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Review of Aboriginal and Torres Strait Islander Cultural Heritage Acts 2003

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1.0 Effectiveness of the Legislation

Is the legislation:

- **still operating as intended**
- **achieving outcomes for Aboriginal and Torres Strait Islander peoples and other stakeholders in Queensland**
- **is in line with the Queensland Government's broader objective to reframe the relationship with Aboriginal and Torres Strait Islander peoples**
- **should be updated to reflect the current native title landscape.**

1.1 Response

The review asks if the legislation is working as intended. Section 4 of both Acts states that the main purpose of each Act is to:

… provide effective recognition, protection and conservation of Aboriginal/Torres Strait Islander cultural heritage.

But how is this measured/assessed? Unfortunately, the Act does not have in-built processes to adequately assess if the legislation is working as intended. This is due to a number of reasons outlined in Table 1.

Table 1 Issues affected the Indigenous Cultural Heritage Acts of Qld

Issue	Comment
Lack of manpower	• DATSIP has never been provided adequate funding, tools and/or manpower to determine if the Act is working or implemented suitable compliance. Contrast can be made with the Victorian Department – Aboriginal Victoria – who have twice the staffing levels of DATSIP, and yet have a State that is seven times smaller than Queensland.
Lack of adequate permitting system	• Although standard across Australia and the world, there is simply no legitimate permitting system in place for Aboriginal heritage assessment in Queensland (AECOM argues that the Qld CHMP process is not a legitimate permitting system in its current form for reasons outlined below). • This simple lack of record keeping and mandatory reporting means that DATSIP has no way of truthfully stating that the Act is working as intended. One only has to ask DATSIP to identify how many sites on the register are still valid sites that haven't been impacted? This basic question can not be answered, which means Section 4 can not be adequately demonstrated. • While idealogical arguments can be made around the cost and effort of implementing and managing a permitting system and the 'perils of greentape' beauracracy, it is noted that third world countries in Africa with rampant international development that our team members have worked in have more robust heritage permitting/reporting processes than Queensland.
Cultural Heritage Management Plans (CHMP) do not protect heritage	• Although the intent of the CHMP process in Qld is to provide major projects with a framework for the management of Indigenous heritage, invariably these documents (and their non-reportable counterparts – Cultural Heritage Management Agreements (CHMA)) extensively cover Indigenous engagement and employment, rather than the proactive management and protection of heritage values. • It should be noted that CHMPs in Qld look nothing like their counterparts in all other States and Territories in Australia or for that matter the world. Non-Qld CHMPs are primarily heritage

Issue	Comment
	management documents and rarely discuss issues like Indigenous representation daily rates for example. • CHMPs in Queensland are also usually developed before any field assessments have been undertaken. This means that the documents do not document specific management measures to protect and conserve individual sites, but instead have generic statements on engagement of the Aboriginal Party is heritage is identified. Again this means that DATSIP has no way of knowing what heritage may or may not be impacted through the CHMP process, therefore this process is not an approvals based permit. Section 4 once again is not met.
Cultural Heritage Management Agreements (CHMA) have no regulatory oversight	• CHMAs which form the bulk of Cultural Heritage documentation in Queensland, are non-reportable management documents with no standards and no oversight from DATSIP. There is literally no way to assess how many of these agreements are in place, whether the agreements are in compliance with the Act and how many Aboriginal heritage sites have been impacted through this process. Their existence is at fundamental odds with Section 4 of the Act.
Vaguely worded guidelines and cross-reference to legislation	• Unlike other global guidelines which spell out the obligations of the user of the Act as to their role and responsibilities, this guidance does not exist in Queensland. NSW and Victoria are stand out models which have clear guidance on how to conduct and prepare Indigenous heritage assessments.
Lack of mandatory reporting requirements	• The 2003 Acts do not require mandatory reporting through either heritage impact assessments and/or site cards. Because of this lack of reporting, there is simply no way to assess what has been impacted in Queensland, again conflicting with the intent of Section 4 of the Act. This position is at odds with all other heritage jurisdictions both in Australia and overseas or for that matter any discipline (ecology, contaminated lands etc) covered by impact assessment style legislation.
Lack of EIS/DA requirements to demonstrate outcomes for cultural heritage	• Unlike other jurisdictions which require measurable outcomes for the management of heritage, the “planning culture” in Qld is more interested in demonstrating that a CHMP/CHMA exists or that the process is underway rather interrogating that meaningful measures have been implemented for heritage management. This is at odds with all other jurisdictions in Australia.

Put simply, we know more about the impact to cultural heritage caused by ISIS in the Middle East then we do about impacts to Indigenous heritage within Queensland. Let that thought sink in for a moment.

1.2 Recommendations

1.2.1 Solution 1: Repeal the Acts and disband the Cultural Heritage Unit at DATSIP

Given that the current Acts have never had the ability to demonstrate their main purpose (to recognise, protect and conserve Indigenous heritage) in their 17 years of existence, an obvious question then is ‘why do we need still need the Acts?’.

Why not repeal the Acts and amend the Planning Act to ensure that Indigenous engagement/ employment plans are a condition of large-scale projects? Immediate benefits to the taxpayers of Queensland would be:

- the winding back of the Cultural Heritage arm of DATSIP freeing up funds and staffing positions for other Indigenous engagement strategies within the Department

- removing the requirement for engagement of Indigenous communities for purely cultural heritage reasons ensuring greater engagement with community through the Planning process.
- removal of the requirement to undertake extensive, expensive and ultimately unproductive pseudoarchaeological excavations directed by mostly unqualified “heritage specialists” engaged by Aboriginal Parties on large public infrastructure projects.

  As an aside, this aspect of the Queensland experience is fundamentally one of the more broken aspects of the current legislation and cannot be reiterated enough. Because of the lack of oversight in Qld, the heritage industry is full of non-qualified people claiming to have archaeological expertise. As a result, the taxpayers of Queensland, have been forced to pay inordinate amounts to resolve quackery brought about by these charlatans.

  The unfortunate effect of this disease in the Qld industry is that an inordinate amount of effort has been put into protecting ‘fake sites’ identified by these illegitimate archaeologists which means real sites are then destroyed through ignorance. This situation will not change under the current system as there is no oversight of qualifications, standards of heritage practice nor peer review of their reports. The current state of affairs has also led to a brain drain of qualified heritage specialists moving interstate to avoid having to work in the Wild West which is Queensland.

While the above would be most certainly be cost-effective, it would not meet the expectations of the people of Queensland nor would it demonstrate that the Queensland government is committed to recognising and promoting the cultural heritage of the First Peoples.

1.2.2 Solution 2: Fundamental Reform of the Act

Therefore, if we agree that Aboriginal heritage is worth protecting, we need fundamental reform of the Act to address the above concerns. To resolve this, Queensland needs to commit to the following:

Structural Reform

- A complete rewrite of the Act that is focussed on delivering clear and unambiguous legislation/guidelines to all stakeholders. AECOM recommends that current system is rejected and the Victorian system be considered.
- Rejection of the Duty of Care process, and replacement with the Victorian planning trigger based approach to heritage assessment
- The implementation of Regulations to support the Act. The Act should be the main superstructure to protection of Indigenous heritage in Qld, however truly effective legislation relies on Regulations that are easier and cheaper to reform and update. NSW and Victoria utilise these legislative tools to great effect in their management of their heritage. This way, the core Act can sit as the foundation of heritage management, and only the regulations need occasional reform, lessening the burden on the Government. AECOM recommends that current system is rejected and the Victorian system be completely adopted with no departures from that format.
- Complete rethink of the Aboriginal Party/Consultation Process. AECOM recommends that current system is rejected and the Victorian system be completely adopted with no departures from that format.
- Complete reform of the CHMP/CHMA process. The current documents do not protect heritage in any measurable way. The current format of these documents is that of a contract for Indigenous engagement. AECOM recommends that current system is rejected and the Victorian system be completely adopted with no departures from that format.

Additional clear points for reform include:

1. Mandatory Permitting
2. Mandatory Reporting of Heritage Assessment and Site Cards to enforceable standards
3. Engagement with the Planning Act beyond tokenistic metaphorical nods

4. Development of Clear Guidelines supported by Regulations; and
5. Ensuring that qualified individuals are undertaking heritage assessments

Most importantly, none of this can be achieved without also fundamental reform of staffing levels at DATSIP. Rebuilding the Department after the culls of the public sector under the Newman government is a substantial undertaking. But if Queensland is serious about protecting Aboriginal heritage, then this is a fundamental first step.

2.0 Ownership and Defining Cultural Heritage

Is there a need to revisit the definitions of cultural heritage.

If yes, what definitions should be considered?

2.1 Response

Yes. The current definitions use terms such as '*of particular significance*'. Phrases like this are symptomatic of the legislation in general which in many ways is typically vague and poorly defined. This, we note, is a continuing theme of both legislation and guidelines including the Duty of Care.

AECOM has reviewed the definitions used in all Australian jurisdictions with respect to Indigenous heritage legislation that define Aboriginal cultural heritage (Table 2). Of these, it is our opinion that the definitions provided in the Victorian *Aboriginal Heritage Act 2006* are the clearest and least ambiguous.

2.2 Recommendation

Queensland should adopt the definitions for Indigenous cultural heritage used in the Victorian *Aboriginal Heritage Act 2006*

Table 2 Indigenous Heritage Definitions

State	Aboriginal Object	Aboriginal Area	Aboriginal Remains	Intangible Heritage
QLD	**A significant Aboriginal object** is an object of particular significance to Aboriginal people because of either or both of the following—(a) Aboriginal tradition;(b) the history, including contemporary history, of an Aboriginal party for an area.	**A significant Aboriginal area** is an area of particular significance to Aboriginal people because of either or both of the following— (a) Aboriginal tradition; (b) the history, including contemporary history, of any Aboriginal party for the area.	**Aboriginal human remains** (a) includes burial objects and associated material; but (b) does not include human remains— (i) buried under the authority of the law of Queensland or another State; or (ii) in or from a place recognised as a burial ground for interment of human remains buried under the authority of the law of Queensland or another State.	Aboriginal tradition means the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships.
ACT	**Aboriginal object** means an object associated with Aboriginal people because of Aboriginal tradition.	**Aboriginal place** means a place associated with Aboriginal people because of Aboriginal tradition.	All references to '**Ancestral remains'** in this Act should be taken to refer to Aboriginal and Torres Strait Islander human remains.	**Aboriginal tradition** means the customs, rituals, institutions, beliefs or general way of life of Aboriginal people.
NSW	**Aboriginal object** means any deposit, object or material evidence (not being a handicraft made for sale) relating to the Aboriginal habitation of the area that comprises New South Wales, being habitation before or concurrent with (or both) the occupation of that area by persons of non-Aboriginal extraction, and includes Aboriginal remains.	**Aboriginal area** means lands dedicated as an Aboriginal area under this Act. **Aboriginal place** means any place declared to be an Aboriginal place under section 84	**Aboriginal remains** means the body or the remains of the body of a deceased Aboriginal person, but does not include: (a) a body or the remains of a body buried in a cemetery in which non-Aboriginal persons are also buried, or (b) a body or the remains of a body dealt with or to be dealt with in accordance with a law of the State relating to medical treatment or the examination, for forensic or other purposes, of the bodies of deceased persons.	Aboriginal cultural heritage consists of places and items that are of significance to Aboriginal people because of their traditions, observances, lore, customs, beliefs and history. It provides evidence of the lives and existence of Aboriginal people before European settlement through to the present.

State	Aboriginal Object	Aboriginal Area	Aboriginal Remains	Intangible Heritage
NT	An **Aboriginal or Macassan archaeological object** is a relic that: (a) relates to the past human occupation of the Territory by Aboriginal or Macassan people; and (b) is: (i) in an Aboriginal or Macassan archaeological place; or (ii) stored in a place in accordance with Aboriginal tradition, including, for example, in an Aboriginal keeping place.	An **Aboriginal or Macassan archaeological place** is a place that: (a) relates to the past human occupation of the Territory by Aboriginal or Macassan people; and (b) has been modified by the activity of those people.		**Aboriginal tradition** means the body of traditions, observances, customs and beliefs of Aboriginals or of a community or group of Aboriginals, and includes those traditions, observances, customs and beliefs as applied in relation to particular persons, sites, areas of land, things or relationships.
SA	**Aboriginal object** means an object (a) of significance according to Aboriginal tradition; or (b) of significance to Aboriginal archaeology, anthropology or history and includes an object or an object of a class declared by regulation to be an Aboriginal object but does not include an object or an object of a class excluded by regulation from the ambit of this definition.	**Aboriginal site** means an area of land: (a) that is of significance according to Aboriginal tradition; or (b) that is of significance to Aboriginal archaeology, anthropology or history, and includes an area or an area of a class declared by regulation to be an Aboriginal site but does not include an area or an area of a class excluded by regulation from the ambit of this definition.	**Aboriginal remains** means the whole or part of the skeletal remains of an Aboriginal person but does not include remains that have been buried in accordance with the law of the State.	**Aboriginal tradition** means traditions, observances, customs or beliefs of the people who inhabited Australia before European colonisation and includes traditions, observances, customs and beliefs that have evolved or developed from that tradition since European colonisation.
TAS	**Protected object** has the meaning assigned to that expression by section 7 (4) ; An order made under subsection (1) shall specify the relic in respect of which it is made, and a relic so specified, and any part of such a relic and any object forming part of, contained within, or attached to, such a relic or object, is referred to in this Act as **a protected object**.	**Protected site** means an area of land declared to be a protected site under section 7 ;		Aboriginal cultural heritage is the tangible and intangible legacy of Tasmania's Aboriginal people. It refers to those places, objects and traditions that have been passed down to us from past generations. It also includes intangible places where there may be no physical evidence of past cultural activities. These include places of spiritual or ceremonial significance or trade and travel routes.

State	Aboriginal Object	Aboriginal Area	Aboriginal Remains	Intangible Heritage
Vic	Aboriginal object means (a) an object in Victoria or the coastal waters of Victoria that (i) relates to the Aboriginal occupation of any part of Australia, whether or not the object existed prior to the occupation of that part of Australia by people of non Aboriginal descent; and (ii) is of cultural heritage significance to Aboriginal people generally or of a particular community or group of Aboriginal people in Victoria; or (b) an object, material or thing in Victoria or the coastal waters of Victoria (i) that is removed or excavated from an Aboriginal place; and (ii) is of cultural heritage significance to Aboriginal people generally or of a particular community or group of Aboriginal people in Victoria but does not include (c) an object that has been made, or is likely to have been made, for the purpose of sale (other than an object made for barter or exchange in accordance with Aboriginal tradition); or (d) Aboriginal ancestral remains.	Aboriginal place is an area in Victoria or the coastal waters of Victoria that is of cultural heritage significance to Aboriginal people generally or of a particular community or group of Aboriginal people in Victoria. For the purposes of subsection (1), area includes any one or more of the following (a) an area of land; (b) an expanse of water; (c) a natural feature, formation or landscape; (d) an archaeological site, feature or deposit; (e) the area immediately surrounding any thing referred to in paragraphs (c) and (d), to the extent that it cannot be separated from the thing without diminishing or destroying the cultural heritage significance attached to the thing by Aboriginal people; (f) land set aside for the purpose of enabling Aboriginal ancestral remains to be re-interred or otherwise deposited on a permanent basis; (g) a building or structure.	Aboriginal ancestral remains means the whole or part of the bodily remains of an Aboriginal person but does not include (a) a body, or the remains of a body, buried in a public cemetery that is still used for the interment of human remains; or (b) an object made from human hair or from any other bodily material that is not readily recognisable as being bodily material; or (c) any human tissue (i) dealt with or to be dealt with in accordance with the Human Tissue Act 1982 or any other law of a State, a Territory or the Commonwealth relating to medical treatment or the use of human tissue; or (ii) otherwise lawfully removed from an Aboriginal person.	Aboriginal intangible heritage means any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge, but does not include anything that is widely known to the public. Aboriginal intangible heritage also includes any intellectual creation or innovation based on or derived from anything referred to above

State	Aboriginal Object	Aboriginal Area	Aboriginal Remains	Intangible Heritage
WA	…this Act applies to all **objects**, whether natural or artificial and irrespective of where found or situated in the State, which are or have been of sacred, ritual or ceremonial significance to persons of Aboriginal descent, or which are or were used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people past or present.	an **Aboriginal site** is: (a) any place of importance and significance where persons of Aboriginal descent have, or appear to have, left any object, natural or artificial, used for, or made or adapted for use for, any purpose connected with the traditional cultural life of the Aboriginal people, past or present; (b) any sacred, ritual or ceremonial site, which is of importance and special significance to persons of Aboriginal descent; (c) any place which, in the opinion of the Committee, is or was associated with the Aboriginal people and which is of historical, anthropological, archaeological or ethnographical interest and should be preserved because of its importance and significance to the cultural heritage of the State; (d) any place where objects to which this Act applies are traditionally stored, or to which, under the provisions of this Act, such objects have been taken or removed.		Aboriginal cultural material means an object of Aboriginal origin that has been declared to be so classified under section 40; Where the Committee recommends to the Governor that an object or class of objects in the State is of Aboriginal origin and is (a) of sacred, ritual or ceremonial importance; (b) of anthropological, archaeological, ethnographical or other special national or local interest; or (c) of outstanding aesthetic value, the Governor may, by Order in Council, declare that object or class of objects to be classified as Aboriginal cultural material.

3.0 Identifying Aboriginal and Torres Strait Islander parties

Is there a need to revisit the 'last claim standing' provision – if yes what alternatives should be considered?

3.1 Response

Yes.

The 'last claim standing' amendments to the original Act are recognised as a 'Band-Aid solution' to address issues around implementing the original consultation requirements of the Act. In particular, where a Project area did not have a current registered Native Title claimant. Due to the Act's poorly worded consultation requirements, the role of the last man standing provisions has led to legal confusion around proponent compliance. For example, if a project has an agreement in place with a number of Aboriginal Parties and part way through construction a new Aboriginal Party wishes to be consulted with, is the Proponent compelled to negotiate with this Party even if the Project is almost completed. Technically under the Act, the answer is yes and the recent Mirvac case confirms this (*Mirvac v Chief Executive of the Department of Aboriginal and Torres Strait Islander Partnerships*). This lack of certainty leads to both Project delivery and financial risk for proponents.

The 'last claim standing' provisions fail because they assume two things:

- Aboriginal people with an interest or demonstrated connection to managing cultural heritage are represented appropriately by the Native Title system
- That claims which have been wholly rejected by the Native Title legal process have a continuing right to represent Aboriginal people from a specific area (see *Sandy on behalf of the Yugara People v State of Queensland* [2017] FCAFC 108)

No consultation system for Aboriginal heritage in Australia is perfect, but a default process which rewards lapsed or rejected Native Title claims only serves to **disempower Aboriginal communities** who can demonstrate connection to country but cannot afford the costs involved in establishing a Native Title claim.

This was demonstrated quite succinctly in two assessments conducted for the Toowoomba Second Range Crossing. The first assessment conducted just before the Act was introduced undertook consultation with community members from six recognised cultural groups: Jagera, Yugara, Ugarapul, Jarowair, Western Wakka Wakka and Giabal (ARCHAEO Cultural Heritage Services & HISTORICO, 2003). The updated assessment in 2017 only consulted with two groups: Jagera and Western Wakka Wakka (Turnstone Archaeology, 2015). Both these groups represented 'Last claim standing' claims, but since this time Jagera has since been replaced over much of its territory by the Yugera/Ugrapul People Claim and Western Wakka Wakka have not been reregistered for their Native Title Claim. If these groups were able to represent their communities' interests before, why (in the case of Jagera) can't they now?

Recommendation:

AECOM recommends that the Act be reformed to be more inclusive and transparent with respect to identifying Aboriginal Parties who can speak for country. The current system including the last claim standing provisions should be repealed and replaced with a modern consultation framework that:

- establishes an authorisation body made up of Aboriginal representatives from across Queensland to review applications to from Indigenous groups to become Indigenous Parties where Native Title has not been determined.
- clarifies roles and responsibilities for Indigenous Party, Proponent and Government.
- provides for a mechanism to deregister a group though the authorisation body, if it is demonstrated that the Indigenous Party can no longer fulfil their obligations

AECOM recommends that the Victorian system be reviewed for ideas. We would also support its adoption in its entirety.

4.0 Identification of Aboriginal and Torres Strait Islander Parties

Is there a need to revisit the identification of Aboriginal and Torres Strait Islander parties – if yes who should be involved and what roles, responsibilities and powers should they have?

4.1 Response

Yes.

The current system fails the fairness test, is not transparent in that it has no reporting requirements to demonstrate that the group in question represents the interests of community and has no accountability/penalty measures for bad faith actors.

4.2 Recommendation

The Victorian solution of establishing an Aboriginal Heritage Council who appoint Aboriginal Parties is the preferred model for consultation in Queensland. It is independent, transparent, accountable and most importantly clearly defines the roles and responsibilities of those stakeholders involved in Cultural Heritage Management: Aboriginal Parties, Proponents and Government.

AECOM recommends that current system is rejected and the Victorian system be completely adopted with no departures from that format. Part 9 and Part 10 of the Victorian *Aboriginal Heritage Act 2006* outlines AECOM's position on roles, responsibilities and powers. We believe that adoption of this system is an important first step to truly empower Indigenous communities with rights and responsibilities over their cultural heritage, rather than the current tokenistic rights they currently enjoy.

5.0 Registered Cultural Heritage Body

Should there be a process for Aboriginal and Torres Strait Islander parties to apply to be a 'Registered Cultural Heritage Body' to replace the current native title reliant model?

5.1 Response

The Consultation Paper raises three options for consideration in respect to this question. We address each of these in the table below:

Option	AECOM Response
Giving the Minister the discretion to decide who the Aboriginal or Torres Strait Islander party is where there is clear court evidence about all of the issues that have been in dispute between the groups, and include a right to object to the decision	AECOM does not agree with this option The Indigenous people of Queensland should not be dictated to by the Minister on who should represent their interests. Instead the process should be driven by Indigenous people, but with clear anti-corruption measures in place for the decision making process.
Reconsidering the roles and responsibilities of cultural heritage bodies to deliver certainty for proponents	AECOM believes that the role of the Cultural Heritage Body is redundant and should be removed from the Act
Extending the role of Native Title Representative Bodies to provide a certification for the identification of the Aboriginal or Torres Strait Islander parties - similar to that found in section 203BE(5) of the Native Title Act 1993(Cth).	AECOM believes that by relying on the Native Title process, this only serves to repeat the mistakes of the past.

5.2 Recommendation

Queensland should adopt the Victorian model of Indigenous self-determination with respect to cultural heritage and establish an Indigenous Heritage Council based model of appointing Registered Aboriginal Parties (RAPs). The system must clearly outline roles and responsibilities and also have safeguards in place for when RAPs cannot fulfil their duties under the Act.

6.0 Land user obligations

Is there a need to bolster the oversight mechanisms for self assessment and voluntary processes – if yes, what should this entail?

6.1 Response

Yes.

While Queensland is not alone in implementing a system of self-assessment and voluntary processes for Aboriginal cultural heritage due diligence, the actual guidance and tools for undertaking this are woefully inadequate. The lack of oversight compounds this, in that there are no baseline guidance/standards on how to be compliant under the Act. It is essentially up to proponents to fail through ignorance to demonstrate non-compliance with the Act.

The current system relies on the Duty of Care Guidelines which are universally decried as being vague while at the same time overly complex to implement. It is not uncommon for different stakeholders (Aboriginal Party, Heritage Professional, Proponent and Government) to interpret the DoC differently. This reinforces the notion that the legislation is unclear and raises the risk of non-compliance with the Act.

6.2 Recommendation

Victoria recognised the shortcomings of the self-assessment due diligence process (transparency, accountability and compliance). To address this, the State has implemented the **Cultural Heritage Management Planning Tool** and a new process for dealing with these issues called the **Preliminary Aboriginal Heritage Test (PAHT)**.

The Cultural Heritage Management Planning Tool is a simple series of yes/no questions that provide the layperson with clear direction as to whether or not a CHMP (further assessment) is required. At the completion of the questionnaire, a PDF summary is provided and this can be used to demonstrate if and when a heritage assessment is required.

http://www.aav.nrms.net.au/aavQuestion1.aspx

The PAHT is a series of questions, not dissimilar from those established by the Qld Department of Transport and Main Roads in their Cultural Heritage Risk Assessment (CHRA) template. Once filled in, the PAHT is assessed by Heritage Officers in the Aboriginal Heritage State Department (Aboriginal Victoria) for a nominal fee (covering Departmental costs) and if compliant - certification is provided.

The Victorian Government documentation for a PAHT is found here

PAHT Application Form

https://w.www.vic.gov.au/system/user_files/Documents/av/Application_form_-_Certification_of_a_Preliminary_Aboriginal_Heritage_Test_application.docx

PAHT Information Sheet

https://w.www.vic.gov.au/system/user_files/Documents/av/Information_sheet_Preliminary_Aboriginal_Heritage_Tests.docx

A succinct summary on the PAHT by heritage consultants implementing the system can be found here:

https://www.achm.com.au/services/preliminary-aboriginal-heritage-test

7.0 Dispute Resolution

Is there a need for dispute resolution assistance for parties negotiating voluntary agreements – if yes who should provide these services and what parameters should be put around the process?

7.1 Response

Dispute resolution should be a mandatory component of all Aboriginal cultural heritage management processes and is in some jurisdictions in Australia, this is mandatorily required before permits are approved.

A useful model supported by the legal profession was discussed at the Brisbane workshop for the reform of the Act. AECOM fully supports this approach. Clarity around dispute should be explicitly clear, in clarifying roles and responsibilities of partners – particularly with respect to the question of "Who Pays".

7.2 Recommendation

DATSIP should provide clear guidance on standard dispute resolution processes that can be included in cultural heritage management documentation and direct stakeholders to detailed dispute resolution assistance when needed.

8.0 Cultural Heritage Assessment Thresholds

Is there a need to reconsider the threshold for formal cultural heritage assessments– if yes what assessment and management processes should be considered?

8.1 Response

Yes.

At the moment, the requirement for undertaking further assessment is driven by the Duty of Care process and as previously discussed, different stakeholders interpret the Duty of Care guidelines radically different from one another. This is due to the fundamental flaw with the legislation and the guidelines – ambiguity and open to interpretation. Instead what is needed is a clear legally defensible system that recognises the differences between minor actions (such as geotechnical drilling) versus major impacts (such as a coal mine, major piece of infrastructure or development).

8.2 Recommendation

Queensland should adopt the Victorian system of thresholds for further assessment. Victoria has a four-stage process for assessing whether a formal cultural heritage investigation is required. This system has been developed with the modern planning framework in mind.

1. **Are you in an Area of Cultural Heritage Sensitivity?**

   The Aboriginal Heritage Regulations identify known landforms that are always likely to have Aboriginal heritage associated with them. These include landforms such as the 200m buffer around named watercourses, Cranbourne Sands, Koo Wee Rup Plain etc. as well as within 50m of a registered Aboriginal heritage place. By delineating where areas are likely to contain Aboriginal heritage values, this step acts as a planning trigger for further assessment. If your project overlaps one of these areas of cultural heritage sensitivity, then you must assess if you are required to prepare a mandatory CHMP.

   If a proposed Activity is not in an area of cultural heritage sensitivity, then they are not obligated to prepare a CHMP. In such cases, where a heritage professional conducting a due diligence assessment determines that risk still remains, a voluntary CHMP can be prepared. AECOM has recommended this recently for a solar farm which was outside of mapped areas of cultural heritage sensitivity, but situated between sensitive areas. We recommended that a voluntary CHMP be prepared. The reasons for this, was that if Aboriginal heritage was identified during construction works, the status of the project would then require a mandatory CHMP to be prepared due to the presence of Aboriginal heritage. Our first day of survey identified artefacts.

2. **Is your project considered an exempt development under the Regulations?**

   Many types of development are considered low risk or is development whereby undertaking heritage assessment would be prohibitively costly to small developers (very small subdivisions) and not in the public interest. Examples include:

   - the development of one or two dwellings (r.9)
   - the development of three or more dwellings on, or the subdivision of, a lot or allotment if it is:
     - less than 0.11 hectares in size; and
     - not within 200 metres of the coast or the Murray River (r. 10 and r. 11)
   - Buildings and works ancillary to a dwelling (r.12)
   - Services to a dwelling (r.13)
   - Alteration of buildings (r.14)
   - Minor works (r.15)
   - Demolition (r.16)
   - Consolidation of land (r.17)
   - Subdivision of existing building (r.18)
   - Amendments to a statutory authorisation (r.19)
   - Jetties associated with one dwelling (r.20)
   - Development of the Sea-bed (r.21)
   - Emergency works (r.22)

3. **Is your project considered a high impact activity as defined under the Regulations?**

   Different high impact activities are categorised in the regulations. If your project does not satisfy these definitions, you are not obligated to prepare a CHMP.

4. **Has your Activity Area been subject to previous significant ground disturbance?**

   Unlike the Queensland Duty of Care Guidelines, the Aboriginal Heritage Regulations legally defines what constitutes significant ground disturbance so there can be no doubt

To review the decision making process in Victoria, you can try their Cultural Heritage Management Planning Tool, which provides steps by step guidance through the decision making process.

http://www.aav.nrms.net.au/aavQuestion1.aspx

9.0 Compliance mechanisms

Is there a need to bolster the compliance mechanisms designed to protect cultural heritage – if yes what needs to be improved and what additional measures should be put in place?

9.1 Response

Yes. There is currently limited capability to demonstrate compliance. AECOM suspects that an independent audit of development within the State would demonstrate rampant non-compliance.

9.2 Recommendation

AECOM **endorses** government being given a greater regulatory presence and be adequately resourced to do so, including auditing of developers and being more active in prosecuting non-compliance.

AECOM **does not endorse** penalties be paid for breaches should go to the communities whose cultural heritage was destroyed. While noble in intent, such a system creates opportunities for abuse and corruption.

It should be noted that under the current ambiguous and poorly worded legislation and guidelines, compliance will always be subjective to the observer. For compliance to work, AECOM recommends that the Act and associated regulations/guidelines be completely rewritten.

10.0 Recording cultural heritage

Is there a need to make improvements to the processes relating to the cultural heritage register and database – if yes what needs to be improved and what changes should be considered?

10.1 Response

Yes. Yes. Yes. Queensland is a joke when it comes to how the cultural heritage register and its associated database are used and presented. The reasons for this are presented below

10.1.1 Access to Primary Data

To access site card/report data in Queensland, an undocumented policy exists informally in DATSIP that a formal request must be lodged with the Aboriginal Party responsible for that area for permission to look at these documents. It is important to remember that this is internal policy and is not a legal requirement of the Act

While suitable for sacred sites, burials and other culturally sensitive sites, blanket application to all sites is not supported by precedent or compatible with the modern planning requirements for EISes and Development Applications. Why is this important?

A recent project that AECOM worked on, identified the presence of a burial located almost 1 kilometre from the Project Area through the DATSIP spatial search. Ordinarily, this would be noted that the site would not be impacted and that the project would not have any impacts on Aboriginal heritage. EXCEPT, the burial was not a single centroid, but was in fact a burial ground that extended 1 kilometre across the landform in question. Were it not for AECOM's heritage specialists skills in landform analysis and undertaking further investigation looking for publicly available and AECOM held information about this area, this would not have been captured and the proponent would have potentially impacted the site. Instead, thanks to AECOM's due diligence, the Project was able to be redesigned to avoid impact to the area.

Another example was a proposed south east Queensland railway infrastructure project that had undertaken due diligence assessment and determined that no sites were present within the rail corridor. Except for the fact that one site (artefact scatter) located just outside the rail corridor, was incorrectly entered into the DATSIP database and was in fact within the rail corridor – thanks again to review of AECOM's digital archive. Early access to DATSIP's records would have captured this and saved the taxpayers of Queensland a considerable sum through delays to Project delivery once this oversight was identified.

Lack of access to basic site card details or the reports accessed from AECOM's 20 year old server archive on the burial ground, meant that this site was potentially going to be significantly impacted by the Project. This example, which is unfortunately not isolated, only too well points out why this position in the modern era of Planning is unsustainable and will lead to the unintended destruction of Aboriginal Heritage. But the fact remains that all data is currently restricted and in many cases, Aboriginal Parties simply refuse to release this information, even if the site is a simple isolated artefact. Apart from South Australia who borrowed the policy from Queensland, no other State or Territory has adopted this position in the 17 years since DATSIP has managed the database (Table 3). One wonders loudly if South Australia would adopt this policy if it has the same level of development as Queensland or Victoria.

Recommendation: DATSIP's policy of restricting information is to be reviewed and access granted to qualified and approved heritage professionals to all information on the database unless individually

requested by the Aboriginal Party to be considered restricted. This would also be incredibly simple to achieve because the Qld software was purchased from the Victorian Government who have already implemented all these systems and controls.

10.1.2 Mandatory Recording

There is no requirement to report and register site cards and their associated reports. This means that there is the potential for previously identified sites to be missed. This also means that even though a project area might have been extensively surveyed, every new assessment is starting from scratch. While expensive to private proponents, this is also a significant and unnecessary cost again to the Queensland taxpayer, especially when previous assessments have not identified any significant heritage values.

Recommendation: Mandatory reporting of sites and submission of reports should be part of the reform of the Act and tied to the permitting process. No site cards. Therefore no permit and no approved Development Application. Again, DATSIP has all the tools for this ready to fo as they have purchased the Victorian ACHRIS system for their backend which is recognised as a world leader for cultural heritage management (Figure 1).

Table 3 Summary of State and Territory Databases

State	Database	Process for Access	Cost	Information Available	Restricted Information
ACT	ACT Heritage Register		Free	• Spatial Search Results • Site Cards • Heritage Reports	Site cards and reports for specific sites requested to be confidential by the Aboriginal Party
NSW	Aboriginal Heritage Information Management System (AHIMS)	Electronic Application	$60/search up to 120 sites	• Spatial Search Results • Site Cards • Heritage Reports	Site cards and reports for specific sites requested to be confidential by the Aboriginal Party
NT	NT Heritage Register (archaeological)	Request to NT Heritage Branch via Email	Free	• Spatial Search Results • Site Cards • Heritage Reports	No restrictions unless requested by the responsible Aboriginal custodians
	AAPA Sacred Sites Register (anthropological)	Electronic access for AAPA Sacred Sites	$27/search	• Abstract and Map of known sites	Detailed sacred site reports are restricted unless approved by the Aboriginal custodians responsible for that site
Qld	Aboriginal & Torres Straight Islander Cultural Heritage Database	Electronic Application	Free	• Spatial Data only	All Site Cards and Reports are in the first instance confidential regardless of whether an it is a sensitive site or an isolated artefact
SA	Taa Wika Database	Electronic Application	Free Must demonstrate: Heritage Advisor	• Spatial Search Results • Site Cards • Heritage Reports	All Site Cards and Reports are in the first instance confidential regardless of whether an it is a sensitive site or an isolated artefact
Tas	Aboriginal Heritage Register	Electronic Application	Free	• Spatial Search Results	Detailed sacred site reports are restricted

State	Database	Process for Access	Cost	Information Available	Restricted Information
				• Site Cards • Heritage Reports	unless approved by the Aboriginal custodians responsible for that site
Vic	Aboriginal Cultural Heritage Information System (ACHRIS)	Electronic Application	$262/search Must be registered Heritage Advisor with: proof of qualifications and	• Spatial Search Results • Site Cards • Heritage Reports	Site cards and reports for specific sites requested to be confidential by the Aboriginal Party
WA	Aboriginal Heritage Inquiry System (AHIS)	Electronic Application	Free – all spatial data for heritage sites freely downloadable	• Spatial Search Results • Site Cards • Heritage Reports	Site cards and reports for specific sites requested to be confidential by the Aboriginal Party

10.2 Site Database

Note that with Queensland's purchase of the Victorian Register software, their guidelines state that they should be using the ACHRIS site types.

Table 4 Aboriginal Heritage Site Types

Vic ACHRIS Site Types (12)	Qld Aboriginal Heritage Register (27)	NSW AHIMS Site Types(19)
Aboriginal Cultural Place	Aboriginal Historical Place	Aboriginal Ceremony and Dreaming
Aboriginal Historical Place	Aboriginal Intangible Place	Aboriginal Resource and gathering
Aboriginal Ancestral Remains(Burial)	Artefact Scatter	Art
Aboriginal Ancestral Remains(Reinternment)	Burial	Artefacts
Artefact Scatter	Burial(s)	Burials
Earth Feature	Contact Site	Ceremonial Rin
Object Collection	Cultural Site	Conflict
Quarry	Dwelling(s)	Earth Mound
Rock Art	Earth Feature	Fish Trap
Scarred Tree	Earthern Arrangement(s)	Habitation Structure
Shell Midden	Engraving(s)	Hearth
Stone Feature	Grinding Groove(s)	Modified Tree
	Hearth/Oven(s)	Non human bone and organic material
	Historical Place	Ochre Quarry
	Isolated Find	Potential Archaeological Deposit
	Landscape Feature	Shell
	Painting(s)	Stone Arrangement
	Pathway(s)	Stone Quarry
	Quarry	Waterhole
	Quarry(s)	
	Resource Area	
	Scarred Tree	
	Scarred/Carved Tree	
	Shell Midden(s)	
	Stone Arrangement(s)	
	Stone Feature	
	Story Place	
	Unknown	
	Weir/FishTrap	
	Well(s)	

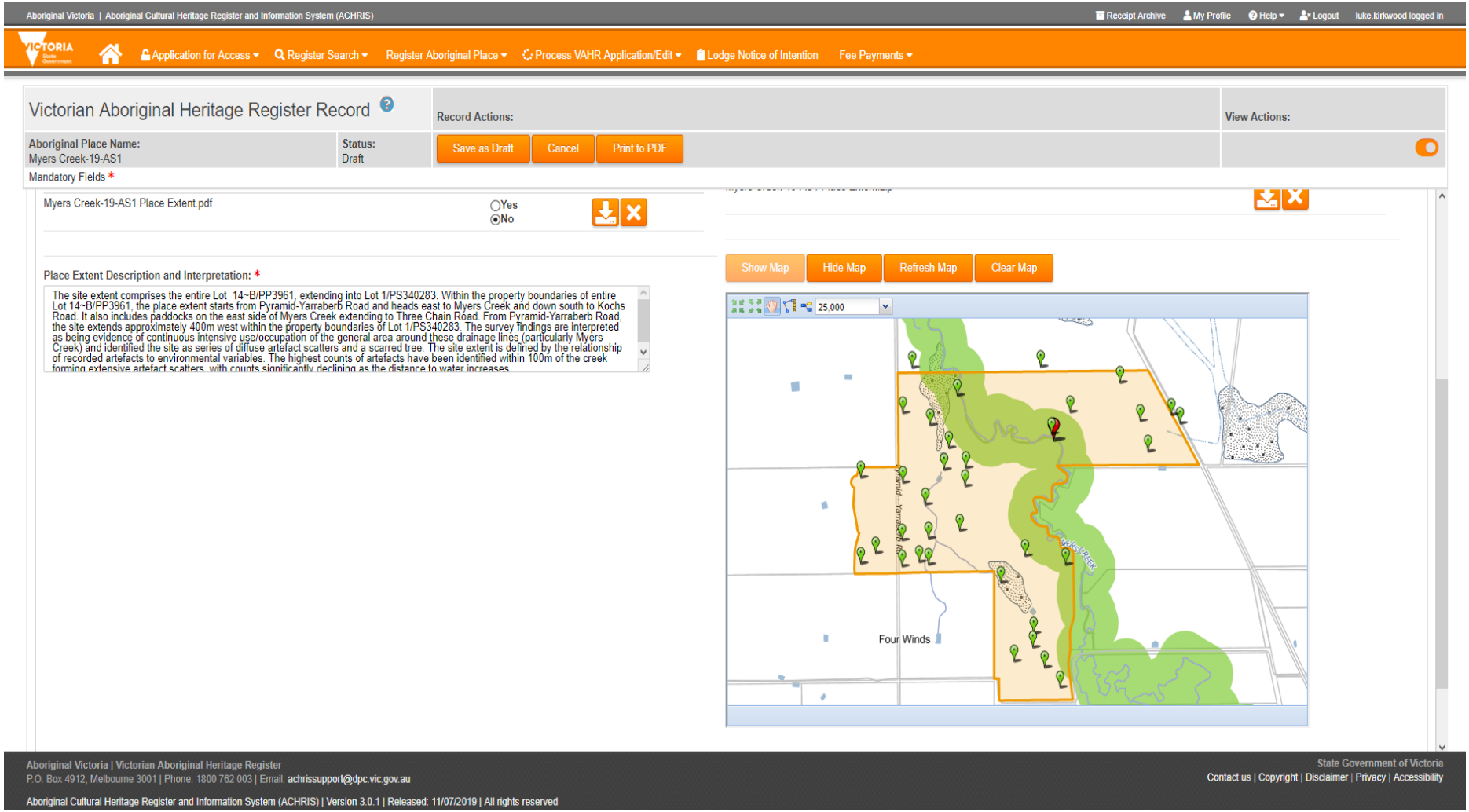

Figure 1 Site Card Entry on the Victorian ACHRIS system

10.2.1 Standards

There are no standards for recording Aboriginal heritage sites in Queensland. Nor is there clear guidance on what site types should be used. A comparison of Qld, NSW and Victoria demonstrates the divide (Table 4). Victoria and NSW have 12 and 19 site types between them. Queensland has 27, many of which are duplicates.

In addition to this, the wild west of databases which is the Qld system allows you to enter in individual artefacts as artefact scatters, even when they are:

1. part of a larger artefact scatter; and
2. located within a few metres of each other.

To demonstrate this, we have chosen a random location in Queensland (in this case the Toowoomba Second Range Crossing). Here you can see numerous sites having been identified. We have then applied a 50m buffer to this data (50m is a standard rule of thumb in Australian archaeology to differentiate between artefact scatters (camp sites) and isolated artefacts (background scatter)) (Figure 2). In this case, the data demonstrates that rather than having 78 separate sites arranged linearly across 1.5 km, we in fact probably have one large camp site.

This quirk of Queensland policy means that yearly archaeological site counts reported by DATSIP are in fact digitally inflated as they are counting individual elements of an archaeological site rather than the site itself.

Figure 2 DATSIP Registered Sites with 50m buffer applied

Recommendation: DATSIP should be directed to develop clear recording and reporting standards for Aboriginal heritage in Queensland.

11.0 Additional Comment

Do you have any other input, ideas or suggestions on how the Cultural Heritage Acts could be improved to achieve their objectives of recognising, protecting and conserving cultural heritage

11.1 Communication

Response: DATSIP routinely does not keep the heritage industry informed on matters which are of immense importance to the discipline. The reform to the Act and even the timing for workshops while available on the DATSIP website, but was not communicated to the heritage industry until several days after going public, even though DATSIP has all of our contact details for those who have registered with the database. Heritage professionals learnt about this reform through professional contacts in the industry, not from Government.

This is contrasted with Aboriginal Victoria (AV) which provides extensive updates to all users of their services. A comparison of this behaviour was clearly demonstrated recently with proposed updates to the respective State databases:

- AV sent out an email, five days ahead of the proposed database maintenance to provide heritage professionals with enough time to complete their business. DATSIP had a message on the database homepage, but did not provide any communication beyond this.
- AV scheduled their maintenance time outside of work hours. DATSIP schedule their maintenance in working hours.
- AV contacted all users of the ACHRIS system after the work was completed and provided information on what updates were included. There was no communication from DATSIP following their maintenance.

In addition to this, AV advises on:

- new Aboriginal Parties and Aboriginal Parties who have been delisted;
- important changes to legislation/guidelines
- cultural heritage initiatives

At the end of each year, AV holds an industry forum to discuss the year that was and give heritage professionals a chance to discuss what worked and what could work better. No such initiative exists in Queensland.

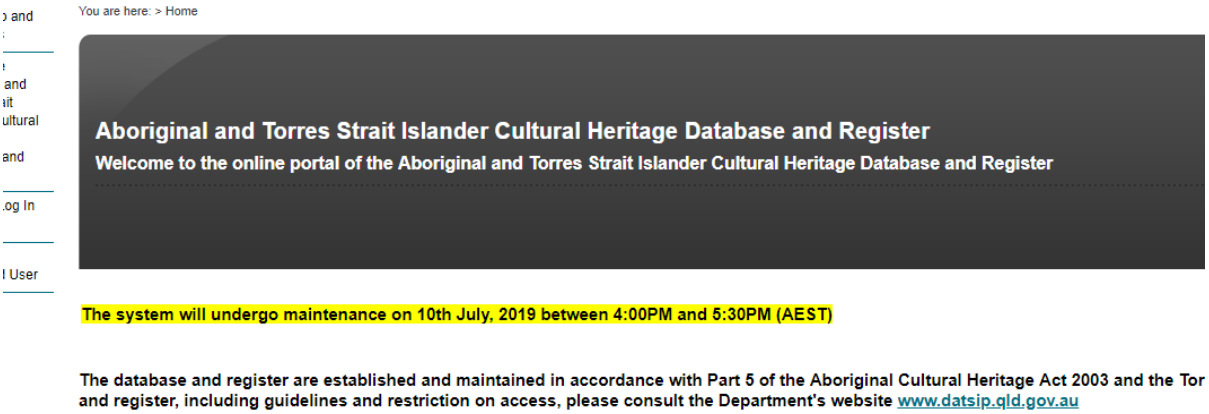

Figure 3 The DATSIP database website (10/7/2019)

Recommendation: DATSIP should be directed to develop protocols to interact with key stakeholders: Aboriginal Parties, Heritage Specialists and the Public on all business-critical matters. Undocumented internal policies should also be published on the DATSIP website.