

31 March 2022

The Relevant Officer

Queensland's Cultural Heritage Acts Review
Department of Seniors, Disability Services
and Aboriginal and Torres Strait Islander
Partnerships
1 William Street
BRISBANE QLD 4000

By email: CHA_Review@dssdsatsip.qld.gov.au

Dear Officer

Submission in relation to the Department's December 2021 Options Paper finalising the review of Queensland's Cultural Heritage Acts

1. I refer to your Department's December 2021 publication titled "*Options paper - Finalising the review of Queensland's Cultural Heritage Acts*" (**Options Paper**) relating to the consultation in finalising the review of the Aboriginal Cultural Heritage Act 2003 (Qld) (**ACHA**) and *the Torres Strait Islander Cultural Heritage Act 2003* (Qld).
2. As a member of the Applicant to the former Gold Coast Native Title Claimant Application QUD346/2006 (**Gold Coast Native Title Claim**) and therefore an *Aboriginal party* under the ACHA for part of the claim area to the Gold Coast Native Title Claim, I wish to make a brief submission in response to the Options Paper in relation to **Option 2** to **Proposal 4.3** of the Options Paper.

Option 2 of Proposal 4.3

3. Proposal 4.3 proposes to reframe the definition of 'Aboriginal party' under the ACHA so that people who have connection to an area under Aboriginal tradition have an opportunity to be involved in cultural heritage management and protection.
4. The Options Paper notes that no changes are proposed in areas where there is a registered native title holder or a registered native title claimant.
5. However, Option 2 to Proposal 4.3 contemplates changes in areas where the Aboriginal party or Torres Strait Islander party is a previously registered native title claimant subject to a negative determination (native title does not exist) and that, in such areas it is proposed that:
 - (a) the Cultural Heritage Acts are changed so that a previously registered native title claimant subject to a negative determination (native title does not exist) is not a native title party; and
 - (b) section 35(7) of the ACHA applies.

6. The map contained in Figure 2, page 22 of the Options Paper depicts Option 2 as applying to part of the claim area of the Gold Coast Native Title Claim area, indicating that the Applicant to the Gold Coast Native Title Claim would "not retain native title party status" under this Option 2.
7. As a former member of an Applicant to the Gold Coast Native Title Claim, I disagree that the Gold Coast Native Title Claim can be considered a "negative determination" that native title does not exist.
8. This is because the matters for which native title was held not to exist within the external boundaries of the claim area of the Gold Coast Native Title Claim were, in any event, areas for which a Claimant Application could not be made, covering areas where previous exclusive possession acts were done (*Native Title Act 1993 (Cth) (NTA)*, section 61A(2)(a)).
9. I provide some brief details in relation to the Gold Coast Native Title Claim by way of background below.

Gold Coast Native Title Claim

10. On 1 November 2013, Rares J made the following relevant orders in the Gold Coast Native Title Claim:
 2. *Unless a party to the proceedings or a member of the applicant applies to the Court on or before 12 December 2013 for the proceedings to be relisted, then on 13 December 2013 the orders in the schedule to these orders become the orders of the Court giving effect to its reasons for judgment given on 3 June 2013.*
 3. *If any application is made in accordance with order 2 on or before 12 December 2013, the orders in the schedule will not come into force or effect and the proceedings will be relisted at a date to be fixed.*
11. The reasons for judgment given on 3 June 2013 which are referred to in order 2 of the 1 November 2013 orders are Rares J's reasons in *Levinge on behalf of the Gold Coast Native Title Group v State of Queensland* [2013] FCA 634 (***Levinge (No 2)***).
12. In *Levinge (No 2)*, Rares J considered that the proper course of action to adopt in the Gold Coast Native Title Claim was to dismiss the proceedings, given the various delays which had occurred to date.
13. The State of Queensland had tendered indicative tenure material to prove the actual grants of freehold land that had been made over approximately 85% of the claim area of the Gold Coast Native Title Claim. The State argued that the grants extinguished any native title over the land and waters concerned and that, absent any suggestion otherwise, the Court ought make a determination under section 225 of the NTA that no native title exists over the areas of freehold land in resolving these proceedings on a final basis.
14. Rares J agreed with that submission, and observed in *Levinge (No 2)* at [60] (my emphasis added):

60 I am satisfied that the uncontested freehold land indicative tenure material filed by Queensland, comprising as it does the actual grants of freehold by or on behalf of the State, **should be accepted as establishing that native title has been extinguished over those lands and waters in the claim area for the purposes of s 225(c) of the Act**: Fejo 195 CLR at 126 [43]; Wilson 231 CLR at 427 [36]; see too Daniel v Western Australia (2004) 138 FCR 254 at 262-263 [31]-[32] per RD Nicholson J.

15. However, Rares J had earlier noted at [57] (my emphasis added):

57 The orders made on 31 May 2012 (amending or repeating the orders made on 2 February 2012) provided that the areas identified in the indicative tenure material filed by Queensland as freehold and as not being subject to ss 47, 47A and 47B **would be deemed to be areas not covered by the application. That would be consistent with the general, unparticularised exclusion of lands and waters of that description in the form 1 application.** However, the only reason for that exclusion was that native title could not exist over such land because it had been extinguished by the grant of freehold and no other basis for the continued existence of any native title rights and interests existed under ss 47, 47A and 47B.

16. Subsequently, as the Applicant to the Gold Coast Native Title Claim did not make the application contemplated in order 2 of the 1 November 2013 orders, on 13 December 2013 in *Levinge on behalf of the Gold Coast Native Title Group v State of Queensland (No 3)* [2013] FCA 1154 (***Levinge (No 3)***), Rares J made the following orders in the Gold Coast Native Title Claim:

THE COURT DETERMINES THAT:

1. Pursuant to s 225 of the Native Title Act 1993 (Cth), native title does not exist in relation to all of the land and waters comprised in the parcels of freehold land described in Schedule 1, excluding any part of such land and waters that is covered by the areas described in Schedule 2 and depicted in the map in Schedule 3.

THE COURT ORDERS THAT:

2. The proceeding be otherwise dismissed.

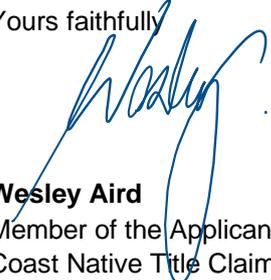
Conclusion

17. On that basis, I consider the effect of the Court's findings and orders in the Gold Coast Native Title Claim are such that the Court has:
- (a) acknowledged that the Gold Coast Native Title Claim should not have covered the parcels of freehold land described in Schedule 1 of *Levinge (No 3)*; and
 - (b) otherwise, held that no determination of native title has been made in respect of the balance areas,

and so *Levinge (No 3)* should not be considered a "negative determination" as contemplated by Proposal 4.3.

18. The outcome from the Gold Coast Native Title Claim and the determination made in *Levinge (No 3)* can be contrasted with a "negative determination" where there has been a finding that there are no laws and customs that derive from a "normative system" in the sense described by the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; 214 CLR 422 - as was held to be the case in the reasons in:
- (a) *Wyman on behalf of the Bidjara People v State of Queensland (No 2)* [2013] FCA 1229;
 - (b) *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15;
 - (c) *Weribone on behalf of the Mandandanji People v State of Queensland* [2018] FCA 247; and
 - (d) *Malone v State of Queensland (The Clermont-Belyando Area Native Title Claim) (No 5)* [2021] FCA 1639.
19. I therefore consider that any action on Option 2 must distinguish between areas which are unable to be the subject of a claimant application under the NTA (see section 61A) and circumstances where the Court has made a finding that no traditional society exists (as described in *Yorta Yorta*).
20. If Option 2 does not make that distinction, it risks prejudicing interests of native title claimants in a similar position to the members of the Gold Coast Native Title Claim.
21. I trust that you will consider these matters. Please contact me on the details below should there be any need for clarification.

Yours faithfully



Wesley Aird
Member of the Applicant to the former Gold
Coast Native Title Claim