Juukan Gorge Report [2.34].

A requirement to protect intangible cultural heritage is also set out in the *Convention for the Safeguarding of Intangible Cultural Heritage 2003*, which was adopted by the United Nations Educational, Scientific and Cultural Organisation (**UNESCO**), and which the Joint Standing Committee on Northern Australia recommended that the Australian Government ratify.[12]

EDO therefore submits that the definitions in the Cultural Heritage Acts should be amended to ensure that intangible cultural heritage is recognised and protected in the same manner as tangible cultural heritage, and ownership of that intangible heritage is vested in First Nations. There should also be recognition that protection of cultural heritage cannot be separated from cultural landscapes.

Proposal 4: Provide a mechanism to resolve cultural heritage disputes, such as a First Nations body or advisory group, or increased dispute resolution powers and jurisdiction in the Land Court

Recommendation 4

A First Nations-led entity responsible for assisting with the resolution of cultural heritage disputes should be investigated and explored in direct consultation with First Nations. Dispute resolution powers and jurisdiction in the Land Court should also be expanded, and First Nations should be able to seek dispute resolution in the Land Courts in relation to cultural heritage without costs risks, and with financial support from the State for experts and legal assistance. Dispute resolution should also be enabled to assist renegotiation where required.

EDO supports the proposal to provide a mechanism to resolve cultural heritage disputes, and in particular supports the option to establish a First Nations-led body to assist with the resolution of disputes (discussed further **below**).

EDO also supports the proposal to increase the dispute resolution powers and jurisdiction in the Land Court. The necessity for increased powers and jurisdiction in the Land Court was demonstrated in the Land Court's recent decision of *Conlon v QGC Pty Ltd* [2020] QLC 3.

In Conlon v QGC Pty Ltd [2020] QLC 3, the Barunggam, Cobble Cobble, Jarowair, Western Wakka Wakka and Yiman (**BCJWY**) native title party sought an injunction to enforce their understanding of a Cultural Heritage Management Strategy that was annexed to an Indigenous Land Use Agreement entered into with QGC. The BCJWY applicants maintained that under the Strategy, a physical inspection of survey areas and archival research was to be undertaken by the Cultural Heritage Co-ordinating Committee before an archaeologist could conduct a cultural heritage survey of the area.

However, President Kingham concluded that the Land Court did not have jurisdiction under either the Land Court Act 2000 (Qld) or the Cultural Heritage Acts to determine the dispute. President Kingham commented that 'This case illustrates a lacuna in the law in Queensland relating to Aboriginal cultural heritage'.[13] This matter reinforces the necessity of increased dispute resolution powers and jurisdiction in the Land Court to allow parties to resolve disputes about the interpretation of a cultural heritage management plan or to enforce it in accordance with its terms.

[12] Juukan Gorge Report [7.30].
[13] *Conlon v QGC Pty Ltd* [2020] QLC 3 at [32].

It must also be recognised that the cost of bringing proceedings in the Land Court often acts as a barrier for many First Nations. Dispute resolution in the Land Court should be a no costs jurisdiction, and First Nations should be able to access mediation and dispute resolution, including injunctions, at no cost, with financial assistance provided by the State for legal and other expertise.[14]

As stated below, in order for the Cultural Heritage Acts to be consistent with UNDRIP, and in particular the principle of FPIC, First Nations must have the ultimate decision-making power with respect to whether interference with cultural heritage is acceptable.[15] Therefore, any dispute resolution mechanism must allow for the withholding of consent by First Nations if an agreement cannot be reached.

A key impediment to justice in the system at present is the inability of some First Nations to access CHMPs or voluntary agreements that may have been entered by a native title party that they are not a party to, or by some representatives of a native title party without consultation with others in the group. First Nations seeking to protect their cultural heritage who do not have access to these documents are at a significant disadvantage in not being able to view whether their heritage is addressed in a CHMP or agreement or expressly excluded, and therefore to assess whether impacts to their heritage are legal or not.

As discussed below, this injustice can be assisted with greater requirements of consultation with all interested First Nations (not just native title parties), reminding native title cultural heritage representatives of their fiduciary duties to the people who speak for cultural heritage or Country, and enabling access to the agreements or CHMPs so that interested First Nations can understand how impacts to their cultural heritage is being managed, or if their heritage is excluded from the agreement.

To ensure a scenario like Juukan Gorge doesn't occur again, recourse to the ability to trigger renegotiation is necessary where new heritage is uncovered or the significance of heritage is established, with access to dispute resolution at these points enabled to assist this renegotiation where needed.

[14] Jinibara Aboriginal Corporation, Submission No 25 to Department of Aboriginal and Torres Strait Islander Partnerships, *Cultural Heritage Acts Review* (26 July 2019) 10-11.
[15] Dhawura Ngilan Report, 36.

Proposal 5: Require land users to document and register all agreements and consultation under the Cultural Heritage Acts

Recommendation 5

We support the proposal to require proponents to document and register all agreements and consultation that occurs in relation to cultural heritage, with such information able to be accessed for auditing and compliance purposes, as well as by relevant First Nations with cultural connection to the relevant cultural heritage. This includes CHMPs and other agreements relating to the protection and management of cultural heritage, with any confidential or secret information redacted as necessary. First Nations should have control over access to this information in being able to decide what information should not be made public, in accordance with principles of FPIC. De-identified information should be available publicly to ensure access by all First Nations and interested parties to the database.

EDO supports a mandatory requirement for proponents to document and register all agreements and consultation under the Cultural Heritage Acts, and for such information to be stored in a secure central system and available for auditing purposes and data capture. This will assist with verifying the validity of actions under the CHMP and other agreements, and also for the department to take a more proactive role in ensuring that proponents are not breaching the terms of the agreements and supporting First Nations where they are.

As highlighted in EDO's submission to the Cultural Heritage Acts Review made in 2019, the Cultural Heritage Acts currently do not require mandatory reporting of compliance with the duty of care obligation to enable compliance to be assessed, with regulators frequently forced to 'guess' if projects are compliant.[16]

It is also often assumed that proponents are not in breach of the Cultural Heritage Acts if they are acting in accordance with a CHMP. For example, the Minister for Aboriginal and Torres Strait Islander Partnerships refused to investigate allegations made by members of the Wangan and Jagalingou People that cultural heritage was being harmed by excavation works on the Carmichael coal mine site, on the basis that the works were being carried out in accordance with a CHMP that those Wangan and Jagalingou People were not even able to access.

The mere existence of a CHMP should not absolve proponents of the obligation to act in compliance with the Cultural Heritage Acts, and should not be used by the government to assume such compliance. A mandatory requirement to document and register agreements and consultations is necessary to ensure that proponents are complying with their obligations under the Cultural Heritage Acts, and to ensure that regulators are able to proactively respond to allegations of non-compliance before cultural heritage is impacted.

However, First Nations must also be able to control access to information that is sacred or secret, in accordance with the principle of FPIC. This means deciding what information about cultural heritage should be made publicly available, and who should be able to access this information. This could be done through consultation protocols, discussed earlier in Recommendation 1, which are developed

[16] Michael J Rowland, Sean Ulm and Jill Reid, 'Compliance with Indigenous cultural heritage legislation in Queensland: Perceptions, realities and prospects' (2014) 31 *Environment and Planning Law Journal* 329, 343.

directly with First Nations and which clearly set out how information about cultural heritage is to be managed.

A public register that is de-identified, providing a general area of heritage, date of listing and ownership would greatly assist with the ability of First Nations who were not part of the registration directly to understand how heritage is being listed.

Proposal 6: Strengthen monitoring and enforcement capacity such as through rehabilitation and education orders, greater powers for authorised officers, or increased numbers of officers and specialised training

Recommendation 6

(a) We strongly support the strengthening of resourcing and capacity in the Department to undertake proactive compliance and enforcement activities to better empower First Nations to protect their cultural heritage.
(b) Greater enforcement rights must be provided to First Nations, so that they can seek to protect cultural heritage without reliance on the State. First Nations should be able to seek enforcement and compliance in the Land Court without the risk of costs, and financial support for such proceedings should be provided by the State.
(c) Where there has been statutory compliance but harm still occurred, an investigation should be triggered to determine whether adequate consultation occurred and whether there was any misconduct by the parties involved, including the Department, the proponent, or the Cultural Heritage Committee appointed under a CHMP.
(d) Proponents should be prohibited from using non-objection and non-disparagement clauses in CHMPs or agreements, and Traditional Owners who are parties to such agreements should have the ability to revoke consent if new information arises in accordance with the principle of FPIC.
(e) Annual public reporting should be required by the Department of the number of complaints received and number of investigations conducted by the Department, to ensure greater transparency for all who are engaged with the operation of the Cultural Heritage Acts.
(f) An audit of the Department should be undertaken each year, with clear KPIs measured which prioritise the protection of cultural heritage and empowerment of First Nations. This audit function could be undertaken by the independent First Nations led body.

EDO supports the proposal to provide for greater capacity to monitor and enforce compliance, for the Department and for First Nations. In particular, EDO supports options that provide the State and First Nations with proactive powers to monitor and enforce with the Cultural Heritage Acts and thus avoid any potential damage or harm to cultural heritage.

However, the options that are provided for in this proposal merely involve creating greater powers for authorised officers, rather than providing First Nations with the ability to seek enforcement actions or administrative review of decisions, which 'unfairly weights legislative frameworks towards the destruction of cultural heritage'.[17] As stated in EDO's submission to the Cultural Heritage Acts Review made in 2019, First Nations are generally required to rely on the State to protect their cultural heritage, and are not meaningfully empowered to prevent, stop or seek redress for illegal actions.

[17] Juukan Gorge Report [7.71].

This is inappropriately paternalistic, where most other rights holders under Queensland laws are empowered to protect their interests without reliance on the government, and even our environmental laws provide broad third-party enforcement powers to protect the environment in the public interest. First Nations must be empowered under our laws to protect their own cultural heritage.

Case Study: Wangan and Jagalingou People

*The Carmichael Coal Mine is located on ancestral Wangan and Jagalingou country. The proponents of the mine, Bravus Mining and Resources (**Bravus**) negotiated a CHMP under the Aboriginal Cultural Heritage Act 2003 (Qld) (**ACH Act**) with the native title party for the area, the Clermont-Belyando Native Title Claimants. However, the negotiation process did not require all Wangan and Jagalingou native title claimants to agree to the CHMP and did not provide a forum for all Wangan and Jagalingou People to be heard. Further, whilst the CHMP required the establishment of a Cultural Heritage Committee to make decisions about cultural heritage, in practice such decisions about cultural heritage were made by a select few individuals.*

In October 2021, a number of Wangan and Jagalingou People became concerned that cultural heritage located on the Carmichael coal mine was being destroyed. Hundreds of artefacts have been found on the site and it is a record of the Wangan and Jagalingou People's occupation of the area and evidence the area has been used by their people for thousands of years.

With assistance from the EDO, 8 Wangan and Jagalingou People wrote to the Minister for Aboriginal and Torres Strait Islander Partnerships requesting he exercise his power under section 32 of the ACH Act to issue a stop order to Bravus to prevent the carrying out of excavation works on a particular site at the Carmichael coal mine to protect Aboriginal cultural heritage at threat from these works, and that he investigate whether this activity was in breach of the ACH Act.

Despite these concerns, a decision was made not to issue a stop order and not to investigate the allegations of offences under the ACH Act. In determining not to investigate, the Department advised that Bravus had followed the statutory compliance process outlined in the ACH Act. Bravus carried out the works in accordance with the CHMP and therefore, to the extent any Aboriginal cultural heritage may have been harmed in the course of those activities, Bravus would not have committed an offence.

There was no offer of a meeting to discuss these concerns nor was there a proposal for mediation to ensure the voices of Wangan and Jagalingou People excluded from the CHMP negotiation process were heard.

This case study demonstrates how First Nations are currently required to rely on the State to protect their cultural heritage and are not empowered to prevent, stop or seek redress for illegal actions. The way in which the Cultural Heritage Acts operate means that many First Nations are excluded from consultation and negotiation about the protection of cultural heritage, and are not able to take action to prevent the harm or destruction of cultural heritage.

EDO reiterates the recommendation made in its 2019 submission, which provides as follows:

> The Cultural Heritage Acts should be amended to provide more effective mechanisms by which First Nations parties can seek to prevent harm from occurring to Aboriginal or Torres Strait Islander cultural heritage, or seek redress from those who have harmed or destroyed Aboriginal or Torres Strait Islander cultural heritage, including the State.

It is also necessary to review sections 23(3) and 24 of the Cultural Heritage Acts to embed FPIC for First Nations groups with connection to areas where potential or actual harm to cultural heritage may occur, following compliance with the statutory framework. Given the events in Juukan Gorge and the findings in the Juukan Gorge Report, the Cultural Heritage Acts are lacking a mechanism to account for similar occurrences. The Juukan Gorge Report highlighted at page 17, that:

> *2.33 Part of the changed approach in Rio Tinto was a drive for expedient rather than thorough processes for the protection and management of cultural heritage. Professor Cochrane stated:*
>
> > *Rio Tinto has been following its own stripped-down version of Cultural Resources Management (CRM) in the Pilbara. The focus has been on the development of the skills and procedures needed to secure quick clearance – the removal of impediments to mining – something that too frequently results in the destruction of sacred sites. This clearance thinking would have encouraged Rio Tinto to think the caves could be destroyed without too much fuss.*
>
> *2.34 Dr Mary Edmunds submitted that the focus on expedited approvals was a by-product of Rio Tinto's site-focused as opposed to landscape or regional approach to cultural heritage protection. This is 'less a cultural heritage protection and management approach and more an industry-focused approach to enable the expedient and efficient removal of cultural heritage from areas subject to exploration and mining.'*

It can be seen from those events that even in circumstances where cultural clearances have been completed and certificates issued, extraordinary harm can occur. In circumstances where there has been statutory compliance and actual harm has occurred, First Nations with connection to the subject area should have an avenue for recourse for such harm caused. Section 24 of the Cultural Heritage Acts does not currently provide for those circumstances.

In these circumstances where there has been statutory compliance but harm still occurred, an investigation should be triggered to determine whether adequate consultation occurred and whether there was any misconduct by the parties involved, including the Department, the proponent, or the Cultural Heritage Committee appointed under a CHMP. Such an investigation could be undertaken by the First Nations-led body or a regulatory body such as the Department of Environment and Science.

Another major limitation on the ability of First Nations to seek enforcement and compliance with the Cultural Heritage Acts or CHMPs is 'non-objection' or 'non-disparagement' clauses. A non-objection clause played a part in the destruction of the Juukan Gorge caves by preventing the Traditional Owners from voicing opposition to the project or seeking a state or federal heritage protection declaration without Rio Tinto's consent.[18] Such clauses which prevent Traditional Owners from critiquing projects or objecting if new information arises do not align with the principle of FPIC.

[18] Juukan Gorge Report [2.84].

Entering into a CHMP or other agreement should not be the end of any negotiations with the Traditional Owners – it should be an ongoing process that is capable of evolving if and when circumstances change, or new information arises.

Proponents should be prohibited from using non-objection and non-disparagement clauses in CHMPs or agreements, and Traditional Owners who are parties to such agreements should have the ability to revoke consent if new information arises in accordance with the principle of FPIC.

Annual public reporting should be required by the Department of the number of complaints received and number of investigations conducted by the Department, to ensure greater transparency for all who are engaged with the operation of the Cultural Heritage Acts.

An audit of the Department should be undertaken each year, with clear KPIs placed on the Department that provide for culturally appropriate administration of the Act, consistent and meaningful consultation and engagement with all First Nations seeking to protect cultural heritage. The protection of cultural heritage and empowerment of First Nations should be the main KPI of the Department.

Reframing the definitions of Aboriginal party and Torres Strait Islander Party

Proposal: Reframe the definitions of Aboriginal and Torres Strait Islander Party so that First Nations who have a connection to an area under Aboriginal tradition or Ailan Kastom are involved in cultural heritage management and protection

Option 1: In areas where there is no registered native title holder or claimant, a previously registered native title claimant is not considered a native title party and s 35(7) is removed. Instead, any First Nations person can request recognition as a party if they claim to have a connection to the area under Aboriginal tradition or Ailan Kastom.

Option 2: Where the Aboriginal or Torres Strait Islander party is a previously registered native title claimant subject to a determination that native title doesn't exist, a previously registered native title claimant subject to a negative determination is not considered a native title party and s 35(7) still applies to determine who the party is.

Recommendation 7

(a) We strongly support the revision of the definition of 'Aboriginal party'. However, we note that it should be amended so that it does not rely on native title. Instead, First Nations with particular knowledge about traditions, observances, customs or beliefs associated with an area should be able to be recognised as a party and consulted on cultural heritage management and protection, regardless of whether there is already a native title party recognised for that area.
(b) A First Nations-led entity could be responsible for determining, in a culturally competent manner, who should be consulted in relation to particular cultural heritage where there is a dispute, including internally in a native title body or between different First Nations groups.
(c) We support the removal of the last claim standing provisions, and the inclusion of a power to appeal decisions to either the Department or the independent body as to the most culturally appropriate people to speak for heritage.
(d) Regardless of which entity assists in deciding the culturally appropriate person to speak for Country or heritage, there must be clear legislative requirements which ensure that people with conflicts of interest with respect to Country, heritage, family connection or development, are not able to be part of this decision-making process.
(e) It should also be reinforced, either within the Cultural Heritage Acts directly or through guidelines, that where the native title party for an area is the relevant Aboriginal party, that fiduciary duties are owed to the native title claim group by the native title applicant. The Department should ensure that native title applicants understand that these fiduciary duties extend to cultural heritage protection and management, such as through clear guidelines or education.

We support either Option 1 or Option 2. However, either option must result in clear and culturally appropriate criteria and process for determining the appropriate Aboriginal party or parties, decided by culturally competent people, ideally First Nations, without conflicts of interest for the Country or heritage. As suggested, either option must allow for broad public notification to allow those with an interest to nominate as holding that interest in the heritage. Also, as suggested, multiple parties must be able to be recognised as having an interest in heritage, with the ability to access dispute resolution processes in the event of any dispute about how the heritage should be managed.

EDO notes that these options are only proposed to apply in areas where there is no existing native title party. While EDO supports the removal of the 'last claim standing' provision, this reform alone does not sufficiently ensure that all First Nations who have a connection to an area are able to be adequately consulted on cultural heritage, regardless of status as a native title party.

The Cultural Heritage Acts currently rely on the *Native Title Act 1993* (Cth) to determine who the Aboriginal or Torres Strait Islander party is for the purposes of consultation with respect to the management and protection of cultural heritage. While using native title party status to determine the appropriate First Nations Peoples to consult with provides greater certainty to proponents, it does not always ensure that all First Nations with a connection to Country are consulted, and has led to division and dissent which has often been fostered and exploited by proponents.[19]

Therefore, EDO supports the proposal to reframe the definitions in the Cultural Heritage Acts so that First Nations who are not a native title party have an opportunity to be involved in the management and protection of cultural heritage.

In particular, EDO supports the removal of the 'last claim standing' provision. The 'last claim standing' refers to s 34(1)(b)(i) of the Cultural Heritage Acts, which operates such that a native title claimant that was not able to prove native title may nonetheless be the relevant party to negotiate with even if there are other First Nations in the area who are the 'right people' to speak for Country. EDO reiterates its submissions made to the Cultural Heritage Acts Review in 2019, in particular that the 'last claim standing' provision is 'culturally inappropriate'.[20]

The current reliance of the Cultural Heritage Acts on the Native Title Act to determine who to consult with about cultural heritage is one-dimensional and does not reflect the complexity of First Nations relationships with and connection to land and culture. It also does not reflect the impacts to First Nations that have occurred since colonisation and through the native title framework, which has often been divisive of family groups and connection to Country. This reality can easily be exploited by developers if the legislative framework does not support meaningful processes that empower broad consultation on Country with the appropriate people.

The need to develop a mechanism to determine the 'right people' to speak for Country that is not reliant on native title party status was seen when members of the Wangan and Jagalingou People tried to protect their cultural heritage from destruction at the Carmichael coal mine. Because there was a CHMP negotiated with the native title applicants, many Wangan and Jagalingou People were excluded from consultation about cultural heritage, even though they had particular cultural knowledge about areas that would be affected by excavation works. This reliance on native title to determine who to consult with allows proponents to tick a box without engaging in meaningful consultation with First Nations who have cultural knowledge about and responsibility for both tangible and intangible cultural heritage. This process also limits the ability of First Nations with historical cultural heritage to seek to protect this heritage and be empowered to be consulted with by those seeking to access or impact land, as has occurred for First Nations at Deebing Creek.

[19] Juukan Gorge Report [7.40].

[20] EDO Qld, Submission No 55 to Department of Aboriginal and Torres Strait Islander Partnerships, *Cultural Heritage Acts Review* (9 August 2019) 3.

Case study: Protection of cultural heritage at Deebing Creek

An example of the complexities created by only requiring consultation about cultural heritage with the native title party for an area can be seen at Deebing Creek Mission. The Mission is a heritage-listed former Aboriginal Reserve located south of Ipswich, which operated from 1892 until 1915. First Nations from across Queensland were forcefully relocated from their traditional lands to the Mission, which is now protected as a heritage-listed site.

Deebing Creek Mission and surrounding areas have significant Aboriginal cultural heritage, including burial sites, bora rings, scar trees and other artefacts. This Aboriginal cultural heritage is associated both with the original custodians of the land, the Yuggera Ugarapul People, as well as the inhabitants of the Mission.

The land surrounding Deebing Creek Mission was purchased by developers in 2019, which has resulted in significant concerns about the protection of cultural heritage, particularly burial sites. While the ACH Act requires the developers to consult about the protection of cultural heritage with the Yuggera Ugarapul People, who are the native title party for the area, it does not provide any such requirement to consult with the descendants of the Mission, who have no native title claim to the area.

The descendants of the Mission now have a historical and cultural connection to the land at Deebing Creek Mission as a result of the Queensland Government forcefully relocating their ancestors from their traditional lands to Deebing Creek Mission. However, this historical and cultural connection, which was created by the actions of the Queensland Government, is not recognised under Queensland legislation, meaning that these descendants cannot protect their cultural heritage or be consulted about development that may harm or destroy it.

This case study demonstrates the importance of ensuring that the Cultural Heritage Acts provide protection of cultural heritage to all First Nations with connection to an area, regardless of status as a native title party.

Ultimately, First Nations with particular knowledge about traditions, observances, customs or beliefs associated with an area who have responsibility for, or are a member of a family or clan group with responsibility for, particular cultural heritage in the area, should be able to be recognised as a party and consulted on cultural heritage management and protection, regardless of whether there is already a native title party recognised for that area.

The Juukan Gorge Final Report explored the difficulties associated with identifying the 'right people' to speak for Country, recognising that it is 'complicated by a long history of state-sanctioned disconnection of Aboriginal and Torres Strait Islander peoples and their lands and compounded by complicated legislative frameworks at multiple levels of government'.[21] The Juukan Gorge Final Report ultimately concluded that 'the process of recognising traditional owner groups will be unique to each jurisdiction', demonstrating that there is no clear solution to the question of who should speak for Country, and that reliance on the native title framework alone is not adequate.[22]

[21] Juukan Gorge Report [7.38].
[22] Juukan Gorge Report [7.46].

EDO reiterates the suggestion made in its submission to the Cultural Heritage Acts Review in 2019, as follows:

> We suggest consideration be given to introducing a notification process where cultural heritage may be impacted, such that any Traditional Owner may notify that they have an interest or concern as to the cultural heritage or site and therefore should be consulted with.

Where there is a dispute between parties as to who should speak for Country or cultural heritage, this could be a role for the independent First Nations-led body to assist in resolving.

While native title parties should still be consulted under the Cultural Heritage Acts, regardless of whether there is a native title party for the area or not, there should be a mechanism by which proponents are required to publicly notify any activities they will be engaging in, and any persons who fulfil the criteria in section 35(7) of the Cultural Heritage Acts should be able to nominate themselves as an Aboriginal party. More than one Aboriginal party should be permitted for an area.

This notification must occur ideally at the time of consideration of the major approvals for the activity, to allow sufficient time for First Nations to hear about the notification and to nominate themselves as an Aboriginal party, and to be heard with respect to the significance of the cultural heritage on the site.

Recognising that notifications can easily be missed, perhaps to assist in making this functional and to avoid people missing out on notification opportunities, an email or contact list could be created that First Nations could add themselves to. Persons on that list could then be notified whenever proposals are made to impact Country – with no discrimination as to who can be added to this list.

The form of such a process of deciding who is culturally appropriate to speak for cultural heritage should be co-designed with First Nations, and EDO supports the proposal made in the Options Paper to establish a First Nations-led independent entity to explore the most culturally appropriate approach for resolving disputes about who are the 'right people' to speak for particular cultural heritage (discussed further **below**).

In the establishment and design of this First Nations-led body, a balance must be struck between ensuring that First Nations in Queensland are able to exercise their right of self-determination in deciding who the 'right people' to speak for Country are, and ensuring that there are clearly legislated criteria for making such determinations to allow for transparency and clarify.

Placing the responsibility for determining the 'right people' to speak for Country in a single body raises a number of issues, including who will make these determinations, how they will be elected or appointed, what criteria they will use to assess cultural connection, what evidence they will require of such cultural connection, and how conflicts of interest will be avoided. These are all complex questions that ultimately will need to be determined by First Nations in Queensland. As we discuss further below, one possible solution could be empowering localised or regional First Nations governance, so that decisions regarding who should speak for Country are made by First Nations within the region who have an understanding of the history and culture of the particular area.

Regardless of which entity assists in deciding the culturally appropriate person to speak for Country or heritage, there must be clear legislative requirements which ensure that people with conflicts of interest with respect to Country, heritage, family connection or development, are not able to be part of this decision-making process.

It should also be reinforced, either within the Cultural Heritage Acts directly or through guidelines, that where the native title party for an area is the relevant Aboriginal party, that fiduciary duties are owed to the native title claim group by the native title applicant.[23] This is relevant in the context of cultural heritage where a member of the native title applicant is appointed to the Cultural Heritage Committee or the role of Cultural Heritage Co-ordinator under a CHMP.

This was seen in the matter of *Williams (on behalf of the Danggan Balun (Five Rivers) People) v Queensland* [2022] FCA 355, where Collier J granted an interlocutory application to remove a member of the native title applicant because that member had exceeded their authority and was no longer authorised to act as a member of the native title applicant. The member of the applicant was appointed as a Cultural Heritage Co-ordinator under a CHMP, and in this role had allocated excavation work to a company he had a personal interest in, thus making a profit from his position without the permission of the claim group.

In fulfilling a cultural heritage management role, such as Cultural Heritage Co-ordinator or member of a Cultural Heritage Committee, a member of the native title applicant must still comply with their fiduciary obligations, which relevantly includes acting in the best interests of the claim group.[24] The Department should ensure that native title applicants understand that these fiduciary duties extend to cultural heritage protection and management, such as through clear guidelines or education.

Promoting leadership by First Nations Peoples

Recommendation 8

(a) A First Nations-led entity that is responsible for managing and protecting cultural heritage should be investigated and explored in meaningful, direct consultation with First Nations. Its role could include providing dispute resolution, both between proponents and First Nations, and between different First Nations groups that claim to have cultural connection to an area where this is in dispute. Such an entity could assist in determining who are the 'right people' to speak for Country where there are disputes and could also investigate how to recognise historical connection as a result of colonisation and displacement. However, this entity must be representative of all First Nations, and must recognise and respect cultural laws and traditional decision-making.
(b) There must be provision to avoid conflicts of interest occurring in the functions of the body.
(c) A First Nations-led entity could also have an audit role of the Department, which may greatly improve trust in the cultural heritage framework.

Proposal 1: Establish a First Nations-led entity responsible for managing and protecting cultural heritage in Queensland.

EDO supports the proposal to establish a First Nations-led entity responsible for managing and protecting cultural heritage. Such a proposal aligns with the principle of self-determination that is enshrined in UNDRIP.

[23] See *Gebadi v Woosup (No 2)* [2017] FCA 1467.
[24] *Gebadi v Woosup (No 2)* [2017] FCA 1467 at [100]-[102]; *Williams (on behalf of the Danggan Balun (Five Rivers) People) v Queensland* [2022] FCA 355 at [43].

The design and governance of such an entity must be led by First Nations, and therefore most of the questions in the Options Paper relating to this proposal should be explored in meaningful, direct consultation with First Nations in Queensland.

EDO submits that any First Nations-led cultural heritage entity should be independent of the government, and should have a role of assisting First Nations throughout the cultural heritage process in a manner that is culturally appropriate. In particular, it could be appropriate for such an entity to assist in resolving inter or intra-group disputes regarding who the 'right people' to speak for Country are. However, there are difficulties associated with empowering an entity to make such determinations, particularly regarding conflicts of interest. This could be resolved by having a large number of First Nations from across Queensland that can be called on to form a panel which can assist in resolving disputes.

A First Nations-led entity could also have an audit role, and be responsible for investigating complaints made with respect to cultural heritage. This may improve trust in the cultural heritage framework, as Traditional Owners can be assured that a First Nations-led independent body is investigating any complaints, rather than a government department.

However, many First Nations people EDO have spoken with raised concerns about how such an entity would be formed so that it is truly representative of all First Nations across Queensland, who have different histories, traditions, views and connections to Country. In particular, there are concerns that people who aren't from a particular Country will be making decisions about who has the right to speak for that Country, or that a First Nations-led entity will prioritise groups that have native title rights and continue to perpetuate the current problems plaguing the cultural heritage system in Queensland.

Any First Nations-led entity that is given decision-making, dispute resolution or advisory functions in relation to cultural heritage must ensure it is representative of all First Nations in Queensland that have an interest in protecting cultural heritage, regardless of their status as a native title party. Such an entity must act in accordance with UNDRIP and the principles of FPIC, which would mean going out on Country and meeting with people in the community to determine who holds the cultural knowledge about particular areas, and who should be consulted for those different areas. Rather than simply relying on the native title framework, the entity would need to engage directly with First Nations to determine who has particular cultural knowledge about and connection to an area.

One way of ensuring that any decision-making entity is truly representative of First Nations across Queensland would be to instead empower First Nations across Queensland to develop their own systems of governance at the local or regional level, made up of First Nations People who are from that region or watershed and who have authority to speak for Country. These local or regional organisations could engage directly with Traditional Owners on Country to help determine who the right people to speak for Country are, and provide a point of contact for proponents to advise them on who to consult with. These organisations could have a broader role than just conducting cultural heritage surveys or clearances, and could be responsible for protection and management of cultural landscapes in their region or watershed, including intangible and tangible cultural heritage and the environment.

Empowering First Nations at the local and regional level to develop their own governance models and decision-making frameworks about cultural heritage and protection of culture and Country aligns with rights of self-determination and free, prior and informed consent protected by international law, as well as the collective and individual cultural rights protected under the Human Rights Act.

We acknowledge that such an undertaking would be complex and resource-intensive, and that establishing another entity or entities to regulate or advise on First Nations matters is contentious and would require significant consultation. However, it is abundantly clear that the Cultural Heritage Acts currently favour proponents and development, and are failing to protect significant Aboriginal cultural heritage in Queensland. Regardless of what form it takes, what is required is a way of ensuring that all First Nations voices are able to be heard about the protection of their cultural heritage, both tangible and intangible, and those voices must be listened to in a way that aligns with the principle of FPIC and which respects the self-determination of First Nations.

Proposal 2: A First Nations independent decision-making entity, in partnership with Aboriginal and Torres Strait Islander peoples, could explore the most culturally appropriate approaches for recognising historical connection to an area for the purposes of cultural heritage management.

EDO supports the proposal for a First Nations-led entity or entities to explore the most culturally appropriate approaches for recognising historical connection to an area for the purposes of cultural heritage management.

As was stated in the Juukan Gorge Final Report, recognition of traditional owners in Australia has been complicated by a long history of colonisation and dispossession, which was often state-sanctioned. It is often difficult to identify who the 'right people' are to speak for Country, and disputes about traditional and historical connection to Country often arise as a result of the adversarial and exclusionary nature of the western legal system and in particular native title, as well as encouragement of such dissent by proponents.

While there is not always a clear resolution regarding who are the 'right people' to speak for Country, such questions of traditional and historical connection should be explored and resolved by First Nations. A First Nations independent entity is one such way of these questions being explored, and EDO is supportive of such a proposal so long as it is grounded in principles of self-determination and FPIC.

FURTHER SUBMISSIONS

EDO makes the following further submissions, which were not addressed in the Options Paper.

Empowering true self-determination and free, prior and informed consent

Recommendation 9

In order for the Cultural Heritage Acts to be consistent with UNDRIP, and in particular the principle of free, prior and informed consent, First Nations must have the ultimate decision-making power with respect to whether interference with cultural heritage is acceptable.[25] Therefore, any dispute resolution mechanism must allow for the withholding of consent by First Nations if an agreement cannot be reached.

The principle of free, prior and informed consent, or FPIC, underpins the rights of Indigenous peoples protected in UNDRIP. FPIC requires affirmative assent, which includes a right to veto. This basis for the right to veto is derived from the right to culture enshrined in article 27 of UNDRIP and the prohibition on States destroying Indigenous culture enshrined in article 8 of UNDRIP. FPIC is not an aspiration or a process, but a right in itself which must be reflected in the design of cultural heritage legislation.[26]

While UNDRIP is not legally binding, if the Queensland Government truly wants to live up to its *Statement of Commitment to reframe the relationship between Aboriginal and Torres Strait Islander peoples and the Queensland Government,*[27] it must respect the rights of Indigenous Peoples protected in UNDRIP, in particular the principle of FPIC and the self-determination of First Nations, through a right to veto activities that will harm significant cultural heritage. A right to veto is also necessary to align with the cultural rights of First Nations protected in section 28 of the *Human Rights Act 2019* (Qld).

Ownership of cultural heritage must be vested in First Nations

Recommendation 10

Section 20 of the Cultural Heritage Acts should be amended so that ownership of cultural heritage, both tangible and intangible, is always vested in First Nations rather than the State.

Ownership of cultural heritage is currently only vested in First Nations in the limited circumstances expressed in s 20(1) of the Cultural Heritage Acts. Otherwise, ownership of cultural heritage vests in the State pursuant to s 20(2) of the Cultural Heritage Acts. This does not align with the rights of Indigenous Peoples as expressed in UNDRIP, which provides that Indigenous Peoples 'have the right to maintain, control, protect and develop their cultural heritage…'.[28]

[25] Dhawura Ngilan Report, 36.

[26] Environmental Defenders Office, Submission No 107 to Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (14 August 2020) 14.

[27] Department of Aboriginal and Torres Strait Islander Partnerships, *Statement of Commitment to reframe the relationship between Aboriginal and Torres Strait Islander peoples and the Queensland Government* (22 June 2021).

[28] UNDRIP art 31.

EDO therefore submits that the Cultural Heritage Acts should be amended to vest ownership of cultural heritage, both tangible and intangible, in First Nations.

Legal means of accessing land must be provided to First Nations

Recommendation 11

Section 153 of the Cultural Heritage Acts should be amended so that First Nations are able to access land upon which their cultural heritage is located for any purpose, not only to carry out a 'cultural heritage activity'.

EDO reiterates its submissions made on the Cultural Heritage Acts in 2019, that First Nations should have a legal means to access land upon which their cultural heritage, both tangible and intangible, is located.

Currently, s 153 of the Cultural Heritage Acts only provides First Nations with a right to enter land to carry out a cultural heritage activity after consultation with the owner or occupier. There is currently no right to access land unless there is a development or other project for which cultural heritage activities are required, such as a cultural heritage survey. This means that First Nations are often prevented from accessing cultural heritage sites for traditional purposes if there is not proposed development on the site. Again, this does not align with article 31 of UNDRIP which provides for the right of Indigenous Peoples to 'maintain, control, protect and develop their cultural heritage…'.

EDO therefore submits that the Cultural Heritage Acts should be amended to allow First Nations to have a legal means to access their cultural heritage for traditional purposes.

Registration of cultural heritage must be improved

Recommendation 12

Part 5 of the Cultural Heritage Acts should be amended so that cultural heritage can be registered by any First Nations person or group with a cultural connection to an area, regardless of their status as a native title party, with more transparency and accountability as to how the Department (or new independent body) is making the decision to register heritage or not.

The current system of cultural heritage registration is not operating effectively, and many First Nations have informed EDO that they have been unable to register their cultural heritage. For example, the Guardians of Djaki Kundu were told their cultural heritage could not be registered because previous studies had been done that demonstrated there wasn't cultural heritage on the site, when those previous studies had not even consulted the First Nations with cultural connection to the Djaki Kundu site.

The process of cultural heritage registration should respect the claims of First Nations regarding the existence of cultural heritage, and active consultation and investigation should occur with the relevant First Nations who claim a connection to cultural heritage in question.

The cultural heritage database is currently where cultural heritage is registered. However, the database is only accessible by the Aboriginal party in relation to their area, and to land users if access

is necessary to satisfy their cultural heritage duty of care.[29] While the cultural heritage register is publicly available, it only contains information about cultural heritage studies, CHMPs, cultural heritage bodies, and details about the Aboriginal party.[30]

We have heard from a number of First Nations people that they are unable to access the register of their cultural heritage, even simply to confirm whether that cultural heritage has been registered. While it is important that details of cultural heritage are kept confidential, some level of transparency is needed so that First Nations can be assured their cultural heritage is being protected regardless of their status as a native title party. This could be resolved by placing de-identified information regarding whether cultural heritage has been registered on the publicly available register. This information could simply identify that cultural heritage exists in a certain radius, so that First Nations with knowledge about that particular cultural heritage can be satisfied that it is being protected.

Department is hindering the effective operation of the Cultural Heritage Acts - review needed

Recommendation 13

To ensure the Acts are effective and to assist in rebuilding trust of First Nations in the government and the operation of the Acts, a full scale review is needed of the Department to ensure that Department staff and processes are supporting and not hindering the operation of the Act to protect cultural heritage, as well as to ensure staff do not involve themselves in decisions about which they have a conflict of interest, and are trained to be culturally appropriate, aware and respectful.

From all of the First Nations peoples we have spoken to, we have heard widespread dissatisfaction and strong concern that the Department officers charged with administering the Cultural Heritage Acts are not fulfilling their obligations. Instead there are a myriad of case studies we are consistently hearing in which the Department is instead significantly hindering the ability of First Nations to protect their cultural heritage. This concern extends across all operations under the Acts, from the point of trying to have cultural heritage registered to provide it with greater recognition and protection, to seeking compliance, investigation and enforcement activities from the Department even where offences are clear and well-evidenced, to simply being able to communicate with the Department officers. This should be of significant concern to the Queensland Government.

Action is needed to review the behaviour and effectiveness of the Department in achieving the objects of the Cultural Heritage Acts, and to rebuild trust that has been significantly eroded in the government and the framework. This includes ensuring that staff do not act in decision making roles where they have a conflict of interest, and that staff are trained to be culturally appropriate, aware and respectful. As discussed above, an independent First Nations-led entity could have an audit role, allowing it to investigate complaints made about the Department, which could improve transparency and trust.

[29] Cultural Heritage Act ss 38-45.
[30] Cultural Heritage Act s 47.

Case Study: Wangkamadla Aboriginal Coporation

*The Wangkamadla Aboriginal Corporation was engaged by the Boulia Shire Council (**the Council**), on behalf of the Queensland Government to undertake cultural clearance for quarry sites that were to be used for impending road works. When undertaking an inspection of a quary site (Glenormiston Pit 1), it was discovered by the Senior Cultural Heritage Officer that the Council had desecrated a stone artefact quarry by extracting stone cores, flakes and artefacts which were used for the purpose of gravel as part of the upgrade of the Donoghue Highway which stretches from Boulia to the Northern Territory border.*

A complaint was made by the Wangkamdla Aboriginal Corporation to the Department on multiple occasions, the most recent in 2019. After providing substantiating evidence that actual harm occurred to cultural heritage, the Department decided not to investigate because of the 'lack of action to progress' the matter and that the 'allegations were not continuing offences given the action taken by the Council to decommission the pit'. The Wangkamadla people were also treated with contempt and the Department was not culturally appropriate in communications, which was identified by the Executive Director of the Department.

CONCLUSION

The main purpose of the Cultural Heritage Acts is 'to provide effective recognition, protection and conservation' of Aboriginal and Torres Strait Islander cultural heritage.[31]

The Cultural Heritage Acts create a protective jurisdiction which has the ultimate purpose of protecting cultural heritage from harm, and it is clear from the experiences of First Nations in Queensland that this purpose is not being achieved. Meaningful reform is necessary to ensure that the Cultural Heritage Acts are fulfilling their purpose and upholding the rights of First Nations recognised in international law and under the Human Rights Act.

Thank you for the opportunity to make submissions on the review of the Cultural Heritage Acts. We look forward to further consulting with the Queensland Government on how the Cultural Heritage Acts can be reformed to better ensure the protection of cultural heritage and to provide for the self-determination and free, prior and informed consent of First Nations.

We would appreciate meeting with you to discuss our submission, as advised in the email enclosing this submission. Please let us know when would be a suitable time for this meeting by contacting Revel Pointon by email at revel.pointon@edo.org.au or by phone at 07 3211 4466.

[31] Cultural Heritage Act s 4.