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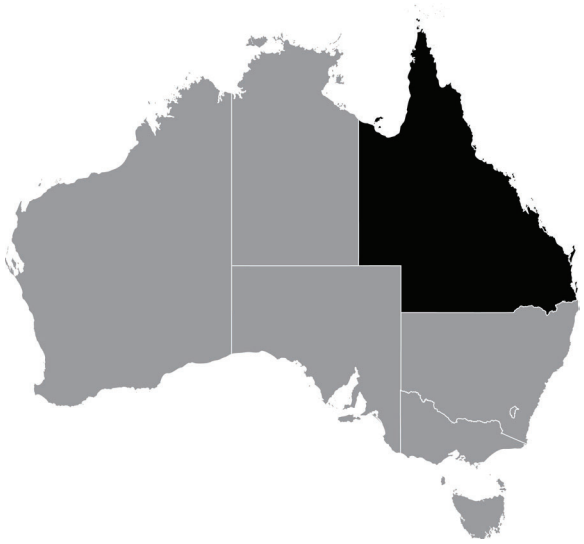

Meeting its aims? Queensland's *Aboriginal Cultural Heritage Act 2003* and the tyranny of its framing

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Abstract

One of the principal aims of the *Queensland Aboriginal Cultural Heritage Act 2003* is to provide statutory authority for the management of Aboriginal cultural heritage in an effective cultural heritage management regime for land users. Although some favourable outcomes exist for Aboriginal people under the *Aboriginal Cultural Heritage Act 2003* [Qld], several weaknesses are also recognised, particularly around the implementation of the Duty of Care Guidelines. In this paper we evaluate the effectiveness of the Act and the Guidelines in protecting Aboriginal cultural heritage. We demonstrate that the Act offers a heritage management context that has at times directly contributed to the damage and destruction of Aboriginal heritage. In doing so, we review a case study to ground discussion of the problems identified in the Act and its Duty of Care Guidelines. Gaps identified between the intent of the Act and its practical application show that the *Aboriginal Cultural Heritage Act 2003* [Qld] is positioned in a processual paradigm which focuses on tangible heritage, with Aboriginal constructions of a broader heritage largely ignored.

Introduction

The recognition, protection and management of Indigenous cultural heritage landscapes, sites, heritage places, intangible heritage and materials are fundamentally important to maintaining Indigenous culture. Nevertheless, around the world, development projects have often proceeded without effective consideration being given to Indigenous cultural heritage, and as a result irreparable damage to culture and heritage has occurred (e.g. Kemp et al. 2021).

Queensland's *Aboriginal Cultural Heritage Act 2003* [Qld] (Qld ACH Act 2003) was (ostensibly) designed to ensure statutory authority for the management of Aboriginal cultural heritage would be in the hands of Aboriginal people within a framework that also provided an effective cultural heritage management regime for land users, as outlined in Sections 4, 5 and 6 of the Act (Stephenson 2006). A companion Act also exists in Queensland: the *Torres Strait Islander Cultural Heritage Act 2003* [Qld]. This Act is identical to the Qld ACH Act 2003 apart from exchanging 'Aboriginal' with 'Torres Strait Islander', despite the very real social and cultural differences between Aboriginal peoples and Torres Strait Islanders. Although in this paper we only refer to the Qld ACH Act 2003, the issues and problems identified here for the Aboriginal Act are repeated in the Torres Strait Islander Act.

The catalyst for undertaking this review into the effectiveness of the Qld ACH Act 2003 was the devastating destruction of the Juukan Gorge rockshelters on the lands of Puutu Kunti Kurrama and Pinikura peoples in the Pilbara region of Western Australia in 2020 (JSCNA 2021). While the Qld ACH Act 2003 lacks the 'destruction permits' that Western Australia's

legislation contains, we were interested to investigate whether the Qld ACH Act 2003, specifically designed to protect Aboriginal cultural heritage, could, nevertheless, contribute to its damage and destruction, as in the Juukan example. The specific questions we asked, in light of recent reviews of all Australia's heritage legislation (JSCNA 2021; McConnell et al. 2021), are: 'Could destruction and desecration of significant Aboriginal cultural heritage places occur in Queensland? Does the Qld ACH Act 2003 (and its associated Duty of Care Guidelines) meet its aims to protect cultural heritage in Queensland?' Our answers to these two questions are 'yes' and 'no', respectively; and this paper outlines why we have come to this conclusion.

The main reason for our pessimism is that heritage legislation in Queensland is situated in a processual framework that privileges the archaeological value of physical 'sites' and largely ignores the socio-cultural context for heritage places (including intangible heritage) and landscapes. Although not deliberately and overtly situated in this processual paradigm, the emphasis of the legislation on tangible heritage and scientific significance is clearly evident (as we demonstrate below). Since heritage management practice is increasingly situated in a post-processual, phenomenological construct that privileges social significance and the value of heritage places for Aboriginal people in the present, as much as in the past (Andrews & Buggey 2008; Brown in press; Byrne et al. 2003; Smith 2006), it is clear that legislation for the protection of Aboriginal heritage in Queensland has not kept up with global Indigenous cultural heritage management discourse, which has advanced to recognise Indigenous ontologies, epistemologies and praxis that exist beyond the scientific processual paradigm (e.g. Atalay 2006, 2012; King 2003, 2013).

In this paper we focus on Part 3 of the Qld ACH Act 2003, which deals with heritage protection in a development context. Part 3 relates to requirements for developers, and others, planning to undertake works that may have an adverse impact on Aboriginal heritage, to first self-assess their 'duty of care'—their statutory due diligence responsibility—in relation to heritage sites and places (DATSIP 2004). We identify numerous weaknesses in Part 3 of the Act which, we argue, stem from the fact that the legislation has been developed—and procedures and policies founded—in a paradigm that privileges tangible sites and objects over Aboriginal approaches to heritage.

These weaknesses dispute the Queensland Government's claims for the effectiveness of the Act (Queensland Legislative Assembly 2003; see also O'Neill 2018). On the contrary, the Qld ACH Act 2003 fails to meet its stated aims in Sections 4-6 of the Act, which are to elevate the place of Aboriginal people in heritage management planning and to ensure heritage protection. Many recent analyses support the contention that destruction of heritage remains a common occurrence in Queensland (e.g. Martin et al. 2016; Rowland et al. 2014; Wilson & Pearce 2017).

We argue here that the practicalities of heritage decision-making are largely contextualised in a presence/absence duopoly managed by the developer. This focus on managing heritage in relation to development impacts lies at the heart of the failings of Queensland Indigenous heritage legislation. We use a case study to illustrate how our concerns have taken shape in the 'real world', and conclude with a critique of recent attempts by the Queensland Government to correct failures in the Act—attempts which, themselves, are flawed.

Weaknesses in the *Aboriginal Cultural Heritage Act 2003* [QLD]

Today, most heritage professionals and archaeologists in Australia readily incorporate Indigenous knowledge into all aspects of research and practice (e.g. Bradley 2008; Brown in press; Mitchell & Guilfoyle 2020; Ross et al. 2015; Thomas et al. 2023). But such recognition of Indigenous ways of knowing is not part of the legislative requirements in Queensland, despite express provisions in the preamble to the Qld ACH Act 2003, which states that the purposes of the Act are:

- ‘to provide effective recognition, protection and conservation of Aboriginal cultural heritage’ (S. 4);
- ‘to establish timely and efficient processes for the management of activities that may harm Aboriginal cultural heritage’ (S. 5[e]); and
- to establish ‘a duty of care for activities that may harm Aboriginal cultural heritage’ (S. 6[d]); and to ensure ‘Aboriginal people are involved in processes for managing the recognition, protection and conservation of Aboriginal cultural heritage’ (S. 6[g]) (see also O’Neill 2018; Stephenson 2006).

For the most part, the Act has failed to achieve these aims. One of the main reasons for this failure is the emphasis placed on recorded site data as the basis for decision-making about the presence/absence of heritage in a landscape (Brown in press). Despite the rhetoric of the principles and purposes of the Act, the destruction of heritage remains a common occurrence in Queensland.

Incorporating Aboriginal ways of being, knowing and doing into the Act

The Qld ACH Act 2003 does provide Aboriginal people with more say in protecting and determining the significance of sites than did the previous Queensland cultural heritage management legislation: the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* [Qld]. The Qld ACH Act 2003 removes much of the power formerly allocated to centralised, bureaucratic government entities and from heritage specialists and archaeologists and purports to situate power for heritage management with Traditional Custodians (Babidge et al. 2007; O’Neill 2018; Watson & Black 2001). Under the Qld ACH Act 2003, Aboriginal groups across the State are responsible for managing cultural resources, including the identification, analysis, and administration of heritage management activities in designated locations, although no State funding is provided to facilitate these responsibilities.

While this situating of heritage management responsibility with Aboriginal communities has been a notable change from the previous legislation, a primary role for Aboriginal people in Queensland to take charge of decision-making about their heritage is balanced and, we argue, nullified by the condition that any cultural heritage identified must be ‘supported by sufficient anthropological, biogeographical, historical, and archaeological information’ (S. 12). This requirement for data and verification, or ‘scientific stewardship’, is consistent with a processual framework for cultural heritage management and demonstrates the retention of a processual approach to archaeology and heritage management in the ‘new’ legislation (O’Neill 2018; Rowland et al. 2014; Stevenson 2006; cf. Smith 2000).

Recognising intangible heritage

As well as outlining the purposes of the Qld ACH Act 2003, Part 1 of the Act provides definitions covering meanings of Aboriginal cultural heritage, significant Aboriginal areas, and objects. The definition of ‘Aboriginal cultural heritage’ is ‘anything that is a significant Aboriginal area or object, or archaeological evidence of Aboriginal occupation’ (S. 8). A ‘significant Aboriginal area’ or ‘significant Aboriginal object’ is defined as an area or object of particular significance to Aboriginal people, based on traditional or historic values, including contemporary values (S. 9).

The Qld ACH Act 2003 does not use the word ’intangible’, but the Act does acknowledge that cultural heritage does not need to be the physical remains of the past to be considered ‘heritage’. It does this in Section 12 where it is recognised that ‘For an area to be a significant Aboriginal area, it is *not* necessary for the area to contain markings or other physical evidence indicating Aboriginal occupation or otherwise denoting the area’s significance’ (S. 12[2], emphasis added). Examples of such places are listed as ‘ceremonial sites, birthing places, a burial place, or the site of a massacre’ (S. 12[3]). What is not included anywhere in the Act are aspects of intangible heritage such as lore, Law, songlines, stories and their settings, dances, ceremonies, and other traditions and practices that are essential to the formation of cultural identity (Ahmad 2006; Boer & Gruber 2012; Munjeri 2004; UNESCO 2004). It is, however, common for legislation to ignore the intangible—metaphysical—aspects of heritage (Harrison & Rose 2010).

Before proceeding, it is important to outline what is meant by 'intangible heritage' and 'tangible heritage'. In an Indigenous context, the concepts are not simply opposites. Intangible heritage is an integral part of tangible heritage, and often vice versa. Most people readily understand the concept of tangible or material heritage. This is the physical manifestation of past land use and occupation and takes the form of archaeological sites and/or heritage places such as shell middens, artefact scatters, carved and scarred trees, burials, the locales of story places, and ceremonial locations (e.g. Bora rings) and so forth. 'Intangible heritage' relates to the traditions and living expressions of human use of the landscape and includes songs and songlines, stories, dances, beliefs, ceremonial practices, land and resource management practices, hunting/fishing/gathering knowledge and how all these values are enacted. Intangible heritage, therefore, involves knowledge and ways of doing and being that have informed—and continue to inform—past and present management and use of Country (Harrison & Rose 2010; Te Hemara n.d.; UNESCO 2004). Given this, tangible heritage can be given meaning by the intangible. For example, physical sites and places may be deemed heritage places because of the nature of knowledge, lore and Law at these places. Similarly, intangible heritage may be recognised in the tangible through the interaction between Country and ways of knowing, doing and being, which produces material places, such as ceremonial sites. In short, tangible and intangible heritage are interlinked and utterly entangled.

In Queensland, therefore, the protection of intangible heritage under the Qld ACH Act 2003 is problematic as it depends very much on National and State Government legislative definitions, rather than on Aboriginal ways of knowing (Briggs 2005; Godwin & Weiner 2006; McNiven 2016; Ross 2010). This is seen most clearly in the narrow foci of the Duty of Care provisions of Part 3 of the Act.

Duty of care

One of the 'innovative' aspects of the Qld ACH Act 2003 is the use of the concept of a 'duty of care' to protect cultural heritage (O'Neill 2018; Stephenson 2006). Under the provisions of Section 23 of the Act, a person who performs an 'activity' (i.e. any development or research activity requiring the disturbance of the land surface in any way, including by surface survey) must first take 'all reasonable and practicable measures to ensure that the activity does not harm Aboriginal cultural heritage' (S. 23[1]). 'Harm' is defined in Schedule 2 of the Act as 'damage or injury to, or desecration or destruction of, Aboriginal cultural heritage'.

But 'harm' to Aboriginal cultural heritage, in and of itself, is not an offence under the Act, providing all 'reasonable and practicable measures' have been taken to avoid harm (Stephenson 2006). If compliance options have been met, as set out in Sections 3, 24, 25, and 26 of the Act, and as provided in the Duty of Care Guidelines (DoCG) issued pursuant to Section 26 of the Act (see below), 'accidental' destruction of Aboriginal cultural heritage is not deemed to be an offence. Destruction that occurs to Aboriginal cultural heritage, but that has been approved under the provisions of a formal Cultural Heritage Management Plan (CHMP) prepared in accordance with Part 7 of the Act, or as allowed by 'another agreement' with a Registered Aboriginal Party, is also not deemed to be an offence under the Act.

The key to the protection of Aboriginal heritage in Queensland is understanding the Duty of Care provisions. On initial reading, the principles outlined in Part 3 seem to provide adequate protections for heritage. The principles include the recognition of Aboriginal peoples as the primary source of knowledge in relation to Aboriginal cultural heritage. The DoCG also establish processes for managing cultural heritage and impose financial and imprisonment penalties for violating Duty of Care. Section 23, in particular, provides specific details about what factors a Court may consider when evaluating an alleged breach of Duty of Care. But a review of the practical implementation of the DoCG shows that these perceived benefits are superficial.

The extent of Duty of Care under the Qld ACH Act 2003, and what is involved in achieving Duty of Care, are not absolutes, but depend on the facts and circumstances of each activity. The legislation offers *guidance* as to what is deemed 'reasonable' in order to meet Duty of Care,

however the standard of care required is determined solely by the land user. The DoCG are based entirely on the type of activity being undertaken and the likelihood of that activity causing harm to the *land surface*, rather than any assessment of cultural heritage and its significance. The impact on Aboriginal cultural heritage is assumed rather than assessed. To meet their Duty of Care, proponents must demonstrate their compliance with the DoCG provisions and with the requirements of S. 23 of the Act. The Qld ACH Act 2003 states that, without limiting the matters that a Court may consider necessary to decide whether a person has complied with the DoCG, the Court *may* consider the following:

a. the nature of the activity and the likelihood of its causing harm to Aboriginal cultural heritage;
b. the nature of the Aboriginal cultural heritage likely to be harmed by the activity;
c. the extent to which the person consulted with Aboriginal Parties;
d. whether the person carried out a survey of the area to determine the extent of Aboriginal cultural heritage;
e. whether the person searched the database and register for information;
f. the extent to which the person complied with the DoCG;
g. the nature and extent of past land uses in the area (S. 23[2]).

In other words, even if heritage is harmed/destroyed, if a proponent has carried out the required actions listed in Section 23 to attempt to meet the Duty of Care requirements, a Court may deem that no offence against the Act has occurred (S. 24).

The DoCG sets out measures additional to those provided in the Qld ACH Act 2003 to ensure that land use activities are managed to avoid or minimise damage to cultural heritage. A person who conducts a land use activity is deemed to have complied with the DoCG if the person *self-assesses* their activity and deems it unlikely to adversely affect or harm Aboriginal heritage. Although neither the Act, nor the DoCG, specifically uses the term 'self-assessment', it is clear from the wording of the DoCG, and from the requirements for the satisfactory demonstration that due diligence has been met, that self-assessment of a land use activity is what is required. The self-assessment provisions of the DoCG have been regularly criticised in numerous public forums on the practicalities of the Aboriginal and Torres Strait Islander heritage protection provisions in Queensland, with heritage practitioners and First Nations people all expressing frustration with the laissez-faire nature of the legislation that places all responsibility for assessing likely development impacts onto the developers themselves (e.g. Robins 2013; Rowland et al. 2014).

Development activities across Queensland occur on various types of lands, including those that have been exposed to prior surface disturbances, those in previously developed areas, activities in areas of previous major ground disturbances, and so-called pristine areas, where no ground disturbance has ever occurred. These types of land surfaces are important when reflecting on the different nature of activities and the likelihood that a proposed activity could harm cultural heritage (Figure 1).

Land use impact categories are defined in the DoCG as follows:

- Category 1: 'No Surface Disturbance': proposed development/activity will have no impact on the land surface.
- Category 2: 'No Additional Surface Disturbance': planned surface disturbance is not inconsistent with previous surface disturbance caused by existing and past land use.
- Category 3: 'Developed Area': the proposed new development will occur on a previously disturbed area and will not substantially change previous land use impacts.
- Category 4: 'Significant Ground Disturbance': new development may impact cultural heritage, but only at the surface, and effects on heritage are unlikely because of previous development in the area that has caused substantial surface disturbance.

- Category 5: ‘Surface Disturbance’: disturbance that causes a lasting impact to previously undisturbed land.

When land users carry out a ‘self-assessment’ and determine that a proposed activity falls within Categories 1-4, the guidelines provide that there is *no requirement to consult with relevant Aboriginal Parties*, despite the overarching aims of the Qld ACH Act 2003 to give Aboriginal people the major role in decision-making about heritage. The land use impact category of a proposed activity is solely determined by the land user. There are no provisions for any appeal by Aboriginal Parties, nor any provisions for oversight of the process by specialists or even the regulatory authority.

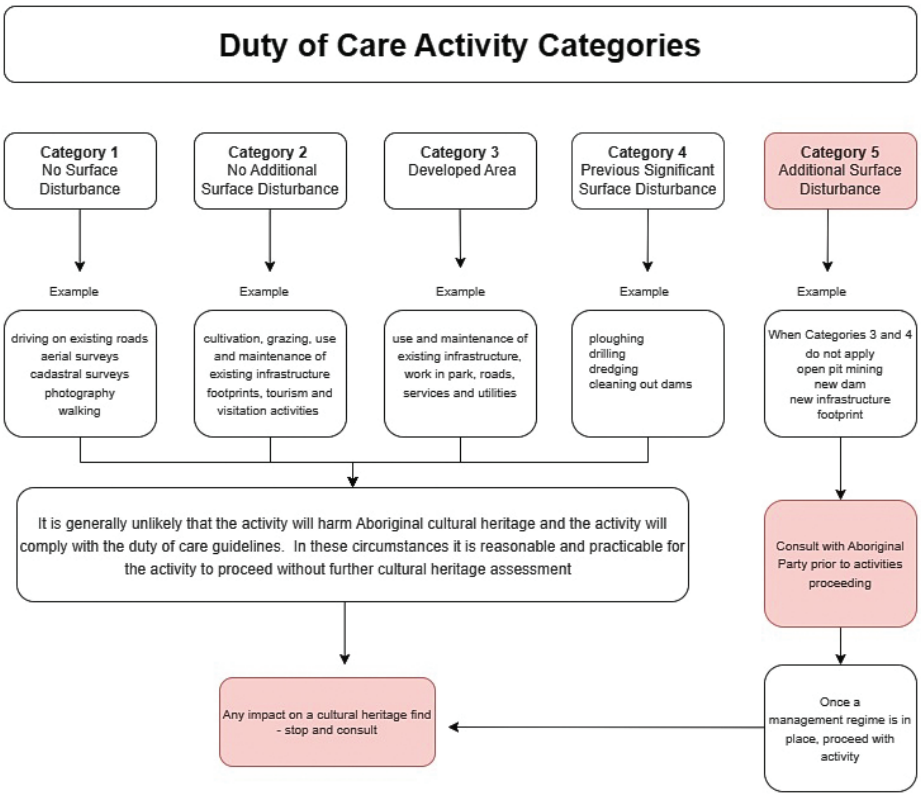

Figure 1: Duty of Care Activity Categories (Department of Aboriginal and Torres Strait Islander Partnerships 2004).

Activity Categories 1-4 are deemed unlikely to harm Aboriginal cultural heritage because either the activity will not disturb the land surface, or the ground has been previously disturbed such that no potential cultural heritage will have survived. The DoCG indicate that, in these circumstances, it is reasonable and practicable for the activity to proceed without further cultural heritage assessment.

Category 4 activities have an additional warning that, despite an area having previously been subjected to significant ground disturbance, certain features of the area may have residual cultural heritage significance, and extra care must be taken when carrying out the activity. This appears to imply that a new development may have an impact on cultural heritage that may have survived previous land use, yet Category 4 works can still proceed without consultation with Aboriginal Parties unless a database search (see below) reveals previously recorded cultural heritage. Interestingly, there is no requirement for sub-surface assessment

by an archaeologist or other person qualified to assess the likelihood of buried cultural materials having survived previous ground disturbance, despite Aboriginal cultural heritage being known to survive development activities (e.g. Hil et al. 2021).

Category 5 activities, which *will* cause additional surface disturbances, are considered to be at high risk of harming Aboriginal cultural heritage. It is in this category—and in this category only—that the land user **must** prepare a Cultural Heritage Management Plan (CHMP). In accordance with Part 7 of the Qld ACH Act 2003 (and the associated Guidelines for the Preparation of a CHMP), it is expected (but not required) that the proponent will notify relevant Aboriginal Parties of the proposed activity and seek their advice on how best to manage the cultural heritage. In the development of a CHMP, Aboriginal Parties are usually given the opportunity to be involved in undertaking a cultural heritage study and/or survey and their advice is usually sought as to how best to manage any activity that may harm cultural heritage identified by the study or survey. But it should be noted that under the provisions of the Qld ACH Act 2003, a CHMP can be completed without the involvement of Aboriginal Parties, provided the express requirements of the due diligence provisions are met.

As well as self-assessing the potential impact of a development activity on the land surface, the proponent is also required to search Queensland's Aboriginal Cultural Heritage Register and Database (see below for a discussion of some of the problems associated with a search of these documents). If the results of the Database and Register searches identify Aboriginal cultural heritage that will be impacted by the proposed activity, regardless of the land use category, the activity must not commence until consultation has occurred with the relevant Aboriginal Parties and an agreed management regime established to manage and protect the Aboriginal cultural heritage.

The Database and Register searches are normally the first step undertaken by a land user, and this is another example of where the DoCG's weaknesses are demonstrated. The DoCG have been drafted in such a way that it is implied that an absence of heritage places on the Register or Database means that there is an absence of heritage in an area. This, however, is clearly not necessarily the case. Given Queensland's vast size, it is quite likely that a planned development will occur in an area that may have never been assessed for cultural heritage. Also, it is implicit in this approach that a single survey, undertaken at a single point in time, can produce an accurate, long term picture of the heritage of an area. This is also obviously not the case, as heritage places are not static in the landscape. Cultural heritage objects can easily be exposed, transported, or buried by a range of geomorphic and/or taphonomic events that have occurred since their initial deposition, such as flooding and erosion, or by recent human cultural activity that exposes previously buried sites or covers previously exposed sites.

Therefore, the Database and Register can only act as a *guide* for land users—the records held in the Database and Register are not absolute indicators of the presence or absence of sites, and should not be relied upon as an accurate record of cultural heritage presence and values.

Another problem with the land-use/land-surface-impact approach is that it completely ignores Aboriginal knowledge of the heritage—especially intangible heritage—in the affected landscape. For example, Site A and Site B might be 500 m apart, but in an Aboriginal framework the two sites may be intrinsically connected. The area between the sites might contain 500 m of ground with no visible, tangible heritage from a land user's perspective but may carry connections that are part of the intangible values of the landscape—connections that include stories of the sites and/or of ancestors who occupied the sites, from an Aboriginal perspective (e.g. Godwin & Weiner 2006).

Summary

The Duty of Care provisions in the Qld ACH Act 2003 are largely managed by land users with no regulation by the Minister or the regulatory authority. The onus of compliance is placed on the land user, whose responsibility it is to determine the impact of their proposed development activity on heritage, based on the nature of previous *land use*, not on the

nature and significance of heritage itself. Neither the Aboriginal Parties, nor a professional archaeologist (nor other relevant heritage practitioner), needs to be involved in this process.

In assessing the risk to Aboriginal heritage, the legislation equates degree of land surface impact to loss of cultural heritage value (O'Neill 2018; Robins 2013). This assumes that value lies solely in tangible heritage places and that these heritage places cannot survive previous land disturbance (but see Hil et al. 2021; McDonald et al. 2007; for evidence that heritage *can* survive considerable land surface disturbance). The DoCG thus neglect the potential for the survival of buried tangible heritage and discount intangible assets, thereby ignoring the cultural value of a location for Aboriginal people (Australia ICOMOS 2013; Godwin & Weiner 2006; O'Neill 2018).

The above weaknesses are highlighted by the following case study, in which sites were destroyed and the developer was taken to Court. The information used comes from publicly available Court transcripts.

The Bottle Tree Quarry

The Bottle Tree Quarry is situated about 200 km north of Roma in central Queensland. Quarrying activities commenced without any assessment to meet Duty of Care requirements. As a result, harm was caused to a number of sites considered to be highly significant to the Traditional Owners, the Karingbal People (the Aboriginal Party for this area), including destruction of at least 50 stone artefacts and three Gumbi Gumbi (*Pittosporum angustifolium*) medicine trees.

In addition to the damage to tangible heritage, there was harm to the cultural, historical, spiritual, and social values of the cultural landscape for Traditional Owners, hence also to intangible heritage. Karingbal people expressed the view that the disturbance caused by the quarry company, and the consequent destruction of sites, damaged their connection with the land and the landscape and the history of their ancestors and artefacts—a connection that cannot be remediated. The Bottle Tree Quarry Site is also a location through which many Aboriginal people travelled from different parts of the country to attend various ceremonies, using the area as a camping place. As such, the site and the location as a whole provide potentially important information about the culture and behaviour of many traditional Aboriginal groups, and their movements through a vast landscape. Consequently, the site and its surrounds are of importance both scientifically (archaeologically) and culturally.

In late 2018, the defendant (the developer) pleaded guilty to two offences under Sections 23[1] and 24[1] of the Qld ACH Act 2003. The primary offence was that the company failed to make any assessment of the development and its potential to harm Aboriginal heritage. In short, the developer did not follow the requirements of Section 23 of the Act or of the DoCG. The developer was fined $188,000 and ordered to pay $2,519 in legal costs. The Court also ordered that the developer pay $250,000 towards the cost of repairing or restoring the Aboriginal cultural heritage at the development locale.

But what if the developer *had* followed the Duty of Care provisions of the Qld ACH Act 2003 and the DoCG? Would harm to cultural heritage have been avoided? Although we cannot know the answer to this hypothetical question, it is interesting to unpack the details of this case study and assess the likelihood of sites being protected in the event due diligence *had* been undertaken.

The location of the Bottle Tree Quarry had been the subject of two previous ground disturbance activities. So, under the provisions of the DoCG, the land user could have self-assessed the development as a Category 4 development, and assumed that the historical clearances would have destroyed any surviving heritage, with the consequence that the development could have proceeded unimpeded. Had the developer undertaken a self-assessment following the requirements of the DoCG and Section 23 of the Qld ACH Act 2003, the company may have avoided a fine, because the Court would, in all probability, have deemed that all 'adequate' steps had been taken to determine the likelihood of Aboriginal heritage being present. Yet

such a finding would still have harmed Aboriginal heritage, as once the Aboriginal Party was made aware of the development and assessed the impact zone, cultural heritage was found and information about the existence of heritage was revealed.

Despite the previous activities on the land, intact tangible cultural heritage *had* survived, as had the intangible stories about the place. It can be argued, therefore, that, had the developer engaged the Aboriginal Party in the Duty of Care assessment process, harm to both tangible and intangible cultural heritage could have been avoided.

The Bottle Tree Quarry case study highlights the problems that can arise from the current self-assessment process of the DoCG, and in the absence of regulatory oversight by the State of the Duty of Care assessment process or of compliance requirements in general. Although in this case the potential for harm was not assessed by the proponent and harm was not identified by the State, we argue that the harm to heritage at the Bottle Tree Quarry is highly likely to have been prevented if compliance checks by the regulatory authority had been undertaken prior to quarrying works commencing. Auditing could have captured the fact that no search of the cultural heritage Database or Register had been undertaken to evaluate the likelihood of the proposed activity harming Aboriginal cultural heritage. The case study also highlights the fact that the 'activity categories' set out in the DoCG are a flawed basis for decision-making about the need for heritage assessment and are an invalid trigger for the involvement of relevant Aboriginal Parties. So how should the flaws in Part 3 of the Qld ACH Act 2003 be rectified? The Queensland Government is currently undertaking a review aimed at providing a solution.

The options review paper

In the current review of the Qld ACH Act 2003 , four of the ten proposals (Proposals 1, 3, 5 and 6) put forward in the Review Paper (DSDSATSIP 2021) relate to Part 3 of the Act:

Proposal 1 aims to replace the current DoCG with a new framework that requires greater engagement, consultation, and agreement with the Aboriginal Party to protect cultural heritage. To make this new proposal achievable, the Queensland Government proposes to map cultural heritage areas across the entire state, in a single, one-off mapping event. The onus will remain with the land user to undertake a search of the mapping Database to determine whether their proposed activity is situated in an identified high-risk area.

Our assessment of Proposal 1 is that it is essentially the current DoCG reworded. The 'new' model still assumes that development activity is at the heart of heritage protection, with the focus on the nature of the *activity* and its potential impact on the *ground*, not on the nature of the heritage that may be affected. The process still only requires limited consultation with Aboriginal Parties; and it is the responsibility of *the land user* to determine whether their proposed activity will affect heritage places, whether previously mapped or not. Aboriginal Parties only become involved if heritage has been mapped in a once-off surface survey, or if (buried) heritage is found during works activities.

Further criticism includes that: the proposal to map the entire State of Queensland for heritage places continues to assume that Aboriginal cultural heritage and its significance are tangible, static, and identifiable via a single surface survey; the proposal does not take into account that tangible heritage sites and places can be buried and therefore not visible during a ground surface survey; the proposal does not recognise intangible heritage; and it is extremely unlikely that such a survey would achieve 100% coverage of the more than 1.7 million square kilometre land area of Queensland. In short, proposal 1 will not address the concerns about the current problems with the Qld ACA Act 2003 in relation to Duty of Care provisions.

Proposal 3 aims to amend the Qld ACH Act 2003 to recognise intangible cultural heritage. This amendment is a positive step forward in recognising Indigenous definitions of cultural heritage, and would bring the Qld ACH Act 2003 into alignment with international best practice by complying with the 2003 *UNESCO Convention for the Safeguarding of Intangible*

Cultural Heritage and the 2007 *United Nations Declaration of Rights of Indigenous Peoples* (UNDRIP). Suggested wording for such a definition has not been released.

Proposal 5 aims to ensure mandatory reporting of compliance by land users who must document and register all agreements and consultation under the Qld ACH Act 2003; and **Proposal 6** aims to provide a greater capacity for monitoring and enforced compliance by increasing the number of authorised government officers to ensure compliance, providing them with specialised training.

Proposals 5 and 6 go hand-in-hand and are positive steps in addressing the current lack of regulation by Government in the legislation. These proposals are important, as without monitoring and implementation of compliance, destruction of heritage will continue across the State. However, without the designated and required collaboration of the land user with the Aboriginal Party, these positive steps will *not*, in our view, provide better protection of tangible and intangible heritage, as compliance review is so poorly resourced in Queensland and as heritage impact assessment is not linked to 'heritage', as the Bottle Tree Quarry case study demonstrates.

Conclusion

We are well into the twenty-first century, and it is now 60 years since processualism dominated the archaeological discipline. It is 50 years since processualism was replaced by post-processualism and social archaeology. Yet heritage legislation in Queensland is still sitting in a processual framework that privileges tangible sites and fails to acknowledge the social context of heritage. Further, Part 3 of the Qld ACH Act 2003 and the associated DoCG are based on a now discarded paradigm of the 'fixity' of sites, which sees sites that have been identified and plotted over the past 50 years locked into a Database and Register that does not recognise that sites and their significance can change over time.

We argue that a post-processual approach to heritage management needs to be incorporated into the DoCG and into Part 3 of the Qld ACH Act 2003. The proposed amendments to the Act and to the DoCG must recognise Aboriginal cultural heritage as mutable, so that a single survey conducted at one point in time is not deemed adequate for long-term heritage management planning. We propose, in cases where there is not a CHMP, the introduction of a requirement that *any* new development must have its own survey conducted as part of initial stage planning, and of late stage planning if there is any more than a 12 month delay between initial planning and final preparation for development, to ensure that any likelihood of heritage being impacted by development is identified as early as possible in the planning stages of development, and that changes to heritage are captured. Furthermore, we propose that the survey process be registered, and regulated for compliance, at the State level.

Indigenous peoples in Australia have lobbied for more meaningful control over their cultural heritage, both tangible and intangible, since the 1980s (Langford 1983). Our review of the current Queensland legislation has demonstrated that in Queensland, after 40 years of lobbying, legislation for the recognition, protection and management of Aboriginal cultural heritage has not yet broadened from its processual archaeological framework to ensure greater Aboriginal involvement in decision-making about their heritage and its management.

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