Your heritage partners

12 June 2021

Committee Secretariat

Joint Standing Committee on Northern Australia

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Re: Further submission to the Joint Standing Committee on Northern Australia's inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia (the Inquiry)

Overview of Submission

Thank you for the opportunity to provide a further submission to the Joint Standing Committees' Inquiry. Australian Heritage Specialists Pty Ltd (AHS) is a privately owned cultural heritage consultancy with offices in Brisbane and Cairns, Queensland. Although AHS predominately works in Queensland, the company and its senior staff and advisers operate across Australia. Consultancy work is provided to Commonwealth, State and local governments, and public and private companies. In addition, AHS provides cultural heritage services to a number of Aboriginal traditional owner groups in Queensland.

On Tuesday, 18 May at 10.00am, Mr Benjamin Gall, AHS Managing Director and Principal and Ms Ann Wallin, AHS Senior Advisor, gave evidence to the Inquiry. Specifically, this evidence related to the following terms of reference of the inquiry:

I. *the interaction, of state indigenous heritage regulations with Commonwealth laws;*

II. *the effectiveness and adequacy of state and federal laws in relation to Aboriginal and Torres Strait Islander cultural heritage in each of the Australian jurisdictions;*

III. *how Aboriginal and Torres Strait Islander cultural heritage laws might be improved to guarantee the protection of culturally and historically significant sites.*

In Queensland, the *Aboriginal Cultural Heritage Act 2003* (ACHA) and the *Torres Strait Islander Cultural Heritage Act 2003* are the relevant state legislation. Associated with the ACHA is the gazetted Cultural Heritage Duty of Care Guidelines (the Guidelines) that give guidance on the application of that Act.

The main purpose of the ACHA "is to provide effective recognition, protection and conservation of Aboriginal cultural heritage" (S. 4). To support this purpose, the fundamental principles of the ACHA are provided in Section 5:

(a) the recognition, protection and conservation of Aboriginal cultural heritage should be based on respect for Aboriginal knowledge, culture and traditional practices;

(b) Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage;

(c) it is important to respect, preserve and maintain knowledge, innovations and practices of Aboriginal communities and to promote understanding of Aboriginal cultural heritage;

(d) activities involved in recognition, protection and conservation of Aboriginal cultural heritage are important because they allow Aboriginal people to reaffirm their obligations to 'law and country';

(e) there is a need to establish timely and efficient processes for the management of activities that may harm Aboriginal cultural heritage.

Evidence given by AHS focused on aspects of the ACHA and its associated Guidelines, with the intention of highlighting areas of ineffectiveness and inadequacy of state laws that currently do not achieve a consistent approach that fulfil the ACHA's stated purpose and principles (above) and do not guarantee the protection of culturally and historically significant sites.

The aim of these discussions was to demonstrate how improvement of these laws could assist in the protection of culturally and historically significant sites. To further this aim, AHS's offer to prepare this additional submission was accepted by the Inquiry as it would provide a greater depth of information than was possible to achieve in a one-hour presentation and discussion.

This submission focuses initially on the three aspects raised by AHS during its presentation, namely:

(1) the so-called "Last Man Standing" provisions of the ACHA;

(2) the categories of the Guidelines by which those who plan activities can measure their responsibilities of compliance with their cultural heritage duty of care; and

(3) Additional discussion points, including the disfunction of the regulator that is a direct result of the inadequacies described in 1. and 2. above.

At the conclusion of AHS's 10-minute presentation, members of the Inquiry asked a range of questions. This submission will also discuss, where relevant, supporting information for AHS's responses, particularly those matters in which the Committee sought specific clarification that was felt required additional supporting information.

1 "Last Man Standing" Provisions

Part 4 of the ACHA provides the mechanisms by which Aboriginal people who are relevant as "the primary guardians, keepers and knowledge holders" (S. 5.b) of their cultural heritage can "reaffirm their obligations to 'law and country'" (S. 5.d). Sections 34 and 35 of Part 4 of the ACHA establish a hierarchy by which an Aboriginal party (i.e., the person or persons to be consulted as the primary guardian, keeper and knowledge holder) is identified for a specific area. This hierarchy uses parts of the Commonwealth's *Native Title Act 1993,* e.g., a person who is a registered native title claimant (S. 34(1)a), or a registered native title holder (S. 34(1)c).

1.1 The Existing Problem

The provision that is key to this discussion is Section 34(1)b which states that if there have previously been registered native title claimants for an area, the last of these claimants to have remained registered is the Aboriginal party for an area who should be consulted about the "recognition, protection and conservation" (S. 4.a) of their Aboriginal cultural heritage.

This provision does not take into account a possible outcome of trials in the Federal Court of Australia under the *Native Title Act 1993* whereby the Aboriginal people who are recognised by the Court "as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage" through their direct descent from the traditional owners/native title holders at the time of non-indigenous settlement have not had a registered native title claim in place.

A prime example of how deficient Section 34(1)b may be is found in the submission to the Inquiry from the Nuga Nuga Aboriginal Corporation. In summary, the Karingbal Brown River people who did not have a registered native title claim were found by the Federal Court of Australia to be the only descendants of the traditional owners/native title holders at the time of non-indigenous settlement, while the registered Bidjara claim and the descendants of Jemima of Albinia on the registered Karingbal claim were found to have no association with most of, or all the claimed area.

Despite this outcome, Queensland's continued interpretation of Section 34(1)b arbitrarily allows for Aboriginal people from the Bidjara people or descendants of Jemima of Albinia who have been shown to have no responsibility as "the primary guardians, keepers and knowledge holders" in the claimed area to have equal status as Aboriginal parties to those people who are descended from the native title holders of the area.

As a result, "Karingbal cultural heritage is highly vulnerable to harm given people with no traditional affiliation with, or traditional knowledge of, Karingbal cultural heritage are able to make decisions about Karingbal cultural heritage, often to the exclusion of the legitimate Karingbal People" (Nuga Nuga Aboriginal Corporation – submission to the Inquiry, p. 3). In fact, incidents are known to AHS where the Bidjara and/or descendants of Jemima of Albinia have been consulted and this has led to detrimental impact (harm in the meaning of the ACHA) to Significant Aboriginal Areas (Section 9 of the ACHA) to the Karingbal People, and the Inquiry is urged to visit the Karingbal Elders in their traditional country to see and hear about this impact (see also section 6 of the Nuga Nuga Aboriginal Corporation's submission to the Inquiry).

1.2 Solution

The solution is an amendment to Sections 34 and 35 of the ACHA to reflect more appropriately the *Native Title Act 1993,* and all possible outcomes of judgements from the Federal Court of Australia.

The amendment may read (highlighted clauses in red indicating changes from the current ACHA):

34 Native title party for an area

(1) Each of the following is a ***native title party*** for an area -

(a) a registered native title holder; or

(b) a registered native title claimant; or

(c) a person who has been found by the Federal Court of Australia in a native title outcome to be the descendant of the native title holders at the time of non-indigenous settlement; or

(d) a person who was a registered native title holder for the area, but only if –

(i) the person has surrendered the person's native title under an indigenous land use agreement registered on the Register of Indigenous Land Use Agreements; or

(ii) the person's native title has been compulsorily acquired or has otherwise been extinguished.

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35 Aboriginal party for an area

(1) A native title party for an area is an ***Aboriginal party*** for the area.

(2) Subsection (3) applies to a native title party for an area who –

(a) is a registered native title claimant; or

(b) is the native title claim group who authorised a person who is no longer alive, but who was a registered native title claimant, to make a native title determination application.

(3) The native title party is an ***Aboriginal party*** for the whole area included within the outer boundaries of the area in relation to which the application was made under the Commonwealth Native Title Act for a determination of native title, regardless of the nature and extent of the claimant's claims in relation to any particular part of the whole area.

(4) Subsection (5) applies to a native title party for an area who is or was a registered native title holder the subject of a determination of native title under the Commonwealth's Native Title Act.

(5) The native title party is an ***Aboriginal party*** for the whole area included within the outer boundaries of the area in relation to which the application for the determination was made, regardless of the extent to which native title was found to exist in relation to any part of the whole area.

(6) However, a native title party to whom subsection (5) applies is not an ***Aboriginal party*** for a part of the area if –

(a) native title was not found to exist in relation to a part; and

(b) there is a registered native title claimant for the part.

(7) If there is no native title party for an area, a person is an ***Aboriginal party*** for the area if –

(a) the person is an Aboriginal person with particular knowledge about traditions, observances, customs or beliefs associated with the area; and

(b) the person –

(i) has responsibility under Aboriginal tradition for some or all of the area, or for significant Aboriginal objects located or originating in the area; or

(ii) is a member of a family or clan group that is recognised as having responsibility under Aboriginal tradition for some or all of the area, or for significant Aboriginal objects located or originating in the area.

In addition, the additional consequences of the *Revenue and Other Legislation Amendment Bill 2018* (**Last Claim Standing Preservation Bill**) also needs to be considered in keeping with the upgrades to the ACHA. Please note the history of the introduction of this piece of legislation is provided in detail in the Nuga Nuga Aboriginal Corporation's submission to the Inquiry. This AHS submission verifies the accuracy of the Nuga Nuga submission on this matter. More recent developments are summarised as follows:

The Last Claim Standing Preservation Bill was passed by the Queensland Parliament in 2018 to overturn the successful challenge to the State Government's interpretation of the ACHA brought by the Nuga Nuga Aboriginal Corporation in the Supreme Court of Queensland. The challenge by the Nuga Nuga Aboriginal Corporation was brought as a last-ditch attempt by the Karingbal People to protect Karingbal cultural heritage, and was viewed favourably by the Supreme Court.

Rather than consult with the Nuga Nuga Aboriginal Corporation, or even appeal the Supreme Court's decision:

(a) the State Government legislated to impose its preferred interpretation of the ACHA, which promotes the very circumstances that put Karingbal cultural heritage at risk of harm; and

(b) the Department of Aboriginal and Torres Strait Islander Partnerships (**DATSIP**) has never even made a final decision on the Nuga Nuga Aboriginal Corporation's original application that was the subject of the decision overturned by the Supreme Court, despite reasonable requests to do so on multiple occasions.

The State Government proposed to "soften the blow" of its actions in passing the Last Claim Standing Preservation Bill by initiating a commitment to a subsequent holistic and broader review of the ACHA, which would include consultation with stakeholders lacking from the process leading up to the introduction of the Last Claim Standing Preservation Bill. The Queensland Parliamentary Economics and Governance Committee made reference to this when recommending the Last Claim Standing Preservation Bill be passed, as follows:

> *The committee notes that DATSIP has referred to the potential for a broader review of the ACHA and TSICHA, and the widespread support for such a review. As a result, the committee supports the proposed amendment to provide certainty until that review can be undertaken. The committee will be interested to hear of progress on such a review.*[1]

DATSIP released a consultation paper for the purposes of this review in 2019, which proposed a process that would result in legislative amendment processes in Quarter 2 of 2020. Seventy submissions were made in response to the consultation paper. A paper of suggested changes was eventually released, to which a number of additional submissions were also made. In AHS's opinion, many of the suggested changes are flawed and will exacerbate the current situation explained above.

However, there have been absolutely no further steps taken by DATSIP or the State Government to progress the review since this time. Karingbal cultural heritage, and potentially all Aboriginal and Torres Strait Islander cultural heritage in Queensland remains exposed to harm due to the deficiencies of the existing legislation and its supporting guidelines (discussed below). It would seem reasonable that DATSIP would be considered responsible for ensuring that Aboriginal and Torres Strait Islander Queenslanders have the ability to exercise their traditional responsibilities and apply their traditional knowledge to protect their cultural heritage. However, the record suggests DATSIP may be indifferent to this.

[1] https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2018/5618T1572.pdf at page 27

2 Cultural Heritage Duty of Care Guidelines

An important element of understanding the nature of Aboriginal cultural heritage is the concept of intangible versus tangible sites and places of significance and this was discussed during AHS's presentation to the Inquiry.

The term "tangible" refers to those sites where physical evidence, e.g., stone artefacts, stone arrangements or scarred trees, can be observed by people other than the Aboriginal party. Another term could be archaeological material. However, intangible sites and places have no physical evidence but may be natural places to which the Aboriginal party attaches high levels of significance because of their traditional knowledge, e.g., a mountain connected to important Dreaming stories. Only the Aboriginal party can define the extent and nature of intangible places.

This understanding of Aboriginal cultural heritage is captured in its definition in Sections 8-9 of the ACHA, namely:

> ***Aboriginal cultural heritage*** is anything that is –
>
> (a) a significant Aboriginal area in Queensland [intangible place]; or
>
> (b) a significant Aboriginal object [tangible]; or
>
> (c) evidence, of archaeological or historic significance, of Aboriginal occupation of an area of Queensland [tangible or intangible].
>
> A ***significant Aboriginal area*** is an area of particular significance to Aboriginal people because of either or both of the following –
>
> (a) Aboriginal tradition;
>
> (b) The history, including contemporary history, of an Aboriginal party for an area.

Gazetted when the ACHA was introduced, the Guidelines state (S. 1.13a) that compliance with them meets the requirements of the ACHA for a person's cultural heritage duty of care. They also state (S. 1.16) that they recognise that "the Act [ACHA] expressly recognises that the views of the Aboriginal Party for an area are key in assessing and managing any activity which is likely to harm Aboriginal cultural heritage".

The Guidelines recognise the definitions and the provisions provided by the ACHA, including those in Section 8-9 quoted above, but also offer definitions and methods of approaching cultural heritage in Queensland that are additional to those of the ACHA. For example, additional definitions (S. 3.0) that will be considered in this section are:

> "Surface Disturbance" means any disturbance of an area which causes a lasting impact to the land or waters during the activity or after the activity has ceased.
>
> "No Additional Surface Disturbance" means surface disturbance not inconsistent with previous surface disturbance.
>
> "Significant Ground Disturbance" means:
>
> - Disturbance by machinery of the topsoil or surface rock layer of the ground, such as by ploughing, drilling or dredging;
> - The removal of native vegetation by disturbing root systems and exposing underlying soil.

Methods of approaching cultural heritage are then provided (S. 4.0) and consist of:

- Category 1 – Activities involving No Surface Disturbance;
- Category 2 – Activities causing No Additional Surface Disturbance;
- Category 3 – Developed Areas;
- Category 4 – Areas previously subject to Significant Ground Disturbance; and
- Category 5 – Activities causing additional surface disturbance.

These methods are predicated by the assumptions that activities in those areas described by Categories 1 and 2 will cause no harm to Aboriginal cultural heritage. Category 3 "is generally unlikely that the activity will harm Aboriginal cultural heritage" (S. 5.1), and Category 4 that "where an activity is proposed in an area, which has previously been subject to Significant Ground Disturbance it is generally unlikely that the activity will harm Aboriginal cultural heritage and the activity will comply with these guidelines" (S. 5.4).

2.1 The Existing Problems

Despite the obvious intent of the ACHA in its principles and purpose (Sections 4-5 discussed in 1 above) and the Guideline's recognition that "the views of the Aboriginal party … are key" (above), Categories 1, 2 and 3 require no consultation, Category 4 only requires consultation when the loose and less than comprehensive Section 6 of the Guidelines is relevant (effectively discounting consultation in a vast number of areas found by self-assessment to be Category 4, and only Category 5 requires consultation. In addition, Category 5 also requires one of the actions provided by the ACHA such as forming an agreement, a cultural heritage management plan or an indigenous land rights agreement that includes cultural heritage management. Effectively, the application of these Guideline categories results in only a few occasions where a proponent planning an activity must consult with the relevant Aboriginal party.

In addition to the deficiencies of application of the ACHA in the Guidelines described in the previous paragraph, the assumptions of these categories and the definitions provided above are that only tangible Aboriginal cultural heritage is relevant as categories 1 to 3, giving no credence to intangible sites and places. And category 4 only gives credence to consulting with the Aboriginal party if Section 6 of the Guidelines is considered relevant during self-assessment. This begs the question: without consultation, how can those intangible sites and places that are only known to the Aboriginal party be appreciated and appropriately managed? The Guidelines only leads to a positive answer to this question through requirements for consultation in all cases if Category 5 is relevant.

While many proponents wish to use the Guidelines in accordance with the principles and purpose of the ACHA, unfortunately this lack of connectivity between the ACHA and the Guidelines has also resulted in numerous cases of less than impressive application of the Guidelines, some of which was described during AHS's discussion with the Inquiry. As a result, sites and places of significance to their Aboriginal parties are regularly being disturbed, or in the worst-case scenario, destroyed. The Inquiry is directed to the numerous publicly available submissions made by Aboriginal people and groups to the Queensland Government's review of the ACHA and Guidelines.

In addition to the inadequacy of the Guidelines to require consultation in many more circumstances through the processes it provides, the definition of Significant Ground Disturbance is regularly inadequately applied, especially its clause "the removal of native vegetation by disturbing root systems and exposing underlying soil". AHS has often found situations where self-assessment has insufficiently applied this definition. An example that AHS knows of can be found in the Jinibara

traditional lands close to Brisbane, where non-indigenous settlement occurred early, in many cases in the 1840s. At that stage, as the main use of landholdings was for cattle and sheep grazing, clearing of native vegetation was an important part of early development. Clearing was usually accomplished by ring barking and/or tree felling, both processes that do not disturb root systems and expose underlying soil, as stumps usually disappeared in time through decay or fire. The introduction of types of tree-felling that cause root system disturbance and expose underlying soil, such as chain felling between two bulldozers or through other heavy machinery was not introduced until well after World War II, by which time much of the vegetation clearance that can be observed today in Jinibara country had occurred. Despite this historical situation that discounts "removal of native vegetation by disturbing root systems and exposing underlying soil", regularly proponents do self-assessment that finds Significant Ground Disturbance allows them to proceed with their project, and the native title parties only find out about this impact when they drive past.

2.2 Solution

The Guidelines require upgrading to reflect the deep concerns held by many Aboriginal people and groups. AHS suggests a basic upgrade would involve the amalgamation of categories 3 and 4 as the differences between definitions of these two categories are arbitrary at best. In addition, the definitions of No Additional Surface Disturbance should be amended to No Additional Ground Disturbance and the definition of Significant Ground Disturbance should be amended to Additional Ground Disturbance. The change from "surface" to "ground" makes clear that any disturbance requiring penetration of the ground needs to be considered. A suggestion would be:

> "Additional Ground Disturbance" is ground disturbance inconsistent with previous ground disturbance (the opposite of the current definition for "No Additional Ground Disturbance").

Using this proposed definition and amalgamation, a reasonable and simpler process is as follows:

<u>Category 1</u>: No Surface Disturbance

As per current Guidelines

<u>Category 2</u>: No Additional Ground Disturbance

- As per current Guidelines with the addition of the points below.
- Check Register and Database. If something on Register or Database, then cannot be Category 2 (must be treated under Category 4).
- Must consult with Aboriginal parties if cultural heritage is found during activities.

<u>Category 3</u>: Additional Ground Disturbance

- Check register and database. If something on the Register or Database exists in the project area, then cannot be Category 3 (must be treated under Category 4).
- If nothing on the Database or Register, letter should be sent to Aboriginal party explaining the project and giving a legally acceptable time frame for a response if the project area is a Significant Aboriginal Area to that party with a reasonable explanation of values. If the response is that the project area is a Significant Aboriginal Area and provides a reasonable explanation

of values, then the project area cannot be Category 3 and must be treated under Category 4.

- Must inform Aboriginal parties if cultural heritage is found during project activities.

Category 4: Activities Causing Additional Disturbance

(Note: Additional Disturbance rather than Additional Ground Disturbance is relevant because it allows for those projects that may not be causing Additional Ground Disturbance but still require further actions because of the impact of the activity on Aboriginal cultural heritage.)

- An agreement, a cultural heritage management plan (CHMP) or an indigenous land use agreement with clauses about management of cultural heritage is required before the activity commences.

Under these revised categories, Section 6 of the Guidelines would be superfluous.

If Section 6 and much of repetition of aspects of the ACHA is removed, the question must be asked why the Guidelines are necessary, as this relevant section (above) could be added to the ACHA.

3 Additional Discussion Points

After AHS's initial presentation, the discussion consisted of questions from members of the Inquiry and AHS representatives. What follows is additional material that is offered to clarify some of the points of discussion.

3.1 Aboriginal people having a Veto and an Avenue of Appeal

A further discussion is provided in response to questions from Senator Canavan, Senator Dodson and the Acting Chair about these two matters.

Veto

A question was asked whether Aboriginal people should have the right to veto a proposed project. As was answered on 18 May, yes, Aboriginal people should have the right to free, prior and informed consent, and by implication to protect their sites and places of significance from impact. By implication this may involve vetoing a proposed project.

Currently, in Queensland this right is perceived by some proponents to be an encumbrance largely because of potential impacts on their projects. However, in many cases, this "logjam" of perceptions between proponents and Aboriginal parties could be relieved by consulting very early in the initial planning for a project, as in most cases, the project and the site or place of significance can be managed in a way that shows respect to both issues. What AHS has regularly observed is the opposite, where a proponent does not commence consultation until the project has been entirely planned and the project area has been purchased.

In such cases, the management required to protect and conserve sites and places of significance may become burdensome financially to the proponent, potentially leading to disagreements, hurdles being placed in front of Aboriginal parties' preferred approaches, and at times the ACHA and its Guidelines being used as a "weapon" rather than a guide.

To alleviate this issue effectively, the ACHA should be upgraded to require consultation at an early point in a proposed project, so that final planning for a project can consider results of that consultation, e.g., protecting or managing values through avoidance or through appropriate and agreed options. In addition, a further amendment of the ACHA should require the regulator to respond within a reasonable timeframe, e.g., 48 hours, if an Aboriginal party brings to their attention the intention to cause, or the actual, destruction or damage to Aboriginal cultural heritage.

Avenue of Appeal

Currently, without a guaranteed rapid response from the regulator, under the ACHA the primary avenue available to Aboriginal parties in cases of dispute with a proponent is to take the matter to Queensland's Land Court.

This is an expensive process that many Aboriginal groups would not be able to afford. In addition, the Land Court upholds the ACHA in its current form. Without reforming aspects of the ACHA, this situation may place a burden on an Aboriginal group who have encountered difficulties in protecting their cultural heritage. Commonwealth cultural heritage legislation should be upgraded to provide an independent jury or group of appropriately qualified people, e.g., heritage specialists and Aboriginal representatives, to which either an Aboriginal group or a proponent can bring a case that has not reached agreement without first resorting to the fuller extent of Commonwealth legislation. In this way, the best intentions of Commonwealth legislation may be invoked in cases where state legislation may not provide similar levels of protection.

3.2 Senator Canavan's question on p. 4 about Commonwealth Involvement

In many respects, the linkage between the Commonwealth Native Title Act and the State ACHA works very well. It is entirely appropriate that those persons, who have successfully gone through a process of native title determination by the Federal Court, to be regarded as the persons who have the traditional knowledge and traditional responsibility to speak for their Country and make decisions about their cultural heritage. So Registered Native Title Bodies Corporate should retain that role.

Whilst less definitive than an actual determination of native title, it seems reasonable that persons who have passed the threshold tests under the Native Title Act to have a registered claim should also have such recognition, as an interim arrangement until that claim is determined.

Where there is a massive disconnect is where there is no positive determination of native title, and no existing registered claim, so identification of persons who can speak on Aboriginal cultural heritage matters falls to the last failed registered claim. In many cases, where there is no duality of failed claims, this may work reasonably well. But where there has been overlapping claims, of varying merits, the system comes undone as the only rule is the date in the calendar that a claim was found to have failed.

The precise nature of the disconnect between the Native Title Act and the ACHA is reliance on technical evidentiary requirements by the former, and purported regard for traditional knowledge and responsibility by the latter. In the case of the last failed registered claim, the primacy of the effects of the technical evidentiary requirements of the Native Title Act can entirely erode regard to traditional knowledge and responsibility, as it has done for the Karingbal People.

By way of further detail, this disconnect is because:

- The ACHA identifies as its first purpose that "the recognition, protection and conservation of Aboriginal cultural heritage should be based on respect for Aboriginal knowledge, culture and traditional practices."

- The Native Title Act provides for a native title determination regime based on the following definition of native title:

  (1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

  (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

  (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

  (c) the rights and interests are recognised by the common law of Australia.

For some groups, the evidentiary hurdles, particularly the need to evidence maintenance of the connection since sovereignty despite the challenges of an oral history and limited and dubious written records, are insurmountable. This has been acknowledged widely, perhaps most notably by the Australian Law Reform Commission (ALRC) in 2015 which reported as follows:

> *the 'laws and customs' model for recognising and determining native title fulfils the important function of recognising native title, but it contributes to a complex legal test for connection in the Native Title Act that calls for considered reform. In addition, statutory construction of s 223 of the Native Title Act has expanded the requirements for proof of native title beyond the elements contained in the actual definition in the Act.'*[2]

The ALRC's recommendations arising from these findings relate to proposed reforms to the Native Title Act. But its findings highlight the urgent need for reform of the ACHA, which is seriously flawed by virtue of that Act's direct reliance on the disconnect itself. It means there are people who have been found to have no traditional knowledge or responsibility for Country being embedded as the persons who have a legislative right to speak for Country, and allows proponents to pick and choose and disenfranchise those persons who have been positively found as the persons descended from the native title holders and who therefore have the traditional knowledge and responsibility, notwithstanding they no longer hold native title according to the strict evidentiary requirements of the Native Title Act.

This is not news to the Queensland Government – its own consultation paper floated the potential for recognition of persons as being the rightful Aboriginal Parties based on "clear court evidence about all the issues that have been in dispute between the groups."[3] But the lethargy pervading this review process means the problem remains an institutional part of the Queensland system which is meant to protect Aboriginal and Torres Strait Islander Cultural Heritage.

In relation to whether there is a greater role for the Commonwealth in legislating for Aboriginal cultural heritage protection, given the huge delays and uncertainties in relation to State reforms (not just in Queensland but equally so in NSW and Western Australia), we think the answer must be yes. This is considerably supported by the significant uptake in recent times of applications for Ministerial declarations under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

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[2] Australian Law Reform Commission, Connection *to Country: Review of the Native Title Act 1993 (Cth)* Final Report, ALRC Report 126, April 2015, at 16

[3] https://www.datsip.qld.gov.au/resources/datsima/programs/consultation-paper-review-cultural-heritage-acts.pdf page 9

A key consideration for the processes under that Act is the extent to which areas or objects are or may be protected from injury or desecration under a law of a State or Territory, and the effectiveness of any remedies available under any such law. The increased application activity under that Act (e.g. the recent application regarding Djaki Kundu site near Gympie in relation to the activities of the Queensland Department of Transport and Main Roads), and the Commonwealth Minister's willingness to make declarations under that Act (e.g. the Wiradyuri People's recent successful application regarding Mount Panorama in NSW) strongly support the assumption that relevant State laws are not effective in protection Aboriginal cultural heritage from injury or desecration.

The question becomes, what is the role for an expanded Commonwealth legislative and regulatory presence in this space? The very different factors and characteristics of Aboriginal and Torres Strait Islander cultural heritage, Aboriginal heritage values and sacred sites across the nation means it would be unworkable to have a "one size fits all" system (applying eastern State concepts in the Northern Territory, and vice versa, for example, would be challenging). But an increased willingness by the Commonwealth minister to deploy the declaration power is one means of dealing with the review delays of the States.

Further consideration of previously proposed Commonwealth legislation to accredit appropriate State and Territory indigenous cultural heritage protection regimes in accordance with Commonwealth requirements and standards, is also worthy of further consideration provided the Commonwealth requirements and standards adequately address the present shortcomings of those regimes that have been identified.

Conclusions

1 ACHA vs Queensland's Human Rights Act

A conclusion that must be reached is that the comprehensive problems raised by the AHS submission are incompatible with Queensland's *Human Rights Act 2019,* especially Section 28(2)(a), legislation that was introduced during the period after on-going discussions had commenced about the failures of the ACHA and its comprehensive review. The Human Rights Act states:

> **28 Cultural rights – Aboriginal peoples and Torres Strait Islander peoples**
>
> (1) Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights.
>
> (2) Aboriginal peoples and Torres Strait Islander peoples must not be denied the rights, with other members of their community –
>
> (a) **to enjoy, maintain, control, protect and develop their identity and cultural heritage** (AHS's emphasis), 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.

Given this current incompatibility between Queensland's ACHA and *Human Rights Act 2019*, it is vital that the review of both the ACHA and the Guidelines is finalised as soon as possible.

2 Current Review of the ACHA and Guidelines

The finalisation of the review of the ACHA and Guidelines is urgently required, so that the recommended outcomes can be assessed against the *Human Rights Act 2019 (Qld)* and Commonwealth legislation.

However, the fact that the review has not been finalised provides the Commonwealth with an opportunity to consider input from a range of organisations including Aboriginal groups (publicly available), the first paper offering some ideas on possible upgrades for comment, and responses to this first paper. The Commonwealth and especially the Inquiry is urged to take an active role in the review, so that the Juukan Gorge episode is not repeated in this State.

3 Commonwealth Responsibilities

As abovementioned, further consideration of previously proposed Commonwealth legislation to accredit appropriate State and Territory Indigenous cultural heritage protection regimes in accordance with Commonwealth requirements and standards, is also worthy of further consideration provided the Commonwealth requirements and standards adequately address the present shortcomings of those regimes that have been identified.

Thank you for the opportunity to provide this information. Your further inquiries would be welcome at any time.

Yours Faithfully

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