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## "A Completely New Approach" to Indigenous Cultural Heritage: Evaluating the Queensland Aboriginal Cultural Heritage Act

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# "A Completely New Approach" to Indigenous Cultural Heritage: Evaluating the Queensland Aboriginal Cultural Heritage Act

## **Abstract**

The Aboriginal Cultural Heritage Act 2003 challenged the hegemony that Western, archaeological methodologies has held over Indigenous cultural heritage in Australia. By choosing to relinquish state control and authority over cultural heritage in favour of the expertise of Indigenous people, the Act created a unique and innovative heritage policy. Over the 10 years the Act has been in force, it has seen a variety of approaches adopted as part of myriad projects. This has created a mature field of practice for investigation and analysis. This article examines and critiques the Act to determine its successes and weaknesses. In doing so, it offers opportunities for other policy-makers to consider as part of policy review.

## **Keywords**

heritage protection, cultural heritage, heritage policy, Indigenous heritage

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## **“A Completely New Approach” to Indigenous Cultural Heritage: Evaluating the Queensland Aboriginal Cultural Heritage Act**

The authority and role of Indigenous people in the management of cultural heritage has been a touchstone of controversy and debate in many post-colonial societies (Battiste & Henderson, 2000). Because the heritage discipline has been heavily influenced by “scientific conservation” principles, Indigenous People’s knowledge, expertise, and methodologies have been marginalised in both legislation and practice (Wharton, 2005). Beginning in the 1980s, there has been an increased recognition of the importance of Indigenous intellectual resources for cultural matters. These responses have differed across jurisdictions with varying levels of success. Due to the relative nascence of this field, examinations of these various approaches are of tremendous value to policy-makers. Understanding and critiquing legislative settings around the world in this field is an important means through which to improve both policy and practice concerned with Indigenous involvement in the management of cultural heritage.

One of the more interesting Indigenous cultural heritage policies has developed in the Australian state of Queensland. The Aboriginal Cultural Heritage Act 2003 (ACH Act) created the most distinctive heritage management regime in Australia.<sup>1</sup> Rather than continuing the centralised, government-controlled, heritage management process endemic throughout Australia, the Act established Aboriginal parties as cultural heritage experts within their traditional country.<sup>2</sup> In doing so, the ACH Act addressed criticisms that previous cultural heritage practices in Queensland had overlooked the role and knowledge of Aboriginal people (Donovan, 2002). This was a dramatic shift. In taking such a step, the ACH Act created what one commentator called “a completely new statutory approach” to Indigenous cultural heritage (Stephenson, 2006, para. 73).

This article argues that the ACH Act was groundbreaking in the way it returned statutory authority to Aboriginal people for the management of their cultural heritage, and that it has resulted in mostly positive outcomes for Aboriginal people, heritage, and project delivery in Queensland. The Act’s several weaknesses are also acknowledged. It fails in some circumstances to protect Aboriginal cultural heritage, can exacerbate intra- and inter- Aboriginal community conflicts about who has the cultural authority to manage heritage (Martin, Sneddon, & Trigger, 2016) and newer legislation in other states, especially the Victorian Aboriginal Heritage Act 2006, have provided systems that are viewed more favourably by some commentators, policymakers, and Aboriginal people (Kiriama, 2012; Porter, 2006). Regardless, the ACH Act’s status as one of the first pieces of legislation to address the marginalisation of Aboriginal people and knowledge in cultural heritage means analysis and criticism of its functioning is valuable.

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<sup>1</sup> The author notes that the Torres Strait Islander Cultural Heritage Act 2003 was passed concomitantly and has had an equally profound affect on the philosophy and approach to managing cultural heritage in the Torres Strait Islands. However, as the author has worked exclusively with the Aboriginal Cultural Heritage Act and acknowledging the cultural differences between Aboriginal and Torres Strait Islander peoples, the commentary and analysis in this article is restricted to the Aboriginal Cultural Heritage Act.

<sup>2</sup> The term “country” has been explored and studied by a range of scholars in keeping with its multiple uses by the Aboriginal community. It used in this article as an area of land traditionally occupied by an Aboriginal group “around a kinship system that includes both living relatives and ancestral creator beings” (McGaw & Tootell, 2015, p. 91).

A growing body of analysis of the operation of the ACH Act and its effectiveness in fulfilling the aspirations of Aboriginal people, land users, the Queensland Parliament, and other stakeholders has emerged. However, this literature has been sharply focused, with authors choosing to consider singular aspects of the Act and its operation such as compliance (Rowland, Ulm, & Reid, 2014), commodification (Martin et al., 2016), and legal implications (Brockett, 2013; Stephenson, 2006). Few authors have examined the Act by historically contextualising the evolution of cultural heritage legislation in Queensland as a means to explain why this most recent attempt at statutory protection developed its philosophies and precepts. Doing so facilitates a wide evaluation of its successes and failures, which other jurisdictions may consider as part of future policy direction.

Now is considered an appropriate moment to critique and examine the Act's operation in its practical and legislative context. There are two reasons. Firstly, the Act emerged in a period of growing recognition of the primacy of Aboriginal people in cultural matters, which followed the acknowledgement of the native title rights of Indigenous people in Australia (Butt, Eagleson, & Lane, 2001; Marks & McDonell, 1996; Ritter, 2009a). For this reason, this Act is instructive of the legislative response of one Australian jurisdiction to the rights of Indigenous people within a post-colonial nation (Evatt, 1996). Secondly, the Act's introduction also coincided with a period of rapid and sizable economic investment by the resources and infrastructure industries in Queensland (Sheehan & Gregory, 2013). Overwhelmingly, the resultant projects intersected with the ACH Act. As a result, the period from 2004 to 2017 saw a litany of methodologies and approaches adopted to comply with the ACH Act, providing a rich vein of practice and evidence to investigate. This mature environment fosters insights into the myriad ways this legislation has been adapted to diverse projects, allowing an analysis of the Act as a policy response in multiple commercial, communal, and cultural settings.

Drawing on this evidence, this article examines and explores the operation of the ACH Act for its policy implications and values. In doing so, it is noted that a number of structural frameworks could lead to valuable evaluations. Discourse analysis could be used to interpret the possession and operation of power by the government, land users, and Aboriginal parties.<sup>3</sup> An archaeological lens could evaluate the conservation of items of material cultural heritage. Or a post-colonial methodology could reveal the legacy and continued functioning of Western cultural, institutional, and scientific hegemony on notions of Aboriginality and heritage in Australia. These and many other approaches would be fruitful. However, this article evaluates the ACH Act by reframing its three seminal principles as investigative questions: Have Aboriginal parties across the state been able to manage cultural heritage according to their own mores and standards? Has the Queensland approach protected Aboriginal cultural heritage? And, has the legislation provided land users with a framework for cultural heritage management to aid the delivery of projects? The article draws on available empirical evidence, the author's 10 years of professional experience with the Act, and the Act's operation to determine what elements have been beneficial to Indigenous cultural heritage management and which have had negative outcomes.

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<sup>3</sup> Under the ACH Act, Aboriginal parties are defined through a link to the Native Title Act 1993, with a registered native title claim resulting in Aboriginal party status (Stephenson, 2006). For those areas without a registered native title claim, cultural heritage bodies could be approved by the state. As noted by Martin et al (2016), this has resulted in some contestation and disagreement among Aboriginal communities as to who has the right to "speak for country."

## Background and Methodology

### The Evolution of the Aboriginal Cultural Heritage Act

To analyse the operation of the ACH Act, it is important to understand the preceding legislative efforts to protect Aboriginal cultural heritage in Queensland and how these influenced the Act's drafting. This provides an explanatory context for the measures that were eventually incorporated into the ACH Act and a framework through which to examine its operation. In Queensland, cultural heritage practice focuses on the identification and preservation of items and places considered to be significant to a community. It draws on an array of techniques to not only preserve these material remnants of the past, but to communicate and promote what is culturally significant about them. As with other jurisdictions in Australia, the evolution of legislative protection for Aboriginal cultural heritage in Queensland took time and reflected evolutions in broader attitudes to both heritage preservation and the position of Aboriginal people within Australian society (McGrath & Lee, 2016; Smith, 2000).

The first legislative regulation and protection of what is now recognised as Aboriginal cultural heritage in Queensland came with the passing of the Aboriginal Relics Preservation Act 1967 (ARP Act). Introduced by the governing National Party, the ARP Act was dominated by two philosophies. In keeping with much historical and contemporary rhetoric, the ARP Act was prefaced on an assimilationist platform, which sought to inculcate and suppress Aboriginal people and culture into broader Australian society (Queensland Legislative Assembly, 1967). Accompanying the assimilationist intent, the ARP Act heavily favoured archaeological techniques. The identification and management of Aboriginal cultural heritage under this Act was the responsibility of the Archaeology Branch of the (Queensland) Department of Aboriginal and Islanders Advancement and Fisheries. Aboriginal people had limited statutory or practical involvement (McArdle, 1997). As a result, cultural heritage was primarily restricted to material remnants of previous occupation and use of the land by Aboriginal people, which was identified and managed by professional archaeologists (Rowland et al., 2014).

When the ARP Act was replaced by Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987 (CR Act), the new legislation retained its predecessor's assimilationist and archaeological underpinnings. The authority for the identification and management of Aboriginal cultural heritage remained with the Minister, who was delegated powers to identify sites, regulate or restrict entry to these sites, appoint heritage protectors, and establish a permitting process after seeking advice from qualified experts. Furthermore, the CR Act applied to all Queensland heritage: Aboriginal and historic (Fourmile, 1996). Many commentators saw the conflation of these two culturally distinct types of heritage as a continuation of attempts to diminish the uniqueness of Aboriginal history and heritage within the Australian community (McArdle, 1997).

There were persistent weaknesses in and criticism of the CR Act (Donovan, 2002; Fourmile, 1996; McArdle, 1997). Aboriginal people generally agreed the Act was "archaic and ineffectual" as it drew on an "outdated ideology" that excluded them from the decision-making and management process (Watson & Black, 2001, para. 1, Outdated ideology section, para. 1). For land users, the lack of clear guidelines led to expensive, time consuming, and—in hindsight—often unnecessary, cultural heritage processes that caused project delays, cost overruns, and ultimately failed to protect cultural heritage (Queensland Legislative Assembly, 2003). In 1998, the state Premier described it as "antiquated and

conceptually flawed” legislation and advised that he had initiated a review (Queensland Legislative Assembly, 1998, p. 2635). Other commentators agreed with the Premier’s summation (Donovan, 2002; Fourmile, 1996; Memmott, 1998). This position was acknowledged by the responsible Minister during the second reading of the bill, which became the ACH Act, when he informed the house that the CR Act had “proven to be an ineffective Act” for all stakeholders (Queensland Legislative Assembly, 2003, pp. 3179-3180). As a result, the Queensland government, Aboriginal people, industry groups, academics, and practitioners were in favour of new legislation to manage and protect Aboriginal cultural heritage.

Work on developing a new approach to Aboriginal cultural heritage commenced in 1998 (Queensland Legislative Assembly, 1998). After an initial draft model was rejected by all parties in 1999, a revised model was released in 2001 and was introduced into Parliament on August 21, 2003 (Queensland Legislative Assembly, 2003). The revised model was the result of extensive consultation with a range of stakeholders including representatives of Aboriginal groups, the Queensland Indigenous Working Group (QWIG), land users, organisations such as AGforce,<sup>4</sup> industry groups, linear infrastructure providers (rail, electricity transmission, gas, and water pipelines), and government agencies. This wide consultation was seen to be a strength of the new bill (Queensland Legislative Assembly, 2003). As a result, the new legislation was shaped to satisfy the broad range of stakeholders who were consulted, which is evident in both the drafting of the bill and its operation as legislation.

Central to the bill were three key aims. The first was “to recognise the fundamental right of Aboriginal people to be involved in the process of assessment and management of activities that may harm their cultural heritage” (The State of Queensland, 2003, p. 1). Second was to ensure the protection of Aboriginal cultural heritage. And the third was the creation of “certainty of process and timeframes for the assessment of cultural heritage and the management of possible impacts upon it” as part of projects and other developments (The State of Queensland, 2003, p. 1). This combination of principles was novel and untested in heritage management in Queensland, or in Australia for that matter, and the provisions of the Act attempt to guide this new approach.

At the heart of the bill was the concept of state wide “blanket protection” of Aboriginal cultural heritage (Watson & Black, 2001). Blanket protection, under this Act exclusively, meant all land users were required to satisfy a general duty of care to protect Aboriginal cultural heritage regardless of the extent of previous studies or the nature of their activities (The State of Queensland, 2003). Such protection had been advocated to protect Aboriginal cultural heritage throughout Australia by other commentators (Schnierer, Ellsmore, & Schnierer, 2011). This protection applied to all areas regardless of whether they had been subject to a survey or contained sites or places entered on a statutory list (Stephenson, 2006). This was an innovation for heritage protection in Queensland. Under the ARP Act, the CR Act, and the Queensland Heritage Act 1992 protection of cultural heritage in Queensland applied only to those places entered on a statutory heritage list (Memmott, 1998).

The ACH Act also shifted the authority to identify, assess, and manage cultural heritage away from centralised, “bureaucratic” government bodies and experts (Watson & Black, 2001). Instead, Aboriginal parties throughout the state would be given responsibility for managing cultural heritage within specified areas. Section 5(b) of the Act recognised “Indigenous people as primary guardians” of cultural heritage

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<sup>4</sup> AGforce is an industry group established to represent the interests of agricultural producers in Queensland.

with guardianship extending to include management of items of cultural heritage and the right for Aboriginal people to make decisions regarding cultural heritage free from external opinion or influence (Aboriginal Cultural Heritage Act, 2003). This reflected advocacy from Aboriginal people for such power to be returned to them in Queensland through the "Ithaca Principles"<sup>5</sup> in 1998 (Donovan, 2002; Memmott, 1998). It was also a move that corresponded with trends in other nations to return authority to Indigenous people as part of land use planning and development (Eversole, 2010; Gardner et al., 2012). While this was a radical shift, it was tempered by the expectation that any such cultural heritage be "supported by appropriate anthropological, biogeographical, historical and archaeological information" (Queensland, 2003a, p. 4409). The reliance on archaeological information and verification, or "scientific stewardship," was consistent with the established framework of cultural heritage management throughout Australia and showed a desire to retain part of the previous approach (Smith, 2000, p. 109).

As blanket protection applied to a plethora of activities, a flexible approach to managing cultural heritage was developed to recognise the potential impacts of a vast array of activities. The Act effectively created a two-tiered heritage regime. For major projects that required an Environmental Impact Statement (EIS), consultation and agreement with the Aboriginal party(s) for the project area was compulsory under Part 7 of the Act. Such consultation had to be recorded and agreed in a Cultural Heritage Management Plan (CHMP), which was approved and registered by the state (Aboriginal Cultural Heritage Act, 2003). The basic administrative requirements along with statutory timeframes for a CHMP were included in the Act (Aboriginal Cultural Heritage Act, 2003). However, the content of these agreements was left to the discretion of the negotiating parties and, unlike native title agreements, the state was not a party or signatory to these agreements. In fact, the ACH Act stipulates that the state "must approve" all CHMPs that satisfy the minimum administrative requirements, regardless of their contents (Aboriginal Cultural Heritage Act, 2003, s. 107).

For projects not requiring a CHMP, the Act included provision for the gazettal of duty of care guidelines. These guidelines were designed to allow land users not requiring an EIS to self-assess their proposed activities and determine if there was a requirement for consultation with the Aboriginal party for the area. Gazetted in April 2004, the guidelines contained five categories that focused on the nature of the proposed activity and evidence of previous ground disturbance (Department of Aboriginal and Torres Strait Islander Partnerships, 2004). New ground disturbance required engagement with the appropriate Aboriginal party. No minimum standard of investigation or approved methodology was described and assessments would not need statutory approval nor the consent of the Aboriginal party for the area. Any project that could show compliance with the duty of care guidelines was compliant with the ACH Act (2003, see s. 23[3][a]).

The role of the state in the management of Aboriginal cultural heritage also changed dramatically. The Act saw the state voluntarily cede its formerly dominant role as the arbiter, manager, and owner of cultural heritage. Instead, the state became an administrative body with some limited enforcement and intervention powers. The Act makes provision for the state to levy fines and issue reparation orders for

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<sup>5</sup> The Ithaca Principles were drafted following a meeting of Aboriginal representatives in the Ithaca Town Hall in Brisbane in 1989. The guiding principle was that Aboriginal people should be responsible for the management of their own cultural heritage (Donovan, 2002).

breaches (Aboriginal Cultural Heritage Act), gave the Minister the power to issue a stop order to protect cultural heritage (Aboriginal Cultural Heritage Act, 2003) and allowed for injunctive relief under the Land and Resources Tribunal Act 1999.<sup>6</sup> These reserve powers were considered ample protection against potential harm to cultural heritage and a necessary deterrent to land users considering avoiding or breaching the Act (Seiver, 2005; Watson & Black, 2001). It also meant the state played a minor role in cultural heritage management and compliance.

In evaluating the proposed legislation, commentators Nicole Watson and Russell Black (2001) were optimistic that the new approach would be beneficial for Aboriginal people. However, due to the novelty and the untested nature of several of the Act's principle tenets, they remained of the opinion that its effectiveness was something they "cannot predict" (Conclusion section, para. 1). This article now examines the operation of the three key principles of the ACH Act in order to evaluate its effectiveness in implementing the goals set by the Queensland Parliament.

## **Analysis and Discussion**

### **The Fundamental Right of Consultation**

The defining feature of the ACH Act was repealing previous state control over cultural heritage and returning it to Aboriginal people. The right to identify and manage their cultural heritage had been explicitly demanded by Aboriginal people in Queensland in 1998 (Donovan, 2002; Memmott, 1998). In response, the Queensland Parliament acknowledged Aboriginal peoples' "fundamental right" to assess and manage their culture free from external control (Queensland Legislative Assembly, 2003, pp. 4400-4401). To facilitate this, the ACH Act attempted to formalise and encourage a consultation process between Aboriginal parties and land users<sup>7</sup> to manage and preserve cultural heritage as part of projects and development. However, this right was tempered by the two-tiered approach of compulsory consultation for major projects and duty of care assessments for minor projects. For this reason, each tier of the regime must be considered separately.

**Compulsory consultation.** As noted above, consultation with Aboriginal parties and the agreement of a CHMP is compulsory only for major projects requiring an EIS. From the introduction of the ACH Act up to June 30, 2015 there have been 333 CHMPs agreed and registered with the state (Department of Environment and Heritage Protection, 2016).<sup>8</sup> For each of these agreements, the land user and Aboriginal party were required to negotiate on the management of cultural heritage within the project area. The contents of these agreements are confidential. However, the ACH Act provides for minimum negotiation timeframes and a range of matters that should be considered during consultation, meaning that each agreement is the outcome of direct engagement between the Aboriginal party and the land user.

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<sup>6</sup> With the passage of Land Court and Other Legislation Amendment Act 2007, the powers of the Land and Resources Tribunal were transferred to the Land Court.

<sup>7</sup> Land users are defined in the ACH Act as a person carrying out, or proposing to carry out, activities on land likely to materially affect the land.

<sup>8</sup> Some of these CHMPs have been entered into for projects that do not require an EIS in accordance with section 83 of the ACH Act. This has been to provide both land users and Aboriginal parties with certainty. These CHMPs must follow the same process as compulsory CHMPs and have the same advantages and disadvantages.



Taken at face value the positioning of Aboriginal people at the centre of the CHMP process for such projects is a success of the Act. As noted during debate, the Parliament sought to ensure that "Aboriginal people are responsible for assessing the level of significance of their culture" as opposed to government officials and non-Aboriginal experts (Queensland Legislative Assembly, 2003, p. 3180). Theoretically, these CHMPs are evidence of a significant number of major projects for which Aboriginal people were the experts and primary managers of their cultural heritage. For each of these projects, the negotiations began from the standpoint that Aboriginal people, not external specialists or government agencies, should advise and work with land users to manage cultural heritage. Consequently, in the case of these projects, the ACH Act has offered an opportunity for Aboriginal parties and their knowledge to be seminal to the management of cultural heritage.

However, this tier is not without its flaws. When examined in more detail, there is evidence that the CHMP process may not have been conducive to ensuring Aboriginal cultural heritage management practices are fully realised, or at least realised in the form all Aboriginal parties would prefer. The context of these negotiations is important. A CHMP requires the deployment of well-honed skills in negotiation, contract drafting and interpretation, survey implementation, and commercial acumen. Added to this are statutory timeframes that allow a land user to seek approval of a CHMP through the Land Court. As a result, much like native title agreement-making, Aboriginal parties in these negotiations find themselves in a "generally weak bargaining position" (O'Faircheallaigh, 2008, p. 4).

While the land user, as the plan sponsor, is required to make assistance available to the Aboriginal party, this is inconsistent and often does not provide commensurate resources that larger land users may have at their disposal (O'Neill, 2016). For these reasons, the Aboriginal party may be placed in a position of agreeing to lesser, or non-preferred, cultural heritage management terms and conditions to avoid an adverse outcome and/or losing control of the cultural heritage process altogether as a result of a Land Court decision. This power disparity has also resulted in factionalism within some Aboriginal parties, which has further reduced their bargaining power and cultural cohesion (Martin et al., 2016). The combination of resource disparity and statutory timeframe pressures has meant many Aboriginal parties have felt they have not been given the opportunity to develop and implement their preferred cultural heritage management strategies. Consequently, the creation of a CHMP agreement between a land user and Aboriginal party does not always result in the involvement of Aboriginal parties in the cultural heritage management process in a culturally appropriate manner.

Not all CHMPs have been manifestly in favour of land users or to the detriment of Aboriginal parties. A significant number of Aboriginal parties have negotiated multiple CHMPs (Department of Environment and Heritage Protection, 2016). Using these experiences, some parties have developed sophisticated negotiation strategies and expertise, which they have deployed to ensure the implementation of methodologies that are in keeping with cultural traditions and expectations. In other cases, the Aboriginal parties are simply more experienced and effective negotiators. These parties have been based predominantly in areas with extensive resource and infrastructure developments allowing them to develop and exercise both influence and expertise in the negotiation process. For these Aboriginal parties, the advent of the ACH Act has been beneficial as it has not only brought them to the centre of the cultural heritage management system, but allowed them to exert significant authority in the way that cultural heritage is managed.

While the compulsory CHMP process has recognised the primacy of Aboriginal people in the cultural heritage process, it has simultaneously moved it into what David Ritter (2009a, 2009b) refers to as a commoditised, agreement-making process typical of native title agreements. While noting that this minimises the cultural aspect of the engagement process, Ritter, along with O’Faircheallaigh (2008) and O’Neill (2016), adroitly argue that the better negotiator is often the most successful party in such agreement-making processes. Based on the author’s experience, this is certainly the case with the ACH Act. While there are a large number of agreements providing evidence of a theoretical shift of authority to Aboriginal parties for cultural heritage, the extent and exercise of that power is dependent on the capacity and capability of the Aboriginal party to successfully negotiate a preferred outcome.

**Duty of care engagement.** Crucial to the passage of the Act was the gazettal of the duty of care guidelines to ensure “the legislation is flexible and workable without being unduly prescriptive” (Aboriginal Cultural Heritage Act, 2003, pp. 4-5). While the duty of care guidelines were intended as a first-step risk management tool, they have evolved, in many cases, to a method for land users to effectively exclude Aboriginal parties from cultural heritage management (Department of Aboriginal and Torres Strait Islander Partnerships, 2016). By completing a Due Diligence Assessment using the guidelines, a land user can assert the project area has been subject to extensive ground disturbance making it “reasonable and practicable that the activity proceeds without further cultural heritage assessment” (Department of Aboriginal and Torres Strait Islander Partnerships, 2004, ss. 4.2, 4.5, 5.2 and 5.5). It is not required that the due diligence assessment be approved by any government agency nor is it compulsory to advise the relevant Aboriginal party of the assessment. Instead, the land user can retain the assessment as proof of compliance with the ACH Act if challenged by the Aboriginal party, the government administrator, or pursued by aggrieved parties through the Land Court.

Many Aboriginal parties and archaeologists contend that the duty of care guidelines do not appropriately consider Aboriginal people’s connection to country and the potential cultural heritage and scientific values of disturbed areas (Rowland et al., 2014). It is argued that the guidelines contain three flaws. Firstly, previous ground disturbance may not have resulted in all artefacts being removed, meaning a site may retain artefacts and scientific value. Secondly, if any remaining artefacts are damaged or of limited scientific value, this does not detract from the cultural importance of these artefacts to many Aboriginal parties. Thirdly, by focusing on ground disturbance, the guidelines do not recognise the potential spiritual or cultural significance of an area for Aboriginal people (Godwin & Weiner, 2008). In many cases by failing to consider material culture and potential intangible and cultural values associated with Aboriginal parties’ connection with land, the duty of care guidelines run counter to the spirit of the ACH Act.

Added to these flaws in the duty of care guidelines, there are projects that have proceeded without any form of Aboriginal cultural heritage assessment. While the ACH Act imposes a duty of care on all land users, it is rarely a mandatory condition of project approval. This has allowed projects to proceed, intentionally or not, without any form of cultural heritage assessment with regulators frequently forced to “guess” if projects are compliant with the Act (Rowland et al., 2014, p. 341). Again, such actions are also detrimental to the ACH Act’s effectiveness. At the outset, such failures leave open the possibility that items and places of cultural heritage value may have been irretrievably damaged or lost. More importantly though, the fundamental precept of the ACH Act—which provides primacy to Aboriginal

parties in managing cultural heritage—can be completely ignored, greatly detracting from its philosophical underpinning.

However, it should be noted that Aboriginal parties have not been denied involvement in all projects covered by the duty of care. In many cases, an assessment has led to the conclusion that consultation with the Aboriginal party is the best path to compliance with the ACH Act and to reduce project risk. As a result, some land users have chosen to voluntarily utilise the Part 7 CHMP process. Such agreements are identical in process and outcomes and with the same potential flaws as Part 7 agreements described above. Concomitantly, a large number of projects have achieved compliance with the ACH Act under Section 23 in partnership with the Aboriginal party. These are generally referred to as cultural heritage agreements or Section 23 agreements. These agreements established between Aboriginal parties and land users are not registered or approved by the state, and therefore the actual number of these agreements developed since 2004 is unknown. However, much like the CHMP process, agreements complying with Section 23 have provided opportunities and resources for Aboriginal parties to identify and manage cultural heritage in ways that are appropriate to their tradition and custom.

Recognising some of these flaws in the guidelines, the Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP), as the administrative agency for the ACH Act, has recently commenced a review. Seeking comment from stakeholders, DATSIP advised that, in their opinion, the guidelines in some cases “fail to capture the residual Cultural Heritage values of an area” (Department of Aboriginal and Torres Strait Islander Partnerships, 2016, p. 1). Such an admission from DATSIP reinforces the point that currently the duty of care guidelines do not provide adequate recognition of Aboriginal parties in the cultural heritage management process commensurate with the precepts of the ACH Act.

### **Preservation of Cultural Heritage**

In decentralising the cultural heritage process, the ACH Act returned responsibility for the identification and preservation of cultural heritage to distinct Aboriginal parties across the state. This was a markedly new approach. From the 1960s onwards, scientific methodologies—predominately archaeology—dominated Australian cultural heritage management (Smith, 2000, 2004). Aboriginal views were often disregarded. The rationale for this shift in Queensland was that the evidence of Aboriginal occupation and use of the land belonged to and should be managed by Aboriginal people in a manner that fit traditional customs and mores. Subsequently, the methods, standards, and assessments of Aboriginal parties came to the fore. As expected, such an approach had consequences for the management of both material and non-material cultural heritage.

As part of the large number of agreements and processes conducted under the auspices of the ACH Act since 2004, substantial areas of Queensland have been subject to cultural heritage surveys. As part of these activities, 42,537 sites of cultural heritage significance have been added to the Aboriginal Cultural Heritage Database up to June 30, 2015 (Department of Environment and Heritage Protection, 2016). This is a remarkable number when it is considered that reporting of items or sites to DATSIP is not compulsory. This large quantum of discoveries points to extensive efforts to identify, manage, and preserve cultural heritage by Aboriginal parties. However, much like the significant number of CHMPs and other agreements, these identified sites require further interrogation.

While there has been substantial cultural heritage identified, the process of identification and management differs from traditional methodologies; in some cases, the difference is stark. The definition of conservation is central. Traditionally, heritage conservation in Australia is taken to mean the identification, preservation, and display of artefacts, items, and practices that are culturally significant (Barber, 2006). Such a process is wrapped up in traditional museological ideas of cultural conservation and archaeological approaches to identification and assessment of material (Wharton, 2005). This approach to cultural heritage gained credence in Australia from the 1960s onwards as university-based and trained archaeologists sought to codify their practice and gain credibility within the discipline globally (Smith, 2000).

When viewed from the perspective of archaeological techniques, the management of material cultural heritage in Queensland since the introduction of the ACH Act has, on the whole, been poor. This is due to the Act's reliance on negotiated outcomes between Aboriginal parties and land users as the principal heritage management technique and the state's inability to insist on the use of archaeological techniques. As a result, the involvement of archaeologists and scientific techniques is reliant upon the Aboriginal party and the land user. In a large number of cases, archaeological expertise is absent because either the Aboriginal party may not request or require it or the land user may not agree to engage a heritage professional. Combined with the absence of minimum qualifications to undertake such assessments, these surveys have seen "basic errors" of artefact identification in the experience of some archaeologists (Martin et al., 2016, p. 148). As such, many surveys may not satisfy the desire of Queensland Parliament that all items and sites be supported by "authoritative anthropological, biogeographical, historical and archaeological information" or standard archaeological process (Queensland, 2003a, p. 3180).

As a result of this lack of a proscribed archaeological methodology or standards, the nature of what constitutes cultural heritage has been the most malleable and evolutionary element of the ACH Act. Some Aboriginal parties have insisted on the use of external, expert opinion and this has resulted in the creation of high quality reports and the publication of some academic papers (Cochrane, Habgood, Doelman, Herries, & Webb, 2012; Godwin & Weiner, 2008; Prangnell, 2004; Prangnell & Gorrington, 2005; Ross, 2010). However, not all Aboriginal parties have adopted a standardised, systematic, archaeological methodology to identify and assess cultural heritage. Parties have, instead, chosen how they manage their cultural heritage. This has fostered different methodologies for the preservation of cultural heritage beyond the formerly dominant Western-scientific paradigm (Byrne, 1991). Aboriginal parties have subsequently reconnected with the past, reinterpreted the significance and utility of material culture, utilised professional techniques when it is considered appropriate and inscribed contemporary meanings onto traditional country. Rather than rely only on archaeological evidence of past occupation and land use to establish significance, Aboriginal parties have, in many cases, understood the landscape in ways that reflect their contemporary values and interpretations and eschewed the dominance of Western views of cultural heritage.

In evaluating this element of the ACH Act, broader consideration must be taken. If analysed only through the lens of archaeological methodologies, the Act has been ineffective and possibly even destructive. However, the ACH Act has, in many cases, facilitated new cultural heritage practices. These new practices see the application of discrete, localised concepts of cultural heritage, which are not always commensurate with traditional archaeological methodologies. Instead, Aboriginal parties have been able to adopt approaches that are determined by and relevant to their traditional cultural standards and

contemporary needs. This has been one of the Act's most significant achievements. By creating an opportunity for Aboriginal people to interpret and manage their past in their own way, the ACH Act has fostered the development of independent, Aboriginal controlled processes for identifying, understanding, and managing heritage free from external influence.

### **A Clear Compliance Process**

The third principle of the ACH Act was to provide land users with a clearly understandable compliance process to manage cultural heritage in a way that reduced project risks. Economic development in the state was seen as important and the need to ensure all projects were able to proceed efficiently was a key element in the development and drafting of the Act (Queensland Legislative Assembly, 2003). To date, this has been the Act's most successful feature. Economic activity in Queensland reached record levels during the implementation of the ACH Act and few, if any, projects were stopped, faced delays, or were deemed economically unviable due to Aboriginal cultural heritage. This absence of delay is especially interesting when the majority of these projects required complex cultural heritage agreements in areas with a high potential for the identification of cultural heritage.

Major projects requiring CHMPs provide the best examples of the lack of disruption. While the negotiation process may have been more challenging than anticipated and the implementation of agreements costlier than originally planned, no major projects have failed to gain approval or reach delivery due to cultural heritage. There have been some minor impacts. Recourse to Land Court has occurred, infrequently, with 5 CHMPs being approved by this body (*Legend International Holdings v. Taylor Aly Awaditijia & Anor*, 2013; *Queensland Electricity Transmission Coproation Ltd. [Trading as Powerlink Queensland] v. Bonner & Ors*, 2006; *State of Queensland [Represented by Department of Health] v. Wesley Aird & Ors*, 2008; *State of Queensland v. Best & Ors*, 2006; *Surat Basin Rail Pty Ltd. v. Gangulu People & Ors*, 2009; *Xstrata Coal Queensland Ltd. & Ors v. Russell Tatow & Ors*, 2008). However, when compared with the number of registered agreements ( $N = 333$ ), this is a minor disruption. In the author's experience, some land users have failed to implement the agreed CHMPs properly, causing delays and cost overruns during project delivery and some Aboriginal parties have used cultural heritage to attempt to delay or stop a project for cultural or commercial reasons. Nonetheless, the number of CHMPs agreed and successfully implemented point to the ability of land users and Aboriginal parties to reach agreements, which facilitate the delivery of major projects.

Outside of major projects, the duty of care guidelines have allowed land users to proceed with significantly reduced project risk. It is difficult to quantify or qualify the number of projects that have proceeded under these provisions in Queensland since 2003. However, there is limited evidence of Aboriginal cultural heritage causing substantial project delays. Without a doubt, the quality of cultural heritage assessment and management for these projects is unknown and has resulted in the exclusion of Aboriginal parties from some cultural heritage processes and damage to items of archaeological significance. While such negative heritage outcomes were not explicitly considered by the Parliament during debate over the Act, the need for a reliable path to compliance was positioned as equal to the management and preservation of cultural heritage. As a result, those projects that have achieved compliance with the duty of care guidelines are further evidence of the effective implementation of the goals of the Queensland Parliament.

Prosecution and injunctive relief have also caused limited disruption to projects, both major and minor. A stop work order under the Act has been issued by the administrator seven times since the introduction of the Act (Rowland et al., 2014; J. Schiavo, manager of the Department of Aboriginal and Torres Strait Islander Partnerships, personal communication, May 11, 2017). There have also been three successful prosecutions of land users under the ACH Act showing there exists relatively widespread compliance with the Act (Chandler, 2008; “Miner fined \$80k for disturbing artefacts,” 2011; “Xstrata Mount Isa Mines fined over Aboriginal heritage site,” 2010; Rowland et al., 2014; J. Schiavo, personal communication, May 11, 2017). Injunctive relief has been granted by Land Court to an Aboriginal party on only one occasion (*Adrian John Beattie for the Western Wakka Wakka Aboriginal People v. Nexus Delivery*, 2016; *Eastern Yugemben People [Applicants] and Coomera Waters Village and Resort and Turnix Pty Ltd. [Respondents]*, 2004). There have also been a small number of disputes settled out of court (J. Schiavo, personal communication, May 11, 2017). A number of cases have appeared before the Land Court; however, these have predominantly been as a result of procedural, technical, or minor matters. This case law has been especially important for clarifying a number of issues not specifically considered in the legislation and for providing legal precedents and interpretation of the Act. This evidence of limited judicial or administrative intervention shows that, on the whole, the failure to comply with the ACH Act has infrequently been the cause of substantial project delays.

This is not to say that land users have been unaffected by the ACH Act. The Act requires the devotion of resources often not envisioned at the start of the project. These costs include heritage assessment, meeting facilitation, consultation, agreement drafting, cultural heritage surveys, and other attendant expenses, which have an impact on project budgets and delivery timeframes. The ACH Act is also not well understood by many proponents. It contains few mandatory requirements and the demands and operation of each Aboriginal party vary, meaning some land users are perplexed about the most appropriate means through which to achieve compliance. In some cases, land users are unsure if their project is compliant. While this carries a level of risk to project delivery, based on available evidence, the author’s experience and anecdotal evidence, there have been sparse adverse impacts on projects.

Overall, the ACH Act has provided a clear and concise pathway for land users to deliver their projects while achieving statutory compliance. Land users and Aboriginal parties have grown accustomed to the negotiation process and are able to reach agreement in a timely fashion, appropriate to each project. The Act’s success in providing a clear path to compliance was confirmed in 2012 by a major industry body which described it as “the best Indigenous cultural heritage legislation in Australia” (Queensland Resources Council, 2012, p. 1). However, the procedural success of the Act should not be confused with the successful management of cultural heritage, and some commentators argue cultural heritage has fared poorly under the ACH Act because of its expediency (Rowland et al., 2014). This potential outcome was accepted by the Queensland Parliament to redress the failings of previous legislation, satiate land users, stimulate economic growth, and in exchange for a decentralised management regime advocated by Aboriginal parties. The Parliament was clear that compliance with proposed legislation was an important element in the drafting of the legislation. For this reason, the ACH Act’s compliance regime must be counted as a success of the Act, if not necessarily for the preservation of cultural heritage.

## Conclusions

As with any new legislation, the ACH Act's effectiveness has been mixed. When viewed through the tripartite lens of the Act's principal motivations, it has generally been effective. Land users have been able to identify a way to deliver their projects without substantial delay and limited instances of prosecution. Significant numbers of items and places of cultural heritage have been identified and preserved in a variety of ways as a result of cultural heritage surveys and other work. But most importantly, Aboriginal people have resumed, and in many cases strongly exercised, a more authoritative role in the identification and management of their cultural heritage. While in other postcolonial nations the failings of such consultative approaches have led to "opposition" to the process, this has not been the case in Queensland (Gardner et al., 2012, p. 18). Concomitantly, the Act is generally seen by commentators to be successful, structurally sound but in need of some considered and targeted reform (Brockett, 2013; Martin et al., 2016).

When considering the application of the precepts of the ACH Act to other jurisdictions in Australia and internationally, however, its demonstrated weaknesses should be carefully assessed. At the forefront of such consideration is the consultation process. From a procedural point of view, the ability of land users to utilise the duty of care guidelines to avoid consultation with Aboriginal parties severely undermines the Act. While the administering department is taking steps to reduce such (mis)use of the guidelines, the success of this review is crucial to the proper functioning of the Act and the full realisation of the rights of cultural authority returned to Aboriginal people with the passage of the legislation. Ensuring Aboriginal parties are consulted in the appropriate manner and at the right stage of projects is crucial to ensuring their rights to manage their cultural resources are returned to them in full accordance with international declarations (Lenzerini, 2016).

The machinations and operation of the consultation process itself are also seminal. As noted above, and by many commentators, the ability of Aboriginal parties to fully exercise their rights under this Act is highly dependent upon their negotiation skills and capacity. Such a situation is not conducive to the protection of cultural heritage nor the fulfilment of the rights of Indigenous people to practice and preserve their culture free and unfettered from external pressures (United Nations Declaration, 2008). These pressures are partially a result of the disparity of power that currently exists between major land users and Aboriginal people in Australia (O'Neill, 2016). In many circumstances, the cultural heritage process, legislated and practiced under the ACH Act, has only reinforced and exacerbated this power differential to the detriment of cultural heritage and Aboriginal people.

This power differential is also a direct result of the series of compromises that were made to ensure the passage of the legislation. The Queensland Parliament was adamant that the views of all stakeholders be considered during the development and implementation of this legislation and that this was to be an act that would not stifle economic development. This has resulted in land users being perceived as having substantial, institutionalised power in the negotiation phases of projects, to the detriment of cultural heritage and Aboriginal people's rights to control that heritage. This power imbalance is not consistent across all projects. However, other jurisdictions that look to the Queensland example as part of policy review and re-design must carefully consider if they are willing to legislate such compromises into policy reform or innovation.

These policy compromises also highlight the challenge the Act provides to contemporary conceptions of the role of government in Indigenous cultural heritage management. The responsible Queensland government agency plays a minor, administrative role. This has been a considered and sustained decision, which was begun during the drafting of the Act and has continued through its implementation. This minimal approach explains the inconsistent application of the Act and the disenchantment of some Aboriginal parties and stakeholders with its operation. However, this was considered necessary in order to return full control and management of cultural heritage to Aboriginal people. The compromises that resulted in both the legislation and its application were and remain government policy. For jurisdictions considering adopting some elements of the ACH Act, the place and role of the government must be carefully considered and clearly defined.

Crucial to understanding the functioning and ways to improve the ACH Act is garnering the views of a wide variety of those who use it regularly. Due to the nature of the legislation, there are myriad professionals and others involved in cultural heritage management in Queensland. Aboriginal people, archaeologists, project managers, lawyers, heritage professionals, government agents, field officers, environmental managers, and advocates all play legitimate and important roles. These individuals have different and diverse experiences of the functioning of the Act, its fissures, strengths, and ideas to reform or reinforce many of its most controversial and important provisions. Adding the views of these professions to the emerging critical literature on this Act would provide a fuller understanding of its nuances and how it can be applied in different settings. Encouraging diverse insights can only improve the functioning of this Act and the deliberations of those seeking to consider and apply it in other statutory contexts.

In the assessment of the author, the ACH Act does warrant such wider consideration by cultural heritage policymakers. Despite the weaknesses and failings, highlighted here and by others, it remains a distinct and valuable attempt to grant primacy to Indigenous people in the management of their cultural heritage. Responding to calls by Aboriginal people to have their right to manage their cultural resources returned to them, the Act diverted markedly from the Western, archaeological paradigm, which not only dominated cultural heritage management in Queensland but had drawn the ire of many Aboriginal people. Although the principal of consultation with Aboriginal parties has not been universally achieved, in situations where Aboriginal parties are consulted, new, unique, and localised versions of cultural heritage controlled by Aboriginal people have evolved. As a result, despite the undulations and tribulations experienced across Aboriginal communities, within industry and among other stakeholders, the conceptualisation of cultural heritage has irrevocably changed in Queensland. At the forefront of this evolution are Indigenous people. This makes the ACH Act a worthwhile and, indeed, successful intervention in the management of cultural heritage in Queensland and one with tremendous potential, if applied carefully, elsewhere.



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