

Review of the Aboriginal Cultural Heritage Act

Ownership and defining cultural heritage

There is a need to review the definitions of cultural heritage, particularly around defining 'intangible heritage'. This is not currently included in the Act however features in the ACH register/database and is commonly referred to in cultural heritage assessments, plans and in discussions with Aboriginal Parties. This should then flow through to an inclusion of how to treat intangible ACH in the assessment and management processes.

There would need to be very careful consideration as to whether the definition of cultural heritage (for the purposes of the Acts) should also extend beyond physical matters to practices. The United Nations Educational, Scientific and Cultural Organisation's convention definition includes oral traditions, performing arts, rituals, festivals and traditional crafts. These are undoubtedly important aspects of cultural heritage that could be afforded stronger protection by specifically including it in the definitions. However, there would need to be a further review of the assessment and management processes outlined throughout the Acts to determine their applicability to "activities/practices" as the act is primarily geared to physical cultural heritage. The inclusion of practices within the definitions would appear to be consistent with the Purpose of the current Acts in item 5a and 5c where the term practices is used:

5 Principles underlying Act's main purpose

The following fundamental principles underlie this Act's main purpose—

*(a) the recognition, protection and conservation of Aboriginal cultural heritage should be based on respect for Aboriginal knowledge, culture and **traditional practices**;*

*(c) it is important to respect, preserve and maintain knowledge, innovations and **practices of Aboriginal communities** and to promote understanding of Aboriginal cultural heritage;*

Council believes that a definition of intangible cultural heritage should be included.

Further - If this definition were also to relate to practices (like the UN definition) then further amendments to the Act would be required to adequately guide how "practices" should be protected and managed as the existing provisions around physical heritage may not suit. There would need to be additional items added to *Part 6 – How the main purpose of the Act is to be achieved* to cover the inclusion of practices within the definition of Cultural Heritage.

Identifying Aboriginal and Torres Strait Islander parties

Council supports the current 'last claim standing' provision with respect to current NT claimants and determinations, as it provides clarity around ACH assessment and consultation processes and also consistency with Native Title holders in an area.

However, where there is no current recognised native title claim or no native title determination the responsibility as Aboriginal Party re Cultural Heritage should not automatically default to the last recognised NT claimant. Council believes there should be a process by which an aboriginal party can apply to be a 'Registered Aboriginal Party' for Cultural Heritage purposes and that this responsibility wrt the ACH Act should only default to the last recognised NT claim (that is not a current claim), if there is no 'Registered Aboriginal Party'. A Native Title Holder or Current Claimant are by default

the “Registered Aboriginal Party” but they should be able to surrender that responsibility to another aboriginal party who has applied to be the “Registered Aboriginal Party”.

In summary, the process for being the recognised aboriginal party, could be as follows:

The Recognised Aboriginal Party is

1. Current Native Title Holder (by default) – if there is none then
2. Current Native Title Claimant (by default) – if there is none then
3. Registered Aboriginal Party (by application and approval) – if there is none then
4. Last Recognised Native Title Claimant (by default)
5. Registered Aboriginal Party (by application and approval) – if any of the default Native Title Parties surrender the responsibility.

In this model it could be extended to allow for the Registered Aboriginal Party approval to be withdrawn (eg, if not meeting their obligations wrt ACH) and so allow for another Aboriginal Party to apply for approval or a NT claimant to take up the responsibility. There would need to be strong governance processes around this aspect.

Land user obligations

There needs to be more explicit requirements for land users to document and keep records of having assessed their risk of harming cultural heritage. Coupled with this there needs to be oversight mechanisms for self-assessment and voluntary processes.

There is a need for dispute resolution assistance for voluntary agreements.

There is a need to reconsider the threshold for formal cultural heritage assessments and the development of Cultural Heritage Management Plans. In particular there should be a requirement for formal CHA’s and as appropriate CHMP’s wherever works are planned where there is a registered cultural heritage site.

Further - Consideration should be given to providing stronger integration between the Acts and the Qld Planning Act and associated Planning Regulation, whereby compliance/consideration of Cultural Heritage is made to be automatically included as part of Development Assessments. Provisions could be included for relevant ‘Material Change of Use’ and ‘Reconfiguration of a Lot’ Applications that require the potential risk to Cultural Heritage to be determined by the proponent (as per ACHAct/duty of care) and where this risk is considered high (including where there is a registered ACH site), require that cultural heritage assessment/report is undertaken.

Similarly, relevant Operational Works applications/approvals could include a requirement that the risk to ACH be determined and where this is considered high and/or there is a registered ACH site, demonstrate how ACH Duty of care will be met.

Dev Approvals could then also include approval conditions relating to Cultural Heritage assessment and consultation, for which DES/DATSIP may become the referral/compliance agency.

Additional measures – There could be a new trigger for assessable development for Operational works where the proposed works are located on or near a site listed on the Aboriginal Cultural Heritage Register/Database. The State or Local Gov could be allocated as assessment manager with

DES/DATSIP as the referral agency or DATSIP could be made assessment manager where this is the only DA trigger. This provides an additional level of protection/assessment around sites listed on the ACH register. If such a trigger were established, then a “Code for Accepted Development” should be developed alongside this trigger that reflects ACH Duty of Care requirements/expectations and/or the provisions of any specific CHMP developed for the ACH site. Complying with the code would allow for Operational works that meet the requirements to proceed without formal development assessment, a pre and post works notification to DES/DATSIP can be included in the Code which allows for oversight by DES/DATSIP as appropriate and enforcement action under the Planning Act if necessary. Activities not meeting the code would require Dev Assessment this allowing for works on ACH sites to be strongly regulated.

Compliance mechanisms

There is a need to strengthen the compliance mechanisms designed to protect cultural heritage. The Act has ample provisions for breaches and penalties for the various provisions of the Act however in practice there is very little investigation/enforcement, and this is generally reactive, reliant on complaints. The process is also somewhat onerous. Consideration could be given to providing for PINs/on the spot fines for specific breaches, allowing for faster and easier enforcement on clear cut breaches. Such provisions could be used to strengthen compliance in specifically in relation to duty of care, to ensure new activities/works are planned giving due consideration to cultural heritage aspects.

The protection of known cultural heritage (registered sites) could be strengthened by providing for very specific breaches and to which PINS could be applied. For example, there could be a specific suite of PINs for:

- Failing to conduct a search of the ACH register/database prior to undertaking new works. *(A timeframe would be needed here – so it could be a requirement that the ACH database must be checked at most 3 months prior to an activity/works commencing and also those undertaking works should be able to produce a copy of the ACH search. While this is not the only requirement for ensuring DOC is met, this recognises the importance of checking the ACH database, there can be no excuse for not accounting for a known cultural heritage site and so not checking the database should be a specific offence).*
- Failing to consult the Recognised Aboriginal Party where an activity/works area includes a registered ACH site. *(This recognises that, at a minimum, works where there is a registered site require liason with the Aboriginal Party. This exempt works undertaken in line with a CHMP for the site as by default liason/consultation has already occurred in order to produce the plan)*

Other new PINs and making existing provisions able to be enforced through PINs where appropriate should be considered as part of the review.

Additional measures

Government should look to provide a greater regulatory presence with resourcing to investigate and prosecute breaches and also to undertake proactive activities like auditing of developments and potentially an advisory service whereby “friendly” audits (ie educational only, not for compliance action) could be provided. The funds received from penalties being enforced should go directly back

into the regulatory agency to assist in providing the enforcement component and also in awareness/education/best practice guides etc, to assist land users to comply. There should however be compensation/funds to aboriginal parties/communities if aboriginal cultural heritage has been harmed/destroyed. At present the Act allows for the Court to order costs of rehab or restoration to be paid to the state or an appropriate entity upon conviction of an offence under the relevant provision of the Act. It could be reviewed as to whether there could also be a provision allowing for the awarding of appropriate compensation to the Aboriginal Party where damage to cultural heritage has occurred.

Consideration should be given to including a “duty to notify” provision in the Act to ensure that potential harm to cultural heritage is reported to DATSIP for follow up investigation and potential enforcement. This could work in a similar way to the duty to notify provisions that currently exist within the Environmental Protection Act which make it a breach not to notify relevant parties of potential/actual harm.

Recording cultural heritage

Currently there are provisions in the Act for the results of formal cultural heritage studies to be supplied to DATSIP. However there are numerous cultural heritage assessments and findings of cultural heritage through monitoring activities that occur through work planning and activity that could be used to also flag and more accurately populate the ACH register/database. There should be requirements for findings of ACH documented by suitably qualified/knowledgeable parties to be supplied to DATSIP from these assessments and site investigations and for DATSIP to include in the register/database.

The Act currently requires that Access for planning purposes be provided however in reality it is difficult for local government planners at a strategic or operation level to gain information in an easy to use format. With advances in technology, GIS and information systems, the access management processes of the database and register need to be reviewed and updated to allow for better integration and incorporation of registered cultural heritage sites into land use planning. And specifically, it should be easier for local government and other land managing entities to access and make use of the GIS data in relation to registered sites location/area (not necessarily the detail of the site) directly without needing to individually request that information. For example, the GIS data points and polygons for registered cultural heritage sites (with appropriate buffers to account for inherent inaccuracies) should be available to a local government to view and utilise within the local governments internal GIS systems in order for various project, maintenance and land use planning tools and processes to flag the potential ACH site and so trigger more detailed investigation as appropriate at an earlier stage in planning processes.

Consideration could be given to providing integration between the Register/Database of Cultural Heritage and property systems used by the State and/or Local Government. For instance, the fact that there is a registered site located on a property could be a notation on the property in the Local Governments Property System so that property searches etc would show that there is a cultural

heritage listing... or similarly the ACH listing could be noted on or attached to the Title for a property so that a Title search would also include the presence of a Registered ACH site.

Additional – The cultural heritage register and/or database could be used to record/document immediate management/protection requirements in relation to registered cultural heritage site/s. These could be placed on the register and remain in place until a CHMP is developed including the site. It could be a requirement of a site listing/registration process that the immediate protection/management requirements be nominated. These should then be listed on any search report from the Cultural Heritage Register/Database and so provide some immediate direction/clarity to a land user around the cultural heritage site. This would not negate the requirement for consultation but rather could assist to ensure potential impact is avoided and focus efforts where consultation would be required.

Eg for a listing of a living scar tree: the immediate protection requirements that apply may be provisions like; no ground disturbing works or herbicide usage are to occur within 2 metres of the tree drip zone, no trimming/lopping of the tree is to occur, slashing/mowing is not to occur within 1 metre of the tree trunk, nothing is to be attached to the tree .