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AIATSIS Submission
Inquiry into the Regional Planning Interests Bill 2013

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) welcomes the opportunity to provide input to the Committee in its inquiry into the Regional Planning Interests Bill 2013 (the Bill).

Through its Native Title Research Unit (NTRU), AIATSIS seeks to promote the recognition and protection of the native title of Aboriginal and Torres Strait Islander peoples through independent assessment of the impact of policy and legal developments. We offer these comments in our capacity as the leading proponent of legal and policy research in the native title sector.

We note that the Bill proposes a regime to strengthen the ability of Queensland regional plans to regulate activity undertaken by the resource sector, and other actors, with respect to areas of regional interest. These areas are identified as including:

1. priority agricultural areas
2. priority living areas
3. strategic cropping areas; and
4. strategic environmental areas.

AIATSIS considers the Bill should appropriately include within its regime a direct reference to areas over which Aboriginal and Torres Strait Islander people have, or may potentially have, traditional rights and interests. Furthermore, it should be noted that certain land within a "priority agricultural area" may well be held under leasehold and subject to native title. We

therefore propose that "A significant Aboriginal or Torres Strait Islander area"[1] be included as a fifth area of regional interest.

By including areas of significance to Aboriginal and Torres Strait Islander peoples within the Bill, the Queensland Government can signal a genuine engagement with traditional owners. AIATSIS strongly encourages recognition and, where indicated, supported development of these various bodies as part of the application process, exemptions or appeal relating to a Regional Interest over an area of significance to Aboriginal and Torres Strait Islander people.

Section 23 of the *Legislative Standards Act 1992* (Qld) (LSA) requires that an Explanatory Note include a brief assessment of the consistency of a Bill with fundamental legislative principles. These principles include that legislation has sufficient regard to rights and liberties of individuals and the institution of Parliament.

We draw attention particularly to section 4(3) of the LSA which sets out that sufficient regard to rights and liberties relevantly includes whether the legislation:

- makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
- is consistent with principles of natural justice; and
- allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
- does not adversely affect rights and liberties, or impose obligations, retrospectively; and
- has sufficient regard to Aboriginal tradition and Island custom; and
- is unambiguous and drafted in a sufficiently clear and precise way.

Although the Explanatory Note to the Bill considers sufficient regard to rights and liberties of individuals was undertaken in its drafting, AIATSIS is concerned that the Bill makes no reference to the potential or likely impact of its measures on the rights and/or interests of Aboriginal and Torres Strait Islander peoples. This is of particular concern because areas the Bill proposes to regulate are subject to existing, inchoate and potential native title interests.

Native title is a property right recognised and protected by the *Native Title Act 1993* (NTA). Operation of any State enactment is, of course, subject to Commonwealth laws. However, AIATSIS is seeking that the Bill acknowledge and explain the potential impact on native title rights and interests under the proposed regime.

Where an action by the State constitutes a "future act" under the NTA, the State is obliged to have first entered negotiations and reached agreement with native title parties.

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[1] This is defined as an area of particular significance to Aboriginal people or to Torres Strait Islander people because of Aboriginal or Torres Strait Islander tradition and/or the history, including contemporary history, of any Aboriginal or Torres Strait Islander part for the area. See s 9 of the *Aboriginal Cultural Heritage Act 2003* (Qld) and s 9 of the *Torres Strait Islander Cultural Heritage Act 2003* (Qld).

Otherwise, the action is invalid.[2] Therefore, the Bill should be overt about its impact on native title as well as how the regime intends to interact with other instruments that provide protection of native title rights and interests.

For example, clause 56 of the Bill provides that conditions required in a Regional Interests Authority will be paramount to conditions required in an Environmental Authority (made under the *Environment Protection Act 1994* (Qld) (EPA))or a Resource Authority (made under one of various resource instruments[3]). Under the current regime, an Environmental Authority will be amended to comply with conditions included in a determination made under s38 (i) (c) of the NTA by the National Native Title Tribunal (NNTT).[4] It is not clear how the Bill intends for an Environmental Authority, amended to align with a Regional Interests Authority, may then be subsequently amended to align with a determination by the NNTT.

It is also not clear how the Bill intends to operate with respect to areas identified as being significant Aboriginal areas or significant Torres Strait Islander areas, pursuant to the *Aboriginal Cultural Heritage Act 2003* (Qld) (ACH) and the *Torres Strait Islander Cultural Heritage Act 2003* (Qld) TSICH. In particular, section 87 of both Acts restricts the provision of an Authority unless:

(a) a cultural heritage management plan for the project has been developed and approved; or

(b) the authority is given subject to conditions to ensure that no excavation, construction or other activity that may cause harm to Aboriginal or Torres Strait Islander cultural heritage takes place for the project without the development and approval of a cultural heritage management plan for the project.

A Regional Interests Authority may well operate to strengthen areas of significance under the Cultural Heritage Act; however, the Bill is silent about how the regimes will interact.

It appears, from a comparison of the Regional Planning Bill and the ACH and the TSICH that the Regional Planning Bill provides stronger protections against development, including mining, for the interest holders on the priority and strategic areas than the protections afforded to Aboriginal and Torres Strait under the respective cultural heritage acts

AIATSIS is concerned that the Bill was drafted without appropriately considering that acts undertaken pursuant to its proposed operation have the potential to restrict native title interest holders from exercising their rights. . We are sure this is an administrative oversight but the consequences reinforce the ongoing imbalance of consideration for the rights and interests of the Traditional Owners of the affected areas vis-à-vis the protections afforded the wider community.

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[2] Section 28 *Native Title Act 1993* (Cth).

[3] For example, a geothermal tenure under the *Geothermal Energy Act 2010*; a GHG authority under the *Greenhouse Gas Storage Act 2009*; or a petroleum authority under the *Petroleum and Gas (Production and Safety) Act 2004*.

[4] See s 212 of the *Environmental Protection Act 1994* (Qld).

AIATSIS urges the Committee to return the Bill to its drafters with instruction to appropriately consult with Aboriginal and Torres Strait Islander parties[5] who will or may potentially be impacted by its enactment.

AIATSIS would like to thank you for the opportunity to provide input to this inquiry. If you would like further information on this submission, please contact Mr Robert Powrie, A/g Director, Indigenous Country and Governance, AIATSIS, on 6246 1167 or robert.powrie@aiatsis.gov.au.

Yours sincerely

Mick Dodson
Chairman

[5] For a definition of "Aboriginal party for an area" see s 35 of the *Aboriginal Cultural Heritage Act 2003* (Qld) and, for a definition of "Torres Strait Islander party for an area", see s 35 of the *Torres Strait Islander Cultural Heritage Act 2003* (Qld).