Aboriginal Cultural Heritage Act

Response to options paper 2021

The ***Aboriginal Cultural Heritage Act 2003*** (ACHA) Section 4 describes its main purpose as

- to provide effective recognition, protection and conservation of Aboriginal Cultural Heritage.

Section 8 provides Aboriginal Cultural Heritage is anything that is a significant Aboriginal area or a significant Aboriginal object.

Section 23 ACHA CULTURAL HERITAGE DUTY OF CARE provides

(1) A person who carries out an activity must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage (the **"cultural heritage duty of care")**

There has only been one prosecution of a landholder pursuant to section 23 ACHA since the enactment of the ACHA in 2003 relating to tree clearing.

Hughes v Harris (Indictment 622 of 2019 District Court Cairns 14 October 2021)

The onus of proof lay with the prosecution and criminal standard of beyond all reasonable doubt applied.

As a prelude to specific comments in relation to the options paper it is useful to visit that prosecution as some valuable insights and significant shortcomings were identified.

The case highlighted the following matters:

1) The ACHA can used as a weapon not a shield. In the Harris case several Departments both State and Federal colluded to prevent lawful tree clearing despite having no evidence as to the existence of, or harm to, Aboriginal Cultural Heritage.
2) The Department charged with the proper administration of the ACHA was complicit in an abuse of process using the legislation for purposes other than that for which it was intended.
3) The presumption that Aboriginal Cultural Heritage is a blanket over the whole of the Australian landscape is wrong in fact and law and is a misnomer.
4) The existence of Aboriginal Cultural Heritage in any given location is easy to allege and difficult to prove or disprove and does not bear forensic scrutiny. The inclusion of intangible matters only exacerbates this problem and if the onus is reversed the landholder faces a monumental task.
5) The is no process to identify the proper people with actual knowledge of the existence of Aboriginal Cultural Heritage. In the Harris case principal witnesses had never visited the area the subject of the activity whilst key elders with actual knowledge known to the prosecutor were not interviewed or called to give evidence.
6) The Department charged with administering the ACHA and expert witnesses called to support any prosecution are clearly biased in the prosecution of the legislation.

Level 1, 15 Spence Street Cairns QLD 4870 ● PO Box 707N North Cairns QLD 4870
Phone +61 7 4052 0700 ● Fax +61 7 4052 0777 ● info@prestonlaw.com.au ● www.prestonlaw.com.au

7) The onus remains with the prosecution to prove beyond all reasonable doubt that an offence has been committed. To reverse the onus of proof places any landholder at untenable risk of abuse of process and insurmountable costs burden.
8) There is no standard as to what reasonable and practical measures in terms of a section 23 prosecution are. Measures that might be reasonable and practicable in the Juukan Gorge could hardly be applicable to a featureless, waterless landscape in Cape York with no recent history of Aboriginal visitation or evidence of the existence of Aboriginal Cultural Heritage.
9) Section 23 is open to misinterpretation and abuse and should be removed from the legislation.

Background

Scott Harris is the owner of Kingvale Station in Cape York and was acquitted on the 14 October 2021 in the District Court at Cairns of a charge pursuant to section 23 of the *Aboriginal Cultural Heritage Act 2003 (*ACHA*).* The charge related to the clearing of native vegetation pursuant to a valid development approval. **(the charge)**

Mr Harris is the lessee of Kingvale Station Lot 1 SP 280074 in Cape York and was granted a development permit on the 16 April 2014 for operational work- vegetation clearing for the purposes of high value agriculture (dryland sorghum) by the Department of Infrastructure Local Government and Planning (DILGP now DSDIP) [1]

The approval related to areas A1, A2, A3, A4 and A5 on Kingvale station.

The charge relates to the clearing of part of areas A1 and A2 (charge area) only. There is no allegation that the clearing of the charge area was not lawful.

Attached to the application for the permit was a land suitability report prepared by Pinnacle Pocket Consulting which described the landform, vegetation and soil types and the ecology in the approval area including the charge area.

On the 14 March 2014 when assessing the application DSDIP issued notices to the Cape York Land Council which was at the time the Aboriginal Body for the purposes of the ACHA. Submissions closed on the 14 April 2014 and no comments were received by DSDIP from CYLC.

The decision notice in relation to the development approval was comprehensive yet there was no mention of Aboriginal Cultural Heritage requirements.

The development approval required that the operational works be substantially commenced within 2 years of date of the permit.

Harris had arranged the purchase of equipment to be moved onto Kingvale in 2015 with a view to commencing the operational work before the 2015 wet season.

The inspection and investigation

From May 2015 and for years green activist groups lobbied both the Federal and State Ministers to intervene to prevent the operational works proceeding on Kingvale.

From late November 2015 the Department of Environment and Heritage Protection (EHP) and the Department of Aboriginal and Torres Strait Islander Partnerships and the Department of Natural Resources and Mines and the Department of Environment (Commonwealth) colluded to use whatever

[1] Decision Notice 16 April 2014 SDA-0214-008018

means available including the EHP Act, the EPBC Act and ultimately the ACHA to delay and ultimately prevent the lawful clearing of native vegetation on Kingvale.

An inordinate amount of public time and resources was expended to this end, and it has cost Harris in excess of $750,000 in legal costs and years of lost production.

The complaints below mainly relate to the actions of the complainant and implicate other Departments and officers in the inappropriate use of the ACHA for purposes other than the legislation intended in building a case against Harris.

Compliant 1

On 4 December 2015 EHP advised Harris in writing:

> *"in the instance of a protected animal being killed or harmed in the course of a clearing operation, the proponent may need to rely on being able to demonstrate that practices were employed that sought to avoid protected wildlife being taken". Penalty $11780-$353,400.*
>
> *"the proponent would need to be operating in accordance with and approved SMP" Penalty $19,437"*

This information was deliberately misleading as the development approval is a complete defence.[2]

Complaint 2

The attendance on Kingvale and investigation by DEHP officers was unlawful.[3]

The monitoring warrant was issued pursuant to the EPBC Act purposes with compliance with EPBC Act and regulation[4] when in fact evidence for the ACHA prosecution was collected.

Complaint 3

The investigation found no breaches of the Nature Conservation Act[5] or the EPBC Act[6], yet the Department persisted in its efforts to stop the tree clearing by using the ACHA for a purpose for which it was not intended.[7] [8]

The prosecution and trial.

The complainant on behalf of the Department of Environment and Science issued a complaint in the Magistrates Court in Cooktown on the 5 July 2018. The complainant on behalf of the State failed to discharge his obligations on behalf of the State as a model litigant throughout the proceedings.

Compliant 4

The complainant used the ACHA as a sword not a shield[9] in an attempt to prevent Harris clearing native vegetation pursuant to a valid development approval[10].

---

[2] Section 88(2) Nature Conservation Act 1992
[3] Email 9 December 2015 Devery to Spragg.
[4] Monitoring warrant issued 9 December 2015 section 528 EPBC Act
[5] Email 15 December 2015 Devery to Williams.
[6] Email 15 December 2015 Devery to Williams enclosing report.
[7] Email 22 December 2015 Spencer to Devery.
[8] Email 15 February 2016 Devery to Price
[9] Transcript Day 4 Page 3 line 40
[10] Email 23 November 2018 Hughes to Schiavo.

The ACHA has been in place for 18 years and there have been hundreds of tree clearing approvals across Queensland with no other complaints, investigations or prosecutions arising at all.

The complainant attempted to use the ACHA to prevent the clearing of vegetation rather than prosecute a breach of section 23 ACHA[11] and protect cultural heritage.

The complainant did not undertake, or cause an expert to undertake, an inspection of the charge areas even though he had the power to do so. All of the vegetation cleared remained on the ground and an inspection of the cleared area and surrounding area by the complainant or other expert would have revealed the existence (if any) of scar trees, burial trees and artefacts in the charge area.[12]

Compliant 5

The complainant failed to interview persons who could have provided valuable information in relation to the existence or otherwise of significant Aboriginal Cultural Heritage in the charge area, eventhough he had direct knowledge as to the existence of these witnesses including the landholder and Aboriginal elders who had actual cultural knowledge of the area.

Complaint 6

The complainant failed to provide adequate and proper particulars of the case against Harris in a manner the Harris could reasonably respond to at the trial.

There were 6 grounds contained in the original particulars included in the summons. The particulars were amended on 3 occasions and an application was made after the commencement of the trial for a further amendment which was refused. The prosecution invented the case against Harris as it went along.

Amendment 1
On the 16 January 2019 the particulars were amended to include a seventh ground:
"Between the 21 January 2016 and 14 May 2016, the defendant by his servants or agents did carry out the activity at the place"

The defendant had no issue with this amendment.

Amendment 2
At the commencement of the trial the particulars were amended to remove grounds 5 and 7
"Otherwise comply with the Cultural Heritage Duty of Care, and
Have in place and /or was not acting under a cultural heritage management plan or native title agreement in respect of or in carrying out the activities."[13]

The defendant could not resist this amendment.

Amendment 3
At the commencement of the trial the particulars were amended to add a word to ground 4
"And /or" instead of "or".

The defendant could not resist this amendment.

[11] Transcript Day 1 page 52 line 15
[12] Transcript Day 4 page 12 line 10
[13] Transcript Day 1 pages 3-7

Amendment 4
At the conclusion of the prosecution opening the Defence Counsel raised an issue with particular 3.

The Olkola Aboriginal Corporation was not the relevant Aboriginal Party at the time of the alleged offence and did not become the relevant Aboriginal Party until 8 March 2018.

The complainant was in possession of a section 95(3) Evidence Act 1977 certificate by Archana Kishore dated 16 May 2019 which confirmed the application to expand the area of the Aboriginal Cultural Heritage Body (Olkola Aboriginal Corporation) to include Kingvale was approved on the 18 March 2018.[14]

The complainant sought to amend particular 3 by replacing the word "corporation" in Olkola Aboriginal Corporation with "people".[15]

The court refused the application.[16]

Complaint 7

The complainant failed to provide adequate and proper particulars of the case against the defendant to the Court despite a request from the court several weeks before the trial.[17]

Communication with the Aboriginal party

It was alleged the Olkola Aboriginal Corporation as the Aboriginal party wrote to Harris on the 15 December 2015 coincidentally at the same time the EHP and DOE were conducting their investigation at Kingvale.[18] There was no evidence of the letter having been received by Harris as it was addressed to:

Scott Alexander
9 Main Street
Strathmore station
GEORGETOWN QLD 4871

This address and therefore the source of the correspondence could only have come from the department[19] as this is not an address known to Harris. The Department were instrumental in this letter being sent.

Complaint 8

The Department encouraged the Olkola Aboriginal Corporation to write to Harris and gave the Olkola Aboriginal Corporation the necessary contact details with full knowledge that the Olkola Aboriginal Corporation was not the Aboriginal Party for Kingvale.

Complaint 9

[14] Section 95(3) certificate Archana Kishore dated 16 May 2018 paragraphs 7-9
[15] Transcript Day 1 page 35 line 40.
[16] Transcript Day 2 page 2 line 5-40
[17] Transcript Day 2 page 2 line 30
[18] Letter 15 December 2015 to Scott Alexander
[19] State Development Infrastructure and Planning or DATSIP

The complainant failed to provide depositions to the Judge before the commencement of the trial causing delay and cost.[20]

Complaint 10

The complainant provided a statement from a witness dated 12 July 2018 who was the only witness to attest that he had actually seen Aboriginal Cultural Heritage on Kingvale and in respect of which the defendant had prepared his case.

The complainant did not take any, or any adequate, steps to ensure the witness was present at Court to give evidence or be cross examined.

Compliant 11

Prior to hearing the Defence Counsel made it known to the complainant that the prosecution was unlikely to succeed and the basis for that contention.

At the commencement of the trail the Defence Counsel made it known to the complainant that the prosecution would be unable to prove certain matters fundamental to a conviction[21] and again advised the basis for that contention.

At the conclusion of the prosecution opening the Defence Counsel took the unusual step of alerting the prosecution to a fundamental shortcoming in its evidence in respect of particular 3 giving the complainant a further opportunity to discontinue the prosecution.[22]

The court refused an application by the prosecution to amend the particular 3 which made it impossible for the prosecution to succeed yet the complainant failed to discontinue the prosecution.[23]

The complainant failed to adhere to the model litigant principles adopted by the State. The complainant had several opportunities to discontinue the proceedings yet proceeded without regard to prospects, cost or inconvenience to the Court.

The evidence

The charge against Mr Harris was that he did carry out an activity and failed to take all reasonable and practicable measures to ensure the activity did not harm Aboriginal Cultural Heritage.[24]

Aboriginal Cultural Heritage is an object of particular Aboriginal significance[25] or an area of particular Aboriginal significance.[26]

There are 3 components to the charge.

1 Activity

---

[20] Transcript Day 1 page 2 line 12 -30
[21] Transcript Day 1 page 3 line 7
[22] Transcript Day 1 page 27 line 25
[23] Transcript Day 2 page 2 line 5-40
[24] Section 23 (1) ACHA 2003
[25] Section 10 ACHA 2003
[26] Section 9 ACHA 2003

The tree clearing was clearly an activity for the purposes of the ACHA and was admitted.

2 Aboriginal Cultural Heritage exists in area of activity

There had to be Aboriginal Cultural Heritage in the charge area.

Despite the body of material produced and volumes of reports, maps and statements and evidence given in the proceedings there was no evidence of the existence of Aboriginal Cultural Heritage in the charge area, or at all on Kingvale.

The prosecution case was either that Aboriginal Cultural Heritage was so prominent in the region that it must have existed in the charge area, or it comprised matters that were intangible.

A senior Olkola man and claimant in the Cape York 1 united claim gave no less than 3 statements prior to the hearing where he failed to mention that he had visited the charge area or that he had seen Aboriginal Cultural Heritage in that area. Despite these statements when the witness had ample opportunity to confirm he had visited the area and had seen either scar trees, burial trees or artefacts he failed to do so.

Conveniently, when it became apparent from the Judges remarks that some evidence of the existence of Aboriginal Cultural Heritage existing in the areas would be necessary to put to the jury and after discussion outside the Court with the complainant that witness came up with some fresh information.

In further evidence in chief that witness claimed he had visited Kingvale on horseback in the nineteen sixties after the referendum in 1967[27] when he was still a child.

That witness claimed he had seen upside down trees (burial trees) on Kingvale in the old horse paddock behind the little hut[28]although he did not know at the time that they were a particular tree or of their significance until later in life when he was told about them by elders.

That witness was asked to mark on map the area where he has seen upside down trees some 50 years prior when he was a child and before he knew what an upside-down tree looked like or what its significance was.[29]

There was no evidence as to how that witness got to this particular area, who he was with, how he distinguished the area he marked, the landform, soil types or vegetation that might suggest the presence of matchwood burial trees.

The circle the witness was asked to draw on a map in the course of giving evidence was nowhere near what is known as the horse paddock or the hut but rather extended south toward the charge area and covered several thousand hectares.

There was no evidence presented that the area described by the witness overlapped, coincided with or included the charge area[30]and in fact his effort failed to include the charge area.

[27] Transcript Day 2 page 71 line 45
[28] Transcript Day 2 page 62 line 15.
[29] Transcript Day 2 page 62 line 25
[30] Transcript Day 4 page 12 line 3

The Judge was highly critical of the evidence being produced in this manner[31]and that witnesses' evidence in relation to his presence on Kingvale and the existence of Aboriginal Cultural Heritage was not ultimately accepted.[32]

Complaint 12

It is not suggested had been coached by the complainant prior to giving his evidence or during the trial however the complainant failed to take a full and detailed statement from the witness and present his evidence in a manner that was admissible, and which did not take the defence by surprise.

An expert witness produced a report dated 2 August 2018 upon which the prosecution relied and in respect of which that expert gave expert evidence.

That witness gave evidence that Cooktown ironwoods were resources for sugar bags and artefact making[33] and that such trees would be found on Kingvale[34] and she relied upon the regional ecosystem mapping as the source.[35]

That witness did not in fact rely upon the regional ecosystem mapping nor was it put into evidence[36] with the result the Court determined there was no evidence of culturally modified trees in the charge area.
The evidence was unsupported opinion from an expert witness and was not accepted.

Complaint 13

The complainant failed to test the expert evidence of the expert witness to ensure it was supported by the necessary sources, reports and evidence in a manner that was admissible and did not take the defence by surprise. Even though an expert witness owes a duty of impartiality to the Court the expert witness was demonstrably biased to the prosecution.

Artefacts

Part of the prosecution was that Harris had harmed significant aboriginal objects (artefacts).

The only evidence as to the existence of artefacts on Kingvale came from an expert geomorphologist who attended Kingvale pursuant to a warrant[37] as an expert geomorphologist to determine the impact if any of the clearing on the Great Barrier Reef on behalf of the Federal Environment Department for the purposes of the EPBC Act investigation.

Whilst that person may have been an officer assisting[38] that taking of photographic evidence for the purposes of the Aboriginal Cultural Heritage Act 2003 was clearly in breach of the things authorised by the warrant as he was not the "executing officer".[39]

---

[31] Transcript Day 2 Page 63 Line 36
[32] Transcript Day 4 page 11 line 40-45
[33] Transcript Day 3 page 8 line 24
[34] Transcript Day 3 page 8 line 35
[35] Transcript Day 3 page 9 line 5
[36] Transcript Day 4 page 10 line 10
[37] Monitoring warrant issued 9 December 2015 section 528 EPBC Act
[38] Section 417(1) Environment Protection and Biodiversity Conservation Act 1999
[39] Section 417(1-5) Environment Protection and Biodiversity Conservation Act 1999

The geomorphologist was neither authorised nor competent to collect information in relation to Aboriginal Cultural Heritage.[40]

The artefacts identified by that person comprised an alleged stone grinding tool and scar tree.[41]

The assessment undertaken of the object by Kingvale failed to find any of the grinding marks on the stone of axe marks on the scar tree which would be indicative of the object being artefacts.[42]

The expert anthropologist in evidence stated that she had found no specific resources that talk about artefacts on Kingvale.[43]

Complaint 14

The Acting Director Cultural Heritage Unit entered the alleged artefacts identified by the geomorphologist on the cultural heritage data base notwithstanding there had been no independent evaluation or verification of the objects, the information had been unlawfully gathered and for the sole purpose of assisting with the prosecution against Kingvale and introduced into evidence the geomorphologist opinion in respect of the artefacts notwithstanding that evidence had been obtained unlawfully.

The recording of the artefacts as significant aboriginal objects on the data base has, since the hearing and at the request of the defendant, been temporarily removed from the cultural heritage data base.[44]

3 Aboriginal cultural heritage had to have suffered harm.

There was no evidence of any kind that Aboriginal Cultural Heritage suffered harm.[45]

Complaint 15

The complainant failed to provide any evidence of harm to Aboriginal Cultural Heritage in the charge area which is a fundamental component a successful prosecution pursuant to section 23 ACHA.

Failure to inspect investigate and prosecute

There have been hundreds of thousands of hectares of land clearing in Queensland since the enactment of the ACHA in 2003. There was in excess of 70 development approvals for clearing of native vegetation for high value agriculture in 2014-2015.

Another station which is approximately 40km east of Kingvale (and interestingly on the eastern side of the Great Dividing Range) was given approval to clear over 30,000 ha of native vegetation for high value agriculture in 2014. Approximately 1800ha were subsequently cleared.

That station is well within the area of high probability of containing significant Aboriginal Cultural Heritage identified by the complainant in the Kingvale prosecution.

[40] Email 17 December 2015 Jeff Shellberg to Drew McLean
[41] Email 17 December 2015 Shellberg to McLean attachments
[42] Transcript Day 3 Page 25 line 5
[43] Transcript Day 3 Page 9 line 45
[44] Email 1 November 2021 Schiavo to Preston Law
[45] Transcript Day 4 Page 12 line 22

The clearing on that station was brought to the attention of the State at the same time as Kingvale[46]and was referred to in the initial investigation.[47]

In February 2021 a complaint was made to DATSIP, QPWS and NRM in relation to cutting removal and sale of native vegetation (mainly Cooktown Ironwood) from Kalinga Station being lot 37 on SP 215745. Photographic evidence was provided of the destruction of scar trees in large numbers without regard to the Aboriginal Cultural Heritage duty or care.

To date no action has been taken to prosecute the offenders.

Complaint 16

There has been no inspection, investigation or prosecution pursuant to the ACHA in Queensland in respect of the activity of tree clearing since 2003 yet Kingvale was singled out and prosecuted without just cause.

Complaint 17

The Acting Director Cultural Heritage Unit failed in his duty by authorising and directing a prosecution pursuant to the ACHA for purposes other than as provided by the legislation in relation to Kingvale and failing to act on a complaint in relation to both section 23 and section 24 of the ACHA in relation to Kalinga and other properties.

The options paper

2.1 Overview proposals

1 Increased consultation with Aboriginal people in the absence of a clear definition of the proper people for an area, a clear definition of what constitutes cultural heritage, and a properly resourced process will lead to greater uncertainty, delays and costs to anyone undertaking a lawful activity. It is an arduous process to determine who are the right people to talk to, how to contact them, how to arrange a meeting, how to have people turn up, how to find people who have any knowledge of the activity area or the cultural heritage and to have them undertake a cultural heritage clearance in a timely and cost-efficient manner.

2 The definition of Aboriginal party needs to be clearly defined not reframed according to traditional law and custom to determine with certainty who are the right people to talk for the land.

3 Reference to First Nations peoples is a misnomer and has no place is Queensland legislation. The term originated to describe Aboriginal peoples of Canada who are ethnically neither Metis nor Inuit. There were over 250 separate indigenous languages in Australia and over 700 dialects. At no time in their 40,000 year history is there any evidence of Aboriginal people being united as a nation. The much touted Cape York United claim has been all but abandoned as will procced as individual determinations as there is no united nation of claimants in Cape York To use inaccurate and popular terminology in the legislative process can only promote false assumptions and create expectations as to rights which do not exist at law.

3.2 Guiding information for development of proposals

[46] Letter 7 May 2015 Minister Hunt to Minster Lyneham
[47] Email 2 December 2015 Paul Horrocks to Michael Devery

- Early consultation

There is a presumption held which is quite false that Aboriginal people occupied and utilised all of the national landscape and that their cultural footprint has left an impression across the entire country. On this basis all activities on all tenures in all situations have the potential to impact upon significant Aboriginal places or objects. This applies equally to a backyard in Brookvale as a paddock in Bourke. The issues become far more problematic when the legislation moves into the realm of intangible cultural heritage.

Early consultation is ideal in a perfect world. In reality and person wishing to undertake an activity must first find who the person or body is to seek information in relation to compliance with the ACHA, make contact, set up a meeting hoping someone will attend, pay for the meeting in advance whether it goes ahead or not, sort out who the right person is from the many and often opposing options, negotiate a fee for the cultural heritage clearance for which there is no standard and if often related to the urgency of the activity.

- Greater oversight

The Department of Resources has access to highly sophisticated real time satellite imagery to assist it to identify and investigate illegal tree clearing so monitoring should pose no problem.

- Legislative reform

Section 23 ACHA needs to be removed from the Act.

There should be no moves to reverse of the onus of proof.

Introduction of intangible Aboriginal Cultural Heritage (ACH) leaves landholders in a untenable position.

- Identifying cultural heritage

With the larger part of the nation now subject to native title claims or determinations and the extraordinary resources expended on cultural mapping it should be incumbent upon the Aboriginal people claiming the existence of ACH to step up and disclose its nature, extent and location so it can be formally recorded. Any person undertaking an activity need only search the register to determine its existence or not.

- Intangible cultural heritage

This concept leaves open the spectre of abuse of process where unfounded unprovable intangible cultural heritage is claimed to either stop an otherwise lawful activity or extort considerable amounts of money for otherwise necessary cultural heritage clearances. A claim of intangible cultural heritage should only be sustained where is has been previously mapped or officially recorded, it is associated with a physical site or object in the location and the person or persons claiming the intangible cultural heritage have exercised their rights in traditional law and custom in respect of that cultural heritage in their lifetime or were made the custodians of the particular cultural heritage in their lifetime.

3.3 Proposals to improve cultural heritage protection.

Proposal 1

1) There is no identified problem with the duty of care guidelines. Greater consultation, engagement and agreement making without strict protocols around the identification of the right people (if they still exist) with appropriate actual knowledge of the location, including appropriate experience of the site an ACH and a fully resourced process dealing with clearance and dispute resolution will lead to further abuse of the process and greater frustration and cost to land holders undertaking lawful activity on their land. However conditional support is given provided there is rigour around the identification and mapping of cultural heritage and a process of review to ensure the mapping is both accurate and honest.
2) There are considerable improvements to be made around the identification of the right people to consult with in relation to particular lands. Any person undertaking an activity should be able to search a register to determine who are the right people to talk to in relation to any particular area and where they can be contacted and by reference to the mapping determine if there is any Aboriginal Cultural Heritage The person then undertaking an activity that will have a

significant impact upon Aboriginal Cultural Heritage should have a clear pathway to obtaining the necessary clearance.

3) Consultation should only occur where a landholder has searched the register and the mapping and has determined the activity will impact upon ACH and the proper people have been identified.
4) Absolutely essential with a sunset date and additions and amendment to be the subject of an application and independent review.
5) The obvious outcome of this approach is that all activities by a landholder and in particular a graziers will become subject to an ACH clearance process. I take you back to the presumption that Aboriginal Cultural Heritage exists across the entire national landscape. It is important that the Wik decision in the High Court determined the existence of native title rights and interest (which presumably include cultural heritage) in respect of which to the extent of any inconsistency subject to the rights of pastoral leaseholder prevail. This High Court decision should be the tenet of the proposed review. The proposed activities and definitions are both excessively proscriptive and prescriptive.
6) No as this will create confusion and cost.
7) The State Government should fund all parties to the process and in particular state leaseholders as the State is the landlord of State leases and the instrumentality imposing ACH on that lease.
8) No. There is no known legal or factual basis for a reference to First Nations peoples in Queensland legislation. The term originated to describe Aboriginal peoples of Canada who are ethnically neither Metis nor Inuit. There were over 250 separate indigenous languages in Australia and over 700 dialects. At no time in their 40,000 year history is there any evidence of Aboriginal people being united as a nation. The much touted Cape York United claim based on a unified society has been all but abandoned as will procced as individual determinations as there is no united nation of claimants in Cape York and no agreement could be reached as to a unified society. To use inaccurate and popular terminology in the legislative process can only promote false assumptions and create expectations as to rights which do not exist at law and create uncertainty and expose the legislation to legal challenge.

Proposal 2

1) ACH clearance should be an integral component of the actual approval where a search of the register and the mapping does not reveal the existence of or impact upon ACH. Where ACH is found to exist and the activity will impact upon the ACH then the approval should be subject to ACH clearance to bring certainty to the process and avoid section 23 abuse.
2) The planning approval should identify the ACH, the right people to consult and the impact. This will avoid the present problem where people who have no connection to or experience of the land or the cultural heritage spend days and considerable resources providing unnecessary clearances or in some cases ACH is fabricated.

Proposal 3

1) Not supported. There are problems with what constitutes ACH in the present framework. Scar trees for example may be as result of bark having been taken for a canoe. Scars left from the extraction of sugarbag whilst indicative of the area in which the nomadic tribes operated may not be significant ACH and are often mistaken for lightning strike or machine damage. The introduction of intangible cultural heritage as ideal as that might be creates a mine field for landholders trying to exercise their lawful rights. As was seen in the Harris case in the absence of ant evidence of a significant aboriginal object or site both the complainant and anthropological expert attempted to develop a line of argument that intangible aboriginal cultural heritage existed over the whole of Kingvale and in fact the whole of Cape York. There was no evidence in support of this contention, and it was

rejected by the Court. The introduction of intangible cultural heritage coupled with a reversal of the onus of proof to the landholder leaves the landholder open to a costly process which can only be resolved to his detriment. It will operate as veto on otherwise lawful rights.

2) This concept leaves open the spectre of abuse of process where unfounded unprovable intangible cultural heritage is claimed to either stop an otherwise lawful activity or extort considerable amounts of money for otherwise necessary cultural heritage clearances. A claim of intangible cultural heritage should only be sustained where is has been previously mapped or officially recorded, it is associated with a physical site or object in the location and the person or persons claiming the intangible cultural heritage have exercised their rights in traditional law and custom in respect of that cultural heritage in their lifetime or were made the custodians of the particular cultural heritage in their lifetime.

Proposal 4

1) No. There is no known legal or factual basis for a reference to First Nations peoples in Queensland legislation. The term originated to describe Aboriginal peoples of Canada who are ethnically neither Metis nor Inuit. There were over 250 separate indigenous languages in Australia and over 700 dialects. At no time in their 40,000 year history is there any evidence of Aboriginal people being united as a nation. The much touted Cape York United claim based on a unified society has been all but abandoned as will procced as individual determinations as there is no united nation of claimants in Cape York and no agreement could be reached as to a unified society. To use inaccurate and popular terminology in the legislative process can only promote false assumptions and create expectations as to rights which do not exist at law and create uncertainty and expose the legislation to legal challenge.
   The Land Court proposal has merit provided the costs of the parties is met by the State.

Proposal 5

1) This proposal is not supported. Whilst ACHA is not tenure specific in the main landholders are State leaseholders. They have been subjected to numerous data collection, retrieval and reporting requirements for decades all at their cost none of which have been sustained or utilised for the intended purpose.
2) The ACH belongs to the Aboriginal people and is protected by a State Department both of whom are better resourced and equipped to undertake this task. Any proposal that will bring certainty to the process and reduce the burden on the landholder would be favoured.

Proposal 6

1) On the basis that the review brings about the introduction of process that creates certainty for the landholder in that he is dealing with
    a) The right people with actual knowledge of the ACH and the location of the activity
    b) Actual or known ACH that has previously been identified and recorded
    c) An actual impact on that ACH
    d) Consultation and agreement that delivers and outcome
    e) Where he is equally resourced, and
    f) Compliance is fair and not subject to abuse

Then a landholder should have no problem with undertaking the activity in the manner he agreed to

4.3 Proposal to reframe definitions.

The present definitions are a best fit within several separate and distinct legislative frameworks with different intents.

The Native Title Act, the Aboriginal Cultural Heritage Act and to some extent the Aboriginal Land Act,

It is not proposed to go into an analysis of the legislation here.

Suffice to say the review and any amendments to the Aboriginal Cultural Heritage Act 2003 should contain a definition of an Aboriginal party who

- Is or represents aboriginal people who are the holders of the cultural heritage in relation to any particular area including the area of proposed activity
- Is able to provide a basis for that contention according to law (eg a native title determination) or traditional law and custom to an appropriate standard so that person(s) can be entered on the register and provide the ACH data to support the mapping.
- Is able to describe the nature and extent ACH either by virtue of actual presence on or visitation to the land or by virtue of knowledge having been passed to them by a person according to traditional law and custom provided there is prior evidence of the existence of that ACH or the transference of knowledge.
- Is able to identify and describe the impact the activity will have upon that ACH.

The definitions place to much emphasis on the risk of the activity to ACH without clearly defining what is ACH and the levels of significance and the consequences of the activity for that ACH. There are problems with what constitutes ACH in the present framework. Scar trees for example may be as result of bark having been taken for a canoe and be significant for many reasons. Scars left from the extraction of sugarbag whilst indicative of the area in which the nomadic tribes operated may not be significant ACH and are often mistaken for lightening strike or machine damage.

5. **Promoting leadership by First nations peoples etc**

There is no known legal or factual basis for a reference to First Nations peoples in Queensland legislation.

The term originated to describe Aboriginal peoples of Canada who are ethnically neither Metis nor Inuit and has been adopted in Australia through popularism and political correctness.

As with the expression “traditional owners” the term First Nations peoples has no place in any legislative frame work by refence to the Constitution, Judicial decision in any Court of competent jurisdiction, State or Federal legislation and in particular the Native Title Act and Aboriginal Cultural Heritage Act.

Nor is it referable to traditional law and custom as there were over 250 separate indigenous languages in Australia and over 700 dialects. At no time in their 40,000 year history is there any evidence of Aboriginal people being united as a nation.

The much touted Cape York United claim based on a unified society has been all but abandoned as will procced as individual determinations as there is no united nation of claimants in Cape York and no agreement could be reached as to a unified society.

To use inaccurate and popular terminology in the legislative process can only promote false assumptions and create expectations as to rights which do not exist at law and create uncertainty and expose the legislation to legal challenge.

Our Ref: David Kempton:171102
Direct line: 07 4052 0726
Direct email: dkempton@prestonlaw.com.au
Your Ref:

5 April 2022

Cultural Heritage Acts Review
Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships.
PO Box 15397
City East Qld 4002

By Email: CHA_Review@dsdsatsip.qld.gov.au
Melanie.Cule@dsdsatsip.qld.gov.au

Attention Melanie Cule

Dear Sir

Aboriginal Cultural Heritage Act Review.

I act for Scott Harris the lessee of Kingvale Station and confirm I lodged a submission with you on his behalf on the 31 March 2022.

I confirm you have since granted an extension of time to 5 April 2022 for him to complete his submission.

Accordingly, I enclose an addendum to his submission.

Please ensure any communication with Mr Harris is via this office.

Yours faithfully

David Kempton
Consultant
for **PRESTON LAW**
Encl

Aboriginal Cultural Heritage Act

Addendum Response to options paper 2021

The ***Aboriginal Cultural Heritage Act 2003*** (ACHA) Section 4 describes its main purpose as

- to provide effective recognition, protection and conservation of Aboriginal Cultural Heritage.

Section 8 provides Aboriginal Cultural Heritage is anything that is a significant Aboriginal area or a significant Aboriginal object.

Section 23 ACHA CULTURAL HERITAGE DUTY OF CARE provides

(1) A person who carries out an activity must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage (the **"cultural heritage duty of care")**

Section 24 ACHA UNLAWFUL HARM TO ABORIGINAL CULTURAL HERITAGE

(1) A person must not harm Aboriginal cultural heritage if the person knows or ought reasonably to know that it is Aboriginal cultural heritage.

It has come to the attention of Scott Harris that on a neighbouring property in Cape York the Department was aware of serious breaches of both Section 23 and 24 ACHA yet failed to properly investigate the offences or prosecute the perpetrators.

The facts so far as Harris is aware are that:

- Kalinga is just 20km from Kingvale Station where in 2020 over 10,000 hectares of remnant forest, namely iron wood, was clear felled for export to China.[1]
- The trees felled (predominantly ironwood) were systematically logged on Kalinga station, Mary Valley station and Lakefield National Park north of Laura and transported to Townsville for export to China.
- Many hundreds of the trees felled were scar trees.[2]
- A traditional owner finally halted the logging as there had been no cultural heritage clearance.
- The sublessee of Kalinga station of a grazing operation claim the logging was reported to the Queensland Department of Resources in 2020 however no action has been taken.
- On the 1 April 2022 an unnamed person (the person who cut the trees) was fined $15,000 in the Cooktown Magistrates Court for felling 113 old growth trees in the Rinyirru National Park in breach of *section 62(1) Nature Conservation Act 1992.*[3]

Harris is concerned that the Review of the ACHA will not take into account the manner in which the State selectively protects and prosecutes Aboriginal cultural heritage.

Harris was prosecuted for a breach of section 23 ACHA in the absence of any evidence.

---

[1] Photograph 1 logging of ironwood trees
[2] Photograph 2 an example of a scar tree taken
[3] Extract from DES WEBSITE

In the Kalinga case there is clear evidence that the landholder, contractor, transporter and exporter did not take all reasonable and practicable steps to ensure the activity did not harm Aboriginal cultural heritage in breach of section 23 ACHA.

There is also evidence that the felling and taking of ironwood trees did actual harm to Aboriginal cultural heritage in breach of section 24 ACHA.

The defense provided for in section 24 (2) (b) ACHA is not available as the person who undertook the activity that caused the harm is not the owner of the Aboriginal cultural heritage nor were they acting with the owner's agreement.

Despite being aware of these breaches in February 2021, the Department of Environment and Science and the Department of Seniors Disability Services and Aboriginal and Torres Strait Islanders have failed to take any steps to investigate or prosecute the most obvious and serious breaches of the ACHA.

Recommendation
There be Ministerial oversight into all allegations of breach, investigation and prosecution of persons for breaches of the Aboriginal Cultural Heritage Act to ensure the integrity of the legislation is maintained to the highest standard.

Photo 1 Iron wood being taken from Kalinga station

Photo 2 A Scar tree from Kalinga station

Man fined for felling 113 trees in national park

Issued: 31 Mar 2022

A man has been fined $15,000 by the Cooktown Magistrates Court over the felling of 113 old-growth trees in the Rinyirru National Park (Cape York Peninsula Aboriginal Land) in far north Queensland.

In 2020, a timber export company entered into an agreement to log Cooktown Ironwood trees (erythrophleum chlorostachys) on two stations on Cape York Peninsula that border the national park.

The man was hired by the timber export company to conduct harvesting activities and he hired other people to conduct the felling.

Between 18 September and 22 October 2020, an unknown timber cutter employed by the man felled 113 trees in the Rinyirru National Park.

On 21 October 2020, a member of the public notified authorities about the felled timber in the national park, and later provided GPS points of location.

The felled trees were not removed from the national park.

In November, Queensland Parks and Wildlife Service rangers catalogued the felled trees, of which 93 were identified as Cooktown Ironwood, with the remaining 20 trees identified as various species.

Rangers measured the top and bottom diameter of every felled tree and provided the measurements to a botanist familiar with the ecology and vegetation of the national park and Cooktown Ironwood trees.

Using those measurements and data on published growth rates, it was estimated more than half of the felled Cooktown Ironwood trees had taken up to 250 years to grow, with the largest tree taking up to 466 years to grow.

The man was charged with one offence of taking a natural resource of a protected area without authority, in contravention of section 62(1) of the *Nature Conservation Act 1992*.

On 30 March 2022, the man failed to appear in court and was sentenced in absentia. In sentencing, the magistrate commented on the serious nature of the offences, including the age of the felled trees.

He was fined $15,000 and ordered to pay $250 in legal costs. As no conviction was recorded, he cannot be named.

As the environmental regulator, the Department of Environment and Science takes compliance seriously. The department has set clear expectations about acceptable behaviour in our national parks.

Where non-compliance is identified the department will take strong enforcement action.

Press Release DES 31 MARCH 2022