QUEENSLAND resources COUNCIL

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31 January 2012

Dr Kathy Munro
Research Director
Community Affairs Committee
Parliament House
George Street
BRISBANE QLD 4000

via email: cac@parliament.qld.gov.au

Dear Dr Munro

Thank you for the opportunity to provide a submission to the Community Affairs Committee's inquiry into the *Aboriginal and Torres Strait Islander Land Holding Bill 2011*.

As you know, the Queensland Resources Council (QRC) is the peak representative organisation of the Queensland minerals and energy sector. The QRC's membership encompasses exploration, production, and processing companies, energy production and associated service companies. The QRC works on behalf of members to ensure Queensland's resources are developed profitably and competitively, in a socially and environmentally sustainable way.

While the Bill seeks to resolve a range of issues in relation to Aboriginal and Torres Strait Islander perpetual and term leases on Indigenous land, the key focus of this submission relates to the proposed amendments to the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003, (the Acts)* which address separate cultural heritage matters.

Cultural heritage regulation and policy has a very significant interest for, and impact on, QRC members. In addition, due to the broad application of the cultural heritage legislation, it covers the full range of QRC's membership, not just those operating on mining tenements.

QRC was actively engaged with the Department of Environment and Resource Management (DERM) during the four years that the *Aboriginal Cultural Heritage Act 2003* was developed and made an extensive submission on the Acts' review original discussion paper in February 2009. A further submission was provided in February 2010, responding to the key issues and draft recommendations discussion paper that was released by DERM for comment in November 2009.

Neither of these submissions sought any wholesale changes to the Acts, noting in fact that QRC members generally regard it as the best indigenous cultural heritage legislation in Australia and that both the certainty and flexibility it provides are crucial, as is its focus on the development of direct relationships between proponents and the owners and managers of indigenous cultural heritage being the indigenous people themselves.

ABN 59 050 486 952
Level 13 133 Mary St Brisbane Queensland 4000
T 07 3295 9560 F 07 3295 9570 E info@qrc.org.au
www.qrc.org.au

Instead the QRC's submissions largely focussed on several specific parts of the Acts and related proposed guidelines that could benefit from further clarification. Several of QRC's key comments and concerns in this regard have been accommodated in the proposed legislative amendments and others will hopefully be addressed during the forthcoming development of the complementary non-legislative cultural heritage reforms.

Further, in January 2011, QRC provided a submission on the October 2010 *Indigenous Cultural Heritage Acts Amendment Bill 2011* exposure draft which proposed a number of legislative changes and administrative actions to improve the efficiency and efficacy of the Acts.

The key outstanding issues of concern for QRC with the proposed amendments to the Acts are raised below for the Committee's consideration. This submission has been developed in consultation with QRC's Indigenous Affairs Committee which is comprised of QRC member companies.

Chief Executive discretion to approve Cultural Heritage Management Plans

During consultation on the legislative reform process, DERM considered proposed amendments to the Acts to allow the Chief Executive to approve a cultural heritage management plan (CHMP) when the native title party has not agreed for the chief executive to approve the plan. DERM ultimately decided against legislating these powers, on the basis that the current section 107(1)(b) of the Acts already provides discretion for the Chief Executive to approve or refuse to approve CHMPs.

QRC remains unconvinced that such discretion is in fact afforded by the current wording of the legislation. Section 107(1)(b) of the Acts confers on the Chief Executive the discretion to approve a CHMP "in circumstances when all consultation parties have not agreed that the chief executive may approve the Plan". This section simply provides that the sponsor may give a CHMP to the Chief Executive for approval if there is at least one endorsed party and all consultation parties for the CHMP agree that the Chief Executive may approve the CHMP. Section 107(3) then provides that, in these circumstances, the Chief Executive must approve the CHMP.

QRC contends there is no basis for reading into these provisions the conferral on the Chief Executive of a discretion to approve a CHMP in circumstances where not all of the consultation parties have agreed that the Chief Executive may approve the CHMP. The Chief Executive's discretion in these matters should be confirmed in the legislation rather than relying on administrative practice, particularly where such fundamental issues would threaten the validity of approvals. The current Bill should therefore be amended to include additional provisions that clearly provide the Chief Executive with the requisite discretion to approve CHMPs in the aforementioned circumstances.

QRC was recently consulted by DERM on the government's alternative to legislative changes, being the development of a draft operational policy to establish the relevant factors the Chief Executive may consider in applying these discretionary powers to approve or refuse to approve a CHMP under section 107(1)(b) of the Acts. QRC has some concerns about the current wording proposed for the draft policy and has also questioned whether the policy should apportion a different weight between circumstances where a member of the Aboriginal Party is passively not participating in a process, compared to where a member of the Aboriginal Party is actively seeking to oppose a process. These comments and concerns will be reiterated to DERM during the policy development process.

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It is emphasised to the Committee that even though this consultation has occurred, it does not change QRC's fundamental position that these discretionary powers should be enshrined in legislation rather than an operational policy.

Transfer of Minister's decision-making powers to the Land Court

QRC supports the amendment of section 117 of the Acts, which transfers the Minister's decision-making powers to the Land Court, to approve or refuse to approve a cultural heritage management plan following the hearing of an objection or referral.

However, there should still be a role for Ministerial discretion where Land Court decisions have the potential to impact on projects considered to be of overriding public benefit. In some cases the issue in question may not be strictly a legal one, but may be more of a policy matter or involve balancing what is ultimately in the state's best interest. This proposal is similar to the provisions in the *Native Title Act 1993 (Cth),* where the Minister has a limited ability to overrule a decision of the National Native Title Tribunal, in circumstances where it is considered necessary to do so in the national interest.

For these reasons, QRC believes these amendments to section 117 of the Acts should also include a limited power for the Minister to over-ride decisions of the Land Court in circumstances where it is considered in the state's interest to do so.

Importance of the complementary non-legislative measures

The cultural heritage legislative reform package included 13 proposed amendments to the Acts and 15 recommendations relating to improving the administration of the Acts. These 15 proposed non-legislative reforms will primarily be delivered through an awareness raising and capacity building program, which is intended to support the community by building knowledge about how the Acts work and improving the capacity of Indigenous parties and proponents to participate in cultural heritage agreement making processes.

Of particular interest to QRC in relation to these complementary non-legislative reforms is the development of non-statutory guidelines on the preparation of cultural heritage agreements and CHMPs and the development of non-statutory guidelines for the exercise of chief executive discretion in approving CHMPs. QRC supports the development of such guidelines and emphasises the need for significant industry consultation in relation to these documents to ensure the development of high quality, workable guidelines rather than rushing the policy development process.

It cannot be overstated that the ultimate workability and effectiveness of the proposed legislative amendments will hinge on the development of appropriate and workable policies, guidelines and other non-legislative reforms for regulating the gaps in the legislation. The successful implementation of the proposed suite of supporting non-legislative reforms will therefore be critical to the overall effectiveness of the legislative amendments included in the Bill.

QRC is committed to continue working closely with government in the development of the aforementioned guidelines and other non-legislative measures to ensure the overall effectiveness of the proposed reforms and to promote the management of Queensland's indigenous cultural heritage in a way that supports development while empowering indigenous people to protect and manage their own cultural heritage.

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If the Committee is interested in hearing more information about the impact of these cultural heritage legislative amendments on the resources sector, QRC would be pleased to appear before the Committee and / or arrange a briefing with members.

Thank you again for the opportunity to comment on the *Aboriginal and Torres Strait Islander Land Holding Bill 2011*. If you have any questions about any of the issues raised in this submission, or would like any further information, please feel free to contact QRC's Director, Community Engagement, Judy Bertram on [redacted]

Yours sincerely

Michael Roche

Michael Roche
Chief Executive

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