



QSNTS

ABORIGINAL CULTURAL HERITAGE ACT 2003
REVIEW

Submission from Queensland South Native Title Services Limited

March 2009

About QSNTS

QSNTS is a body funded by the Commonwealth of Australia under section 203 FE (1) of the Native Title Act 1993 (Cth) ("NTA") to perform the functions of a Native Title Representative Body for the area of Southern and North West Queensland.

Section 203B of the NTA sets out the functions of representative bodies.

The principal objective of QSNTS is to support Native Title Claim groups to achieve recognition of Native Title and to achieve fair and reasonable compensation for impairment of native title rights and interests which result from the conduct of activities on traditional lands of its clients. QSNTS provides expert advice to indigenous claimant groups on the prosecution of Native title Determination and Compensation Applications. It also advocates law reform and on a wide range of legal and policy issues to do with native title claims resolution, protection of Aboriginal cultural heritage and Aboriginal land rights.

As a result of a program of recent amalgamations, QSNTS is now the largest native title service provider in Queensland accounting for approximately half of all native title claims and covering almost half of the land area of Queensland.

The Need for Reform

Section 4 of the Aboriginal Cultural Heritage Act 2003 (the Act) states that:

"The main purpose of the Act is to provide effective recognition, protection and conservation of Aboriginal cultural heritage."

Sections 5 (a) and (b) of the Act provide that this should be achieved by the recognition, protection and conservation of Aboriginal cultural heritage and be based upon respect for Aboriginal knowledge, culture and traditional practices and that Aboriginal People should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal Cultural Heritage.

The experience of QSNTS and many of its clients has been that the Aboriginal Cultural Heritage Act, while improving on the lack of cultural heritage protection offered by its predecessor (the Cultural Records (landscapes Queensland and Queensland Estate) Act 1987), has failed to provide an effective basis for the protection of Aboriginal Cultural Heritage in Queensland by the traditional guardians or keepers of Aboriginal Cultural Heritage.

This is because the Act fails to:

- properly define or provide independent recognition of the traditional owners of Aboriginal cultural heritage;
- vest ownership of Aboriginal cultural heritage (except specified matters) in the Aboriginal People who by their culture and traditional practices are the guardians and keepers their Cultural Heritage;
- provide a means by which the traditional owners can seek an effective redress from those who intentionally or negligently damage or destroy Aboriginal Cultural Heritage;
- assert a duty of care for the protection of Aboriginal Cultural Heritage in an unqualified manner; and
- provide Aboriginal people with a legal means of accessing land upon which their Aboriginal Cultural heritage is located.

Below we deal with the identified shortcomings.

Recognition of the traditional owners of Aboriginal Cultural Heritage

The Act does not contain a definition of the traditional owners of Aboriginal cultural heritage. This inhibits the identification of those Aboriginal persons who should properly be regarded as the guardians or keepers of Aboriginal cultural heritage. Section 14 (3) of the Act states that Aboriginal cultural heritage should be protected by those with traditional or familial links to the cultural heritage. The terms “traditional” or “familial” are not defined in the Act. The term “Aboriginal tradition” is defined in Section 36 of the *Acts Interpretation Act 1954* to mean a body traditions, customs and beliefs generally or of a particular community or group of Aboriginal people relating to particular persons, areas objects or relationships. The term “familial” in common usage may mean family, ancestral, household and domestic. Both terms are too broad to be of much

assistance in identifying which persons the Act wishes to have respected as the guardians or keepers of Aboriginal cultural heritage.

To add certainty, we therefore, submit that the Act include a definition of traditional owner similar to that suggested below:

“Traditional Owners” means the lineal descendants of Aboriginal persons who were prior to sovereignty entitled to use and occupy the lands and waters upon which the Aboriginal cultural heritage was originally located.

The Act avoids setting up a regime for the independent recognition of traditional owners by seeking to rely on the process for Determination of Native Title rights and interests in the NTA (see Sections 34 and 35). However, the test of whether native title exists in land and waters is more complex than that which needs to be applied to identifying who should be recognised as the keepers of Aboriginal cultural heritage. In order to prove the existence of Native Title rights and interests all the elements of Section 223 of the NTA must be established. Not only must a group of aboriginal persons who occupied the lands and waters prior to sovereignty (along with their laws and customs) be identified it must also be shown that a group indigenous persons have continued to observe those laws and customs right up to the present day. In determining who should have a right to be involved in protection of Aboriginal Cultural Heritage on the other hand, it is not important to determine whether the laws and customs (or a sufficient number of them) of original traditional pre-sovereignty society have survived to this day. It is only relevant that there are descendants of the pre-sovereignty society who are still concerned to protect the cultural heritage of that society.

In addition, due to the complexity of the legal test, determinations of Native Title have only been achieved after a lengthy process usually spanning many years. Further, many more claims for native title are made than determinations. The result being that that there may be several claims for native title over the same area of land spanning several years and it will be rare for applicants, claim group descriptions or for the group of persons in whose favour a determination is ultimately made to be the same as the earlier claims. Often native title claims have failed or been replaced because the claim group description is not supported by evidence of the nature of the society that existed prior to sovereignty or because it has been made on behalf of only some of the people entitled to seek a determination over a specific area. To the extent that the Act

seeks to give registered native title claimants procedural rights to protect cultural heritage, there is a danger that others who may be entitled to seek a determination of native title are excluded. The experience of QSNTS has been that some registered and formerly registered native title claimants have actively worked against the registration of a subsequent more inclusive native title claims because of the procedural rights bestowed upon them by Section 34 and 35 of the Act.

Conversely, QSNTS also accepts that due of the stringency of the legal test as to who may exercise native title rights and interests, the number of persons in whose favour a determination is made may be much smaller in number than those who the claim group accepts as being the guardians of the Aboriginal cultural heritage for an area.

QSNTS submits that the link with the Registration of Native Title Claims and the determination of Native Title Rights and Interests under the Native Title Act is inappropriate to ensure protection of Cultural Heritage under the Act and it should be discontinued.

It is submitted that sections 34 and 35 of the Act be deleted and that the following (or something similar) be substituted:

Native Title Party for an area

1. A person who is recognised by the chief executive as a Traditional Owner is a Native Title Party.
2. In recognising a Native title Party, the chief executive must satisfied based upon either:
 - (a) a report prepared by a suitably qualified expert; or
 - (b) the provision of a certificate which acknowledges and refers to a report prepared by suitably qualified expert) from a body performing the functions of a representative body or an Aboriginal Cultural Heritage Body for the area, that the person is a lineal descendant of the aboriginal persons who used and occupied the area prior to sovereignty.
3. A person dissatisfied with the decision of the chief executive may within 28 days appeal to the Land Court.

Aboriginal Party for an area

1. A Native Title Party is an Aboriginal Party if the chief executive is satisfied
 - (a) that it is comprised of all the Native Title Parties for the area; or
 - (b) for the area it is an entity that is:
 - (i) open to membership by all the Native Title Parties;
 - (ii) is representative of Native Title Parties; and
 - (iii) is capable of carrying out the functions of an Aboriginal Party as set out in this Act.

2. A person dissatisfied with the decision of the chief executive may within 28 days appeal to the Land Court.

In proposing the above scheme it is accepted that there will also be a need for the inclusion of provisions empowering the chief executive to revoke recognition of a Native Title Party and an Aboriginal Party with corresponding rights of appeal to the Land Court. It is noted that similar schemes currently exist within the Act for appealing decisions relating to the recording of the findings of cultural heritage studies and the approval of Cultural Heritage Management Plans.

Section 37 of the Act provides that the function of an Aboriginal cultural heritage body is to identify the Aboriginal parties for the area or a particular part of an area. Except for a possible role in certification as to who should be a Native Title Party, it is inappropriate for an Aboriginal Cultural Heritage Body to directly identify Aboriginal Parties. This is because there is less likelihood that an Aboriginal Cultural Heritage Body is in possession or has the resources to commission independent expert opinion to identify the lineal descendants of the original indigenous occupants of the land prior to sovereignty. On the other hand, entities performing the functions of representative bodies under the Native Title Act, are often resourced to obtain such research in the process of preparing a Native Title Determination Application. It is submitted that a more appropriate function for an Aboriginal Cultural Heritage Body is to facilitate the ability of Aboriginal Parties to participate in the protection of cultural heritage once they have been identified and recognised and Section 37(1) of the Act should be amended accordingly.

Ownership of Aboriginal Cultural Heritage

The Act vests ownership of Aboriginal cultural heritage in traditional owners (being described as those with traditional or familial links to the cultural heritage) only in limited circumstances, in particular, where the items of cultural heritage fall within the categories set out in Section 14 (3) of the Act.

In all other circumstances, by virtue of section 20 (2), the State retains residual ownership of Aboriginal cultural heritage. The policy reason for this is provided at page 3 of the Explanatory notes to the Act:

“In other circumstances, the State will retain residual ownership of cultural heritage generally in order to ensure effective protection and regulation and to maintain the integrity of the land tenure system (such as where Aboriginal cultural heritage is *in situ* on freehold land). The legislation makes it clear that the State does not claim title to the land upon which the cultural heritage is located.”

However, the vesting of residual ownership of Aboriginal cultural heritage in the State has little or no affect on the stated policy objective of maintaining the integrity of the land tenure system. The integrity of the land tenure system, is ensured by virtue of the combined operation of Sections 24 (4) and 21 of the Act which makes clear that the vesting of residual Aboriginal cultural heritage does not give the State ownership of the land in which it is situated and does not prevent an owner or occupier from using and enjoying the land for purposes consistent with the tenure. Providing these sections of the Act are maintained, it should make little or no difference to the owner or occupier of the land from the perspective of maintaining the integrity of his or her tenure whether the ownership of residual Cultural heritage is vested in the State or the traditional owner.

On the other hand, it would assist the effective protection of Aboriginal cultural heritage, if ownership of cultural heritage were vested in traditional owners rather than the State. Firstly, the ability of the State to impose a penalty upon those who unlawful damage or possess Aboriginal Cultural Heritage is not dependant upon it being vested with ownership of that cultural heritage. Secondly, it is more likely that traditional owners rather than the State would have knowledge of whether an area or object was significant, had been damaged or removed from its location.

It is submitted that Section 20(2) of the Act should be amended to vest ownership of residual cultural heritage in the traditional owners where they exist and otherwise in the State.

Redress by traditional owners for damage to their Aboriginal cultural heritage

The Act empowers only the State to take action to enforce compliance with the obligations not to unlawfully harm or possess Aboriginal cultural heritage and with the Duty of Care for activities imposed by Section 23 of the Act.

By virtue of section 32H of the Land Act 2000, the Land Court has power to grant injunctive relief to prevent damage to Aboriginal cultural heritage. In many cases, the right to seek injunctive relief in the Land Court is not an effective answer because harm to Aboriginal cultural heritage may have already occurred prior to the making of an application. In such circumstances, traditional owners have no choice but to rely and on the State to institute criminal proceedings where breaches have occurred. Much of the surviving Aboriginal cultural heritage exists in isolated and hard to get to locations, it may be difficult to succeed in a criminal prosecution where the standard of proof is beyond a reasonable doubt. In addition Section 3 (2) operates to prevent the State from being liable to prosecution for an offence, so there is no effective deterrent against Government Departments damaging Aboriginal Cultural heritage when they carryout Activities or projects.

The procedure provided in the Act alienates traditional owners because they have little or no control over the enforcement process. In addition, the effectiveness of the enforcement process may be significantly achieved if traditional owners were provided with a civil cause of action by which they themselves initiate actions requiring proof on civil standard against persons who unlawfully damage or possess Aboriginal Cultural heritage or breach the Duty of Care set out in the Act.

It is therefore submitted that the Act be amended by creating in addition to the existing criminal penalty a right of action for traditional owner to seek damages against persons who unlawfully harm or possess aboriginal Cultural Heritage or breach the Duty of care provided in the Act.

Section 27 of the Act provides that a Court may order costs for the repair or restoration of Aboriginal cultural heritage against a person convicted of an offence involving the unlawful harm or possession of Aboriginal cultural heritage. The section empowers such an order to be made in favour of the State or another appropriate entity. It is submitted that the obligation for payment of costs for repair or restoration of Aboriginal Cultural Heritage should not be contingent on the attainment of a criminal conviction but rather on the establishing to the civil standard that a person has caused damage to Aboriginal Cultural Heritage. The Act should also provide that where possible traditional owners should be consulted about how the repairs and restoration is to be conducted and provided with the first opportunity to carry out such repairs and restoration. Where the repairs and restoration have been carried out by the traditional owners the Act should provide that they be appropriately compensated for their efforts.

Cultural Heritage Duty of Care

The Explanatory Notes to the Act state that: "the creation of a duty of care underpins the legislation." It asserts that Section 23 of the Act is "the cornerstone of the protection afforded under the new Act..... The intent of the clause is to prevent harm prevent harm to Aboriginal Cultural heritage."

There is nothing intrinsically wrong with the formulation of a Duty of Care in the form provided by the Act. However, in our view any suggestion that the inclusion of such a duty of care can by itself prevent harm to Aboriginal cultural heritage is overly ambitious for a number of reasons:

1. It only applies when activities other than the everyday usage are being conducted by the tenure holders.
2. The Duty of Care is applied when a project or development is being conducted and arrangements (other than the possibility of recording its existence on a data base) are not prescribed for the on-going protection Aboriginal Cultural Heritage after the project or development has concluded.
3. Except where a Cultural Heritage Management Plan is required, the proponents of activities are left to their own devices in deciding what if any measures will be implemented to meet the Duty of Care. Unless an EIS is required, the Act does not require the proponents of activities to even advise the State or traditional owners that the activity has the potential to harm Aboriginal Cultural Heritage.
4. The Act effectively relies on the good conscience of the proponents of activities to report potential breaches of the Duty of Care. The Act does not provide for a regime of inspection by traditional

owners or the State and as a matter of practicality breaches of the Duty of the Care unless voluntarily disclosed will be almost impossible to uncover.

5. There are a multiplicity of complicated ways of meeting the duty of care which may not involve the actual conduct of a survey of the area affected by the activity to find out the location and extent of aboriginal cultural heritage.

For these reasons it is submitted that both criteria to be applied by a Court in deciding whether a proponent of an activity has taken all reasonable measures to avoid harm to Aboriginal cultural heritage and the circumstances under which a proponent is deemed to have complied with the Duty of Care should be narrowed and simplified. In particular:

Section 23 (2) (b) should be deleted, as this is likely to require a Court to make a finding about the significance of the damaged cultural heritage to traditional owners which is a matter that is more appropriate for assessment of penalty rather than liability.

Sections 23 (2) (f) and (g) should be deleted because the consideration in Section 23(2) (d) is more relevant than whether the proponent has on paper met the requirements of the cultural heritage duty of care guidelines, while the later consideration is already covered by Section 23 (2) (a).

Sections 23 (a) (iv) and (v) should be amended to provide that compliance with the cultural heritage duty of care guidelines or the native title protection conditions only excuses a breach of the cultural heritage duty of care where their application has resulted in a study or survey designed to reveal the extent and location of Aboriginal cultural heritage in the affected area. To do otherwise only encourages proponents of activities not to sponsor approvals of cultural heritage plans where there is no formal legal requirement for such a plan. It is submitted that this is not desirable if the protection of Aboriginal Cultural Heritage is the primary objective of the Act.

Similar comments to those above can be made in respect to Sections 25 (2) (a) (iv) and (vi) and 26 (2) (a) (iv) and (vi).

To improve compliance with the cultural heritage duty of care it is submitted that a court should be guided by the inclusion of a provision in the Act requiring the imposition of a lesser or no penalty where the proponents have voluntarily reported a breach to the State, are not serial offenders and have taken remedial action by arranging for the repair and restoration of the damaged Aboriginal Cultural Heritage by the traditional owners.

Access by Traditional Owners to land

Perhaps the main impediment to achieving a better standard of on-going protection of Aboriginal cultural heritage is the omission of a statutory right for traditional owners to access land for the purpose of ensuring that their cultural heritage is not harmed or damaged by tenure holders.

Section 153 of the Act presently only provides traditional owners with a right to enter land (after consultation with the owner or occupier) where another Act authorises a person to enter land for carrying out a project and a cultural heritage activity is a necessary or ancillary activity for that project.

In NSW, Section 47 of the Aboriginal Land Rights Act 1983 ("the NSW Act") allows local Aboriginal Land Councils to negotiate agreements with the owner, occupier or person in control of any land to permit any specified Aborigines or group of Aborigines to have access to land for the purposes of hunting, fishing or gathering of traditional foods on the land. Section 48 of the NSW Act allows a Court to issue access permits where the Local Aboriginal Land Council has been unable to negotiate access with the owner or occupier.

QSNTS understands that since Section 48 of the NSW Act has been operational (26 years) no application has been made to a Court for a permit.

Based on the NSW scheme, it is submitted that Section 153 of the Act should be amended to allow an Aboriginal Party to negotiate agreements with the owners or occupier of land to give traditional owners access to land for traditional purposes including the protection of Aboriginal cultural heritage. A new provision to Section 153 should also be added to the Act entitling the Land Court to make orders permitting such access where an agreement has not been reached between an Aboriginal Party and Owner or occupier.

We therefore submit that Section 153 of the Act be amended to the following:

153 Access to land

1. For the purposes of this Section “traditional purposes” means access to the land or waters by traditional owners for the purpose of hunting or fishing or the gathering of traditional foods for domestic purposes or the performance of traditional ceremonies and for the protection, repair or restoration of Aboriginal Cultural Heritage.
2. A person who wishes to enter land must consult with the owner occupier of the land about obtaining the necessary access.
3. Notwithstanding subsection (1), an Aboriginal Party may negotiate an Agreement with an owner or occupier or person in control of any land to permit ongoing access by traditional owners to that land for traditional purposes.
4. Where an Aboriginal Party has been unable to negotiate an agreement to obtain access for traditional purposes, it may apply to the Land Court for a permit conferring a right of access for traditional purposes.
5. An Application under subsection (3) (“the Application”), must be made in the prescribed form and lodged with the Registrar of the Land Court.
6. The Registrar must refer the Application to the Land Court together with a statement as to who appears to be the owner, occupier or person in control of the land and waters to which the Application relates.
7. The Land Court must:
 - (a) give notice of the Application referred to it under subsection 6 to any person who, in its opinion, is likely to be directly affected if access was granted to the land for traditional purposes; and
 - (b) by that notice , provide that objections to the Application may be lodged within the time specified in that notice.
8. The Land Court must:
 - (a) consider the Application; and
 - (b) any objections to the Application,
 - (c) order that the Application be granted unconditionally or subject to the imposition of any conditions it considers desirable to achieve the co-existence between the right of

- owner or occupier to the quiet enjoyment of the land for the purposes of the tenure and providing for access the land for traditional purposes, or
- (d) if it is of the opinion that access to the land for traditional purposes could not reasonably coexist with the right of the owner or occupier to the quiet enjoyment of the land for the purposes of the tenure, refuse the Application, or
 - (e) Notwithstanding paragraphs (c) or (d), if it considers that Aboriginal culture heritage is in danger of being damaged, harmed or destroyed, the court may make an order imposing such conditions on the use of the land by the owner, occupier or invitee that it considers necessary to prevent such damage, harm or destruction.
9. The Court may punish for contempt, any person who without reasonable excuse does not comply with an order made under paragraphs (8) (c) or (e).
10. If a person is authorised under another Act to enter the land to carry out activities for a project, and the cultural heritage activity is a necessary complementary or ancillary activity to the project-
- (a) the person is also authorised to enter the land to perform an activity under this Act related to the prevention of damage or harm to cultural heritage (“the cultural heritage activity”); and
 - (b) unless otherwise agreed between the person and the owner or occupier, the conditions of access that apply are the same conditions of access that apply under the other Act.
11. The authority given to the person under subsection (11) extends to agents and employees of the person acting under the authority of the person.
12. If the person is the sponsor for a cultural heritage management plan, the authority also extends to endorsed parties for the plan and their representatives, if their access to the Land is-
- (a) reasonably required to properly assess Aboriginal cultural heritage values for developing the plan; and
 - (b) approved by the sponsor.

Conclusion

It is QSNTS' view that the Aboriginal Cultural Heritage Act 2003 ("the Act") has failed to ensure effective protection of Aboriginal Cultural Heritage in Queensland. A number of significant shortcomings are described above along with suggested reforms that we submit will better achieve the main purpose of the Act – *to provide effective recognition, protection and conservation of Aboriginal cultural heritage.*

The first suggested reform is that the Act include a definition of traditional owner as the lineal descendants of Aboriginal persons who were prior to sovereignty entitled to use and occupy the lands and waters upon which the Aboriginal cultural heritage was originally located. QSNTS submits that this definition will better identify those Aboriginal persons who should properly be regarded as the guardians or keepers of Aboriginal cultural heritage.

The second reform is for Section 20 (2) of the Act to be amended to vest ownership of residual cultural heritage in the traditional owners where they exist and otherwise in the State of Queensland. This reform will assist the effective protection of Aboriginal cultural heritage because it is more likely that traditional owners rather than the State would have knowledge of whether an area or object was significant, had been damaged or removed from its location.

The next suggested reform is to provide a means of legal redress by traditional owners for damage to their Aboriginal cultural heritage. In addition to the existing criminal penalty, we submit that there should be a right of action for traditional owners to seek damages against persons who unlawfully harm or possess aboriginal Cultural Heritage or breach the duty of care provided in the Act.

The forth suggested reform is for the Act to assert a duty of care for the protection of Aboriginal Cultural Heritage in a less qualified manner. It is submitted that both the criteria to be applied by a Court in deciding whether a proponent of an activity has taken all reasonable measures to avoid harm to Aboriginal cultural heritage, and the circumstances under which a proponent is deemed to have complied with the Duty of Care should be narrowed and simplified.

Finally, it is submitted that the Act should be amended to provide Aboriginal people with a legal means of accessing land upon which their Aboriginal Cultural heritage is located. This will remove what is perhaps the main impediment to achieving a better standard of ongoing protection of Aboriginal cultural heritage – the omission of a statutory right for traditional owners to access land for the purpose of ensuring that their cultural heritage is not harmed or damaged by tenure holders.

QSNTS hopes that the Consultative Committee finds this submission useful. We are available to address or clarify particular points in this submission so please contact us if necessary.