Submission for the Inquiry into the *Aboriginal and Torres Strait Islander Land Holding Bill 2011*

31 January 2012

A submission from the
Australian Archaeological Association Inc.

1.0 PREAMBLE

The Australian Archaeological Association (AAA) represents archaeologists and cultural heritage practitioners (including Aboriginal archaeologists and cultural heritage practitioners) from all over Australia and has approximately 1000 members. This submission has been prepared by Dr Anne Ross and Ms Dee Gorring on behalf of the Executive of the Association.

The Association would like to express its strong concern regarding the extremely short timeframe made available to review and prepare a submission for such a complex issue.

The Association's primary interest in the *Aboriginal and Torres Strait Islander Land Holding Bill 2011* (the Bill) relates to the amendments to the *Aboriginal Cultural Heritage Act 2003* (ACHA), proposed in Part 11 of the Bill. This submission deals with these proposed amendments.

In brief, the principle conclusions drawn by the AAA about the Aboriginal and Torres Strait Islander Land Holding Bill 2011 are:

1. The Bill does not appear to bear any relationship to the *Aboriginal Cultural Heritage Act 2003* or to the *Torres Strait Islander Cultural Heritage Act 2003*, and the placement of substantial amendments to these two acts within the provisions of the Bill requires serious reconsideration;

2. The proposed amendments to the Indigenous cultural heritage legislation make no substantive changes to the management of cultural heritage in Queensland. These amendments have the potential to make cultural heritage management in Queensland an adversarial process;

3. The Australian Archaeological Association Inc. urges the government to undertake a full and complete review of the Indigenous heritage legislation in Queensland.

2.0 OVERVIEW OF THE BILL

The *Aboriginal and Torres Strait Islander Land Holding Bill 2011* is designed to deal with matters relating to leased Aboriginal and Torres Strait Islander Lands in Queensland following the repeal of the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985.* The Bill introduces a new Land Holding Act with the aim of linking the Land Holding legislation with the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991*, which, with the introduction of the Bill, become the principal legislation for leasing on Aboriginal and Torres Strait Islander lands in Queensland. The Bill aims to protect Aboriginal and Torres Strait Island leases and lease entitlements, and provide mechanisms to facilitate resolution of outstanding issues relating to leases (including, for example, ownership of improvements on leases) by agreement.

The Bill is presented in 11 Parts, as follows:
Part 1 Definitions and purposes of the Act;
Part 2 Lease entitlements – establishing previous and current entitlements;
Part 3 Identifying obstacles to lease entitlements (including issues relating to lease boundaries; identifying 'relevant persons'; ownership of improvement to leases; procedures for granting leases);
Part 4 Conditions of leases;
Part 5 Procedures relating to land holdings;
Part 6 Ownership of structural improvement to leases;
Part 7 Lease boundaries;
Part 8 Local Advisory groups;
Part 9 Miscellaneous
Part 10 Repeal of the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985*
Part 11 Amendments to existing Acts in light of the enactment of this Bill.

None of the matters raised in the Bill relates directly to Aboriginal cultural heritage management, either as defined in the ACHA or in wider literature on cultural heritage management (e.g. Blake 2000; Ellis 1994; King 2003; Pearson and Sullivan 1995; Ross 2010; Smith 2006).

3.0 CONTEXT OF AMENDMENTS TO THE *ABORIGINAL CULTURAL HERITAGE ACT 2003* (ACHA) AND THE *TORRES STRAIT ISLANDER CULTURAL HERITAGE ACT 2003*

3.1 Background

According to the Explanatory Notes that accompany the Bill (http://www.legislation.qld.gov.au/Bills/53PDF/2011/ATSILandHoldB11Exp.pdf):

> The Bill amends the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003* **to address separate cultural heritage matters** (emphasis added).

The Explanatory Notes indicate that the amendments to the Queensland Indigenous heritage legislation are 'to clarify and enhance processes that protect, manage and conserve Indigenous cultural heritage in Queensland'.

3.2 Relevance

None of these protection, management and conservation processes relates in any way to the substantive content of the Bill. It is therefore unclear why the amendments to the ACHA are included in this piece of totally unrelated legislation.

3.3 Differences between Aboriginal and Torres Strait Islander Cultures

As with previous submissions by the Australian Archaeological Association (AAA) regarding Indigenous heritage legislation in Queensland, the AAA notes with concern that the amendments to the *Aboriginal Cultural Heritage Act 2003* are identical to the amendments to the *Torres Strait Islander Cultural Heritage Act 2003*. The vastly different culture of the Torres Strait should be recognised in a totally separate cultural heritage act that provides for the specific needs and interests of Torres Strait Islander people.

3.4 Limitations

In this submission we focus on the amendments to the *Aboriginal Cultural Heritage Act 2003*, as the majority of our members work on mainland Australia. The comments we make here regarding the *Aboriginal Cultural Heritage Act 2003* apply equally to the amendments to the *Torres Strait Islander Cultural Heritage Act 2003*.

4.0 COMMENTS ON THE PROPOSED AMENDMENTS TO THE *ABORIGINAL CULTURAL HERITAGE ACT 2003* (ACHA) (PART 11, DIV. 2)

4.1. S.93: Amendments to Section 23 of ACHA

These amendments aim to ensure that any cultural heritage agreement, prepared to meet Duty of Care obligations under s.23 of the ACHA and designed to act as an alternative to a Part 7 Cultural Heritage Management Plan (CHMP), must make explicit reference to Aboriginal cultural heritage. To this end, the proposed wording to Section 23(3)(a)(iii)(A) needs to **omit 'or impliedly'.** Any alternative to a CHMP must *expressly include Aboriginal cultural heritage as an overt subject of the agreement.*

4.2. S.94: Amendments to Section 24 of ACHA

These amendments aim to ensure that any harm to cultural heritage is mitigated via adequate assessment of cultural heritage in accordance with a heritage agreement prepared to meet Duty of Care obligations under s.23 of the ACHA and designed to act as an alternative to a Part 7 Cultural Heritage Management Plan (CHMP). Such an alternative agreement must make explicit reference to Aboriginal cultural heritage. To this end, the proposed wording to Section 24(2)(a)(iii)(A) needs to **omit 'or impliedly'.** Any alternative to a CHMP must *expressly include Aboriginal cultural heritage as an overt subject of the agreement.*

4.3. S.95: Amendments to Section 25 of ACHA

These amendments aim to ensure that unlawful excavation, removal, etc. of cultural heritage is mitigated via adequate assessment of cultural heritage in accordance with a heritage agreement prepared to meet Duty of Care obligations under s.23 of the ACHA and designed to act as an alternative to a Part 7 Cultural Heritage Management Plan (CHMP). Such an alternative agreement must make explicit reference to Aboriginal cultural heritage. To this end, the proposed wording to Section 25(2)(a)(iii)(A) needs to **omit 'or impliedly'.** Any alternative to a CHMP must *expressly include Aboriginal cultural heritage as an overt subject of the agreement.*

4.4. S.96: Amendments to Section 26 of ACHA

These amendments aim to ensure that unlawful possession of cultural heritage is mitigated via adequate assessment of cultural heritage in accordance with a heritage agreement prepared to meet Duty of Care obligations under s.23 of the ACHA and designed to act as an alternative to a Part 7 Cultural Heritage Management Plan (CHMP). Such an alternative agreement must make explicit reference to Aboriginal cultural heritage. To this end, the proposed wording to Section 26(2)(a)(iii)(A) needs to **omit 'or impliedly'.** Any alternative to a CHMP must *expressly include Aboriginal cultural heritage as an overt subject of the agreement.*

4.5. S.97: New Part 3 Division 5 – Mediation

This amendment is designed to provide procedures for the management of disputes about the management of cultural heritage (other than a dispute relating to a CHMP). AAA applauds the addition of this new Division in the ACHA.

4.6. S.98: Amendments to Section 34

AAA has made a number of submissions previously regarding the serious problems associated with Section 34 of the ACHA. In brief, these submissions have noted that the use of Native Title as the basis for identifying Indigenous Parties is flawed and requires modification to ensure that all traditional owners with a connection to country are able to participate in heritage management. The AAA has previously recommended (submission dated 18 February 2010) that mechanisms to identify Aboriginal Parties (and Torres Strait Islander Parties) be decoupled from native title provisions and that traditional custodian status be recognised in a similar way to that used in the Northern Territory

Aboriginal Sacred Sites Act 2006. The amendments proposed as part of the Bill discussed here are simply rewordings of Section 34. The amendments make no attempt to address the serious flaws in Section 34 and AAA remains disappointed at the lack of political will to address these problems here.

4.7. S.99: Implementation of a new category of agreement, viz. *cultural heritage agreements*

This amendment is designed to introduce a new category of agreement to act as an alternative to a Part 7 CHMP. The AAA applauds this new initiative but notes that there are several issues associated with its adoption and these issues need to be addressed, possibly in a new set of regulations or guidelines. The issues we note are as follows:

a. These provisions are likely to discourage heritage assessors from undertaking a Part 7 CHMP, which is a robust and well developed mechanism for cultural heritage management planning. The *cultural heritage agreement* proposed in this amendment is a much simpler form of agreement and lacks many of the important aspects of a formal CHMP.
b. The *cultural heritage agreement* as outlined here will be very useful for heritage agreements required as part of non-development activities, such as research or educational activities on cultural sites. The advantage of a simpler form of agreement in these circumstances is clear, but these advantages become disadvantages for heritage protection and management in development contexts.
c. There is no provision to register this new style of agreement. To meet best practice cultural heritage management principles, it is vitally important that all forms of heritage agreement, whether a formal CHMP, a formal *cultural heritage agreement* as defined here, or any other form of native title agreement, ILUA, or any other agreement relating to cultural heritage, must be formally registered with the regulatory authority (currently the Department of Environment and Natural Resources – DERM). The lack of provision for the registration of *cultural heritage agreements* is particularly surprising given the location of this new provision within Part 5 of the ACHA, which is that part of the Act which relates to registration of heritage.
d. Provision should be made for appropriate dispute resolution procedures in the event of failure to reach an agreement, particularly when applied to development proposals.

Consequently, although the AAA recognises the need for the formalisation of agreements of this kind, the AAA recommends that they only be used in research activities and for small projects that are defined as Categories 1, 2 and 3 in the Duty of Care Guidelines

4.8. Various amendments relating to the functions of the Land Court in relation to cultural heritage

Sections 100, 101, 102, 105, 108, 109 and 110 all relate to the functions of the Land Court in hearing various disputes in relation to Aboriginal cultural heritage. In general, the amendments grant considerable new powers to the Land Court in decision-making (as opposed to making recommendations to the Minister). The AAA is concerned that these provisions have the potential to make for a much more adversarial process in handling cultural heritage disputes, and further removes the government, and its agents, from being involved in decision-making in cultural heritage management. The AAA deplores this move to an even more laissez-faire approach to cultural heritage management by the government and recommends that these amendments are not enacted.

4.9. S.103: Amendment to Section 86

This amendment ensures that a native title agreement can only act as an alternative to a Part 7 CHMP agreement if the native title agreement specifically includes mention of Aboriginal heritage. The AAA applauds this clarification of the place of native title agreements in the alternative agreement process but notes that there is no provision to register such agreements. To meet best

practice cultural heritage management principles, it is vitally important that all forms of heritage agreement, whether a formal CHMP, a native title agreement, a formal *cultural heritage agreement*, an ILUA, or any other agreement, must be formally registered with the regulatory authority (currently the Department of Environment and Natural Resources – DERM).

4.10. S.106: Amendment to Section 115

This amendment changes the provisions of various stakeholder responsibilities in disputes relating to cultural heritage management.

4.11. S.107: Amendment to Section 117

This amendment provides a clarification of the possible rulings of the Land Court in relation to cultural heritage disputes.

4.12. S.111: Amendment to Section 157

This amendment delays the next review of the ACHA to 2022. Given the very great problems with this Act, as has been pointed out in previous submissions by the AAA, a delay of further review of the Act is unacceptable. The AAA recommends an urgent, immediate, full and thorough review of this legislation with a genuine willingness on the part of the government to address the very serious flaws in the Act. In addition, the constant advance in archaeological techniques, the ongoing evolution of Aboriginal approaches to knowledge and management of cultural heritage, and the changing nature of development activities all mean that an Act that is current in 2012 will be seriously outdated in just five years. To ensure that this Act is relevant to modern best practice heritage principles, it is not only vital that the ACHA be thoroughly reviewed, but in the absence of such a review, regular ongoing revision of the procedures encompassed by the Act is required. Such regular revision needs to be at five year intervals at the longest.

4.13. Various amendments relating to transitional procedures

Sections 112 to 114 are transitional amendments. These amendments are procedural and allow for transitional arrangements to allow the implementation of the proposed amendments.

4.14. S.114: Amendments to ACHA dictionary

This is another procedural amendment.

5.0 RECOMMENDATIONS

From the discussion above, the AAA makes the following recommendations:

5.1. Section 93 – amendments to s23 of ACHA:
23(3)(a)(iii)(A) **omit 'or impliedly'.**

5.2. Section 94 – amendments to s24 of ACHA:
24(2)(a)(iii)(A) **omit 'or impliedly'.**

5.3. Section 95 - amendments to s25 of ACHA:
Section 25(2)(a)(iii)(A) **omit 'or impliedly'.**

5.4. Section 96 - amendments to s26 of ACHA:
Section 26(2)(a)(iii)(A) **omit 'or impliedly'.**

5.5. Section 98 – amendments to Section 34 of ACHA:
Section 34 requires urgent major review and revision.

5.6. Section 99 - Part 5 *cultural heritage agreements*:
Although this new form of formal agreement is very welcome for research activity and other developments that may have a relatively limited impact on cultural heritage, the *cultural heritage agreement* is not suitable for developments that are defined as Category 4 or 5 developments. It is therefore recommended that additional provisions be added to limit the use of Part 5 *cultural heritage agreements*; to make a Part 7 CHMP the required form of agreement for Category 4 and 5 developments; and to require that any *cultural heritage agreement* be formally registered, as for a CHMP.

5.7. Various provisions for increased powers of decision-making by the Land Court:
Provisions in Sections 100, 101, 102, 105, 108, 109 and 110 should not be enacted; instead the Minister and/or the regulatory authority should retain final decision-making roles in each of these cases.

5.8. Section 111 – amendment to Section 157:
A delay in review of the ACHA to 2022 is unacceptable. The ACHA must be thoroughly reviewed and completely overhauled immediately and as a matter of urgency. In the absence of such a review the Act needs to be regularly revised to take account of changing practices in archaeological research, in Aboriginal approaches to knowledge and management of cultural heritage and in development activity. Such reviews must be in five year intervals at the longest.

6.0 CONCLUSION

The AAA makes two general observations about the *Aboriginal and Torres Strait Islander Land Holding Bill 2011*:

1. The Bill does not appear to bear any relationship to the *Aboriginal Cultural Heritage Act 2003* or to the *Torres Strait Islander Cultural Heritage Act 2003*. As a consequence, the placement of substantial amendments to these two acts within the provisions of the Bill is incomprehensible.

2. The proposed amendments to the Indigenous cultural heritage legislation are largely procedural and minor. They make no substantive changes to the management of cultural heritage in Queensland, other than to further reduce the responsibilities of government for heritage management. The amendments have the potential to make cultural heritage management in Queensland even more adversarial than in the past, which generally disadvantages the owners of heritage – the Indigenous peoples.

As a consequence of these observations, the Australian Archaeological Association Inc. once again urges the government to undertake a full and complete review of the Indigenous heritage legislation in Queensland as a matter of utmost urgency. Given the very great expertise in Indigenous heritage management that resides in the membership of the AAA, this Association continues to offer to make its expert members available to the government for advice and consultation in any such genuine review and overhaul of this important piece of legislation.

REFERENCES

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