Review of Queensland Cultural Heritage Act

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Most importantly, we have reached the stage where the opinions of people who are not from First Nations groups should be of minimal significance unless those opinions have been invited by members of the First Nations. I was asked to comment by leaders of the Wangkamadla Native Title holders. **Answers to all questions should be those determined by First Nations people**.

My comments will mostly be concerned with the nature of Cultural Heritage and its position within the state. My experience has come from working with Aboriginal communities in Queensland, NSW and Western Australia, and I have worked with Cyprus Mine, Osborne, BHP, Rio Tinto, Woodside, Xstrata/Glencore and others. My experience has been that, in general, Aboriginal communities work hard to minimise conflict with proponents, and proponents always employ some people who are sympathetic to the interests and desires of those communities. Management of the proponents, however, often include people with ruthless attitudes to the business they conduct on Aboriginal land, and often employ people with little or no cultural sensitivity. In my experience, senior management are most often ignorant about Aboriginal culture, but open to being educated. **Protection of Aboriginal cultural heritage depends, ultimately, on the education of senior management in cultural sensitivity**.

Two starting points from the options paper:

> From 1.1
> To ensure these Acts continue to protect and conserve Queensland's Aboriginal and Torres Strait Islander cultural heritage, while facilitating business and development activity.
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> AND
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> Building on the earlier consultation and analysis, the review is examining whether the Cultural Heritage Acts: • are still operating as intended • are achieving intended outcomes for Aboriginal and Torres Strait Islander peoples and other stakeholders in Queensland • align with the Queensland Government's broader objective to reframe the relationship with Aboriginal and Torres Strait Islander peoples • are consistent with the current native title landscape • comply with contemporary drafting standards.

It is worth noting that the words "*while facilitating business and development activity*" are not necessarily relevant to the dot points in the second starting point, though the weasel words "*and other stakeholders*" might include them. Both sets of words derive principally from interests outside the concerns of those for whom the Cultural Heritage Acts are most important. The Queensland Government needs to ensure that those words do not overwhelm the interests of the First Nations[1] in this Act because otherwise it will lack all authority.

[1] My own experience is exclusively with groups of people in Australia. They generally prefer to be known by their language name (Wangkamadla, Yalarrnga, Mitakoodi, Wonnarua, Wong-goo-tt-oo etc) or as Aboriginal. I have not worked with Torres Strait Islanders, but I imagine that many of my comments would apply to them too. In keeping with current practice I use the name "First Nations" to the grouping that includes all such peoples in Australia. I do not make detailed comment about the Definitions discussed in Part 4 and Part 5. These are more properly issues that should be decided by First Nations parties.

It should be the single job of the Cultural Heritage legislation to define the protection of the interests of First Nations people.

Similarly, the Guiding Principles in 1.2 are not compatible with the statement of the priority given to "business and development." The authors of the document need to be clear that they are seeking to revise the Cultural Heritage Acts to "Protect and Conserve". Under those circumstances, the view that they are "facilitating business and development activity" is not necessarily relevant. Indeed, all of the statements by "proponents" in Section 1.4 are statements that the developers would like to be able to proceed without protecting or conserving cultural heritage. **Strengthening the power of First Nations people will be seen to be a better way ahead**, as envisaged in 3.3 Proposal 1 and in Sections 4 and 5. **Statements about the interests of "business and development" and "other stakeholders" should be removed from the Act. The Act should be about safeguarding the Cultural Heritage rights of First Nations people against them.**

1. There will be business and development activities arising from empowering First Nations.
2. There will be opportunities for business and developers to work WITH First Nations people in any region in which they are setting up[2].

    In a previous study, I concluded (with my co-author) that it was necessary for the business or developer to invest in education in the region (whatever it is—this should apply in towns and cities as well as in country areas) so that their business can employ graduates from their investment.

3. What is **urgently required is education of proponents** so that they do not display such disdain for or sense of superiority over the First Nations people whose country they seek to work on.

    My experience with most businesses is that they have individuals who recognize this weakness of the proponent's position, but they are not necessarily powerful enough within their organization for their voice to be heard. NO PROPONENT should be given a licence to operate in a region without a decision to ensure that their operations respect and protect the cultural heritage interests of the First Nations peoples on whose land they are operating. That will require education and action on the part of the so-called proponents.

4. Education and action among the proponents will require that Cultural Heritage issues are embedded in senior management and flow from them to the employees.

    This was one of the problems with the Ju'ukan Gorge situation: senior executives were not empowered to make decisions to protect and conserve cultural heritage. This revised legislation is an opportunity for the Queensland Government to embed First Nations interests in the whole of government. By and large, the major issues here reside not with First Nations communities, but with those whose actions would impact them.

[2] It was a real shock to me when working with the company that was originally Mount Isa Mines to know that throughout the whole history of the mine until 2013 there had been no employment of any of the local First Nations people at the mine.

Section 3.

The feedback is all relevant. It is most important that the Duty of Care needs to be monitored, and oversight by a government body is needed. It would be possible for a proponent to ignore the Act and proceed as if they could minimize their Duty of Care by bluffing the Aboriginal community. **All development proposals should require a statement of the steps taken to comply with a Duty of Care**.

It is important to recognise that there are two areas in which Cultural Heritage is more complex.

1. Not all of the physical remains of heritage will have been recorded previously.

   There is generally a need for First Nations communities to be asked to state their knowledge of physical heritage prior to the development. The proponent needs to have developed a relationship with the First Nations community prior to any work on the development. In the case of many developments, physical remains have often been discovered only subsequent to substantial outlay on the development, and it has been very difficult for anyone to go ahead with that development which requires them to either alter plans so as not to destroy physical remains, or to afford the necessary mitigation required by the First Nations community. Development planning should **begin** by working with First Nations people to minimise the risk that proposals be expensive before First Nations people have expressed a view.

   It is also the case that in many situations, First Nations people have worked with archaeologists and anthropologists to record their heritage in advance of the development, but only after costs of the development have been incurred. Most of that work has involved payments by the proponent to First Nations people and to the archaeologists and anthropologists. Because of the source of those payments, the proponents feel they have a right to prevent access to reports. This seems to have been the case with Ju'ukan Gorge. **IT IS ESSENTIAL THAT ACCESS TO THAT CULTURAL HERITAGE KNOWLEDGE BE CONTROLLED BY FIRST NATIONS PEOPLE, NOT PROPONENTS**.

2. Intangible Heritage is a very big issue in relation to developments. The whole country is covered with places and stories of significance that enable(d) peoples to relate to each other in the past, and in most cases, allow peoples to continue to relate to each other.

   It is often the case that such knowledge has been shared within communities on a need-to-know basis—often among people with particular status in First Nations societies. Consequently, First Nations people have often been reluctant to share such Heritage with people who do not (yet) need to know, both within and beyond their own community. What changes is not the knowledge, but the nature of that need. This is a further reason for the ongoing relationship between the (potential future) proponents and the First Nations community. The potential of a development will change the nature of the need to know because people outside the First Nations community will now need to ensure that the places associated with the Intangible Heritage are not destroyed, risking the termination of the Heritage value. **This is another reason why First Nations people should be involved from the very beginning of a proposal and that control of the information should reside with the First Nations groups, not with the proponent**.

Section 3.3 Proposal 1

I welcome the intention to replace the Duty of Care Guidelines, and especially welcome the option to require greater engagement, consultation and agreement with the First Nations communities.

I would be reluctant to see the Duty of Care abandoned altogether. It remains a powerful expectation of any proponent that they have obligations. **Greater engagement should just facilitate that Duty of Care**. I have proposed above that all proposed developments should include a statement about how the proponent met their Duty of Care. That should be agreed to by the First Nations groups.

I welcome the notion of early engagement with the communities.

I think that the Cultural Heritage Act might go down a different path from that proposed because I think that the idea of "mapping of high-risk cultural areas" is difficult to achieve in practical terms, and fraught with danger if it is thought that the maps could record sufficient heritage to allow any usefulness in the identification of high-risk areas in the manner proposed. The danger would be that, even supposing the mapping of all places and stories of significance could be achieved, the evident cost would lead to the solidification of the maps as a definitive account. Any evidence reported after that mapping would be brought into suspicion, yet it is the existence of unremembered heritage that is the whole reason that archaeology exists. As I understand it, the nature of the Cultural Heritage in question was always flexibility according to circumstances. The proposed mapping sounds like fixity—the opposite of flexibility. **First Nations communities must give their view on the value of the proposed mapping, and its cost.**

Early consultation with communities is essential. This should be undertaken with an open mind about what heritage will be revealed. It is also important that the cost of any consultation be borne by the proponent as a cost of development, but without ownership. **The information revealed should be jointly owned by the First Nations community AND the Queensland Government**, so that if any results need to be made public (as was the case with Ju'ukan Gorge) there is a public record of them.

I am troubled by the notion of "high-risk" areas. Any phrasing of this sort offers the possibility that what is of high risk to the First Nations communities can be defined as not being of high risk by the proponent. I think the Queensland Government needs to be transparent here. If the intention is to protect Cultural Heritage, then this Act needs to state that. If the intention is to provide conditions under which proponents can avoid the restrictions that may result from identification of Cultural Heritage then it would be really refreshing if it were to say so—even though I disagree. But it seems to be the case that almost all Cultural Heritage Acts around the world leave weasel words in legislation so that clever lawyers for proponents can point out a lack of protection of Cultural Heritage. It is worth remembering that the destruction of the Ju'ukan Gorge sites was perfectly legal under the WA Legislation at the time. But it was manifestly not protecting the Heritage in a way that that legislation **seemed** to promise. **New Cultural Heritage legislation absolutely needs to avoid weasel words and uncertainties if the Queensland Government and proponents are to avoid controversies with adverse effects.**

Section 3.3 Proposal 2

I welcome the proposal that the "risks to cultural heritage are identified and addressed in the early stages of project planning." But this proposal puts the planning first and foremost.

The integration of cultural heritage protection and mapping into land planning is fraught with danger unless the First Nations groups have real power in the planning process.

Land planners are the most irresponsible people in the State. They generally do not consider the impact of their decisions for anyone else except their own short-term interests. This can be seen most obviously in land clearance and in fossil fuel exploitation, both of which have destructive effects in terms of emissions and the long-term interests of Queenslanders, and land clearance is strongly implicated in the severity flooding—now seen as the major issue it always was. There is no reason to expect that land planners would have any responsibility towards the interests of First Nations people (or anyone else). For this reason, the word "addressed" is a weasel word which would allow land planners to ride roughshod over the Cultural Heritage interests of First Nations people. **First Nations groups should have the power to veto any planning proposal on Cultural Heritage grounds.**

Section 3.3 Proposal 3

Intangible Heritage is an essential element of any recognition and protection of First Nations' Heritage. It is the knowledge that gives meaning to the material evidence by which those not knowledgeable can recognise Cultural Heritage. The documentation of Intangible Heritage is essential wherever it is deemed appropriate by First Nations groups and is otherwise appropriate.

I have recorded Intangible Heritage in the form of Oral Histories but always because the member of a First Nations group wanted them reported. In the case of a recent publication, with one author who is the person whose oral history it was, the story was familiar because we had been told the same story by the man's mother's brother thirty years before. In this case, the history was not primarily about traditional knowledge of songlines etc (though it included that) but in terms principally of historical events otherwise only available as oral history from the non-First Nations people. **Intangible Heritage includes traditional knowledge, such as songlines, as well as the otherwise unrecorded history from the First Nations side of the frontier.**

Section 3.3 Proposal 4

The question of a mechanism to resolve and deal with issues arising under the Cultural Heritage Acts is one that only arises if First Nations Cultural Heritage is seen as a problem rather than an asset. Only if it is seen as a problem do disputes arise. The government needs to work to change the public mindset so that Queenslanders see Cultural Heritage as an asset first. An advisory group would not be strong enough for this vision of the importance of Cultural Heritage. **Any First Nations group in a particular area needs to start from the Native Title Holders and to have real power to affect decisions where Land Courts dominated by non-First Nations people might be in conflict with Cultural Heritage.**

Section 3.3 Proposal 5

Mandatory reporting

Again, the proposal starts from the assumption that the proponents have priority and must account for their actions about something that they view as standing in their way. If we turn the situation around and give priority to the First Nations groups and give them the authority to work with proponents, development would still be possible, but the empowerment would be different. **In essence this is principally about reversing the order of things, would still require reporting and documentation, but would vest control over that with the First Nations groups.**

Section 3.3 Proposal 6

Capacity to monitor and enforce compliance

These proposals sound excellent—they seem to have the right intention but an overly officious or punitive implementation mechanism. The principal problem I see is that the proposal is expressed in terms of enforcement. We all remember that the enforcement of Native Vegetation legislation in NSW was seen by the land holder as heavy-handed and led to murder. That is not be a good outcome of any legislation, so much is required to prevent conflict between the First Nations Cultural Heritage body and land holders or proponents. This will require much education that minimises conflict insofar as it is possible. I do not think that all of these "enforcement" capacities have been envisaged with this in mind.

Again, what I am proposing would be a massive change in the location of power. In consequence, it would be desirable for the First Nations communities to be informed that any change to make their Cultural Heritage more salient in the Queensland community requires of them an equal change in their respect for those who currently hold the power in the State. It will only be possible to have equitable outcomes if both sides of any dispute (and there would be many) recognise that the other party has had to come to terms with a different way of looking at things. In all likelihood this will be a long process, but **it is not acceptable that the First Nations people continue to be losers in their own land, especially when that is the result of legislation supposed to protect their interests**.