

Cape York Land Council
Aboriginal Corporation ICN 1163
ABN 22 965 382 705

Cairns Central Office
32 Florence Street
PO Box 2486
Cairns QLD 4870
Phone: (07) 4053 9222
Fax: (07) 4051 0097
Freecall: 1800 623 548
email: admin@cylc.org.au
http://www.cylc.org.au

Cooktown Area Office
Charlotte Street
PO Box 6
Cooktown QLD 4871
Phone/Fax: (07) 4069 6066
email: cooktown@cylc.org.au

Weipa Area Office
Evans Landing
PO Box 376
Weipa QLD 4874
Phone: (07) 4069 7484/385
Fax: (07) 4069 7341
email: weipa@cylc.org.au

Contact: **Meg McLoughlin**
Email: mmcloughlin@cylc.org.au

6 November 2009

Indigenous Heritage Law Reform
Heritage Division
Department of the Environment, Water, Heritage and the Arts
GPO Box 787
CANBERRA ACT 2601

By email: atsihpa@environment.gov.au

Attn: The Honorable Peter Garrett AM MP
Minister for the Environment, Heritage and the Arts

RE: INDIGENOUS HERITAGE LAW REFORM

We refer to the Review Paper by the Department of the Environment, Water, Heritage and the Arts in relation to the possible reforms to the legislative arrangements for protecting traditional areas and objects.

Cape York Land Council (CYLC) is an Aboriginal Corporation formed by the Cape York traditional owners in 1990 to advance the self determination of Aboriginal people in the Cape York Peninsula. We consult with traditional owners and represent their aspirations relating to management, use and ownership of Cape York Peninsula.

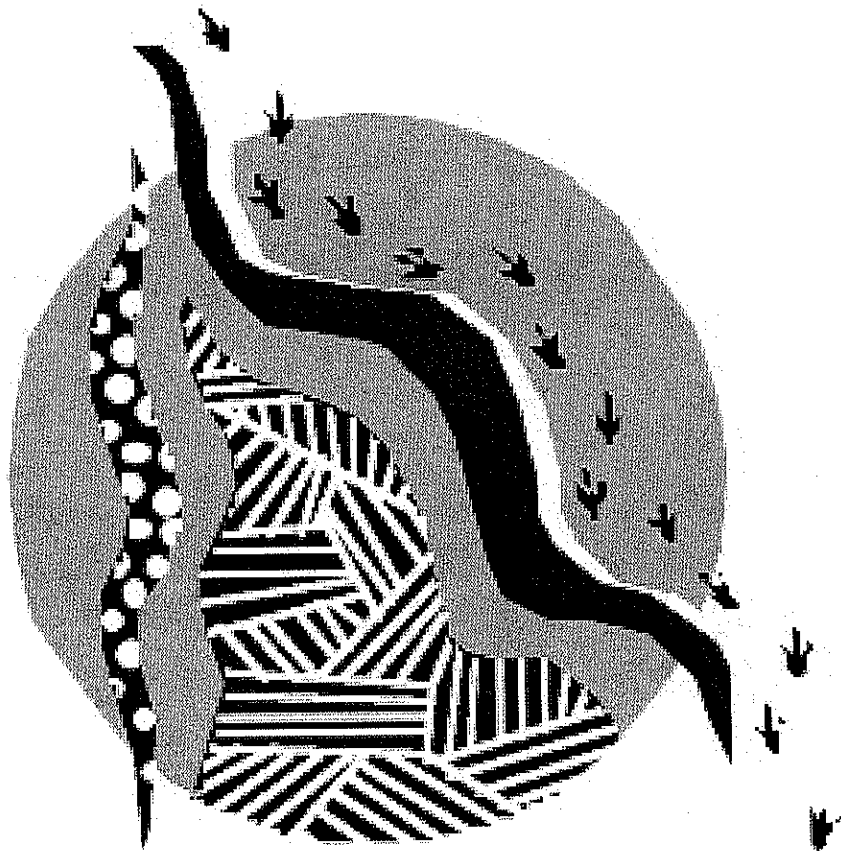
CYLC welcomes the opportunity to provide feedback on proposals for more effective laws to protect Indigenous areas and objects across Australia. We submit that Indigenous people continue to seek Indigenous ownership, Indigenous control, and blanket protection of their cultural heritage. We hope that the Honorable Minister Garrett AM MP will effectively incorporate the feedback of stakeholder submissions to improve the legislation as well as the knowledge and understanding of indigenous cultural heritage by the Australian public.

Traditional Owners from Cape York look forward to further engagement in the review process.

Yours faithfully,
CAPE YORK LAND COUNCIL

PETER CALLAGHAN
CHIEF EXECUTIVE OFFICER

The Cape York Land Council
Aboriginal Corporation



Indigenous Heritage Law Reform
Submission

Department of the Environment, Water, Heritage and
the Arts

CONTENTS

PAGE

Glossary of Terms	3
Cape York Land Council Submission	4
Proposal 1	8
Proposal 2	8
Proposal 3	8
Proposal 4	8
Proposal 5	9
Proposal 6	10
Proposal 7	10
Proposal 8	11
Proposal 9	11
Proposal 10	12
Proposal 11	13
Proposal 12	13
Proposal 13	13
Proposal 14	14
Proposal 15	15

GLOSSARY OF TERMS

CYLCAC	Cape York Land Council
DEWHA	Department of Environment, Water, Heritage and the Arts
DERM	Department of Environment and Resource Management
DEEWR	Department of Education, Employment and Workplace Relations
NTRB	Native Title Representative Body
NTSP	Native Title Service Provider
PBC	Prescribed Bodies Corporate
ATSI	Aboriginal and Torres Strait Islander
NTDA	Native Title Determination Application
NTA	<i>Native Title Act 1993</i>
ACHA	<i>Aboriginal Cultural Heritage Act 2003</i>
TSICHA	<i>Torres Strait Islander Cultural Heritage Act 2003</i>
ATSIHP	<i>Aboriginal and Torres Strait Islander Heritage Act 1984</i>
EPBC	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
CHS	Cultural Heritage Surveys
ICCPR	International Covenant on Civil and Political Rights
ICH Convention	Convention on Safeguarding of Intangible Cultural Heritage

INDIGENOUS HERITAGE LAW REFORM

SUBMISSION

Possible reforms to the legislative arrangement for protecting traditional areas and objects

Cape York Land Council

Introduction

Cape York Land Council (CYLC) welcomes the opportunity to comment on the federal government's proposals for more effective laws to protect indigenous traditional areas and objects across Australia.

CYLC is an Aboriginal Corporation formed by the Cape York traditional owners in 1990 to advance the self determination of Aboriginal people in the Cape York Peninsula. We consult with traditional owners and represent their aspirations relating to management, use and ownership of Cape York Peninsula.

For traditional owners from Cape York, culture and connection to country are inextricably linked. To adequately reflect this relationship, any strategy for the management of Aboriginal cultural heritage must be developed in close partnership with traditional owners, and recognize the primacy of traditional owners' rights under traditional law and custom to manage and protect cultural heritage that relates to their traditional country.

The protection and management of cultural heritage is seen by traditional owners in Cape York as an important aspect of the settlement of native title claims. Focusing on traditional ownership as the basis for cultural heritage management ensures that the management of cultural heritage is consistent with, and integrated into, a broader strategy for Aboriginal management of land and resources.

1. Problems with the current situation and improvements needed

CYLC has recently provided submissions to the Queensland Government regarding the *Aboriginal Cultural Heritage Act 2003 (ACHA)* and *Torres Strait Islander Cultural Heritage Act 2003 (TSICHA)*. This submission reflects some relevant concerns we have raised with the Department of Environment and Resource Management (DERM).¹

¹ Please refer to attachment "A"

CYLC submits that legislation and its reform only reflects part of the problem with the inefficacy of cultural heritage protection in Australia. There is a lack of understanding on the part of the public as well as the bureaucracy of indigenous peoples' connection to country, of native title rights and interests and spiritual "place" aspects of indigenous cultural heritage.

There is a strong need for community awareness supported by legislation. We believe that the DEWHA should work collaboratively with the Department of Education, Employment and Workplace Relations (DEEWR) to ensure that a basic understanding of indigenous cultural heritage is part of the Australian public school curriculum.

1.1 Inadequate emphasis on intangible cultural heritage

Traditional Owners from Cape York are concerned that the cultural heritage legislation in Australia has a strong emphasis on physical objects and not enough attention is given to understanding the connection of an Aboriginal person to his/her country (as compared to the European concept of land as a marketable commodity). We believe that the non physical aspects of cultural heritage may be more significant in many respects than the physical aspects, and this needs to be addressed in the State and federal legislation.

These *non physical* concerns are wide in range and include recognition and respect in the following situations (which are not exhaustive):-

- (a) acknowledging a traditional owner of a particular area and paying them due respect by asking them for their permission to go on their country and explaining why there is a need to go on country and what is proposed to be done there;
- (b) women (whether Aboriginal or not) not going into areas where they are forbidden to go;
- (c) men (whether Aboriginal or not) not going into areas where they are forbidden to go;
- (d) people who are not entitled to do so going into forbidden areas (such as sacred areas, burial grounds and bora grounds²);
- (e) the concern which Aboriginal people have for those who ignore the restriction on going to certain areas according to traditional law and custom and their belief that those people will suffer sickness or other ill fortune in consequence;
- (f) the fear that Aboriginal people have that if they do not prevent others going into restricted areas they (the Aboriginal people) will suffer sickness or other ill fortune for not preventing the access; and
- (g) Showing respect for totems which are attached to particular groups or country (which will vary according to different groups and regions, and which will require consultation with the group in question to ascertain what demonstrating respect requires).

1.2 Problems with the Native Title Act (NTA) future acts regime

² Areas where initiation ceremonies are conducted

CYLC appreciates that 'the simple, practical fact is that state governments, not the Commonwealth, issue exploration permits and regulate mining, land subdivision, town planning, pastoral and agricultural activities likely to impinge on indigenous heritage sites or physical objects. Any successful legislation must engage the states and their agencies in comprehensive and workable processes.'³

Currently, the system operates whereby developers search:

- Any registered Native Title Determination Application (NTDA) Area or determined native title area (which trigger the NTA future act regime); and
- Any cultural heritage registered sites/objects on the cultural heritage register

CYLC is concerned that there are no incentives to conduct further searches or consultations for prospective developers. If developers do not find any results in these searches, they are unlikely to have access to any further sources of information regarding cultural heritage in an area which is not subject to a native title claim or determination. There is clearly a need for protection beyond the rights conferred by the future act regime and for the searches not to be limited to areas subject to registered native title claims and determinations.

An appropriate scheme would:-

- Require a "cultural heritage sign-off" before an area can be accessed by a development proponent;
- Require face-to-face consultation with the appropriate traditional owner group/s for an area (based on information provided by the relevant native title representative body). The group(s) would then provide advice about where to go, what cultural sites exist, who to consult with regarding men's & women's places, protocols for accessing certain areas, etc;
- Ensure that the process was repeated when any works were undertaken.

Government and business may be concerned that traditional owners will try and stop development. If traditional owners are not properly consulted and advised about the need for particular development, and their views are not accorded respect, then the risk of objection is significant. If traditional owners are brought into the process, and their role as traditional custodians of their respective areas is acknowledged, then accommodation is much more likely. This includes respect for a group's cultural heritage (tangible and intangible), whether in a native title determined area or claim or otherwise.

1.3 Review Process

³ *Aboriginal and Torres Strait Islander Heritage Protection Bill 1998*, Second reading speech, November 22 1999

Whilst noting the significance of this review, we have concerns about the review process:

- there is no funding provided for the consultation process, so that the ability of Indigenous people to have input is extremely limited;
- the timeframes for review are too short

Despite the intention of CYLC to facilitate input from a broad range of stakeholders through our networks, we have met with funding restrictions regarding the consultation process.

CYLC submissions:

In order to engage effectively with communities on Cape York who are affected by the Aboriginal and Torres Strait Islander Heritage Protection Act (ATSHP) and its possible amendments, the Commonwealth should provide funds for adequate *on country* consultative meetings which factor into consideration the travel and time costs associated with partaking in such meetings for traditional owners.

- We believe that it is crucial the Commonwealth meet with all native title service providers (NTSP) and representative bodies (NTRB) to further discuss, negotiate and workshop the proposed reforms.
- If this reform process is to be seriously considered by traditional owners, adequate and appropriate timelines need to be written [with input from NTRBs & NTSPs] to properly achieve appropriate and equal outcomes for all parties involved.

1.4 Outstanding Issues

- There is a lack of understanding on the part of the bureaucracy in terms of what cultural heritage actually means to Indigenous people. Further, we submit that there is:
 - a lack of courtesy on the part of the government and bureaucracy, who do not take the time to sit down and listen to knowledgeable Indigenous people;
 - a resulting lack of trust on the part of Indigenous people in providing relevant information to government representatives;
 - Insufficient education and awareness amongst Indigenous people about the legislation

PROPOSAL 1: Clarifying the purpose of the legislation

CYLC submits that the points identified in Proposal 1 generally express the purpose of the legislation but that the implication of the principles *in reality* is a concern of traditional owners.

- **Indigenous people continue to seek Indigenous ownership, Indigenous control, and blanket protection of their cultural heritage**
- The cultural and natural heritage rights of Indigenous people are described and enshrined in the following international conventions and declarations:
 - *The International Covenant on Civil and Political Rights (ICCPR)*
 - *The UN Declaration of the Rights of Indigenous Peoples*
 - *The Convention on the Safeguarding of Intangible Cultural Heritage (ICH Convention)*
 - *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*

All these conventions recognise the rights of Aboriginal Peoples to own their **cultural and natural heritage**. Australia has ratified each of these conventions, and therefore has agreed to be bound to the principles set out in them. Failing to formulate a comprehensive and robust cultural heritage framework constitutes a failure to adhere to our voluntarily entered into international obligations.

PROPOSAL 2: Making Terminology consistent with the purposes

- We submit that the definitions and terminology used must be specifically aligned with Aboriginal law and custom and that thorough consultation with a range of indigenous groups should occur before finalising any terms

PROPOSAL 3: Promoting effective laws through accreditation

CYLC agrees that accreditation processes have the potential to promote higher standards of protection. These standards must be coupled with practical on-the-ground implementation. In Queensland, the principles of the legislation⁴ are relatively sound but the legislation itself does not operate to meet those principles in reality.

There is a need for protection to be determined as early as possible in order to negotiate fairly and agree on protection.

We also submit that there is a need to have compulsory education as part of school curricula for a State to be accredited.

PROPOSAL 4: The proposed standards for accrediting state and territory laws

These standards are generally broad and allow for various interpretations. CYLC particularly notes the following:

⁴ *Aboriginal Cultural Heritage Act 2003 and Torres Strait Islander Cultural Heritage Act 2003*

- (5) “Indigenous personal remains” needs defining to include anything that represents or constitutes a part of the human body and secret sacred objects i.e.: body hair, human digits (toes & fingers), finger & toe nails, tooth/teeth, bones, internal organs (heart, brain, liver, etc.);
- (6)(a) the reference to penalties for causing adverse impact on traditional areas or objects should also include compensation payable to the Traditional Owner Group/s;
- (6)(b) refers to the need for repair provisions but we note that some damage is difficult to repair, or irreparable’ which encourages the need for a tighter, robust and official process;
- (7) the “note” refers to “any indigenous Australians who have responsibility for an area or object under traditional law and customs or who “know” the traditional laws and customs applying to that area or object: CYLC is concerned that this definition does not correspond with aboriginal law and custom as it does not acknowledge the necessity of indigenous people to have a *right* to speak for country’
- (9) refers to providing for arbitration when agreements are not possible, but the practical elements of this proposal are far-reaching: funding; responsibility; scope for mediation in the first instance;
- (14) the exemptions in this section are too broad ;
- (15)(b) (iii) the likely effect of giving or withholding approval on: “the cultural, social, economic and environmental welfare of the community” are very broad and undefined in the proposal;
- (18) the suggestion that the “laws must require the state or territory to maintain records of (a) the locations and physical description of traditional areas and objects in standard 1, where known,” is very restrictive and in some instances this would not abide by indigenous law and custom;
- (20) whilst the opportunity for legal reviews is noted, federal government policy needs to reflect this with appropriate assistance and funding

PROPOSAL 5: Ensuring that, if legally recognised traditional custodians exist, only they can seek Commonwealth protection

- CYLC submits that only Traditional Owners for particular country can speak for that country and in most cases the speaker is speaking on behalf of the Elders and the Traditional Owner group; Neighbouring tribes/individuals/groups do not have the right to speak for that country/area
- The Commonwealth should seek information from the appropriate Traditional Owners through NTRBs or NTS’ who have the knowledge, experience and skills to know the rightful Traditional Owners for the country, area or object
- The Native Title process (as it stands) is not the most reliable source of accurate records. The public government database often contains names of deceased people as a contact person for a group (which is highly offensive for Indigenous people)

- Neighbouring Indigenous parties should consult with the rightful Traditional Owners for that object, area, country regarding a joint heritage protection application. They would not have the right to apply for a heritage protection application on their own, but may do so jointly in agreeance
- We note that Prescribed Bodies Corporate (PBCs) are proposed as the appropriate bodies to apply for Commonwealth heritage protection (with assistance from NTRBs). However, CYLC is concerned with the notion of PBCs being the **only** eligible applicants where a Native Title determination has been made. We appreciate that there is a reluctance to interfere with valid traditional decision-making. However:
 - Not all native title holders for an area will be members of the PBC;
 - Many PBCs have insufficient funding and resources at the present time, and may well simply not have the capacity to be able to pursue a proper decision-making process either at all, or within applicable time limits. There is no indication that this position is likely to change in the foreseeable future;
 - There may not be a PBC in existence - sometimes there is a gap between the date of the determination and the appointment of the PBC, or the PBC may be removed (for example, if it becomes insolvent); and
 - There is a possibility that the PBC might be the development proponent or otherwise support the proposed development, in circumstances where an appropriate traditional decision-making process has not been followed;

We therefore suggest that provision should be made for the PBC “or other representative of the common law holders” to be able to apply for Commonwealth protection. This would, for example, enable an NTRB to make an application on behalf of the native title holders in circumstances where a PBC was unable to respond within the relevant timeframes.

PROPOSAL 6: Ensuring that Commonwealth protection would not prevent an act authorized under a registered indigenous land use agreement

CYLC submits that this proposal depends on whether the rightful Traditional Owners agree to the lodgement of the application. The department would need to consult with the Traditional Owners to ascertain whether they agree to the lodgement of a stop application/s to be assessed or considered. Alternatively, the Traditional Owner group might have knowledge of the activity and/or a verbal agreement in place with the other party.

PROPOSAL 7: Removing duplication of state and territory protection for indigenous remains

- The current processes are not particularly operable i.e.: notification of discovery, contacting relevant Traditional Owner group, investigating

the discovery, reporting/documenting the discovery and compliance procedures

- Generally, by the time discoveries are found and damage is reported to the relevant department the damage is irreparable and may have created disharmony and sorrow within the Indigenous community
- The reporting and compliance process has to be reviewed and regionalised for local representatives to work closely and with Traditional Owners to stop vandalising, damage, destruction of Indigenous heritage, sites, objects, traditions and customs
- Traditional Owners should report the discovery of any damage to the Minister's office/department, and then lodge a report with the Police. Investigations carried out by the Police must be with the rightful Traditional Owners and Department representatives

PROPOSAL 8: Addressing gaps in state and territory laws to ensure respectful treatment of indigenous secret sacred objects and remains

- Public display of secret sacred objects or personal remains should be prohibited unless prior approval is given from the rightful Traditional Owners of that object or personal remains
- We submit that the definition of "indigenous personal remains" must include anything that represents or constitutes a part of the human body and secret sacred objects i.e.: body hair, human digits (toes & fingers), finger & toe nails, tooth/teeth, bones, internal organs (heart, brain, liver, etc.) and items associated to that object or personal remains i.e.: King Plate, spear, axe, shield, headdress, neckwear, clothing and etc

PROPOSAL 9: Specifying the information needed for applications for protection

- We appreciate that the department acknowledges there is a low success rate of applications and the urgent need for better clarification about the legislation
- We are also concerned that there is limited scope for adequate and appropriate resources/ assistance or funding/transport/ for the proposed applications
- A lack of access to support and resources does not encourage active participation from traditional owners
- CYLC submits that the information proposed for applications for protection may be too culturally onerous for traditional owners. In many instances, details cannot be written or even provided about the reasons to protect certain areas or objects. This is particularly relevant for the draft proposal "traditional laws and custom"
- State and federal departments need to develop their understanding of processes in relation to communication, liaison and consultation with Indigenous Australians.
- Formalising the application process and the each procedural step in this process would be an advantageous, minimise confusion for

Traditional Owners. If properly explained to the appropriate traditional owners, this would also broaden their knowledge and understanding of the legislation, obligations and requirements

PROPOSAL 10: Using conferences to consider how best to deal with the issues

- Indigenous Persons [other than applicant] should be clearly defined/listed/approved by the relevant Traditional Owner Group
- Conferences will not be operable via teleconferences, videoconferencing and/or other electronic media; Traditional Owners will need to travel to the nearest major town and/or relevant parties travel to the appropriate community
- If either applicant or person who is proposing to carry out the activity cannot attend the conference, [for good reason] the conference should not go ahead
- Conferences should be viewed as an aide to the process of achieving a resolution and not perceived as the quickest way to resolving issues
- Discussions regarding confidential and sensitive issues should be approached and discussed in a sensitive and culturally appropriate manner to achieve a resolution
- CYLC has the following outstanding questions relating to the use of conferences:
 - *Who supports Traditional Owners to seek and obtain professional advice and services for costs incurred prior, during and after the conference i.e.: legal, facilitation, mediation etc?*
 - *How much time and notice is given to let people know to register their interests i.e.: NT rights and interests, legal interests and/or their interests are affected in some way*
 - *Who facilitates/convenes these conferences and what culturally appropriate processes are in place for the Traditional Owners to actively participate in the conference i.e.: women talking to women, men to men, formal/informal setting, explanation of processes, Indigenous mediator/facilitator*

PROPOSAL 11: Protecting sensitive information

- Cape York Traditional Owners generally do not trust information regarding their cultural heritage to be uploaded onto public databases for fear of misuse of information
- Traditional Owners should not have to divulge culturally sensitive, confidential or personal information; it must be acceptable that Traditional Owner's do not reveal certain aspects relating to areas, objects, country and items that cannot be explained either verbally or in the written form i.e.: No Go Areas, Culturally Sensitive Information, Stories that cannot be spoken

- Traditional owners are concerned with the level of power that is attributed to the Minister, namely that there is no certainty that the current Minister is educated on Aboriginal and Torres Strait Islander (ATSI) culture, traditions and way of life. Also, the Minister's gender will affect his/her position to assess information regarding some places, stories or objects

PROPOSAL 12: Clarifying the reasons for providing and revoking interim protection

- A Short-Term Protection Order should be implemented or at least investigated upon verbal recognition of the need for protection
- 48 hours is not enough time to prepare an application - considering that Cape York is remote and the wet season creates difficulty for travel; lack of resources; and that traditional owners will require assistance to write their Application for submission
- The requirements for a valid Application need to be clearly stated and explained prior to lodgement with the department i.e.: process, legislation, timeframes, requirements, technical, scientific and environmental advice
- the Minister must consider the traditional implications and threats to Traditional Owners law and customs, health, environment, well-being and spirituality
- Consultation required before a Protection Order is issued should include: wider Traditional Owner Group, wider community (indigenous and/or non-indigenous), key Indigenous organisations: NTRBs, Councils, Local Governments

PROPOSAL 13: Clarifying the reasons for providing and revoking longer-term protection

- A draft Statement of Facts should be circulated between the relevant parties for their comments but should not be released as a Public Document as the information/details can create confusion and be misinterpreted
- Confidential cultural information given out or discussed at meetings with other relevant parties could cause inter-tribal disharmony and/or problems within the Traditional Owner group. This is particularly the case if the information is used disrespectfully or to used to advance one party's agenda
- The Minister should take into consideration the verbal aspect of receiving information from Traditional Owners. In some cases, verbal information cannot be written down or recorded due to a groups' custom and may not be able to be entered into the Statement of Facts
- Notification requirements should be sent or forwarded to the Future Acts Units within the NTRBs or NTS' so staff could contact the relevant or rightful Traditional Owner's or Group regarding this process.

CYLC has the following outstanding questions relating to this proposal:

- *Will the independent advisor have demonstrated understanding and awareness of Aboriginal traditions, culture, history, lore, customs, well-being, spirituality, health and environment?*
- *How informed will the independent advisor be on the Application?*
- *What are the required outcome, process and timeline for the independent advisor?*
- *Where else can the Applicant or Traditional Owner's go if the decision that the Minister made at his discretion is not a favourable decision? i.e.: Ombudsman*

PROPOSAL 14: Updating the penalties and improving the enforcement powers

- Currently, Traditional Owners do not receive any compensation to assist them to repair damage to their heritage and sites; Compensation needs to be addressed in the legislation
- The monitoring responsibility should be with DERM/DEWHA and not be the legal responsibility of the Executive Officer's of corporations and landholders. The organisations and landholders do not have the resources to monitor the applicant
- A timeline of the compliance & legal procedures and consequences should be properly explained to all parties involved in the Application i.e.: Traditional Owners, local Councils, key organisations
- Initial Cultural Heritage Surveys (CHS) could be used to alleviate the issue of ignorance: CHS' can initially be used to inform people where they can and can't go, what they can and can't do and who to talk to
- Penalties, breaches, court costs etc. can be avoided if proper compliance and CHS' are done;
- Any Police or inspectors must be in the company of Traditional Owners when they are investigating the damaged heritage site, area, object etc.
- CYLC submits the following preferred methods of promoting compliance and enforced protection:
 - Proper and thorough consultation/liaison with all parties
 - Timeline of compliance and enforcement process/procedures
 - Better awareness of penalties, breaches, criminal offences, compensation
 - Better awareness of Indigenous culture, traditions, way of life, customs i.e.: cultural awareness
 - Better awareness of relevant legislation i.e.: Environment Protection and Biodiversity Conservation Act
 - EPBC, ATSIHP, Criminal Code

- More resources (staff) to monitor, manage, oversee the gap within the compliance process/procedure

PROPOSAL 15: Reviewing the effectiveness of the legislation at regular intervals

- The department should consider reviewing the legislation within 3 years then at ten year intervals
- As noted, more thorough consultation is required as per our submissions on page 4

Aboriginal Cultural Heritage Act 2003 Review

Cape York Land Council

3/6/2009

Submission to the Minister of the Department of Natural Resources and Water on the efficacy and efficiency of the Aboriginal Cultural Heritage Act 2003.

Introduction

Cape York Land Council (CYLC) understands that the Indigenous Cultural Heritage Act review is being undertaken by the Department of Natural Resources and Water (NRW) and will examine the efficacy and efficiency of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003*. This submission reviews the Aboriginal Cultural Heritage Act (ACHA) in terms of its fulfillment of its purpose to provide effective recognition, protection and conservation of Aboriginal cultural heritage.

1. Review Process

CYLC's Chairman Michael Ross and CEO Peter Callaghan are members of the Consultative Committee, whose role is to assist in the consultation process by facilitating a broad range of stakeholders through CYLC's networks, as well as to provide advice as to how best to engage with people who work with, or are affected by this legislation.

At a meeting with Dr Evelyne Meier and Jim Hill in November 2008, we expressed our concerns about the review process for the Indigenous Cultural Heritage Act, noting that:

- there is no funding provided for the consultation process, so that the ability of Indigenous people to have input is extremely limited;
- the timeframes for review are far too short and do not take into account cultural timeframes for Indigenous people, nor the wet season in North Queensland;
- The consultative committee meetings are ill-timed, with the first Committee meeting held on 17 September 2008, and a second meeting not proposed until March 2009, which is *after* the closing date for submissions.

Despite the intention of CYLC to facilitate input from a broad range of stakeholders through our networks, we have met with funding restrictions regarding the consultation process.

CYLC submissions:-

In order to engage effectively with communities on Cape York who are affected by the *Aboriginal Cultural Heritage Act* (ACHA) and its possible amendments, the State needs to provide funds for adequate *on country* consultative meetings which factor into consideration the travel and time costs associated with partaking in such meetings for traditional owners.

2. Definition of "cultural heritage"

While the definition is broad in terms of its coverage of the *tangible* aspects of cultural heritage, there are also *intangible* aspects of cultural heritage which aren't covered by the definition.

CYLC submissions:-

CYLC submits that the ACHA has a strong emphasis on physical objects and not enough attention is given to understanding the connection of an Aboriginal person to his/her country (as compared to the European concept of land as a marketable commodity). We believe that the non physical aspects of cultural heritage may be more significant in many respects than the physical aspects, and this needs to be addressed in the legislation.

These *non physical* concerns are wide in range and include recognition and respect in such areas as:-

- (a) not going onto someone's country without paying that person the recognition, respect and politeness of asking his/her permission and explaining why you wish to go there and what you propose to do there;
- (b) women (whether Aboriginal or not) not going into areas where they are forbidden to go;
- (c) men (whether Aboriginal or not) not going into areas where they are forbidden to go;
- (d) people who are not entitled to do so going into forbidden areas (such as sacred areas, burial grounds and bora grounds) either per se or without the appropriate formalities;
- (e) the concern which Aboriginal people have for those who ignore the "No Go" prescriptions and their belief that those people will suffer sickness or other ill fortune in consequence;
- (f) the fear that Aboriginal people have that if they do not prevent others going into some "No Go" areas they (the Aboriginal people) will suffer sickness or other ill fortune for not preventing the access; and
- (g) Showing respect for totems which are attached to particular groups or country

3. Principles of the Act

While the principles set out in the ACHA are sound, the legislation does not operate to meet those principles in reality. Indigenous people continue to seek Indigenous ownership, Indigenous control, and blanket protection of their cultural heritage.

The cultural and natural heritage rights of Indigenous people are described and enshrined in the following international conventions and declarations:

- *The International Covenant on Civil and Political Rights (ICCPR)*
- *The UN Declaration of the Rights of Indigenous Peoples*
- *The Convention on the Safeguarding of Intangible Cultural Heritage (ICH Convention)*
- *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*

All these conventions recognise the rights of Aboriginal Peoples to own their cultural and natural heritage.

CYLC submissions:-

CYLC submits that the following key problems with the legislation are outstanding:

(1) A lack of understanding on the part of the bureaucracy in terms of what cultural heritage actually means to Indigenous people. This approach is entrenched by the Duty of Care Guidelines.

Examples:

- I. 2.2 of the Guidelines provides that ‘it is unlikely that Aboriginal cultural heritage will be harmed where (a) the current or proposed activity is on an area previously subject to significant ground disturbance’;
- II. 4.1 provides ‘where an activity involves no Surface Disturbance of an area it is generally unlikely that the activity will harm Aboriginal cultural heritage’;
- III. 4.3 includes as activities that can occur without further cultural assessment - walking, driving on existing roads and tracks, surveys which do not cause surface disturbance and photography.

We submit that these are all inappropriate assumptions to make as cultural heritage may well be affected in those circumstances.

(2) Further, we submit that there is:

- a lack of courtesy on the part of the Government and bureaucracy, who do not take the time to sit down and listen to knowledgeable Indigenous people;
- a resulting lack of trust on the part of Indigenous people in providing relevant information to government representatives;
- Insufficient education and awareness amongst Indigenous people about the legislation.

(3) CYLC believes that a new system should be developed, as the current scheme fails to provide even basic protections to many aspects of cultural heritage. A more appropriate scheme would:-

- require a “cultural heritage sign-off” before an area can be accessed by a development proponent;
- require face-to-face consultation with the appropriate group/s for an area (based on information provided by the relevant NTRB). The groups would then provide advice about where to go/what cultural sites exist/who to see in relation to men’s & women’s places/protocols for accessing certain areas, etc;
- ensure that the process was repeated when clearing/excavation was to occur.

4. Ownership, custodianship and possession of Indigenous Cultural Heritage

Review Paper Questions:-

- *Has the legislation worked to ensure all human remains and sacred objects held by Qld Govt are controlled and protected by owners?*
- *Has Qld Museum’s authority to accept custody worked to protect CH?*

CYLC submissions:-

- Key requirements noted during the original consultations before the ACHA was enacted were that Indigenous people's ownership of cultural heritage should be recognised; and that they should be placed in a position where they can do whatever is necessary to protect their cultural heritage. The ACHA does not go far enough in terms of either ownership or powers;
- There are many areas or objects of significance which are not accessible to Traditional Owners under the ACHA - e.g. areas and objects lawfully obtained by others prior to that date. An example is a significant site in Eastern Kuku-Yalanji country, which is currently ordinary freehold. Following the commencement of the ACHA, EKY People attempted to negotiate with the landholder for protection of the area but were unsuccessful in their efforts, apart from writing to advise the landholder of the existence of the area and that a duty of care applied;
- Additionally, as noted above, the ACHA does not extend to "non-physical" aspects of cultural heritage;
- It is submitted that the focus of the ACHA (which is currently based on Traditional Owners having to respond to development proposals if they are aware of them, and if they can demonstrate that cultural heritage places or objects exist, which often requires funding and/or resources that they don't have) should be changed so that development proponents are required to engage with Traditional Owners at an early stage of the process, to assist them with determining whose country is involved and with whom they should speak, to seek the permission of the relevant Traditional Owners to come onto country, and to identify what steps are necessary to ensure that all cultural heritage issues are taken into account.

5. Protection of Indigenous cultural heritage

Review Paper Questions:-

- Has duty of care worked to protect Cultural Heritage?;
- Have duty-of-care guidelines provided clarity and assisted with compliance?;
- Has legislation achieved objective of enabling Aboriginal and Torres Strait Islander people to have control over secret or sacred information?;
- Have stop orders, court orders re rehab, ministerial powers been effective in averting and repairing damage?

CYLC submissions:-

- CYLC does not know and has sought information from DNRW about how many successful prosecutions there have been under the ACHA, and how many Stop Orders have been given. Nor does the Review Paper provide any information. The submissions below are therefore made with that proviso;
- s.23(3) deems compliance with the duty of care if a person is acting under a native title agreement or another agreement with an Aboriginal party, unless Aboriginal cultural heritage is expressly excluded from the agreement. We submit that this

provision should be removed, and replaced with a provision for deemed compliance where a Native Title agreement specifically states that cultural heritage has been assessed. There is a risk that Traditional Owners could sign up to agreements without being aware of the legislative requirements;

- Additionally, CYLC's experience has been that development proponents can use Native Title negotiations to exert unfair pressure on Traditional Owner groups to sign up to inadequate cultural heritage processes (for example, by requiring an ILUA which purports to contain a Cultural Heritage Management Plan, before consent is provided for a Native Title determination). It is very likely that activities will be conducted in the future under the guise of such agreements, resulting in damage to cultural heritage;
- It is difficult to see the system working adequately unless and until government and development representatives are willing to show the courtesy of sitting down and listening to knowledgeable Indigenous people about what things are important to them and what things concern them;
- A minimum standard for any activity in categories 2-5 should require a search of the Register and database, and appropriate consultation with the NTRB for that area.

6. Native title parties, Indigenous parties and CH bodies

Review Paper Questions:-

- Has the definition of ATSI parties ensured appropriate people are identified?
- Do CH bodies assist with identification of ATSI parties?

CYLC submissions:-

Directly linking cultural heritage with native title in legislative processes creates significant practical problems.

In Cape York, Traditional Owner groups assert the existence of native title for all of their traditional country, unless and until it is established that native title has been extinguished, and whether or not there is a native title claim on foot. Even where native title has been or is likely to have been extinguished, it is very likely that cultural heritage will continue to exist. The existence of a native title claim is therefore often irrelevant to the issue of protecting cultural heritage.

The Cultural Heritage system must be separated from the Native Title claim process:-

- Practical problems have arisen under s.34(1)(b)(i), which provides that the Native Title Party for an area is a person who **was** a registered native title claimant, but whose claim has failed, when there is no other Registered Native Title Claimant or Native Title Holders for the area. This means that someone with no or a weak claim to Native

Title (as a result of which their claim is removed from the system), can continue to have status for cultural heritage purposes unless and until another Native Title claim is lodged over the area. We submit that that there should **not** be a nexus between native title claims and cultural heritage processes unless there is a Registered Native Title Body Corporate for the area, and at the very least, not where the claim has been withdrawn or struck out;

- Similarly, under s.36, the Minister cannot register a corporation as an Aboriginal Cultural Heritage Body if there is currently another corporation so registered (noting that the Minister can cancel registration if no longer satisfied with the registration). This can create practical problems where an inappropriate corporation is registered.

CYLC also queries the requirement for a corporation, and suggests that funding could instead be directed towards NTRBs to assist with identification of the relevant Traditional Owners.

7. Indigenous cultural heritage databases

Review Paper Questions:-

- If you have requested info, how efficient and effective was the process?
- How useful has the information been?

CYLC submissions:-

- CYLC submits that the database and registry systems of the ACHA do not work effectively. We believe that less than 1% of existing cultural heritage for Cape York would be listed on the register at present.
- Decisions about entry of information onto the database or register are made by non-Indigenous government representatives, as well as what/to whom information is released.
- Many Aboriginal people are distrustful of officialdom and of placing details of their special places on a public record. Their concerns are largely derived from experiences such as people coming in large numbers to rock art and other sites who show little respect and leave their rubbish and vandalism behind them, and people purloining their stories and publishing them in a manner or place from which they profit and the Traditional Owners get nothing other than the bad experience.
- The public registers are known to contain only a small fraction of the detail that needs to be known and a system needs to be developed whereby provision is made and funding provided for each Group to be able to record its own material and develop a list of contact persons for a given area. Proponents of any entry onto or use of the land would be required to consult with those contacts to develop a plan or program that affords requisite protection of the cultural heritage asset.

8. Indigenous Cultural Heritage registers

Review Paper Questions:-

- If you have requested information, how efficient and effective was the process?
- How useful has the information been?
- Have the registers been useful as a planning and research tool?

CYLC submissions - see comments above under database heading. Also:

- As with the database, there are concerns about decisions being made by non-Indigenous government representatives as to what gets on to the register, and what/to whom info is released;
- As for the database, there are concerns about the willingness of Indigenous people to provide information that will be publicly released;
- We also have concerns about information on the register being publicly available - noting that there may well be issues about the accuracy or adequacy of the information, based on the concerns set out below regarding the processes for involvement in studies and Cultural Heritage Management Plans, and appeal processes.
- CYLC is concerned that too much power is accorded to the chief executive to make a decision about cultural 'significance' and whether to record cultural significance information. This could allow instances where the findings of the cultural heritage study are inconsistent with anthropological, bio-geographical, historical and archaeological information and the question of whether to register the study on the basis of its 'authoritative status' is a subjective one for the chief executive alone.

Such a process is inconsistent with the definitions of significant Aboriginal areas and objects, which provide for the Aboriginal party to determine what is and is not significant. The expansive definitions provided by those sections (sections 8-10) are undermined if the chief executive makes the final determination. CYLC believes that Indigenous cultural value must be determined through a process of self-evaluation.

- We are also concerned with the limits of the register as a form of fulfilling a duty of care without engagement with the relevant Aboriginal parties.
- The ACHA has the effect of directing disputes about the registration of culturally significant sites to the Land Court. In this instance, Aboriginal people are confronted with an adversarial process where time, skills and resources are needed to defend their cultural rights. Once again, the legislation fails to provide the funding necessary for Traditional Owners to respond to these statutory mechanisms. We are further concerned that The Land Court does not make a decision and rather makes recommendations to the Minister.

9. Cultural Heritage Studies

Review Paper Questions:-

- Has a cultural heritage study helped in accurate assessment of Aboriginal and Torres Strait Islander cultural heritage?;
- How effective is the legislation in ensuring both proponents and Aboriginal and Torres Strait Islander people can make meaningful contributions to cultural heritage studies?

CYLC submissions:-

- We submit that it is inappropriate that final decisions about what is significant in terms of cultural heritage are made by the Minister, and that the Land Court's decision is not final, but merely a recommendation to the Minister. It is vital for Aboriginal and Torres Strait Islander people to be involved in these processes in practice. For example, there are restrictions in funding available for the purpose, as well as time limits for notice of a desire to take part. Further, if the deadline is missed, it is not possible to appeal a decision for information to be placed on the register (or for the information not to be registered).
- S53(2) states that Aboriginal parties are responsible for assessing the level of significance of areas and objects included in the study area, and that an Aboriginal party may take part in a cultural heritage study, by giving written notice to a sponsor within a period of 30 days. This timeframe is unworkable, particularly where there are no registered native title claimants or native title body corporate to facilitate a response.

CYLC recommends that the time frame for a response to a cultural heritage study should at least equate with the period specified in the *Native Title Act 1993* (Cth) and be extended to four months. Notification by the Department of NRW of the intention to carry out a study to NTRBs is also paramount to enable assistance with responses within the timeframe (note funding restrictions for cultural heritage issues).

10. Cultural Heritage Management Plans

Review Paper Questions:-

- Have Cultural Heritage Management Plan guidelines been helpful in developing Cultural Heritage Management Plans?
- To what extent do Cultural Heritage Management Plans provide timely and efficient process for management of activities?

CYLC submissions:-

- We consider it inappropriate that final decisions on the adequacy of Cultural Heritage Management Plans are made by the Minister. We hold the same concerns regarding processes and appeals as we have noted for cultural heritage studies above.
- Again, we submit that the 30 day period within which to respond is inadequate, given the lack of support provided to Traditional Owners to respond to such notices and the repercussions they may face for failing to respond. CYLC recommends that the State reassess indigenous involvement in Cultural Heritage Management Plans, in order to legitimize its concerns about cultural heritage protection. We suggest that a time period of 4 months to respond be instituted, in line with the *Native Title Act 1993*.
- A further concern is that the sponsor and the endorsed parties are required to negotiate how the proposed project can be managed in a way that avoids or minimises harm to indigenous cultural heritage (sections 102-103). This method again promotes negotiation of the study directly between the endorsed Aboriginal parties and the sponsor. Traditional Owners require advice from anthropologists and lawyers in drawing up the agreement, in order to properly negotiate the terms and conditions including payments for a study. We are supportive of the ability of NTRBs to provide such assistance by utilising in-house anthropological and legal staff. However, NTRBs are not currently funded to provide assistance with cultural heritage issues and therefore are unable to assist Traditional Owners in matters of this regard.

11. Investigation and enforcement

Review Paper Question:-

- Have investigation and enforcement powers been effective to protect Aboriginal and Torres Strait Islander cultural heritage?

CYLC submission:-

We are unaware of the way in which investigative and enforcement powers have been used. No information about these aspects has been provided as part of the review.

12. Aboriginal Parties

CYLC submissions

Section 34 defines a Native Title party as including a person who at the time of commencement of the Act was a registered native title claimant for the area if one of three items is satisfied. These include circumstances when a person's claim has 'failed' but there is 'no other registered claim over the area and there is not, and never has been, a native title holder for the area (Section 34(1)).

If there is neither a registered Native Title Claimant or a registered Native Title Body Corporate, then a person can be an Aboriginal party for the area if that person is an Aboriginal person with particular knowledge about traditions, observances, customs or beliefs associated with the area, and the person has responsibility under Aboriginal tradition for some or all of the area or for significant objects located in or originating in the area or is a member of a family or group that is recognised as having responsibility under Aboriginal tradition for the some or all of the area (section 35

CYLC has concerns that the expression ‘failed’ is not defined within the ACHA. The term is discretionary, and may include: claims that have failed on the merits after trial (i.e. a determination that the Applicants are not the Traditional Owners for the region); a claim that have been struck out; or a claim that has been voluntarily withdrawn.

CYLC is aware of a number of ill-founded native title claims which have been struck out by the Court, where the claimants continue to hold the status of “Native Title Parties.” In reviewing the submissions, we submit that the Minister should consider removing s 34(1)(b)(i).

13. Aboriginal Cultural Heritage Bodies:

CYLC submissions

NTRBs have a statutory duty to research and identify Aboriginal persons in the area. It follows that NTRBs are an obvious choice as a potential Aboriginal heritage body under the Act.

NTRBs are also ideally placed to administer many operational aspects of an indigenous cultural heritage regime as they already have in place:

- an established network with traditional owners;
- existing level of expertise in relevant technical areas;
- established relationships with government agencies, industry bodies and the private sector; and
- the ability, with appropriate resourcing, to produce cost effective outcomes efficiently in the practical application of cultural heritage legislation.

CYLC supports the proposal for the appointment of NTRBs as Aboriginal cultural heritage bodies for their respective areas, and for funding to be provided by the State for them to carry out the extra notification burdens that would be placed on them by this system.

14. Relationship with Planning and Land Use Legislation

CYLC submissions:-

There should be integration of Aboriginal cultural heritage issues with planning and development processes from the earliest stage, to enable timely identification of Aboriginal cultural heritage and consideration of its protection in the development of the application process.

CYLC supports the proposal that a proponent should in all circumstances, search both the database and register to ascertain the existence of any registered Aboriginal cultural heritage in the area concerned and consult with the Aboriginal Party for the area. Consultations with Aboriginal parties would commence with Aboriginal parties once the relevant NTRB for the area had been notified and they had in turn, made contact with the relevant Traditional Owner group for the area concerned.

Conclusions

CYLC appreciates the opportunity to participate in this consultation and looks forward to ongoing engagement with NRW about the efficacy and efficiency of the legislation. CYLC hopes to witness meaningful changes to the *Aboriginal Cultural Heritage Act* which reflect the concerns of indigenous people in Queensland, and encourage the knowledge and practical use and of the Act. We strongly encourage ongoing *on-country* consultation to allow for a more accurate representation of the concerns of indigenous people regarding their cultural heritage.

