

# EVERICK HERITAGE

## Queensland Cultural Heritage Acts Review

-

### Everick Heritage Submission

We write to provide formal submission to the Department of Aboriginal and Torres Strait Islander Partnerships ('DATSIP') for the review of the *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld) (the 'Acts').

Everick Heritage ('Everick') is a cultural heritage consultancy based in Brisbane, with offices in Townsville, Coffs Harbour, Tweed Heads and Sydney. We offer heritage management services to clients throughout the country. We work on approximately 150+ new projects a year, including many of the major mining, linear infrastructure and private developments throughout Queensland.

As a heritage consultancy that is actively involved in working under six heritage management jurisdictions, we believe we are well placed to make observations on the effectiveness of the Acts in relation to other regimes. Our experience is that the Queensland system of self-assessment and direct negotiations between land users and Aboriginal Parties leads to inconsistent and generally poorer heritage outcomes. This is particularly so for mid-sized and smaller development impacts (including agricultural industries), which are proceeding largely unregulated. As a result, legislative reform must be considered urgent in Queensland.

We have identified 6 key areas of legislative / administrative reform that we believe would negate the need for an entirely new set of Acts. Fundamentally, most of the principles and stated aims of the Acts are sound. Unfortunately, there are a handful of key weaknesses that need correction for the Act to be effective. These weaknesses are discussed below.

#### 1. Stronger Governance Structures.

We submit that the principle solution lies in more active regulation and oversight. Our system, which relies on land users and Aboriginal parties taking action in the Lands Court, is demonstrably not working. The disincentives of taking such action to both sides (costs, time, poor publicity) has made such action unrealistic in most instances. As a result, many aspects of the legislation remain untested, leading to confusion and conflict. Ultimately, heritage protection is a basic human right and an expression of the ethics of our community. We cannot hope to achieve ethical outcomes if the system itself is considered by so many to be unethical.

# EVERICK HERITAGE

We submit the solution can take many forms, but the principal response should be:

1. Fund DATSIP to undertake a review role for duty of care assessments, tied into the *Planning Act 2016* (Qld) (see point 2 below).
2. Establishment of an expert panel to provide for efficient dispute resolution processes, comprising both Indigenous and non-Indigenous experts.
3. The introduction of a series of practice directions that would cover issues such as:
  - a. Intangible heritage interpretation.
  - b. Methodological direction.
  - c. Efficient negotiation processes.
  - d. Reasonable rates of payment.

## 2. Integration into the Planning Act

It is a concerningly frequent occurrence in our consulting activities that we see land users and developers who are unaware of their cultural heritage obligations under the Acts. One of the major contributing factors to this lack of awareness is a failure to integrate cultural heritage obligations into broader planning and approvals processes. This can be solved by integration of the requirements of the Acts into the *Planning Act 2016* (Qld).

## 3. Duty of Care Guidelines

The Duty of Care Guidelines are a flawed concept that need substantial revision if they are to provide for effective heritage management. In particular, Category 4 and the concept of significant ground disturbance is too broad. Almost all the most significant heritage sites Everick has identified over the past 17 years have been within lands that have been subject to significant ground disturbance.

Further, self-assessment does not work. This is especially the case where complex cultural and archaeological issues are being assessed by non-qualified persons.

## 4. Funding and Resourcing

Currently, the only entities responsible for overseeing the self-assessment process are Aboriginal Parties, who are not resourced to undertake such a task. Additionally, Aboriginal Parties are poorly positioned to approach land users, often multi-million-dollar companies and corporations with substantial resources, in order to hold them accountable for a failure to exercise their cultural heritage duty of care. As such,

# EVERICK HERITAGE

Aboriginal Parties are forced to charge an excess for Proponents that do engage to cover costs of regulating land users and monitoring developments and associated risks to their cultural heritage, if this process of regulation of country happens at all. This inherently tarnishes the engagement process as Proponents who are complying with the duty of care and self-assessment/voluntary agreement obligations under the Acts are punished for their peers who do not.

The role of Native Title Applicant and/or Cultural Heritage Traditional Owner can be an exceptionally onerous one that must be undertaken with little guidance and no resourcing. Additionally, Traditional Owners are forced to give up other forms of employment and remuneration to fulfil their engagement obligations under the Acts and perform a regulatory function they are not supported to sufficiently execute. It is submitted that an important pillar of a revised heritage regulatory system is resources to Aboriginal Parties to allow them to properly fulfill their obligations.

## 5. Statutory Obligation Awareness

It is a concerningly frequent occurrence in our consulting activities that we see land users and developers who are unaware of their cultural heritage obligations under the Acts. One of the major contributing factors to this lack of awareness is a failure to integrate cultural heritage obligations into broader planning and approvals processes.

Case Studies 1 & 2 (See Attachment A) are sadly all too common in Queensland. Some breaches of the duty of care under the Acts are willful and in complete understanding of the obligations of the Acts. However, we believe many more breaches of the duty of care are carried out by well meaning landowners and developers who assume they have complied with all statutory and regulatory requirements when they reach the end of the approvals/development application process. It is abundantly clear in Queensland that the process land user driven self-assessment and voluntary agreement fails because of a lack of awareness of the Acts requirements and a corresponding lack of oversight.

It is submitted that a solution to this would be more education of land users to increase awareness, administrative oversight and integration into the *Planning Act 2016* (Qld).

## 6. Negotiations and Reasonableness

This lack of resourcing and support discussed in point 4 above also means that Aboriginal Parties often seek advice from individuals that have their own personal (often financial) motivations. Everick has observed a trend, particularly in south east Queensland, whereby Aboriginal Parties are increasingly relying on legal representation to be the primary contact point throughout all aspects of the engagement

# EVERICK HERITAGE

and agreement negotiation process. The result of this trend is a process that is meant to primarily focus on the protection of heritage and empowerment of Aboriginal Parties becomes an overly complicated and litigious affair.

Everick has been involved in engagement processes where the legal representatives of Aboriginal Parties have demanded legal fees of \$60,000-\$200,000 to undertake a Part 7 Cultural Heritage Management Plan (CHMP) process, which largely relies on established industry agreement templates, in addition to as Aboriginal Party attendance fees. This is unfair on land users and wasteful of resources that could be better spent providing positive cultural and social outcomes to Indigenous communities.

It is submitted a solution to these issues would be establishment of:

- (a) practical directions and avenues for state assistance, to provide guidance to Aboriginal Parties on how to fulfil their statutory obligations; and
- (b) an efficient dispute resolution process, overseen by an expert panel.

# EVERICK HERITAGE

## Attachment A: Relevant Case Studies

*Case Study 1:* While Everick was undertaking a Duty of Care Assessment for a client for a prospective land purchase, the current landowner cleared likely Category 5 vegetation in a landscape that had high potential for Aboriginal cultural heritage. The landowner had obtained a permit to undertake the clearing from the relevant council which guided them through an exhaustive list of statutory and regulatory obligations, yet cultural heritage obligations were not mentioned. The Aboriginal Party for the area is not currently in a position where they are adequately informed, organised or resourced to identify this action.

*Case Study 2:* Everick was commissioned in 2018 by a developer to undertake a Duty of Care Assessment after being approached by an Aboriginal party for one Project. Immediately following the provision of that advice, the Developer sought cultural heritage advice for several active projects in their portfolio, many of which were in construction phase. Despite being an active land user throughout the State, the first project had alerted them to their obligations under the Act where they were previously unaware.

*Case Study 3:* Everick has worked for a client on a range of projects in NSW over the past 10 years and continues to do so. When we became aware of similar projects they were undertaking in Queensland, we queried what they were doing to comply with the *Aboriginal Cultural Heritage Act 2003* (Qld). We were advised that they didn't require expert advice in Queensland and that heritage wasn't a factor in the planning.