

## Gas Supply and Other Legislation (Hydrogen Industry Development) Amendment Bill 2023

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**SUBMISSION ON THE GAS SUPPLY AND OTHER LEGISLATION (HYDROGEN  
INDUSTRY DEVELOPMENT) AMENDMENT BILL 2023 (QLD)**

**ON BEHALF OF:**

**THE FIRST NATIONS BILAI, GURANG, GOORENG GOORENG, TARIBELANG BUNDA PEOPLE  
ABORIGINAL CORPORATION REGISTERED NATIVE TITLE BODY CORPORATE (RNTBC) ICN:  
8650**

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**as authorized representative of the Board of the First Nations Bailai, Gurang, Gooreng  
Gooreng, Taribelang Bunda People Aboriginal Corporation RNTBC INC: 8650**

The *Gas Supply and Other Legislation (Hydrogen Industry Development) Amendment Bill 2023* (Qld) (the Bill) into the Queensland Parliament on 9 May 2023 and was accompanied with a Statement of Compliance in relation to Human Rights that recognised the subject matter of the Bill could limit indigenous cultural rights. According to the Department of Energy and Public Works press release (10 May 2023), “the Bill is the first phase of a review of legislation to support the effective regulation of renewable hydrogen development and use in Queensland”.<sup>1</sup>

In accordance with the ambition of Queensland to become a “renewable energy powerhouse”<sup>2</sup>, the Bill is a response to identified regulatory barriers hindering the renewable hydrogen industry. Queensland, particularly the Gladstone Region and the Gladstone State Development Area, is currently experiencing significant commercial industrial activity, including the following hydrogen related infrastructure developments:

- Acciona Energy will transform 1,250 hectares of land within the Gladstone State Development Area into the Aldoga Solar Farm, a 445MW solar photovoltaic (PV) facility. Acciona Energia has signed an agreement to lease the land from Economic Development Queensland for the purposes of constructing and operating the Aldoga Solar Farm for a period of 30 years.
- Hydrogen Utility purchased a 171-hectare site located within the Gladstone State Development Area to be developed as the 3GW H2-Hub for the production of renewable hydrogen and ammonia as well as an associated export terminal infrastructure at Fisherman’s Landing.
- The Queensland Government owned Corporation, Stanwell, and Japanese hydrogen supplier, Iwatani, recently announced completion of a feasibility study investigating the commercial viability of developing a large-scale renewable hydrogen facility, the Central Queensland Hydrogen Project (CQ-H2), in the Gladstone State Development Area.
- Others, including Australian Gas Network, Sumitomo Corporation, Origin and ENEOS, are planning or exploring renewable hydrogen production facilities in the Gladstone region.

The Bill will therefore be of significant relevance to the Gladstone region and these developments.

The Traditional Owners of the Gladstone, Bundaberg and North Burnett regions, including the land which comprises the Gladstone State Development Area, are the **Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda first nations people, (BGGGTB People)** who are represented by the **First Nations Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda People Aboriginal Corporation Registered Native Title Body Corporate ICN 8650 (the PBC)**. The indigenous cultural rights of the BGGGTB People are recognised under s28 of the ***Human Rights Act 2019 (Qld) (HR Act)*** as being applicable to **all traditional lands and waters of the Bailai, Gurang, Gooreng Gooreng, Taribelang Bunda people, not just those over which native title exists**. Accordingly, the HR Act applies to areas across the Gladstone region, including the Gladstone State Development Area.

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<sup>1</sup> Queensland Government, Department of Energy and Public Works, Accessed on 16 May 2023 <epw.qld.gov.au/news-publications/legislation/gas-supply-amendment-bill-2023>.

<sup>2</sup> Queensland Government, 2022, Gladstone’s Next Chapter – a clean and prosperous future, accessed on 19 May 2022 <statedevelopment.qld.gov.au/industry/queensland-is-renewable-ready/gladstones-next-chapter-a-clean-and-prosperous-future>.

The purpose of this submission on behalf of the PBC is not to comment on the content of the Bill but rather on the Statement of Compatibility and the procedures followed to determine whether the Bill was compatible with human rights. Specifically, the failure of the Department and the Minister to meet their obligations under the HR Act in relation to consideration of the impact of the Bill on the indigenous cultural rights of the BGGGTB People prior to putting the Bill before the Parliament due to:

- their lack of consultation with the BGGGTB People in relation to the potential impact of the limitations on their Indigenous cultural rights – without that knowledge no person can make a judgement on whether the limitations that will arise from passage of the Bill are reasonable and demonstrably justifiable; and
- the apparent reliance on cultural heritage and native title rights to meet the obligations to protect indigenous cultural rights when those rights are very limited and do not cover the much broader suite of indigenous cultural rights identified in the HR Act.

### **Lack of Consultation**

The BGGGTB People acknowledge the importance of the development of the Hydrogen renewable energy industry in Queensland and the important role Gladstone region will play in this. To this end the proponents in the region have been actively working with PBC to understand the impact on BGGGTB People's rights and how they can be addressed. This has included signing Memorandums of Understanding (**MoUs**) with Fortescue Future Industries and the Hydrogen Utility H2I. The PBC is also currently in negotiations with Stanwell to sign a similar MoU/Statement of Intent. To this end the proponents have been actively engaging with the PBC to establish appropriate processes for consultation on indigenous cultural rights and potential compensation.

Unfortunately, the same cannot be said of the Queensland Government. The failure of the Minister and his Departments to at least make contact with the BGGGTB People as the Traditional Owners that are most affected by any potential developments and changes to the regulatory environment governing the Hydrogen industry, conducted on their lands, makes a mockery of this Government's introduction of the HR Act. This lack of consultation sets an alarming precedent that if allowed to continue will mean that all legislation could be introduced by the current and future governments without any true consideration of the impact any limitations would have on indigenous cultural rights. It is therefore an imperative that this be addressed now particularly because, as stated above, this Bill is the first phase of a review of legislation to support the effective regulation of renewable hydrogen development and use in Queensland.

It is not the intention of the PBC to impede the development of this important new industry but it is incumbent on it to ensure that the indigenous cultural rights of the BGGGTB People are respected by all involved. It is only able to do this if it is consulted in relation to matters that place potential limitations on those rights and at a point that enables it to have meaningful input.

Concerningly, despite extant obligations under the HR Act and the Gladstone State Development Area Development Scheme<sup>3</sup>, decisions to allow development within the Gladstone State Development Area have been taken without consultation with the Traditional Owners. The Gladstone State Development Area Development Scheme<sup>4</sup>, states that

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<sup>3</sup> State of Queensland, State Department of State Development, Infrastructure, Local Government and Planning, Gladstone State Development Area Development Scheme (May 2022) access 19 May 2022 <[statedevelopment.qld.gov.au/\\_\\_data/assets/pdf\\_file/0015/12516/gstda-development-scheme.pdf](http://statedevelopment.qld.gov.au/__data/assets/pdf_file/0015/12516/gstda-development-scheme.pdf)>.

<sup>4</sup> State of Queensland, State Department of State Development, Infrastructure, Local Government and Planning, Gladstone

development “will avoid impacts on environmental, cultural heritage<sup>5</sup>”, with assessment requiring that “Indigenous and non-Indigenous cultural heritage values, and community values of the premises on which the development is undertaken, and immediate surrounds, are identified and managed, consistent with current best practice”. Without appropriate consultation with the Traditional Owners of the land that comprises the Gladstone State Development Area and other industrial sites in the Gladstone region, via the PBC, developments covered by the Bill cannot possibly avoid impacts on the BGGGTB People’s cultural rights and heritage and the obligation to identify and protect indigenous cultural rights and heritage, consistent with best practice, remains unaddressed.

The views and concerns of the PBC, as the representative of the affected First Nations People, have not been appropriately canvassed in the development of the *Gas Supply and Other Legislation (Hydrogen Industry Development) Amendment Bill 2023* (Qld). Under these circumstances, a Statement of Compatibility that suggests that indigenous cultural and human rights have been properly considered under this proposed legislation is disingenuous. It is not possible for any person to determine whether the limitations imposed on those rights by the Bill are reasonable and demonstrably justifiable having regard to the matters listed in s13(2) of the HR Act without a proper understanding of exactly what those cultural rights encompass for the BGGGTB People and how the potential limitations will impact on those rights. To ensure the Queensland Government’s obligations under the HR Act are met, the Traditional Owners must actively participate in the legislative reform process being undertaken by the Queensland Government with respect to developments on their traditional country. Without such involvement at formative stages, Traditional Owners are afforded just the platitudes of policy that have failed them consistently since colonisation.

The *Human Rights Act* s28 acknowledges that Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right to:

- enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings;
- to enjoy, maintain, control, protect and develop and use their language, including traditional cultural expression;
- to enjoy, maintain, control, protect and develop their kinship ties;
- to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and
- to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.

These cultural rights of Aboriginal and Torres Strait Islander peoples can be limited where it is reasonable and demonstrably justified<sup>6</sup> to do so. In determining whether the limitations from the Bill in the current circumstances are reasonable and demonstrably justified, under section 13(b) of the Act the following things must be considered:

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State Development Area Development Scheme (May 2022) access 19 May 2022

<statedevelopment.qld.gov.au/\_\_data/assets/pdf\_file/0015/12516/gsda-development-scheme.pdf>.

<sup>5</sup> Cultural heritage value means qualities such as knowledge, culture, and tradition, and/or physical characteristics of Indigenous and non-Indigenous cultural heritage, that require consideration, assessment and management under relevant legislation and policies, and/or values of importance to local communities affected by the Gladstone SDA. State of Queensland, State Department of State Development, Infrastructure, Local Government and Planning, Gladstone State Development Area Development Scheme (May 2022) access 19 May 2022

<statedevelopment.qld.gov.au/\_\_data/assets/pdf\_file/0015/12516/gsda-development-scheme.pdf>.

<sup>6</sup> *Human Rights Act 2019* (Qld) s8.

- (a) the nature of the human right;
- (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
- (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
- (d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
- (e) the importance of the purpose of the limitation;
- (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
- (g) the balance between the matters mentioned in paragraphs (e) and (f).

These factors cannot be properly considered without knowledge of what is encompassed within the particular cultural rights in relation to the land and seas of the BGGGTB People. In particular, under (f) a determination cannot be made regarding the nature and extent of the limitation on the BGGGTB People's cultural rights posed by the Bill if no attempt has been made to discover what those rights entail for the BGGGTB People. A failure to consult and to understand what and how the BGGGTB People's cultural rights will be limited amounts to the government unilaterally determining that the impact on the BGGGTB People's cultural rights is reasonable and demonstrably justifiable without any actual knowledge of the impact of those limitation and this is inconsistent with both the tenor and the provisions of the HR Act.

In a recent case, the Land Court held that as a public entity it is bound by the HR Act in making its decisions and, in order to determine how indigenous cultural rights were impacted in relation to the matter before it, it was appropriate that the Court go out on to Country and hear directly from the Traditional Owners and their Elders there.<sup>7</sup> This establishes a precedent for the proper procedure to implement to make informed and compliant decisions under the HR Act. There have been no consultations with the BGGGTB People in relation to the proposed Bill or other decisions made on projects, let alone consultations with Elders on Country.

### **Reliance on Native Title and Cultural Heritage**

In the Statement of Compatibility the Minister relies heavily on the fact that:

- (a) compensation for pipelines will be payable to native title holders; and
- (b) holders of the licence will still be subject to the duty of care cultural heritage requirements that require reasonable care and practical measures to ensure the activity doesn't harm cultural heritage,

as a means of demonstrating that the limitations imposed on indigenous cultural rights are reasonable and justifiable.

The indigenous cultural rights granted under s28 of the HR Act apply to all the traditional lands and waters of indigenous people. It is not limited in application to traditional lands over which native title is held. As much of the land in question in Gladstone has had native title extinguished, native title offers little or no protection of the BGGGTB People's cultural rights over the totality of their traditional lands.

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<sup>7</sup> *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 5) [2022] QLC 4.*

Cultural heritage requirements are also very limited in their application as they apply to only the tangible manifestations of cultural rights such as preservation of artifacts or sacred places and even then, it is very limited. The Queensland Human Rights Commission indicates that indigenous cultural rights may be enlivened in various circumstances including with respect to laws, policies, acts or decisions that limit the ability of Aboriginal persons to take part in cultural practice, or otherwise interferes with their distinct cultural practices; restrict access to a place of spiritual significance for Aboriginal people, or prevent or limit traditional practices on that land; and regulate the conduct of commercial activities on the traditional lands of Aboriginal persons.<sup>8</sup> Cultural heritage laws offer no protection to these much broader aspects of spiritual and economic connection to traditional lands, the right to practice culture and beliefs or to conserve and protect the environment and productive capacity of the traditional lands and waters.

The indigenous cultural rights encompassed by s28 of the HR Act are far broader than the extremely narrow concepts of native title and cultural heritage laws. Relying on the application of these laws to establish that the limitations on indigenous cultural rights are reasonable and demonstrably justifiable fails to recognise that:

- (a) these laws may have little to no application; and
- (b) even if they are applicable their scope is extremely narrow and cannot substitute for the broad indigenous cultural rights under s28;

and they should never be seen as a replacement for the proper consideration of the reasonableness and justifiability of limitations imposed on indigenous cultural rights by the proposed Bill.

## **Conclusion**

It is our submission that the review should highlight to the Assembly under s39 of the HR Act the failings of the processes and reasoning in the Statement of Compatibility around indigenous cultural rights and their non-compliance with the requirements of the HR Act with particular reference to the lack of consultation with First Nations People whose cultural rights will be most severely limited by the Bill. To allow the Bill to pass through Parliament without bringing this issue to light will effectively relegate indigenous cultural rights to little more than a sentence or two in each Statement of Compatibility with no real practical consequence or meaningful consideration. We therefore request that passage of the Bill is delayed until there is real and meaningful engagement with the PBC and any of First Nations groups whose cultural rights may be impacted by the arrangements in the Bill.

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<sup>8</sup> Queensland Human Rights Commission, 2019, Cultural rights of Aboriginal and Torres Strait Islander peoples, accessed on 19 May 2022 <[qhrc.qld.gov.au/your-rights/human-rights-law/cultural-rights-of-aboriginal-and-torres-strait-islander-peoples](http://qhrc.qld.gov.au/your-rights/human-rights-law/cultural-rights-of-aboriginal-and-torres-strait-islander-peoples)>.