NEW ABORIGINAL AND TORRES STRAIT ISLANDER CULTURAL HERITAGE LEGISLATION PROPOSED FOR QUEENSLAND*

Introduction

Following on from the Queensland Government's 1999 discussion paper outlining a draft model for new cultural heritage legislation, the Queensland Minister for Natural Resources and Mines introduced two Cultural Heritage Bills into the State Parliament on 21 August 2003.

The review leading to the *Aboriginal Cultural Heritage Bill* 2003 and the *Torres Strait Islander Cultural Heritage Bill* 2003 responded to the inadequacies identified with the current *Cultural Record (Landscapes Queensland and Queensland Estate) Act* 1987 (Cultural Record Act). The two Cultural Heritage Bills together aim to provide effective protection of Aboriginal and Torres Strait Islander cultural heritage, and to create flexible and workable processes that address land-use impacts with certainty, in both a timely and cost efficient way. Although the two Bills establish comparable and complementary processes, as their titles imply they deal separately with Aboriginal cultural heritage and Torres Strait Islander cultural heritage issues.

When they commence, the Bills will repeal the current Cultural Record Act. At this stage they are intended to commence on a date to be fixed by proclamation proposed for 2004.

Features of the Bills

In contrast to the scheme established by the *Queensland Heritage Act* 1992, where protection is given only to items listed by the Queensland Heritage Council, the Cultural Heritage Bills instead establish blanket protection of cultural heritage, irrespective of whether it has been identified or registered. The difference in approach of the two regimes recognises that Aboriginal peoples and Torres Strait Islander peoples do not have statutory rights of access to land to identify their cultural heritage.

The second important feature of the two Bills is that together they establish a general duty of care to take all reasonable and practical steps to be aware of, and to avoid harming Aboriginal or Torres Strait Islander cultural heritage as a mechanism to support the Bills' blanket protection of cultural heritage. The duty of care concept has been adopted elsewhere in Queensland legislation,[1] and for the purpose of the two Bills its objective is to ensure that appropriate steps are taken to protect cultural heritage, while at the same time allowing for some flexibility in how the legislation is applied to specific areas and activities.

New Penalties

Significantly the Cultural Heritage Bills increase maximum penalties by an order of magnitude from $7,500 to $75,000 for individuals and from $75,000 to $750,000 for corporations. In addition, the Bills provide for a maximum of two years imprisonment for damaging registered cultural heritage.

Cultural Heritage and Native Title

The Bills integrate with native title processes by defining respective Aboriginal parties (or Torres Strait Islander parties) as registered native title claimants or native title holders whose outer claim boundaries encompass part or all of the land concerned. The purpose of these provisions is to

---

* Stuart Watson BSc(Hons), LLB(Hons), Solicitor, McCullough Robertson, Brisbane.

1 For example, Queensland's *Environmental Protection Act* 1994, *Dangerous Goods Safety Management Act* 2001, and the *Workplace Health and Safety Act* 1995.

overcome previous problems experienced with the Cultural Record Act when proponents seek to identify the appropriate peoples to talk to about cultural heritage issues in a specific area.

The Bills provide that where a relevant party's native title claim fails, that party will still be the Aboriginal or Torres Strait Islander party for the area until another person becomes a registered native title claimant. The Bills recognise that the existence of cultural heritage values do not depend on the existence of native title in an area. The cultural heritage values do not disappear simply because there may be no registered native title claimants or holders for the land and in those situations the Bills provide that the relevant Aboriginal or Torres Strait Islander party will be the person with particular knowledge about traditions, customs, or beliefs associated with the area or object.

The Bills also enable appropriately representative incorporated bodies to apply to be registered as the cultural heritage body for a particular area. Cultural heritage bodies have the role of identifying the correct Aboriginal or Torres Strait Islander party for an area.

Database and Register

The Bills formalise the cultural heritage database of the 14,000 sites, places and objects that have been recognised over the past 80 years. Although the cultural heritage database is to remain confidential, the Bills also establish a cultural heritage register which will be a publicly available repository of sites, places and objects that have been registered following a comprehensive cultural heritage study.

While the Bills provide for Aboriginal and Torres Strait Islander peoples to be responsible for assessing the level of significance of their culture, there is a statutory requirement that assertion of cultural heritage significance must be consistent with authoritative anthropological, biogeographical, historical and archaeological information.

Cultural Heritage Management Plans

The existing permitting regime under the *Cultural Record Act* is to be replaced by a framework based on the adoption Cultural Heritage Management Plans ('CHMPs') to promote flexibility, effectively allowing proponents and Aboriginal or Torres Strait Islander parties to agree to 'opt out of the legislation'. CHMPs will be mandatory in some circumstances.

Voluntarily initiated CHMPs will be an important mechanism for proponents to demonstrate how they have acted to meet the duty of care, as well as achieving certainty of process. The Bills provide that all agreed CHMPs are to be formally approved by the State, with any objections heard in the Land and Resources Tribunal.

A CHMP will be mandatory for high impact developments that also trigger the requirement to prepare Environmental Impact Statements.[2]

***Integrated Planning Act* and IDAS**

The Bills link with the Integrated Development Assessment System ('IDAS') established by the *Integrated Planning Act* 1997 by amending the *Integrated Planning Regulation* 1998 to provide that the Department of Natural Resources and Mines ('DNRM') will be the concurrence agency for Cultural Heritage matters. As a result, the DNRM's concurrence agency jurisdiction under IDAS will be extended to include development applications involving a material change of use under a planning scheme affecting an area identified on the publicly accessible registers of

---

2 For example, non-standard mining activities under the *Environmental Protection Act* 1994.

Aboriginal or Torres Strait Islander cultural heritage. The duty of care concept adopted by the Bills seeks to ensure that other levels of impact on cultural heritage values are managed. It is intended that the State Government will develop guidelines that outline proponents' duty of care, and guide proponents on measures to be taken to discharge the duty.

The Bills contain provisions empowering the State Government to take steps to preserve or protect cultural heritage by, for example, fencing a heritage site for protection. The Bills also contain transitional provisions allowing proponents to seek approval of project specific guidelines which is important as it provides proponents with a 'pathway to legality for existing operations'.

The Minister's Second Reading speech noted that the legislation will not commence until preparatory work is complete, including the establishment of the cultural heritage registers and the finalisation of duty of care guidelines.[3] There is also a proposal to review the new legislation after five years.

SOVEREIGN RISK AND UNDEVELOPED LEASES*

The Queensland Government commenced legal proceedings in the Queensland Supreme Court on 24 October 2003 against the Aluminium Pechiney Group seeking the surrender of ML 7032 over the Aurukun bauxite deposits, near Weipa, in Western Cape York. ML 7032 contains an indicated reserve of 500 million tonnes of bauxite. The Queensland Government seeks a mandatory injunction enforcing the surrender of the lease and various declarations essentially to the effect that the 1975 agreement under which ML 7032 was granted is no longer of any force or effect, that the lease granted under that agreement exists only for the purposes of surrender and that Pechiney has no existing rights or entitlements under the agreement or the lease.

The government's action has significant implications for long term security of tenure over major undeveloped resource projects.

The 1975 agreement was ratified by an Act of the Queensland Parliament, the *Aurukun Associates Agreement Act* 1975. The Act has itself been the subject of earlier comment in AMPLA journals[1]. Certainly the 1975 agreement between Pechiney and the Queensland Government assumed the future development on ML 7032 of a world class bauxite mining and alumina refining operation. This has not occurred, the Queensland Government alleges in the present proceedings, by extended deadlines and this lies at the heart of the Queensland Government's claim that ML 7032 is liable to forfeiture

While at the date of publication Pechiney's formal response to the proceedings is unknown, it will be interesting to see whether the proceedings will involve fundamentally different views by government and the leaseholder as to the world bauxite and alumina markets, and investment decisions predicated on the condition of those markets. Press reports indicate that Pechiney is likely to allege it was given unequivocal assurances by government that refining investment would not be required unless economically viable. Of greater significance, however, is the fact that the Queensland Government has referred the matter to the Queensland Supreme Court for ultimate

---

3 Minister for Natural Resources and Mines' Second Reading Speeches, *Aboriginal Cultural Heritage Bill* and *Torres Strait Islander Cultural Heritage Bill,* 21 August 2003 at pp 3179-3181, *Queensland Parliament Hansard.*

* Damien Cronin, Consultant, Phillips Fox.

1 See for example K D MacDonald, "Negotiation and Enforcement of Agreements with State Governments relating to the Development of Mineral Ventures" (1977) 1 AMPLJ 27 at 36 and L A Warnick, "The Roxby Downs Indenture" [1983] AMPLA Yearbook 31at 61.