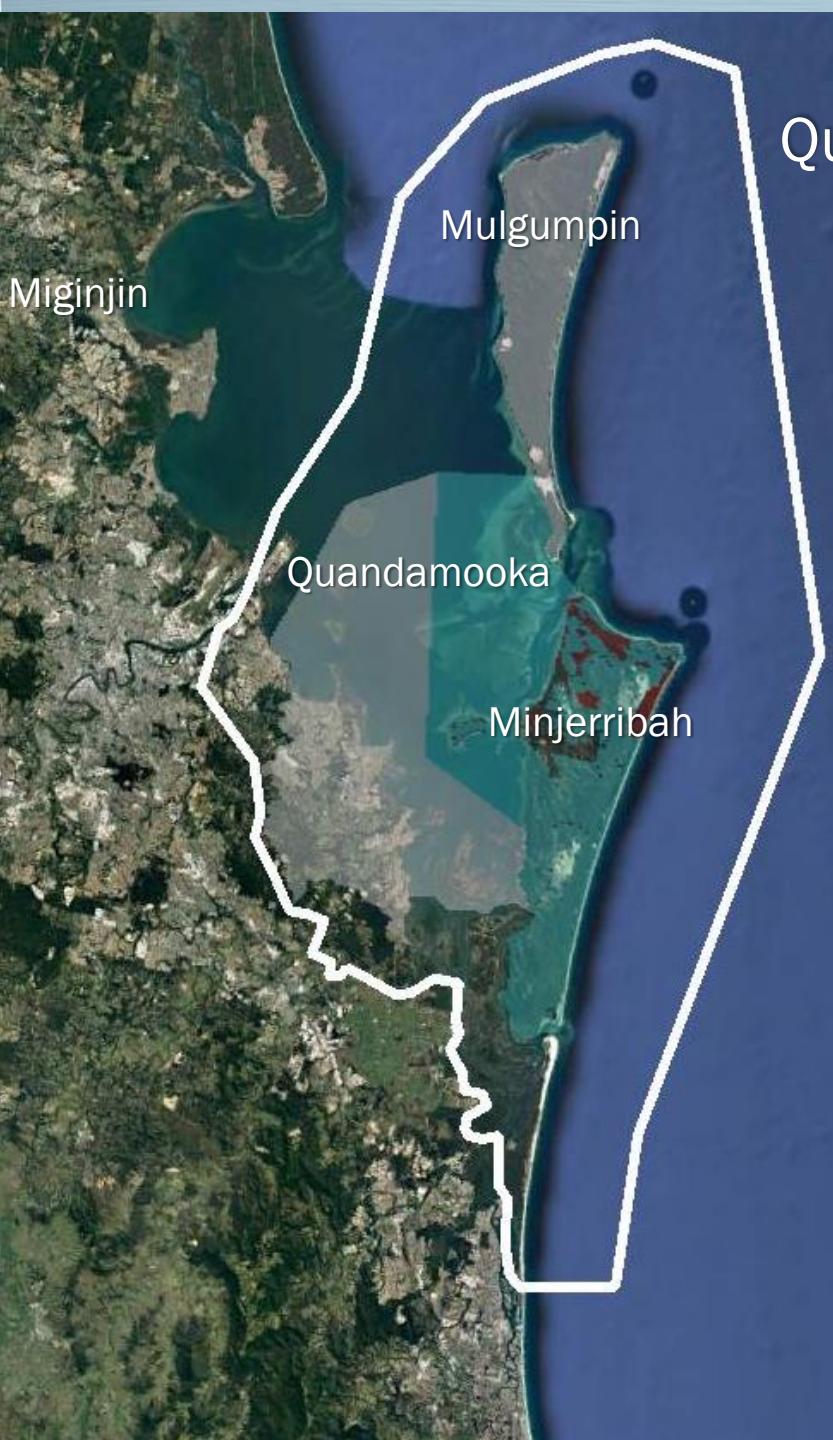
Quandamooka Law Review Project:
Ensuring state law supports native title outcomes

5 June 2018



Quandamooka People and Native Title

Native Title Determinations - QP 1& 2

- 2,264 hectares of Exclusive Possession lands on State land on Minjerribah
- 22,639 hectares onshore and 29,505 hectares offshore of Non Exclusive Possession lands on and around Minjerribah
- 13,800 hectare terrestrial Indigenous Joint Management Area and commitment to a Marine Park Memorandum of Understanding.

Registered Native Title Claims – QP 4 & Coast

- QP4 – 17,159 hectares onshore areas of Moreton Island.
- Coast Claim - 53,058 hectares of mainland, southern Moreton Bay and Southern Moreton Bay Islands

QYAC – Recognised Rights

- On 4 July 2011, Quandamooka People had native title determined and formally recognised across Minjerribah, and Moreton Bay.
- An Indigenous Land Use Agreement outlines all previous acts of government and their status post determination, such as mining leases and permits to occupy.
- QYAC is the Aboriginal Cultural Heritage Body under the Aboriginal Cultural Heritage Act 2003, which applies to all tenure types.

Exercise of Quandamooka rights

The Quandamooka determination, paragraph 7 held that;

> "The native title rights and interests are subject to and exercisable in accordance with:
>
> (a) the Laws of the State and the Commonwealth; **and**
>
> (b) (b) the traditional laws acknowledged and traditional customs observed by the native title holders."

Commonwealth Laws

Section 211 of the Native Title Act 1993 removes many Commonwealth/State/Territory law restrictions on native title holders:

"(1) Subsection (2) applies if:

(a) the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on a particular class of activity (defined in subsection (3)); and

(b) a law of the Commonwealth, a State or a Territory prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law; and

(ba) the law does not provide that such a licence, permit or other instrument is only to be granted or issued for research, environmental protection, public health or public safety purposes; and

(c) the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders.

Removal of prohibition etc. on native title holders

(2) If this subsection applies, the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:

(a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and

(b) in exercise or enjoyment of their native title rights and interests."

Definition of **class of activity**

(3) Each of the following is a separate ***class of activity*** :

(a) hunting;

(b) fishing;

(c) gathering;

(d) a cultural or spiritual activity;

(e) any other kind of activity prescribed for the purpose of this paragraph.

State Laws

Different categories of laws:

(a) Specific exclusion of impact on native title

"Nothing in this act affects Native Title rights or interests",

(b) Invalid presumption

Section 45 of the *Forestry Act 1959* (Qld) –presumption of ownership of quarry materials, disturbed by finding of native title rights over "Traditional Natural Resources"

(c) Exemptions that now apply to native title holders, but probably not understood that way, i.e. Existing use rights in *Planning Act 2016*(Qld)

(d) Some things recognised, but not all:

See section 95 *Water Act 2000* (Qld), or section 14 *Fisheries Act 1994* (Qld)

Issue – Lack of clarity

Failure to specifically set out how Native Title rights and interests are protected by, and operate within, State legislative frameworks leads to confusion.

No one wants to set a precedent.

No one wants to make a decision without clear policy guidance.

Once again, despite recognition of native title rights no one knows how they fit in without more expensive litigation.

QYAC approach

August 2013

Initially, QYAC tried to settle high level agreed MOU to set out relationships with native title holders and local government and State authorities.

Failed to get a response.

December 2013

QYAC sent draft factsheets to provide clear guidance.

Sea Country

Quandamooka		Government	
CAN	CANNOT	CAN	CANNOT
Catch, cook, eat, share with Quandmooka People all fish species	Catch fish for commercial purposes	Carry out existing management activities	Create new obligations that impact on native title without future act notices
Catch fish, crabs, dugong and turtles in all areas of the sea country	Cannot catch for commercial purpose	Fine or penalize all others for fishing in restricted areas	Fine Quandamooka People for fishing in restricted areas
Access all areas by power boat, kayak, canoe, jetski	Be in control of vessel without necessary licence	Repair existing structures	Remove existing structures or build new structures without future act notices
Take sand, clay, plants, shells water and other natural resources	Take sand, clay, plants, water, shells and other natural resources for commercial purposes	Regulate other people for taking natural resources	Fine Quandamooka People for taking sand, clay, seaweed, plants or animals

“Too broad and too disparate”

QYAC, at the State’s invitation, then took a more specific approach:

- Visitor access protocol –Government agency visitors notify QYAC prior to visiting island
- Bushfire Management protocol – first draft of a policy to ensure Quandamooka law and custom incorporated into business as usual

Still not acceptable to the State.

Right to live and Planning Act

The right to live was established on both exclusive and non exclusive lands.

Planning law includes a concept of “existing use rights”, if the dwelling was there prior to the operation of the Planning regime, as many native title residences are on Minjerribah.

No express statement in Qld Sustainable Planning Act about Native Title rights.

QYAC advocacy

QYAC wrote and requested native title rights be incorporated more expressly into the Planning regime at a number of levels, in accordance with International Human Rights law.

Some success, new object, section 5 (d):

"valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition."

Shaping SEQ: Regional Plan

Elements and strategies

Element 1: Traditional Owners

Traditional Owners are engaged and their culture is respected in planning for the region.

Strategies

1. Recognise and plan for the economic and social needs of Traditional Owner communities in consultation with those communities.
2. Recognise the procedural rights of Traditional Owners to be consulted at the outset on matters that may affect their native title rights, the alienation of unallocated state land or traditional heritage values.
3. Engage Traditional Owners to enable their cultural knowledge and connection to regional land use and seascapes to be included in planning for communities and the sustainable management of natural assets and natural economic resources.

Redlands City Council

Despite QYAC working intensively with local government and State Government on supporting native title outcomes through planning law, the local council has refused to incorporate those zoning changes in their proposed Local Plan.

Local Government consented to the Determination, but wants to be directed by the State Government before supporting native title outcomes in their planning. Is it discrimination?

Existing Use rights

- Workforce for Benevolent Institution from 1800s
- Preferred to Myora Mission which was closed and residents moved by Government to One Mile
- For a long period from mid 1940s to 1964, Office of Director of Native Affairs, Land Administration Board/Commission, Department of Lands and Department of Public works considered various proposals to improve tenure and conditions and even premises at One Mile, and declined to install basic public infrastructure, water, sewage, roads, stormwater and electricity.

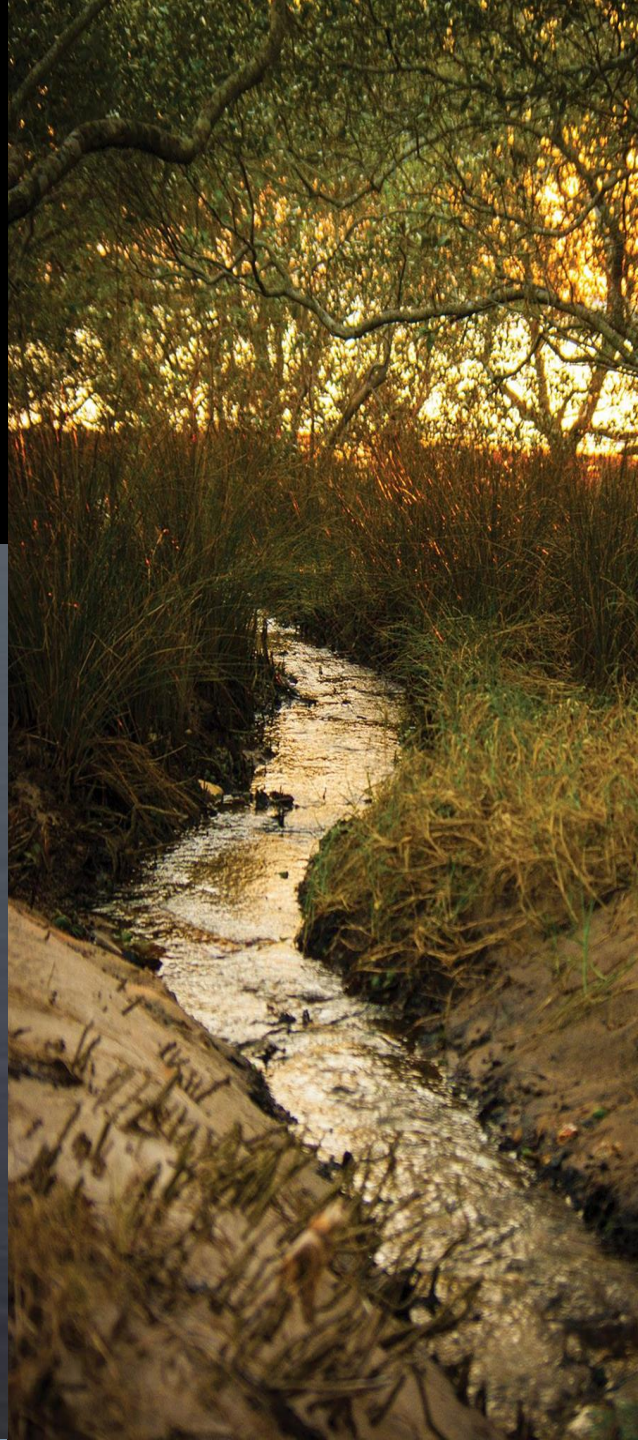
Acting land Secretary 1946

- The majority of these people were originally removed from the Aboriginal reserve at Myora, and it is understood that the Superintendent gave these people permission to erect their homes on the Benevolent reserve at One Mile…
- The land on which they are living is vacant Crown land….it is recommended that these people be allowed to remain in their present situation rent free on this Crown land and no tenures at all be allowed….
- It is further recommended that the proposed reticulation of these houses from the water scheme be abandoned since such installation would only add permanency to this struggling settlement…with regard to sanitation of the One Mile area, it could be carried on by members of the population by arrangement.
- At present there are 132 people, men, women and children in the area.

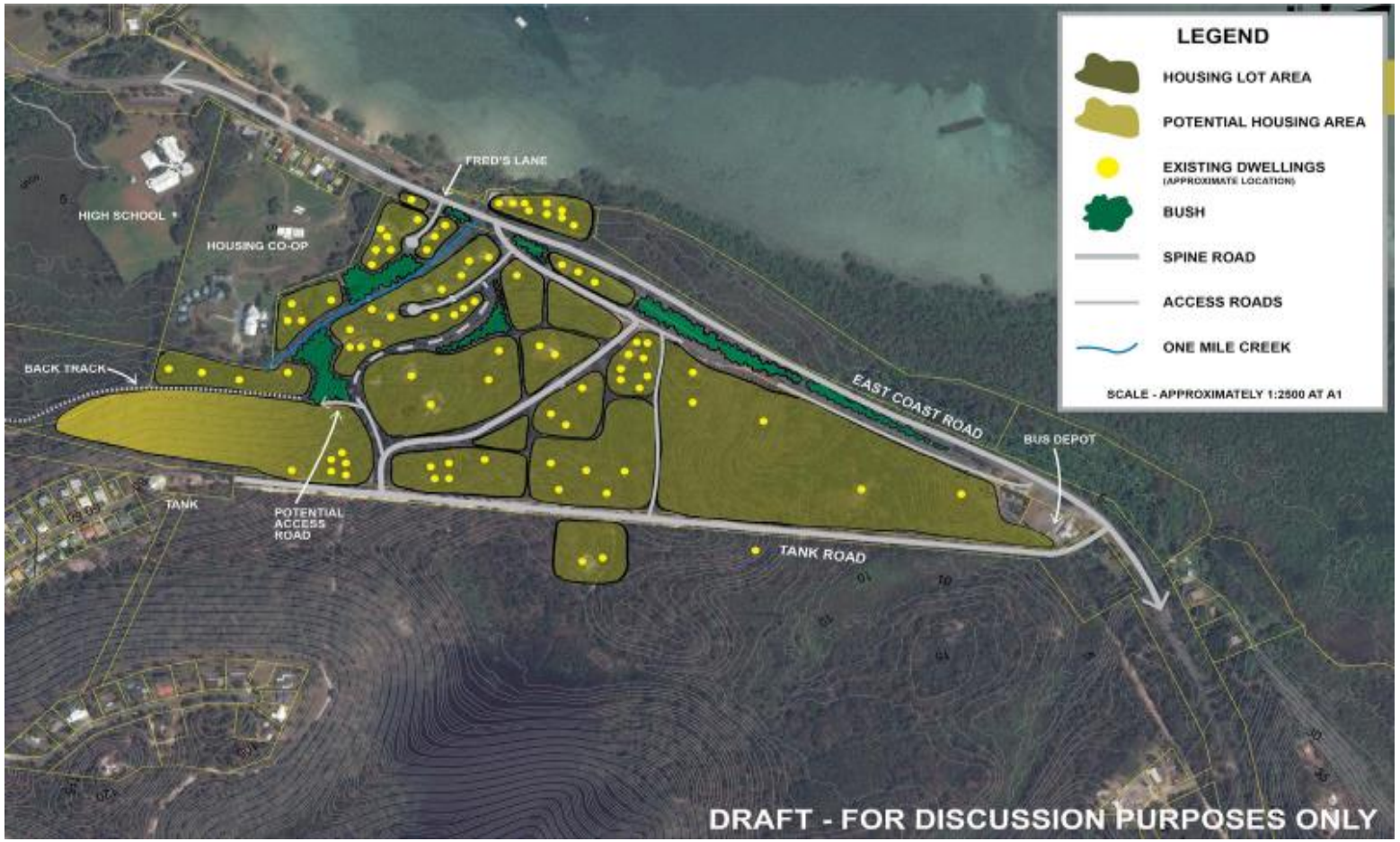
One Mile

"Acknowledging the history of One Mile, and the efforts of our Ancestors and Elders, QYAC is supported and encouraged to continue its commitment to ensuring that once more One Mile becomes a safe, healthy, affordable place to bring up future generations of Quandamooka people with infrastructure and dwellings that are ecologically sustainable."

Quandamooka Yoolooburrabee Aboriginal Corporation (QYAC) Elders in Council, Moreton Island
26 June 2016



One Mile


LEGEND
HOUSING LOT AREA
POTENTIAL HOUSING AREA
EXISTING DWELLINGS
(APPROXIMATE LOCATION)
BUSH
SPINE ROAD
ACCESS ROADS
ONE MILE CREEK
SCALE - APPROXIMATELY 1:2500 AT A1
FRED'S LANE
HIGH SCHOOL
HOUSING CO-OP
BACK TRACK
EAST COAST ROAD
BUS DEPOT
TANK
POTENTIAL ACCESS ROAD
TANK ROAD
DRAFT - FOR DISCUSSION PURPOSES ONLY

Economic opportunities

Investment in land, housing, and community business is impaired by the lack of clarity around the exercise of native title rights.

While it is not possible to sell fish, animals or rock, or sand, is it acceptable to request a small fee to recover your access costs?

Is there a degree of artificiality?

Queensland

Due to the lack of progress in the previous government regime, the current Qld State Government has established a Ministerial Forum constituted by several Cabinet Ministers to:

- Ensure compliance with State ILUA obligations;
- Whole of Government response to agreed priority actions;
- Maximise the social and economic returns of the State investment in native title outcomes.

Sensible solution – support native title rights

It is difficult to identify another example of the legally recognised rights of other Australians to fish, hunt, live or possess not being recognised and positively supported in State regulatory and management regimes for over 25 years.

On 28 May 2018 QYAC has requested that the Queensland Government systematically review its legislation and policy to positively recognise native title rights and interests into regulatory and management regimes.

Thank you

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