AUSTRALIAN HERITAGE SPECIALISTS

Your heritage partners

31 March 2022

Cultural Heritage Review Team
DSDSATSIP
1 William Street
BRISBANE QLD 4000

Submission via: https://qchub.dsdsatsip.qld.gov.au/cultural-heritage-acts-review/userinfo/CHAR-submission

Dear Cultural Heritage Review Team,

Re: Review of Cultural Heritage Acts (Formal Submission)

We have the pleasure of providing the following submission in relation to the Departments current program 'Reshaping Queensland's cultural heritage laws', which responds directly to the *Options Paper, Finalising the review of Queensland's Cultural Heritage Acts* (DSDSATSIP, December 2021).

As you would be aware, both Ann Wallin and Benjamin Gall (AHS Principal Consultants) have been substantially involved at a practice level working for proponents and Traditional Owners within the cultural heritage sector across 4 decades in Queensland and Australasia and recently appointed to the Department of Seniors. Disability Services and Aboriginal and Torres Strait Islander Partnerships' (DSDSATSIP) Stakeholder Panel, whereby we have provided input into the development of the Options Paper abovementioned.

Among other relevant areas of participation, Ann was also the State's sole expert witness for Ostwalds vs State of Queensland, which led to the largest successful prosecution ever recorded under the *Aboriginal Cultural Heritage Act 2003* to date, following 2 years of expert assistance by Ann and Ben on the matter.

Ann and Ben are the only consultants in Queensland who were appointed by the Parliament of the Commonwealth of Australia, Joint Standing Committee on Northern Australia, where they provided expert witness services to the Committee for matters relevant to cultural heritage for reform within Queensland, which their inputs are published within the hearing's report, *A Way Forward Final report into the destruction of Indigenous heritage sites at Juukan Gorge* (October 2021), which we recommend as a key document to be tabled alongside the options paper for the Departments' review, which can be found at:

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Northern_Australia/CavesatJuukanGorge/Report

The following information is provided in direct response to the Options Paper Survey, which are tabled below.

Providing Opportunities to
Improve Cultural Heritage Protection

Proposal 1: Replace the current Duty of Care Guidelines with a new framework that requires greater engagement, consultation and agreement making with the Aboriginal party or Torres Strait Islander party to protect cultural heritage.

Questions?

1. Do you support this proposal and option?

AHS supports the proposal to replace the current Duty of Care Guidelines with a new framework with the proviso that the new framework should be succinct and clearly written so that it is easily understood by all and is not open to misinterpretation.

However, the proposed option of using two categories of activity – a prescribed activity and an excluded activity – as described in the options paper does not give sufficient clarity. Does this mean that consultation for a prescribed activity would only go ahead if the activity was associated with a high-risk area? If this is the case, then Aboriginal cultural heritage that exists in areas that are not defined through mapping as high-risk areas may be destroyed. Some if not all such cultural heritage may be considered Significant Aboriginal Areas once defined.

Suggested Reform

An important element of understanding the nature of Aboriginal cultural heritage is the concept of intangible versus tangible sites and places of significance and this was discussed during AHS's presentation to the Inquiry.

The term "tangible" refers to those sites where physical evidence, e.g., stone artefacts, stone arrangements or scarred trees, can be observed by people other than the Aboriginal party. Another term could be archaeological material. However, intangible sites and places have no physical evidence but may be natural places to which the Aboriginal party attaches high levels of significance because of their traditional knowledge, e.g., a mountain connected to important Dreaming stories. Only the Aboriginal party can define the extent and nature of intangible places.

This understanding of Aboriginal cultural heritage is captured in its definition in Sections 8-9 of the ACHA, namely:

> ***Aboriginal cultural heritage*** is anything that is –
>
> (a) a significant Aboriginal area in Queensland [intangible place]; or
>
> (b) a significant Aboriginal object [tangible]; or
>
> (c) evidence, of archaeological or historic significance, of Aboriginal occupation of an area of Queensland [tangible or intangible].
>
> 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 an Aboriginal party for an area.

Gazetted when the ACHA was introduced, the Guidelines state (S. 1.13a) that compliance with them meets the requirements of the ACHA for a person's cultural heritage duty of care. They also state (S. 1.16) that they recognise that "the Act [ACHA] expressly recognises that the views of the Aboriginal Party for an area are key in assessing and managing any activity which is likely to harm Aboriginal cultural heritage".

The Guidelines recognise the definitions and the provisions provided by the ACHA, including those in Section 8-9 quoted above, but also offer definitions and methods of approaching cultural heritage in Queensland that are additional to those of the ACHA. For example, additional definitions (S. 3.0) that will be considered in this section are:

> "Surface Disturbance" means any disturbance of an area which causes a lasting impact to the land or waters during the activity or after the activity has ceased.
>
> "No Additional Surface Disturbance" means surface disturbance not inconsistent with previous surface disturbance.
>
> "Significant Ground Disturbance" means:
>
> - Disturbance by machinery of the topsoil or surface rock layer of the ground, such as by ploughing, drilling or dredging;
> - The removal of native vegetation by disturbing root systems and exposing underlying soil.

Methods of approaching cultural heritage are then provided (S. 4.0) and consist of:

- Category 1 – Activities involving No Surface Disturbance;
- Category 2 – Activities causing No Additional Surface Disturbance;
- Category 3 – Developed Areas;
- Category 4 – Areas previously subject to Significant Ground Disturbance; and
- Category 5 – Activities causing additional surface disturbance.

These methods are predicated by the assumptions that activities in those areas described by Categories 1 and 2 will cause no harm to Aboriginal cultural heritage. Category 3 "is generally unlikely that the activity will harm Aboriginal cultural heritage" (S. 5.1), and Category 4 that "where an activity is proposed in an area, which has previously been subject to Significant Ground Disturbance it is generally unlikely that the activity will harm Aboriginal cultural heritage and the activity will comply with these guidelines" (S. 5.4).

The Existing Problems

Despite the obvious intent of the ACHA in its principles and purpose (Sections 4-5 discussed in 1 above) and the Guideline's recognition that "the views of the Aboriginal party … are key" (above), Categories 1, 2 and 3 require no consultation, Category 4 only requires consultation when the loose and less than comprehensive Section 6 of the Guidelines is relevant (effectively discounting consultation in a vast number of areas found by self-assessment to be Category 4, and only Category 5 requires consultation. In addition, Category 5 also requires one of the actions provided by the ACHA such as forming an agreement, a cultural heritage management plan or an indigenous land rights agreement that includes cultural heritage management. Effectively, the application of these Guideline categories results in only a few occasions where a proponent planning an activity must consult with the relevant Aboriginal party.

In addition to the deficiencies of application of the ACHA in the Guidelines described in the previous paragraph, the assumptions of these categories and the definitions provided above are that only tangible Aboriginal cultural heritage is relevant as categories 1 to 3, giving no credence to intangible sites and places. And category 4 only gives credence to consulting with the Aboriginal party if Section 6 of the Guidelines is considered relevant during self-assessment. This begs the question: without consultation, how can those intangible sites and places that are only known to the Aboriginal party be appreciated and appropriately managed? The Guidelines only leads to a positive answer to this question through requirements for consultation in all cases if Category 5 is relevant.

While many proponents wish to use the Guidelines in accordance with the principles and purpose of the ACHA, unfortunately this lack of connectivity between the ACHA and the Guidelines has also resulted in numerous cases of less than impressive application of the Guidelines, some of which was described during AHS's discussion with the Inquiry. As a result, sites and places of significance to their Aboriginal parties are regularly being disturbed, or in the worst-case scenario, destroyed. The Inquiry is directed to the numerous publicly available submissions made by Aboriginal people and groups to the Queensland Government's review of the ACHA and Guidelines.

In addition to the inadequacy of the Guidelines to require consultation in many more circumstances through the processes it provides, the definition of Significant Ground Disturbance is regularly inadequately applied, especially its clause "the removal of native vegetation by disturbing root systems and exposing underlying soil". AHS has often found situations where self-assessment has insufficiently applied this definition. An example that AHS knows of can be found in the Jinibara traditional lands close to Brisbane, where non-indigenous settlement occurred early, in many cases in the 1840s. At that stage, as the main use of landholdings was for cattle and sheep grazing, clearing of native vegetation was an important part of early development. Clearing was usually accomplished by ring barking and/or tree felling, both processes that do not disturb root systems and expose underlying soil, as stumps usually disappeared in time through decay or fire. The introduction of types of tree-felling that cause root system disturbance and expose underlying soil, such as chain felling between two bulldozers or through other heavy machinery was not introduced until well after World War II, by which time much of the vegetation clearance that can be observed today in Jinibara country had occurred. Despite this historical situation that discounts "removal of native vegetation by disturbing root systems and exposing underlying soil", regularly proponents do self-assessment that finds Significant Ground Disturbance allows them to proceed with their project, and the native title parties only find out about this impact when they drive past.

A Solution

The Guidelines require upgrading to reflect the deep concerns held by many Aboriginal people and groups. AHS suggests a basic upgrade would involve the amalgamation of categories 3 and 4 as the differences between definitions of these two categories are arbitrary at best. In addition, the definitions of No Additional Surface Disturbance should be amended to No Additional Ground Disturbance and the definition of Significant Ground Disturbance should be amended to Additional Ground Disturbance. The change from "surface" to "ground" makes clear that any disturbance requiring penetration of the ground needs to be considered. A suggestion would be:

> "Additional Ground Disturbance" is ground disturbance inconsistent with previous ground disturbance (the opposite of the current definition for "No Additional Ground Disturbance").

Using this proposed definition and amalgamation, a reasonable and simpler process is as follows:

Category 1: No Surface Disturbance

As per current Guidelines

Category 2: No Additional Ground Disturbance

- As per current Guidelines with the addition of the points below.
- Check Register and Database. If something on Register or Database, then cannot be Category 2 (must be treated under Category 4).
- Must consult with Aboriginal parties if cultural heritage is found during activities.

Category 3: Additional Ground Disturbance

- Check register and database. If something on the Register or Database exists in the project area, then cannot be Category 3 (must be treated under Category 4).
- If nothing on the Database or Register, letter should be sent to Aboriginal party explaining the project and giving a legally acceptable time frame for a response if the project area is a Significant Aboriginal Area to that party with a reasonable explanation of values. If the response is that the project area is a Significant Aboriginal Area and provides a reasonable explanation of values, then the project area cannot be Category 3 and must be treated under Category 4.
- Must inform Aboriginal parties if cultural heritage is found during project activities.

Category 4: Activities Causing Additional Disturbance

(Note: Additional Disturbance rather than Additional Ground Disturbance is relevant because it allows for those projects that may not be causing Additional Ground Disturbance but still require further actions because of the impact of the activity on Aboriginal cultural heritage.)

- An agreement, a cultural heritage management plan (CHMP) or an indigenous land use agreement with clauses about management of cultural heritage is required before the activity commences.

Under these revised categories, Section 6 of the Guidelines would be superfluous.

If Section 6 and much of repetition of aspects of the ACHA is removed, the question must be asked why the Guidelines are necessary, as this relevant section (above) could be added to the ACHA.

2. Improvements that could be made (including Q.3. Should consultation occur)

AHS would prefer to see the following:

- Retention of the definition of Significant Aboriginal Area or Object (as also appears to be the intention of Proposal 1 as the definition is listed under Examples of definitions;
- Clarity in the Duty of Care Guidelines or equivalent that where Aboriginal Cultural Heritage is known to exist even if it is not called a Significant Aboriginal Area or Object on the State's Database, consultation must occur;
- The addition of High-Risk Area that replaces self-assessment of landforms, vegetation clearing etc. as they currently appear in the Duty of Care Guidelines;
- Amalgamation of Category 5 (into Category 4 with a name as per our recommendations above);
- Where planned activity is in an area that can be described as a Significant Aboriginal Area or Object, a High-Risk Area, an area of category 5, or where Aboriginal Cultural Heritage is on the State's Database then consultation must occur.
- Consultation as required above should be defined as written communication, and if requested by either party, meeting, assessment and reporting.
- Where planned activity will involve ground disturbance that is greater or deeper than what is in existence in areas that are not described by the above Significant Aboriginal Area or Object, High-Risk Area or Category 5, consultation via written communication asking for advice from the Aboriginal Party should occur.

4. Proactively mapping cultural heritage areas

Currently the State's Database is highly deficient and riddled with mistakes. For example, when an assessment was made of all so-called scarred trees in Jinibara country of Sunshine Coast Regional Council area, not one of the so-called scarred trees on the Database was in fact a culturally scarred tree. Proactive mapping of traditional country is essential if the Database is to be a worthwhile tool.

Assisting traditional owner groups, particularly those who have achieved native title determination or have been found through the native title process to be descendants of the traditional owners of a country should be funded so that appropriate mapping can occur.

5. Definitions

In addition to existing and proposed definitions, the following should be considered:

A definition of 'Significant Ground Disturbance' should be amended to 'Additional Ground Disturbance'. The change from "surface" to "ground" makes clear that any disturbance requiring penetration of the ground needs to be considered. A suggestion would be:

> "Additional Ground Disturbance" is ground disturbance inconsistent with previous ground disturbance (the opposite of the current definition for "No Additional Ground Disturbance").

6. Should consultation protocols be developed for each Aboriginal party?

The Cultural Heritage Acts should recognise that individual groups of traditional owners may have their own internal processes of government that their representatives – Aboriginal parties – are following. This situation further underlines the need for initial consultation as discussed above, which gives the Aboriginal party the ability to inform the proponent and other parties of the appropriate protocols for consultation with that group. Rather than develop a format for consultation protocols that do not necessarily respect the individual perspectives of each group, it would be preferable to include a direction in the Cultural Heritage Acts that a response to a written request to consult should include directions on the group's consultation protocols.

Proposal 2: Integrate cultural heritage protection and mapping into land planning to enable identification of cultural heritage at an early stage and consideration of its protection.

Questions?

1. Do you support this proposal and option?

Yes. Quality project planning relies on the quality of its incorporated information.

2. Are there any improvements that could be made?

The critical element is support for Aboriginal parties to organise the upgrade of recording and mapping their traditional country for the State's Database.

Proposal 3: Amend the Cultural Heritage Acts to expressly recognise intangible elements of cultural heritage.

Questions?

1. Do you support this proposal?

Yes. The concept that a Significant Aboriginal Area or Object may incorporate intangible reasons currently is covered in section 9 of the Aboriginal Cultural Heritage Act by the term "Aboriginal tradition" which is defined in the *Acts Interpretation Act 1954,* section 36*,* but it is clear from how the *Aboriginal Cultural Heritage Act 2003* has been used to date that including more clarity in the definition of Significant Aboriginal Area or Object will help people's understanding.

Proposal 4: Provide a mechanism to resolve and deal with issues arising under the Cultural Heritage Acts.

Questions?

1. Do you support this proposal?

Yes. The process of assisting with disputes between parties arising under the Cultural Heritage Acts should have a step-by-step approach, commencing with mediation.

This should consider an approach which caters for disagreement arising through any attempt to develop a cultural heritage agreement (other agreement), as there is currently no straight forward mechanism for party's to resolve a dispute arising when all voluntary measures to agree have been exhausted – whereby the Qld Law Society or a court led mediation process could be enabled to assist the parties to form agreement – providing natural justice for both parties concerns to be appropriately managed outside of a Court hearing.

This is a more appropriate mechanism compared to the develop an independent and expertly trained (e.g., who aren't associated with a particular government, proponent or Aboriginal Party and qualified in mediation), compared to the proposal for a First Nations decision-making entity, who may not be expertly trained in such matters.

Currently a recognised mediation process is only available (in general terms) within a Cultural Heritage Management Plan (CHMP), commenced under Part 7 of the Act. For example, a dispute that arises during the development and/or implementation of a cultural heritage agreement (other agreement under Section 23(a)(iii)) is not currently able to be resolved through appropriate mediation.

2. Do you support these options?

The preferred option for an appropriate step-by-step approach would be:

- First step: for a trained mediator to be provided by application of either party to the Queensland Law Society or the Land Court. The mediator should be free to both parties and obviously independent.
- Second step: if the first step is not successful, giving the Land Court jurisdiction to hear disputes and enforce agreements.

Proposal 5: Require mandatory reporting of compliance to capture data and support auditing of the system.

Questions?

1. Do you support this proposal?

Yes. As agreements made under Section 23(a)(iii) of the Cultural Heritage Act are the most common way in which compliance with a land user's cultural heritage duty of care is achieved, it is important that these are also lodged with the State as are currently Cultural Heritage Management Plans and Cultural Heritage Studies.

2. Improvements to Options

Currently, the only mention of an agreement under Section 23(a)(iii) agreement is in that section of the Cultural Heritage Act. There is no guidance on what such an agreement should include. Is a verbal agreement such an agreement? Is a hand-written paragraph signed on a car bonnet by a single Aboriginal Party a sufficient agreement when the development of a Cultural Heritage Management Plan requires consultation with all relevant Aboriginal Parties?

The Cultural Heritage Acts should be upgraded to include clear direction on the minimum accepted in an agreement.

Proposal 6: Provide for greater capacity to monitor and enforce compliance.

Questions?

1. Do you support this proposal?

Yes. The history of regulation of the Cultural Heritage Acts to date clearly indicates the necessity of bringing in these powers to monitor and enforce.

2. Improvements to Options

The outcome of *Dunn v Ostwalds* underlines the need to include another enforcement process and sets a precedence for such matters. In this case, the judgement found a quarrying company guilty of the destruction of a Significant Aboriginal Area that was on the State's Database and ordered a fine to be paid to the State and the costs of mitigating the site to the Aboriginal Party.

The owner of the quarrying company then declared bankruptcy of his company. By law, the owner still had to pay his fine to the State, but the cost of site mitigation was not honoured because of bankruptcy.

Effectively, the Aboriginal Party who had been wronged missed out completely any effective compensation for their pain and loss. Enforcement compliance in the Cultural Heritage Act should be upgraded to include payment of all monies ruled by the courts should be initially to the State, and any Court ruling of reparation to an Aboriginal Party should immediately be paid by the State to that party, regardless of the actual payment (or lack of) by the party prosecuted.

Reframing the definitions of 'Aboriginal party' and 'Torres Strait Islander party'

Proposal: Reframe the definitions of 'Aboriginal party' and 'Torres Strait Islander party' so that people who have a connection to an area under Aboriginal tradition have an opportunity to be involved in cultural heritage management and protection.

Proposal 1: Proposals for reframing the definitions of 'Aboriginal party' and 'Torres Strait Islander party'

Two options have been provided to reframe the definitions of 'Aboriginal party' and 'Torres Strait Islander party'. This change to the Cultural Heritage Acts is particularly relevant in situations where there is no registered native title holder or native title claimant.

Of the two options, option 1 provides the best opportunity to protect and manage cultural heritage through appropriate consultation with those people who are the descendants of the Aboriginal or Torres Strait Islander group for that traditional country in traditional times.

However, this statement is made on the proviso that the concept of 'claim of connection' is elaborated appropriately in the Cultural Heritage Acts, so that mere claims of connection without evidence of legitimate traditional knowledge, responsibility and connection are not made.

Effectively this could be done by retaining the current threshold of requirements included in section 35(7) as a test that the First Nations independent decision-making body established under option 1 are required to consider.

In addition, any outcomes of relevant native title determinations or findings by a Court should also be a factor that the independent decision-making body must consider, e.g., where the Court has found that certain people are the descendants of the native title holders of the country even though these people did not meet the technical evidentiary requirements under the *Native Title Act 1993*.

Such people should be recognised as the Aboriginal or Torres Strait Islander party of that country, and the other parties to the Court decision should not be recognised.

Proposal 2: The First Nations decision-making entity, in partnership with Aboriginal and Torres Strait Islander peoples, explores the most culturally appropriate approaches for recognising historical connection to an area for the purposes of cultural heritage management.

Australian Heritage Specialists have specific concerns.

1. By using the term 'historical connection', the intent of this recognition that a place may have historical significance to First Nations people may potentially be considered as or even more important to traditional connection.
2. The meaning of Traditional Owner and Traditional lore and custom (and responsibility) must predominate over historical connections by those parties who are not the Traditional Owners for the land and sea for obvious reasons. This simple aspect of cultural heritage is in our experience commonly misunderstood within non-Indigenous Australians typically.
3. It is our view that the current setting of two acts for cultural heritage within Queensland; the *Queensland Heritage Act 1992* (which caters for historic aspects, including Aboriginal historical community), and the *Aboriginal Cultural Heritage Act 2003* (for caters for Traditional Owner aspects) should not be compromised further.

It is our view therefore that the process for recognising historical connection of Aboriginal and Torres Strait Islander People to an area where they hold historical connection - for the purposes of cultural heritage management already exists in completeness within the Queensland Heritage Act 1992 (QHA).

In particular, a site, place or object which is significant to Aboriginal and Torres Strait Islander People to an area which holds historical significance to that particular community or cultural group for social, cultural or spiritual reasons can be managed by the entry of a place onto the Queensland Heritage Register using the following entry criteria (in particular criterion g, but also potentially criteria a, b, c, d, h – noting that only one criterion needs to be reached to allow a place to be entered):

> *35 Criteria for entry in register [Queensland Heritage Register]*
>
> *(1) A place may be entered in the Queensland heritage register as a State heritage place if it satisfies 1 or more of the following criteria—*
>
> *(a) the place is important in demonstrating the evolution or pattern of Queensland's history;*
>
> *(b) the place demonstrates rare, uncommon or endangered aspects of Queensland's cultural heritage;*
>
> *(c) the place has potential to yield information that will contribute to an understanding of Queensland's history;*
>
> *Example of a place for paragraph (c)—*
>
> *a place that has potential to contain an archaeological artefact that is an important source of information about Queensland's history;*
>
> *(d) the place is important in demonstrating the principal characteristics of a particular class of cultural places;*
>
> *(e) the place is important because of its aesthetic significance;*
>
> *(f) the place is important in demonstrating a high degree of creative or technical achievement at a particular period;*
>
> *(g) the place has a strong or special association with a particular community or cultural group for social, cultural or spiritual reasons;*
>
> *(h) the place has a special association with the life or work of a particular person, group or organisation of importance in Queensland's history.*

We therefore encourage the review to leave the historic aspects of Aboriginal and Torres Strait Islander culture within the existing framework in place under the QHA – noting that this also currently permits people of South Sea Islander background to also protect places of cultural significance within Queensland – along with many other backgrounds of people who share our historic Queensland history since contact period.

Thank you for the opportunity to provide this information.

Your further enquiries would be welcomed.

Yours sincerely,

Ann Wallin
Senior Advisor

Benjamin Gall
Principal | Managing Director

Australian Heritage Specialists Pty Ltd
ABN: 51 605 153 419
P: 07-3221 0000
E: reception@ahspecialists.com.au
Level 8, Brisbane North Point, 231 North Quay BRISBANE QLD 4000