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Friday 26th July 2019

Cultural Heritage Acts Review- DATSIP
PO Box 15397
City East
QLD 4002

Re: Cultural Heritage Acts Review Submission

Dear Cultural Heritage Acts Review Team,

Please find enclosed a submission by the Australian Archaeological Association Inc. (AAA) for the Queensland Cultural Heritage Acts Review. This document has been prepared by select Queensland-based members of the AAA who attended a forum at The University of Queensland on 15 July 2019. The discussion and the recommendations made in this submission were informed by input from the Aboriginal community members and Aboriginal Parties from across south-east Queensland who were able to attend the forum, as well as Aboriginal people from the communities within which we work, along with cultural heritage practitioner colleagues.

I commend this document to you.

Yours sincerely

Dr Michael Slack
President, Australian Archaeological Association.

SUBMISSION TO

Queensland
Indigenous Cultural Heritage Acts Review

July 2019

A submission from the Australian Archaeological Association Inc.

Executive Summary

This submission has been prepared by members of the Australian Archaeological Association Inc. (AAA), in collaboration with archaeologists and anthropologists from The University of Queensland, and representatives of Aboriginal communities in southeast Queensland. Owing to the geographical focus of those involved in preparing this document, this submission relates only to the *Aboriginal Cultural Heritage Act 2003.*

We emphasise that the Acts are not meeting their principal aims (Section 5), either as a result of flaws in original drafting (especially in relation to Duty of Care principles) or due to advances in the international practice of cultural heritage management that make elements of the current Act obsolete (especially in relation to definitions).

The main findings presented in the submissions are:

1.1 Definitions of cultural heritage

- Definitions as established in Sections 8-12 not workable:
    - The definitions do not specifically acknowledge the concept of intangible heritage as defined by UNESCO convention (UNESCO 2003, notwithstanding Section 12);
    - The definitions do not specifically acknowledge the concept of living heritage as defined by UNESCO convention (UNESCO 2017);
    - The definitions do not specifically acknowledge the concept of cultural landscapes as defined by UNESCO World Heritage convention (1992 – see Brown 2019);
    - The breadth of definitions of cultural heritage in the Acts, particularly in Sections 9 and 11 relating to Aboriginal cultural areas and the setting for tangible cultural heritage, means that specific aspects of heritage can easily be overlooked.
- Definitions that suggest that Aboriginal heritage is more than the physical remains of the past, expressly as encompassed in archaeological sites, are not recognised in those sections of the Act related to the implementation of cultural heritage management, specifically in Parts 4, 6 and 7, which relate almost solely to archaeological sites and tangible heritage places.

Recommendations

- Definitions in the Act need to be updated to recognise the definitions used in modern cultural heritage management discourse;
- The Act needs to recognise that Aboriginal people may wish to use their own definitions of heritage in their management of cultural heritage in accordance with long-standing laws and customs relating to caring for heritage and country;
- Practice Notes, similar to those used in the Burra Charter (AICOMOS 2013) should be considered for the Act, to explain definitions and provide certainty for land users.

1.2 Ownership of cultural heritage

- Ownership of Aboriginal heritage is vested in the State (Section 20) except in relation to burials, secret/sacred objects, and artefacts collected by Aboriginal Parties (Sections 6 and 14). This goes against Aboriginal law and custom in relation to the ownership and management of cultural heritage, which Aboriginal people in this state have implemented since the beginning of time. As such, the Act disempowers Aboriginal people by denying them the ability to access to their traditional laws, customs and knowledge in relation to caring for heritage and country.
- At the same time, however, for legal reasons, heritage around Australia is formally and legislatively 'owned' by the state. Such 'ownership' by the state allows the state to develop legislation to manage and protect heritage. Without such formal, legislated ownership, it is not possible to have cultural heritage legislation. This challenging issue regarding ownership needs to be acknowledged in cultural heritage legislation, perhaps with a recognition or Indigenous custodianship under Indigenous law.

Recommendations

- Section 20 of the Act should be revised to recognise Aboriginal custodianship of all aspects of Aboriginal cultural heritage, tangible and intangible, and including living heritage and cultural landscapes, in accordance with Aboriginal law and custom relating to caring for heritage and country.

2. Identification of Aboriginal Parties

- The coupling of Aboriginal Party status with native title can be beneficial where native title has been determined;
- The coupling of Aboriginal Party status with native title may be disempowering of Aboriginal people where native title has been determined not to exist by the Courts, yet "last claim standing" provisions in the Act hand cultural heritage management rights to one Traditional Owner group over other legitimate claimants to heritage;
- The coupling of Aboriginal Party status with native title fails to recognise that many Aboriginal people have legitimate claims to Aboriginal cultural heritage and heritage management rights even though they do not have native title rights (McGrath [ed.] 2016).
- While the coupling of Aboriginal Party status to Court determinations of native title holders and registered native title claimants may be problematic in the ways outlined above, these *do* provide some legal certainty about identified Aboriginal Parties.

Recommendations

- Where there is a Consent Determination extant that identifies Traditional Owners (Native Title Holders), the Prescribed Body Corporate (PBC) becomes the (principal) Aboriginal (or Torres Strait Islander) Party. It should be recognised,

however, that even in these situations there may be Aboriginal people who do not feel represented by the PBC. There needs to be some acknowledgement that, in certain circumstances, the PBC alone may not be the sole representative of Aboriginal people with connections to cultural heritage, and therefore additional consultation may be required;

- Where a PBC does not exist, then a process to determine the Aboriginal Party must be outlined in the Act to reduce conflict;
- Given the complexity and highly politically charged nature of this issue, it is recommended that forums be conducted with Indigenous community representatives alone, to discuss Indigenous community responses to the problem and proposed solutions.

3. Land User Obligations

- Self-assessment of Duty of Care compliance is a failed concept which has led to the damage or destruction of thousands of cultural heritage sites, places and landscapes over the past 15 years of the Act's operation;
- Partial Duty of Care can be met by proponents undertaking a search of the DATSIP cultural heritage database (Section 23[e]). This database is highly inaccurate and is incomplete;
- Duty of Care Guidelines fail to recognise the breadth of definitions of cultural heritage;
- Duty of Care Guidelines fail to recognise the potential for buried cultural heritage (particularly archaeological sites) to have survived previous land use;
- There are inadequate triggers for the development of Part 7 Cultural Heritage Management Plans;
- Part 6 Cultural Heritage Studies are seriously underused. Given that these documents are the principal mechanism provided in the Act for the assessment of the significance of cultural heritage, this is a serious problem;
- Part 7 Cultural Heritage Management Plans are underused and often go unregistered, making their usefulness limited;
- A Part 7 CHMP is currently only required under an EIS and where a development activity has been assessment by the proponent to be a Category 5 activity under the provisions of the Duty of Care Guidelines. Many high impact development projects are not undertaking a cultural heritage assessment as part of their development, as they sit outside of the threshold of an EIS.

Recommendations

- The assessment of Duty of Care should be made the responsibility of the regulatory authority, in particular:

- Under the provisions of *Planning Act 2016*, local government authorities should be encouraged to make compliance with the ACHA a condition of development, not merely an advisory requirement, especially in regards to development applications for operational works
- As an alternative to the regulatory authority assessing Duty of Care requirements, the Act could make provision for heritage advisors, local council heritage officers, Aboriginal Cultural Heritage Bodies, Aboriginal Parties, and/or a qualified cultural heritage officer employed by the land use proponent, to make compliance decisions;
- If Aboriginal Cultural Heritage Bodies and/or Aboriginal Parties are to be given a role in reviewing development applications, they need to be resourced to do so;

- Financial responsibility for Duty of Care must be borne by developers while regulated by the state;
- Land users must prove that they have met their Duty of Care to the satisfaction of the appropriate and relevant Aboriginal Party and/or the regulatory authority;
- The Duty of Care Guidelines need to be revised to take account of both tangible and intangible heritage, and to recognise the likelihood that buried cultural heritage (particularly archaeological sites) may have survived previous ground disturbance;
- Realistic triggers for cultural heritage assessment must be based on cultural heritage analyses, not development type;
- The threshold for CHMPs needs to be widened and aligned with other states such as Victoria, to include high impact developments such as residential developments.
- CHMPs and reports prepared as part of the CHMP process must form part of the database, and be able to be accessed by Aboriginal Parties, cultural heritage advisors, and land use managers;
- The appointment of an independent Indigenous Cultural Heritage Board with State-wide responsibilities would bring Queensland heritage management legislation into line with other states which have such advisory bodies.

4. Compliance

- The laissez-faire paradigm that underpins the Act is not conducive to the successful oversight of compliance with the legislation;
- There is no role for Aboriginal Parties to be included in compliance provisions in the Act.

Recommendations

- The state should assume a regulatory role in relation to the protection and management of Indigenous cultural heritage;

- There should be dedicated compliance and enforcement officers who review development applications at initial planning stages and at the commencement of construction;
- A proportion of the Government levy on development applications should be isolated to Traditional Owner Parties to finance their role in compliance review;
- An Advisory Committee or Council for Indigenous Heritage should be implemented to provide oversight for cultural heritage management in the state;
- DATSIP needs to undertake an education/ marketing campaign with developers, local governments, archaeologists and heritage practitioners in Queensland, clarifying the importance of and how to, comply with the act.

5. Recording Cultural Heritage

- There are problems that arise in the interpretation of the database when it is accessed by untrained land users who misunderstand the meaning of absence of cultural heritage recordings in a proposed development area;
- There are errors in the database owing to the age of many of the entries;
- There are serious gaps in the database because the reporting of cultural heritage is not mandatory;
- Many Aboriginal people are reticent to see their cultural heritage recorded in the database because of fears of misuse of data that has the potential to be passed to the public.

Recommendations

- The database should be thoroughly reviewed for errors, and a program to ground-truth all records implemented, in conjunction with local Aboriginal people and Aboriginal Parties;
- A program should be implemented to consult with Aboriginal people and Aboriginal Parties about the value of registering all known cultural heritage on the database, either as point data or as area polygons;
- Following acceptance by Aboriginal people and Aboriginal Parties, the Act should be revised to ensure that all reports and data generated from Cultural Heritage Studies, Cultural Heritage Management Plans and voluntary Other Land Use Agreements are included on the database;
- Land users and development proponents should be required to undertake training in interpreting the data held in the database before they are given access to the database;
- The DATSIP database should be ground-truthed by local government and Aboriginal Parties under Part 6 studies. If this cannot occur, a search of the database should not allow a developer to meet part of their duty of care.

Conclusion

Our submission makes a number of recommendations aimed at addressing the problems we have identified. We also make one overarching recommendation, aimed to address all the major deficiencies of the legislation discussed below, especially in regard to cultural heritage definitions, land user obligations, triggers for cultural heritage assessment, compliance, cultural heritage recording (including assessment of significance) and database usefulness. This overarching recommendation is:

> **that the State develop a state planning level Cultural Heritage Management Plan (CHMP), based on regional Cultural Heritage Studies (CHSs), funded by the Queensland government**.

This CHMP would occur across the state, with funding made available to Indigenous organisations for regional CHSs that identify places of significance (tangible heritage sites, cultural landscapes, and intangible elements of heritage including living heritage), at-risk sites, evaluate the accuracy of place information on the existing database, generate interpretative signage, incorporate up-to-date GIS heritage management processes and software applications, etc. to feed into the state-wide plan.

Preamble

Aboriginal and Torres Strait Islander peoples have long been responsible for their cultural heritage and have managed that heritage successfully for tens of thousands of years; well before the institution of cultural heritage legislation.

Heritage is a cultural *process*, an act of making meaning in and for the present and the future:

> [Heritage is] being in place, renewing memories and associations, sharing experiences … to cement present and future social and familial relationships. Heritage [isn't] only about the past – though it [is] that too – it also [isn't] just about material things – though it [is] that as well – heritage [is] a process of engagement, an act of communication and an act of making meaning in and for the present (Smith 2006:1).

It is vital that cultural heritage legislation acknowledges this long process of creating and managing heritage in the past, and continuing it into the present and the future, through realistic definitions of cultural heritage and processes for cultural heritage management that incorporate Indigenous people's knowledge paradigms.

The current Queensland Acts, despite having initial principles that address these issues, do not, in practice, enable the implementation of either the principles of the Act or Indigenous knowledge paradigms, for a number of reasons. In this submission we outline our concerns resulting from these failures.

As a consequence of non-implementation of the principles of the Act, harm is being caused to cultural heritage and to those people who are custodians of it.

In this submission, we address the Review terms of reference, as outlined in DATSIP's briefing and discussion paper. In doing so we make recommendations that aim to meet the concerns of Traditional Owners (TOs), and those of cultural heritage practitioners and scholars researching cultural heritage matters in a Queensland context, while remaining pragmatic.

Introduction – Is the Act doing what it sets out to do?

The *Aboriginal Cultural Heritage Act 2003* (ACHA) aims 'to provide effective protection and conservation of Aboriginal cultural heritage'. Its principles are:

- Respect for Aboriginal knowledge, cultural and traditional practices
- Aboriginal people are regarded as guardians of heritage
- To maintain Indigenous knowledge and promote understanding of Aboriginal culture
- To allow Aboriginal people to reaffirm obligations to law and country.

As well as these principles, the Act aims to facilitate development that may impact on cultural heritage. The Act, therefore, aims to be inclusive, recognising that heritage is both physical (sections 8, 9, 10 and 11) and non-physical (section 12), making provisions for both development and research (Part 7), acknowledging Aboriginal values yet also recognising the importance of archaeological, anthropological, biogeographical and historical significance. This objective of inclusiveness is laudable, but is also problematic. As currently constituted, there is clear evidence that the Act cannot adequately address all the elements of this inclusive aim.

The following document is structured according to the 5 key questions of the DATSIP Review, organised as:

1. Ownership and Defining Cultural Heritage
2. Identifying Aboriginal and Torres Strait Islander parties
3. Land user obligations
4. Compliance mechanisms
5. Recording Cultural Heritage

1.0 Ownership and Defining Cultural Heritage

1.1 Definitions of cultural heritage

In the last 20 years, scholarly understandings of cultural heritage have changed and global instruments of cultural heritage have begun to recognise these changes. This shift may be understood as moving away from a principal emphasis on place-based definitions of tangible cultural heritage (i.e. things that can be touched), especially archaeological sites and objects, to a broader understanding of the concept of cultural heritage that includes both tangible and intangible heritage as well as cultural landscapes.

Intangible heritage

Prominent is an understanding that place and activity are enmeshed through the concept of Living Heritage and Cultural Landscapes. Intangible heritage is defined by UNESCO (2003) as follows:

> Cultural heritage does not end at monuments and collections of objects. It also includes traditions or living expressions inherited from our ancestors and passed on to our descendants, such as oral traditions, performing arts, social practices, rituals, festive events, knowledge and practices concerning nature and the universe or the knowledge and skills to produce traditional crafts.
> (UNESCO 2003)

Living heritage

More recently, UNESCO has expanded the definition of intangible heritage to elucidate the meaning of 'living heritage', which includes:

- Oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
- Performing arts such as dance;
- Social practices, rituals and festive events;
- Knowledge and practices concerning nature and the universe;
- Traditional craftsmanship such as traditional weaving (UNESCO 2017; see also Poulios 2014: Chapter 4).

Cultural landscapes

'Cultural landscapes' is a term originally coined by Sauer in 1925:

> The cultural landscape is fashioned out of a natural landscape by a culture group. Culture is the agent, the natural area is the medium, the cultural landscape is the result (Sauer 1925:46).

The cultural heritage management discipline has for many years advocated the importance of situating heritage places within a 'cultural landscape' setting, which provides the context for cultural heritage management of places and objects, and the cultural values (including beliefs, stories, songs, etc.) associated with these places and objects. The first time this concept was codified in an Australian context was in the 1988 Burra Charter (Brown 2019:24), when the definition of 'place' was changed to incorporate

the landscape context within which a place was situated. The Burra Charter is the guide to best practice in the management of heritage places developed by ICOMOS' Australian chapter (Australia ICOMOS 2013).

In 2019, Brown provided an evaluation of the concept of cultural landscapes as it is increasingly used in World Heritage literature and practice. Brown demonstrates that the overarching concept of 'cultural landscapes' has gained traction in cultural heritage management discourses generally. To omit the category from contemporary legislative consideration exemplifies an outdated view of heritage (Brown 2019).

Definitions of cultural heritage in the Queensland Acts

The definitions of Aboriginal cultural heritage in the ACHA (especially Sections 9 and 11 with respect to areas and the landscape context of sites; and Section 12 which recognises [superficially] the notion of intangible heritage – but see Ross 2010) do indeed allow for an expanded view of cultural heritage, through the definition of Aboriginal areas (which might be construed as accommodating the concept of 'cultural landscape' – see especially Section 11) and the recognition that to be cultural heritage, heritage need not necessarily be a physical place (Section 12 – but see Ross 2010). However, these definitions do not expressly recognise intangible heritage, living heritage, and cultural landscapes, and thus these important aspects of cultural heritage can be easily overlooked or ignored by those attempting to implement to Act, but without a good grasp of the complexities of the modern definition of 'cultural heritage', to the detriment or even harm of significant heritage places and landscapes.

Implementing the definitions of cultural heritage in the Queensland Acts

In practice, the broad-based definitions in the Act are rarely implemented, nor are they represented in the sections of the Act that deal with further matters of definition. In Section 23 for example, the focus is almost solely on the physical manifestations of cultural heritage. In the Duty of Care Guidelines based in Section 28 of the Act, the definitions are all focussed on tangible sites. Of significant concern is that in Part 6 and Part 7, Cultural Heritage Studies (CHSs) and Cultural Heritage Management Plans (CHMPs) refer almost exclusively to the management of physical remains from the past, thereby ignoring intangible heritage, living heritage and cultural landscapes, all of which may have past and present-day manifestations.

It is important to acknowledge that tangible heritage and archaeological sites and places are vitally important parts of cultural heritage considerations. Nothing that we say here aims to lessen the value and significance of physical heritage places and archaeological sites. The point we make is that heritage must be recognised as incorporating all aspects of the cultural heritage discourse, which has so firmly evolved in collaboration between archaeologists, heritage practitioners, and Traditional Cultural Heritage Managers – the Aboriginal Traditional Owners themselves.

1.2 Ownership

The above discussion of definitions of cultural heritage highlight the current disconnect between Indigenous approaches to heritage and its management on the one hand, and limitations of the Queensland Heritage Acts on the other. Clearly, cultural heritage is

owned and managed by those who created that heritage and their descendants for whom that heritage has meaning (Andrews and Buggey 2008; Smith 2006).

Under the ACHA, cultural heritage is deemed to be the property of the State (Section 20[2]) apart from burials, secret/sacred objects, and artefacts collected by Aboriginal Parties (Section 6, reinforced by the provisions of Section 14, which make it clear that Aboriginal ownership **only** refers to burials, secret/sacred objects, and archaeological materials collected by Aboriginal Parties). All sites, Aboriginal areas (Sections 9 and 11) and other cultural heritage (Section 12) are the property of the State, yet there are no provisions, anywhere in the Act, for the State to be actively involved in the protection of the cultural heritage the State owns. All protection falls to land users (see below).

At the same time, however, for legal reasons, heritage around Australia is formally and legislatively 'owned' by the state. Such 'ownership' by the state allows the state to develop legislation to manage and protect heritage. Without such formal, legislated ownership, it is not possible to have cultural heritage legislation. This challenging issue regarding ownership needs to be acknowledged in cultural heritage legislation, perhaps with a recognition or Indigenous custodianship under Indigenous law.

1.3 Conclusion

Indigenous people have developed, and continue to develop, their own approaches to cultural heritage, which are parallel to new approaches to cultural heritage represented in the UNESCO and World Heritage conventions and in scholarly work. These approaches all emphasise the fact that cultural heritage may be understood as created in the past by Aboriginal ancestors, narrated and given meaning in the present by descendants of these ancestors, with a view to future engagements with that heritage (Andrews and Buggey 2008; McGrath [ed.] 2016; Ross 2008, 2010; Smith 2006). It is these definitions of Aboriginal cultural heritage that must be acknowledged in the Act, along with the corollary that **all** cultural heritage is, in accordance with Aboriginal law, owned by the Aboriginal people associated with that heritage, by dint of their descent from those who created the heritage in the first place. These observations must form the basis for revisions to the definitions of heritage and recognition of Indigenous heritage custodianship in all aspects of the Act, including provisions relating to the implementation of heritage management.

1.4 Recommendations

Based on the discussion above with respect to definitions of cultural heritage in this submission we make the following recommendations that aim to address the problems in the Acts regarding definitions of cultural heritage:

1.4.1 Sections 8, 9, 11 and 12 of the Act need revision to acknowledge, explicitly, that, as well as tangible heritage (objects and sites), CH incorporates Intangible Heritage, Living Heritage and Cultural Landscapes, referring to definitions in UNESCO and World Heritage Conventions.

1.4.2 Given that many Indigenous Parties and Aboriginal people develop their own definitions of what constitutes cultural heritage for them, both in the past and in the present, there must be an acknowledgement in the definitions that Aboriginal and Torres Strait Islander Parties may have reason to specify their own cultural heritage in the preparation of CHSs and CHMPs, and that this is permitted by the Act.

1.4.3 A system of Practice Notes should be included in the Acts, following the example of the Burra Charter Practice Notes (Australia ICOMOS 2013), that explain the nature of definitions of cultural heritage and that expressly recognise the importance of the need to incorporate Traditional Owner knowledge in developing area specific definitions. These Practice Notes would need explicit links to definitions in Sections 8-12 (in the way that Duty of Care Guidelines are currently linked to Sections 23 and 28). The inclusion of Practice Notes would act to assist in the creation of certainty around the new definitions of cultural heritage proposed in these recommendations.

Based on the discussion above with respect to ownership of cultural heritage, in this submission we make the following recommendations that aim to address the problems in the Acts regarding ownership of cultural heritage:

1.4.4 Custodianship of all aspects of Aboriginal cultural heritage should reside with Aboriginal Parties, not only burials, secret/sacred objects, and artefacts collected by Aboriginal Parties, even if legal 'ownership' continues to reside with the state. Such recognition of custodianship would reinstate an acknowledgement of Aboriginal connection to the cultural heritage of their ancestors, and reify living Aboriginal relationships to place, landscape and heritage activity "in and for the present".

2.0 Identifying Aboriginal (and Torres Strait Islander) Parties

2.1 Introduction

There are considerable problems that have arisen from the 'last claim standing' provision in the Acts and the coupling of native title provisions with the identification of Aboriginal Parties in the Cultural Heritage Acts. For example, in accordance with the provisions of the Act, the Native Title Representative Body is often the first point of engagement in development applications, however Traditional Owners (who may not always be members of ACHBs or of Native Title Representative Bodies) should also be part of that initial engagement. We note that an inclusive approach to Traditional Knowledge holders for cultural heritage places and areas would emphasise an inclusive approach to the question of whom to consult.

2.2 Recommendations

We recommend a hierarchical approach to the identification of Aboriginal Parties and Traditional Owners in the Acts:

2.2.1 Where there is a Consent Determination extant that identifies the native title holders, the Prescribed Body Corporate (PBC) becomes the (principal) Aboriginal (or Torres Strait Islander) Party. It should be recognised, however, that even in these situations there may be members of the Aboriginal people who do not consider themselves to be represented by the PBC. There needs to be some acknowledgement that, in certain circumstances, the PBC alone may not be the sole representative of all aboriginal people in an area and therefore additional consultation may be required.

2.2.2 Where a PBC does not exist, then a process to determine the Aboriginal Party for the purposes of the ACHA must be outlined in the Act to reduce conflict. Linking this process to native title may not always be appropriate, given the large number of Aboriginal peoples who choose not to engage in the native title process but nevertheless seek to protect their cultural heritage, for a number of reasons.

2.2.3 Given the complexity and highly politically charged nature of this issue, it is further recommended that forums be conducted with Indigenous community representatives alone, to discuss Indigenous community responses to the problem and proposed solutions.

3.0 Land user obligations

3.1 Introduction

The current laissez-faire approach to heritage management in the Acts places considerable obligations on land users to ensure the protection of Indigenous cultural heritage. Self-assessment of a development or other activity likely to harm cultural heritage, and the lack of realistic thresholds that trigger cultural heritage assessment, lie at the heart of the problems with site protection in the Act. As Martin et al. (2016) and McGrath and Lee (2016) observe:

> … the (Queensland) government's deliberate use of a 'power blind' approach has gone too far and there is a pressing need to find a way to balance statutory oversight of heritage management processes with the empowerment of traditional owners (McGrath and Lee 2016:9).

In this submission we aim to suggest practical ways to rectify the current power imbalance.

3.2 Self-assessment by land users

Under the provisions of Section 23 of the ACHA, developers and other land users self-assess the likelihood of their development/activity having an adverse impact on Aboriginal cultural heritage. Such land users are rarely skilled in cultural heritage identification, nor are they trained to understand the possible impacts of previous disturbance on Aboriginal heritage sites and places.

Survival of buried heritage

One example of this point relates to the failure of Duty of Care provisions to recognise the likelihood of the survival of buried Aboriginal heritage (particularly archaeological sites), even in areas previously disturbed by previous land use. The Duty of Care Guidelines imply that a development that is planned for an area in which there has been previous ground disturbance is, usually, a Category 3 or Category 4 development, unlikely to further affect Aboriginal heritage, thereby not requiring further cultural heritage assessment. Nevertheless, the survival of buried heritage, even in the most extreme cases of prior ground disturbance, has been well documented in archaeological literature (e.g. Haslam et al. 2003, McDonald et al. 2007, Rains and Prangnell 2002).

The failure of the Duty of Care Guidelines to recognise that tangible Aboriginal heritage is often buried and therefore survives below the surface of the ground is a significant problem for, and in the opinion of many of the people we engaged in the development of this submission, critically undermines the Act's capacity to meet its stated aim 'to provide effective protection and conservation of Aboriginal cultural heritage'. As a consequence, there are very many examples of land users inadvertently damaging or destroying (buried) cultural heritage.

Problems with self-assessment – alternative procedures involving regulatory authorities

No other legislation or assessment of development/land use impact on a land value (e.g. flora, fauna, environmental degradation) leaves assessment to unskilled development proponents or land users.

In all states other than Queensland, skilled heritage staff in regulatory authorities assess the likelihood of a development proposal adversely impacting heritage, and advise the proponent of the need for, and level of, cultural heritage assessment, which is then carried out by the appropriate Aboriginal people (Aboriginal Party where an Aboriginal Party has been identified) in collaboration with skilled heritage professionals.

We argue that the state should assume the legislated role of a regulatory body in relation to Indigenous heritage, in the same way that it is a regulatory body for other heritage and/or environmental protection matters across Queensland, and as occurs in all other Australian cultural heritage jurisdictions. The current, largely deregulated system in Queensland has not been conducive to consistently good heritage management across the state and this needs to be acknowledged and remedied (McGrath and Lee 2016, Martin et.al. 2016; Rowland et al. 2014).

3.3 Flaws in Duty of Care provisions

Duty of Care aims to ensure that any activity likely to harm Aboriginal cultural heritage (as defined in Schedule 2 of the Act) first considers that cultural heritage and takes all reasonable steps to minimise harm. This aim is currently not being realised because the Duty of Care process is flawed, for a number of reasons:

3.3.1 The Duty of Care activity is self-regulated by people with little or no knowledge or experience in Aboriginal cultural heritage management;

3.3.2 Duty of Care is self-assessed by a land user, based on the nature of impact of the land use on cultural heritage, and not on the likelihood of the existence of cultural heritage;

3.3.3 Partial Duty of Care can be met by proponents undertaking a search of the DATSIP cultural heritage database (section 23[e]). This database is highly inaccurate and is incomplete and as a consequence a search of the database is **not** adequate to meet the principle of minimising harm to Aboriginal Cultural Heritage (see below);

3.3.4 Duty of Care, as defined in s23 of the Acts, assumes that the state database contains an accurate and comprehensive record of every heritage location in the state, and this is far from true (see below). Lack of access to reports of previous cultural heritage assessments of an area reduces the effectiveness of the Duty of Care assessment. Making accurate decisions about Duty of Care requires that adequate information be available relating to:

a. the development area;
b. previous land use activity;
c. the nature of heritage in the area; and
d. the likelihood that heritage has survived previous land use.

The absence of any record of cultural heritage in an area searched on the database is more likely to be a reflection of the absence of previous cultural heritage assessment than the absence of cultural heritage. Most developers/land users do not understand this and believe they have met their Duty of Care by searching the database and, finding no records listed, falsely assume that there is no cultural heritage in the proposed development area.

3.3.5 The guidelines do not recognise the full range of cultural heritage (see above). Not only do the guidelines imply that all heritage is tangible/archaeological (McGrath and Lee 2016; Martin et al. 2016; Ross 2010), the emphasis of the guidelines on an assessment purely of the land *surface* also ignores the fact that a great deal of tangible heritage/archaeological material is buried, and not able to be accessed via surface assessment (see above);

3.3.6 There is no opportunity for oversight of the process by the regulatory authority;

3.3.7 Section 23 of the ACHA, and the Duty of Care Guidelines (issued under Section 28 of the Act) list some of the requirements of 'Duty of Care' actions. These actions are not linked to the *Planning Act 2016*, which leads to inconsistency across the State in the assessment of developments. For example, the number of database searches per annum is far lower than the number of development applications each year, which suggests that a large number of development applications bypass

the ACHA and its provisions. The inability of the State to report on the efficacy of the ACHA legislation is linked to the lack of a requirement to report Section 23 assessments to the regulatory authority.

3.3.8 Triggers for an assessment of the likely impacts of development on cultural heritage are poorly developed. Apart from the requirement that Aboriginal Parties must be consulted for all developments requiring an Environmental Impact Assessment, the only other trigger is when a land user self-assesses a development to be at the Category 5 level. As we have already demonstrated, even Category 3 and 4 developments may cause harm to buried cultural heritage. When intangible heritage and cultural landscapes are also recognised as Aboriginal cultural heritage, any development, from Category 1 to 5, could cause harm to cultural heritage. Triggers for heritage assessment must be based on cultural heritage reasoning and the professional and/or informed assessment of the likelihood of cultural heritage occurring in a proposed development area;

3.3.9 A Part 7 CHMP is currently only required under an EIS and where a development activity has been assessment by the proponent to be a Category 5 activity under the provisions of the Duty of Care Guidelines. In 15 years, there have been 358 CHMPs registered in Queensland, which demonstrates that not all EISs are undertaking a mandatory CHMP. As those projects that require an EIS are mining, petroleum and gas projects, as well as those declared as a coordinated project by the State, many high impact development projects are not undertaking a cultural heritage assessment as part of their development. Victoria includes residential developments, subdivision of land and construction within their threshold to undertake a CHMP, resulting in 3000 CHMPs in the last 5 years.

3.4 Recommendations

Based on the above discussion relating to the Duty of Care provisions in the ACHA, we make the following recommendations:

3.4.1 The assessment of Duty of Care should be made the *responsibility of the regulatory authority*, as it is in other States and Territories, and not the responsibility of the land user. The mechanisms for assessing Duty of Care in States and Territories other than Queensland not only meet best practice cultural heritage management requirements (Pearson and Sullivan 1995), but also *enhance certainty* for both the cultural heritage and the developer.

For Queensland, Duty of Care could be made more effective in a number of ways:

a. Under the provisions of *Planning Act 2016*, local government authorities should be encouraged to make compliance with the ACHA a condition of development, not merely an advisory requirement, especially in regards to development applications for operational works;

b. To achieve reliable assessment of the potential effects of development on cultural heritage, an increased role for the regulatory authority is needed;

c. Triggers for cultural heritage assessments must be based in cultural heritage reasoning and the professional and/or informed assessment of the likelihood of cultural heritage occurring in a proposed development area;

d. As an alternative to the regulatory authority assessing Duty of Care requirements, the Act could make provision for heritage advisors, local council heritage officers, Aboriginal Cultural Heritage Bodies, Aboriginal Parties, or a qualified cultural heritage officer employed by the land use proponent to make decisions. All such assessments would need to be reviewed and approved by the regulatory authority to ensure both consistency and accuracy;

e. If Aboriginal Cultural Heritage Bodies and/or Aboriginal Parties are to be given a role in reviewing development applications, they will need to be resourced to do so.

3.4.2 Financial responsibility for Duty of Care must be borne by developers while regulated by the state.

3.4.3 Land users must prove that they have met their Duty of Care to the satisfaction of appropriate and relevant Aboriginal Party and/or the regulatory authority.

3.4.4 The Duty of Care Guidelines need to be revised to take account of intangible heritage and the likelihood that buried tangible cultural heritage has survived previous ground disturbance. Such revision should recognise that a CHMP is needed for most of the categories defined in the Duty of Care Guidelines, and not solely for Category 5 developments.

3.4.5 Assessment of the requirements of Duty of Care will not be effective unless assessors are able to access as much information as possible about the area in which land use is to occur. CHMPs and reports prepared as part of the CHMP process must form part of the database, able to be accessed by Aboriginal Parties, cultural heritage advisors, and land use managers (see also below).

3.4.6 The appointment of an independent Indigenous Cultural Heritage Board with State-wide responsibilities, would also help to resolve these issues.

4.0 Compliance mechanisms

4.1 Introduction

There is a significant need to deal with the compliance mechanisms under the Act.

Currently, compliance is largely left to the development proponent/land user, with conflicts or disputes resolved through the courts. This significantly disempowers poorly resourced Aboriginal Parties and Traditional Owners.

The authority for compliance must be held with the regulatory authority, including employing trained and well-resourced compliance officers.

4.2 Training and Resourcing

Compliance is intimately associated with the necessity for training and empowerment of Indigenous peoples in cultural heritage management and caring for country.

One example of a workable template for consideration is the Victorian model, in which Universities, Cultural Heritage bodies and TAFEs are in partnership for the training of cultural heritage officers and practitioners. Such training includes archaeology, linguistics, site protection, and the broader set of cultural heritage skills.

- It is urgent that the Act be updated to defend cultural heritage of the state against non-compliance given the weak compliance mechanisms currently in place.
- In particular, the Act should define particular kinds of places – for example bora grounds in Queensland - that would be protected in perpetuity, as defined by the state, in collaboration with TOs, with clearly identified access rights.

4.3 Recommendations

Based on the discussion generated with our colleagues, it is recommended that:

4.3.1 The state assumes a role as a regulatory body in relation to Indigenous cultural heritage in the same way that it is a regulatory body for other heritage matters across Queensland (e.g. in the *Queensland Heritage Act 1992*).

4.3.2 There should be dedicated compliance and enforcement officers, possibly extended to local councils, who review development applications at initial planning stages and at the commencement of construction.

4.3.3 A proportion of the Government levy on development applications be isolated to Traditional Owner Parties to finance their role in compliance review. Resources should be made available to support training for Indigenous people in effective heritage management.

4.3.4 Heritage assessment and management policies and procedural requirements relating to heritage protection and management should be reviewed by an Independent Indigenous Heritage body. We recommend that an Advisory Committee or Council for Indigenous Heritage be implemented, with a mix of stakeholders. This Cultural Heritage Advisory Body would include members nominated by Indigenous people from around the State. The aim of this body would be to provide state-wide oversight of cultural heritage management policy and procedures, and advice at the state level that can be applied regionally.

4.4.4 DATSIP needs to undertake an education/ marketing campaign with developers, local governments, archaeologists and heritage practitioners in Queensland, clarifying the importance of and how to, comply with the act.

5.0 Recording cultural heritage

5.1 Interpreting the database

Many of the issues associated with the database and register are underpinned by the discussion above. For example, the problem that results from developers/land users thinking that the database is a record of all sites in Queensland (see Section 4.3[5] above), so that an absence of records in a proposed development area equates with an absence of sites in the development area, stems from two issues:

5.1.1 The inadequacies of the definition of cultural heritage, which fails to recognise that heritage is more than just the physical remains/archaeological evidence of the past; and

5.1.2 The lack of understanding amongst development proponents regarding the ways in which heritage assessments are undertaken and the results of heritage are recorded.

5.2 Errors in the database

Other problems with the database and register are:

5.2.1 Many database entries are incorrectly listed and heritage practitioners and Aboriginal people with whom we consulted in the preparation of this submission were particularly critical of the location data, which are routinely wrong and incorporate translation errors from previous very old entries that have not been updated with changing datum standards.

5.2.2 The database does not take into consideration the overall cultural landscape. Even if a site is on the database and a developer conducts a lot and plan search, something as significant as a Bora Ring, which might be on the adjoining lot and will be impacted by the development (runoff from fill etc), will not be listed on the completed search request.

5.3 Gaps in the database

Many Traditional Owners are uncomfortable with registering specific point data, in relation to sacred or sensitive heritage places. Many cultural heritage places, therefore, are not listed on the database.

An alternative to enforcing the registration of point data would be to allow Aboriginal Parties and/or other culturally knowledgeable Aboriginal people to decide to register a cultural place as a polygon. This would allow a sensitive area or landscape to be documented, but without specific locational or even informational data to be made public. The Aboriginal people with whom we spoke in the development of this submission agreed that with this approach it may be feasible to make the registration of all cultural heritage places - documented as part of agreements, CHSs and CHMPs - mandatory.

All protected plants have been mapped by the state of Queensland, to create triggers to ensure protection and management in the event of development threats. A similar mapping exercise is clearly possible for Indigenous cultural heritage.

5.4 Recommendations

The following recommendations result from the discussion above:

5.4.1 The database should be thoroughly reviewed for errors, and a program to check entries via site visits (i.e. ground-truth) to all existing records should be implemented, in conjunction with local Aboriginal people and Aboriginal Parties;

5.4.2 All protected plants have been mapped by the state of Queensland, to create triggers to ensure protection and management in the event of development threats. A similar mapping exercise should be implemented for Indigenous cultural heritage;

5.4.3 A program should be implemented to consult with Aboriginal people and Aboriginal Parties about the value of registering all known cultural heritage on the database, either as point data or as area polygons, with the latter recording technique aimed to protect sensitive/secret/sacred places from being accessed by anyone other than the Aboriginal group registering the data in the first place;

5.4.4 Following acceptance by Aboriginal people and Aboriginal Parties, the Act should be revised to ensure that all reports and data generated from CHSs, CHMPs and voluntary other agreements are included on the database, with safeguards put in place to protect sensitive/secret/sacred places from being accessed by anyone other than the Aboriginal group registering the data in the first place;

5.4.5 Access to the database should be restricted to members of Aboriginal communities, Traditional Owners and Aboriginal Parties, and to researchers with a legitimate reason to search the database. Land users and development proponents should be required to undertake training in interpreting the data held in the database before they are given access to the database;

5.5.6 The DATSIP database should be ground-truthed by local government and Aboriginal Parties under Part 6 studies. If this cannot occur, a search of the database should not allow a developer to meet part of their duty of care. It should be made clear that the database is highly inaccurate and is not a clear indication of what is on the ground and that the developer must contact the Aboriginal Party in order to get a more complete picture of the cultural heritage potential of a site.

Conclusion

Our submission makes a number of recommendations aimed to address the problems we have identified. We also make one overarching recommendation, aimed to address all the major deficiencies of the legislation discussed below, especially in regard to cultural heritage definitions, land user obligations, triggers for cultural heritage assessment, compliance, cultural heritage recording and database usefulness. This overarching recommendation is:

> **that the State develop a state planning level Cultural Heritage Management Plan (CHMP), based on regional Cultural Heritage Studies (CHSs), funded by the Queensland government**.

This CHMP would occur across the state, with funding made available to Indigenous organisations for regional Cultural Heritage Studies that identify sites of significance, at-risk sites, generate interpretative signage, up-to-date GIS heritage management processes, software applications, etc. to feed into the state-wide plan. The present legislation prompts the identification of heritage in the context of development applications that generally necessitate the destruction of heritage. This contributes towards the piecemeal loss of Indigenous heritage in much the same way that environmental assessments that solely consider the impact of specific developments fail to deal with climate change. Some funding to support Indigenous organisations to work with Universities to conduct regional assessments unconnected with development activities – e.g., of coastal burial sites threatened by climate change – could help to remedy this. This is particularly sorely needed in the Torres Strait. Furthermore, under this recommendation, funding would be available to improve heritage training of Indigenous organisations and communities to undertake CH work, providing a long-term dividend in upskilling and professional entry for Indigenous Queenslanders.

This overarching recommendation is supported by the following sub-recommendations: –

- Cultural Heritage Bodies, Aboriginal Parties and knowledgeable Aboriginal people, in association with cultural heritage practitioners, analysts and scholars would develop a regional cultural heritage sensitivity map for all lands within particular Traditional Owner territories.
- This map would identify cultural heritage sites, places and landscapes of high, moderate and low significance:
    - Areas of low significance would be relatively open to developers, requiring little to no additional cultural heritage assessment, delivering certainty in these areas;
    - Areas of moderate significance would trigger the preparation of a Part 7: Cultural Heritage Management Plan (CHMP);
    - Areas of high significance would trigger a specific Part 6: Cultural Heritage Study, leading to a Part 7: CHMP should some types of development be deemed appropriate, and detailed consultation with Traditional Owners.

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