# Indigenous rights in land use
## PLANNING STRENGTHENED IN QUEENSLAND

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**FOR THE FIRST TIME IN THE** history of planning legislation in Australia, the *Planning Act 2016* (Qld) contains a clause that requires the land use and environmental planning system to value, protect and promote Aboriginal and Torres Strait Islander peoples' knowledge, culture and tradition. This is a historic first. Up until now, no planning legislation anywhere around Australia has required planning agencies to take account of Aboriginal and Torres Strait Islander peoples' rights and interests; not even as a consequence of the Commonwealth's *Native Title Act 1993* (Cth).

The *Planning Act 2016* (Qld) amendments, sections 5(1) and 5(2) need to be read together:

*5. Advancing purpose of Act*

1. *An entity that performs a function under this Act must perform the function in a way that advances the purpose of this Act.*

2. *Advancing the purpose of this Act includes (amongst other matters):*

   *(d) valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition.*

The inclusion of s 5(2)(d) in the new *Planning Act 2016* (Qld) came about because the Queensland Government was reviewing its *Sustainable Planning Act 2009* (Qld). The credit for its inclusion goes to Dr Sharon Harwood of James Cook University. Dr Harwood made several submissions to the Queensland Government during the consultation phases on the development of the new legislation, and in those submissions Dr Harwood drew the Queensland Government's attention to s 4 the *Legislative Standards Act 1992* (Qld) which prescribes the minimum standards for legislation in Queensland. The *Legislative Standards Act 1992* (Qld) includes a set of fundamental legislative principles, which require that legislation should have sufficient regard to the rights and liberties of individuals and to the institution of Parliament. In turn, sufficient regard to the rights and liberties of individuals depends on whether, for example, the legislation 'has sufficient regard to Aboriginal tradition and Island custom'. Dr Harwood pointed out that the new planning legislation therefore has to have 'sufficient regard to Aboriginal tradition and Island custom' in accordance with Section 4(3)(j) of the *Legislative Standards Act 1992* (Qld).

Section 5(2)(d) in the *Planning Act 2016* (Qld) is 'tenure blind'. This means that the provision operates regardless of whether native title exists or not, regardless of whether the land in question is part of a land transfer or grant under the *Aboriginal Land Act 1991* (Qld) or the *Torres Strait Islander Land Act 1991* (Qld), and regardless of whether the land is subject to an Aboriginal or Torres Strait Islander heritage listing or site of significance.

Furthermore, the provision applies to all entities performing functions under the *Planning Act 2016* (Qld), namely the Queensland Department of Infrastructure, Local Government and Planning as well as a host of other State Government departments and agencies, all local governments in Queensland, and any other entities performing functions under this Act throughout Queensland. Functions under this Act include for example, state planning policies, regional plans, local planning schemes, temporary local planning instruments (TLPIs), planning scheme policies, and the State's development assessment system (the State Assessment and Referral Agency (SARA)).

The inclusion of section 5(2)(d) in the new *Planning Act 2016* (Qld) raises a number of important questions. Such as:

1. Why should *'valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition'* be included in planning legislation?

2. What constitutes *'Aboriginal and Torres Strait Islander knowledge, culture and tradition'*?

3. Who holds the appropriate information about *'Aboriginal and Torres Strait Islander knowledge, culture and tradition'*?

4. How can entities operating under planning statutes go about accessing the necessary information about *'Aboriginal and Torres Strait Islander knowledge, culture and tradition'* so that their actions can value, protect and promote them?

5. How can *'valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition'* be factored into planning functions under statutory planning instruments such as State Planning Policies, regional plans and planning schemes?

6. What criteria can be applied to ascertaining whether *Aboriginal and Torres Strait knowledge, culture and tradition* have been appropriately valued, protected and promoted in the particular function or functions being performed under the relevant planning statute?

The obvious answer to the first question lies in Dr Harwood's reasoning about the requirements in the *Legislative Standards Act 1992* (Qld). There are also a number of other imperatives including the United Nations Declaration on the Rights of Indigenous Peoples, the recognition of native title rights and interests by the High Court in *Mabo (No. 2)* and the increasing number of native title determinations and Indigenous land Use Agreements (ILUAs) arising from the *Native Title Act 1993* (Cth).

The answers to the subsequent questions will depend in very large measure on the input of the Aboriginal and Torres Strait Islander peoples and communities as the 'place-owner' of the place that is the subject of the particular planning instrument or activity that is being performed under the *Planning Act 2016* (Qld). To put it another way: entities preparing planning instruments, such as local planning schemes, regional plans or state planning policies, will need to engage with the relevant Aboriginal and Torres Strait Islander peoples in the preparation of the document or instrument right from the very beginning of the process if they are to demonstrate that they have 'advanced the purpose of the Act' with respect to 'valuing, protecting and promoting Aboriginal and Torres Strait islander knowledge, culture and tradition'.

If the provision is to make a difference in terms of genuinely valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, cultures and traditions, in land use and environmental planning, then all entities performing functions under the new Act need to take the time to develop a constructive and long term working relationship with the relevant Aboriginal and Torres Strait Islander peoples and communities. All entities performing functions under the Planning Act will need to understand and accept that the information they need in order to satisfy s 5(2)(d) is the province of Aboriginal and Torres Strait Islander peoples –it is not for others to decide what this might comprise or entail.

The first step the Queensland Government could take toward implementing this provision is to consider establishing a reference group comprising representation drawn from the network of Native Title Representative Bodies/Service providers, Registered Native Title Bodies Corporate, the Aboriginal and Torres Strait Islander Land Trusts and from the Aboriginal Shires and Torres Strait Regional Councils and Local Government in Queensland so that a dialogue may commence, especially about the questions I have posed above. This reference group could take on the task of developing some guidance notes for entities performing functions under the new Act and how they may be able to work with the relevant Aboriginal and Torres Strait Islander peoples and communities in order to satisfactorily 'value, protect and promote Aboriginal and Torres Strait islander knowledge, culture and tradition'.

The Deputy Premier and Minister for Planning indicated in the Queensland Parliament when the legislation was in its final debating stages in May 2016, that the Government was not going to rush the introduction of the new *Planning Act 2016* (Qld) because it will require a considerable amount of work to bring the necessary administrative and support arrangements into place. The new Planning Act will therefore not come into effect until sometime in mid-2017 at a date to be announced.

The Queensland Government is to be commended for inserting this provision into its new land use and environmental planning legislation. The challenge will be for other jurisdictions to follow suit when they next review their planning legislation.

Images: Kowanyama landscape, QLD.
Credit: Tran Tran, AIATSIS.