

2<sup>nd</sup> August 2019

Cultural Heritage Acts Review  
DATSIP  
PO Box 15397  
City East  
QLD 4002

e: [CHA\\_Review@datsip.qld.gov.au](mailto:CHA_Review@datsip.qld.gov.au)

Attention: Cultural Heritage Acts Review Team.

***Aboriginal Cultural Heritage Act 2003 (Qld) and Torres Strait Islander Cultural Heritage Act 2003 (Qld) (the Cultural Heritage Acts) Review Submission***

This submission has been prepared by Jabree Limited and is also made on behalf of the Gold Coast Native Title Group.

Jabree Limited (Jabree) would like to thank DATSIP for the opportunity to comment on the Cultural Heritage Acts Review. As Jabree operates in South East Queensland, this submission will only cover aspects of the *Aboriginal Cultural Heritage Act 2003 (Qld)* 'the Act'.

In summary, Jabree would like to raise the following points as matters of importance:

- **Aboriginal people determining the cultural significance** of a site is an important aspect of the Act that needs to remain.
- **Land Users** (developers and proponents) should be required to provide appropriate evidence as to how they have achieved compliance with the Act and how they have engaged Aboriginal Parties to determine the cultural significance of a site.
- A strong need remains for the **Education of Land Users** around the operation of the **Act** and **Duty of Care Guidelines (DOCG)** and clarity around how their activities comply with the Act and DOCG.
- A more proactive approach to the recognition, protection & conservation of Aboriginal Cultural Heritage should be developed through **triggers within Local Government Planning Schemes**, particularly around Operational Works Development Applications.
- The **threshold for Cultural Heritage Management Plans (CHMPs) needs to be**

**broadened** in line with other jurisdictions to include high impact activities such as large-scale residential developments.

- **Enforcement officers** should be employed to operate proactively on the ground to ensure Land Users are complying with the Act;
- Any **monetary amounts** gained from fines or prosecutions under the Act, need to be **shared with the Aboriginal Party for the area**, as it is their cultural heritage that has been damaged or destroyed.

Jabree would like to make the following statements as outlined in the DATSIP Consultation Paper's five key areas to consider:

### ***Ownership and Defining Cultural Heritage:***

1) *Is there a need to revisit the definitions of cultural heritage- if yes, what definitions should be considered? What additional assessment and management processes should be considered?* Yes. There is a need to revisit the definition of cultural heritage to include the overall cultural landscape and intangible cultural heritage.

- *Issue 1:* The first discussion point under ownership and defining cultural heritage in the review paper is around recognising broader cultural landscapes when assessing the impacts of land use activities on Aboriginal cultural heritage. Often there is the case, where there may be a registered site recorded on the database or register on one lot and plan and a search request is lodged for the adjoining property. The search request result does not pick up that a cultural heritage site is on the adjoining lot and thus, it does not recognise the broader cultural landscape.
- *Solution 1:* Search request results include areas within the broader cultural landscape.
- *Issue 2:* Intangible cultural heritage is not included in the current definitions of the Act.
- *Solution 2:* In line with the Victorian legislation, include a definition about Intangible Aboriginal Cultural Heritage: 'Aboriginal intangible heritage means any knowledge of or expression of Aboriginal tradition, other than Aboriginal cultural heritage, and includes oral traditions, performing arts, stories, rituals, festivals, social practices, craft, visual arts, and environmental and ecological knowledge, but does not include anything that is widely known to the public' (This definition is taken from the amendments to the Victorian Aboriginal Heritage Act (S.79B in Part 5A of the [Aboriginal Heritage Act 2006 \(Vic\)](#)).
- *Issue 3:* Sensitive landforms and landscapes are not included in the definitions.

- *Solution 3:* Definitions around Sensitive Landforms and Landscape Categories need to be included to encompass areas with high potential for cultural heritage sites. Those that are: ‘Within 200m of (or the feature itself):
  - a waterbody or watercourse (including existing watercourses, prior waterways, but does not include man-made bodies of water such as dams),
  - a river, creek, stream, channel or watercourse (including prior, perennial, intermittent and ephemeral watercourses),
  - a natural lake, lagoon, swamp or marsh (including ancient lakes),
  - a natural depression through which water can be collected, or which forms part of an intermittent channel,
  - Coastal fringe high water mark (dune systems, rocky points, areas of coastal vegetation),
  - Dunes (inland, riverine or coastal),
  - Ridges (including ridgetops and saddles, stony rises, promontories),
  - Declared Ramsar wetlands,
  - Remnant vegetation,
  - Caves and rock-shelters,
  - Sand hills,
  - Unique landscape features such as *inter alia*: The Great Barrier Reef, waterfalls, gorges, escarpments, stony rises, volcanic plugs, lava flows.

### ***Identifying Aboriginal and Torres Strait Islander Parties:***

This submission does not recommend any changes to the Act’s current provisions for identifying Aboriginal & Torres Strait Islander Parties and registering Aboriginal Cultural Heritage Bodies.

### ***Land User Obligations:***

- 1) *Is there a need to bolster the oversight mechanisms for self-assessment and voluntary processes- if yes, what should this entail?* Yes. There is a strong need to bolster the oversight mechanism for self-assessment and voluntary processes. However, the Act should retain provisions (such as those in s23) that allow Aboriginal Parties to undertake cultural heritage surveys and develop agreements outside of Part 7 CHMPs. This allows Aboriginal Parties to exercise control and autonomy over the management of their cultural heritage.

- Issue 1: The Act has been in existence for over 15 years, yet many land users still do not know about (or understand) the Act or the DOCG; or the different types of Aboriginal Cultural Heritage sites.
- Solution 1: DATSIP to undertake an education and media campaign about land users' obligations under the Aboriginal Cultural Heritage Act. This should include the use of case studies to explain the application of the DOCG and the types of Aboriginal Cultural Heritage that exists in Queensland. This process should be undertaken in collaboration with Aboriginal Parties.
- Issue 2: Land users undertaking self-assessment of their development activity and reaching the conclusion they have achieved compliance with the Act. How are self-assessing land users able to demonstrate they have undertaken reasonable and practical measures, in order to meet their Duty of Care (DOC) under the Act? Without enforcement officers, who is checking this?
- Solution 2: Enforcement officers should be employed to provide a cross-checking mechanism ensuring that land users are complying with the Act & DOCG.
- Issue 3: The five categories under the DOCG can be confusing for land users.
- Solution 3: The five categories under the DOCG need condensing to a maximum of three and should be clarified so they are more user friendly.
- Issue 4: There is a reliance on land users to 'do the right thing', which has resulted in a reactive environment on the ground. Aboriginal Parties are required to approach land users whose developments have commenced and request evidence of compliance with the DOC. It should not be the responsibility of the Aboriginal Party to police compliance with the Act.
- Solution 4: Enforcement officers are provided with an on-the-ground compliance brief, to assess development activities' compliance with the DOC. If it is left up to the Aboriginal Parties to police this, they should be resourced appropriately to do so.
- Issue 5: Some Local Government Authorities (LGAs) are only just starting their process for cultural heritage assessments in their infrastructure projects.
- Solution 5: DATSIP and the Council of Mayors should be actively encouraging dialogue and workshops with LGAs on meeting their DOC.
- Issue 6: Aboriginal Cultural Heritage is usually not dealt with in the planning stages of a development. This has led to the Act being very reactive. Unless a development triggers an EIS, or a relationship has already been established with land users there is no easy way for Aboriginal Parties to know what development applications are being lodged in their area. Self-funded options for Aboriginal Parties to monitor local developments include:

- scanning LGA online development applications e.g. the Gold Coast Council's PD Online;
  - drive around looking for impact assessable development signs;
  - check newspapers for an impact assessable development application advertisement.
- Solution 6: LGAs should be actively encouraged to build their relationship with Aboriginal Parties so that the Aboriginal Parties are made aware when development applications are lodged with Council, over areas that could potentially include Aboriginal Cultural Heritage sites. One way that LGAs could address this is to undertake a Part 6 Study under the Act, for their Shire area with the Aboriginal Party and either map the area with a traffic light system (green for go- the area has been checked and is fine to develop, amber- there might be a cultural heritage site within the boundary and to consult the Aboriginal party, and red- there is a cultural heritage site identified within the boundary, stop and consult); or a predictive modelling layer (such as was undertaken by Tweed Shire Council in their Cultural Heritage Management Plan). These mapping layers need to be placed into local government planning schemes, along with Aboriginal Cultural Heritage Codes and a trigger for Operational Works development applications. A similar situation is already working across Queensland for historical heritage and it is time that Aboriginal Cultural Heritage is also included as currently, the planning triggers are discriminatory.
- Issue 7: How are land users making sure that the main purpose of the Act is achieved, that being Sec.6g '...ensuring Aboriginal people are involved in processes for managing the recognition, protection and conservation of Aboriginal cultural heritage'? Under the Act, Aboriginal Parties are responsible for assessing the significance of areas. How are land users undertaking self-assessment meeting the criteria to determine cultural significance? That is, are they involving the Aboriginal Party for the area in cultural heritage assessment processes?
- Solution 7: It is very important that Aboriginal Parties maintain responsibility for determining the cultural significance of an area and that this is included in cultural heritage assessments. Sec23, 2c considers 'the extent to which the person consulted with Aboriginal parties about the carrying out of the activity, and the result of the consultation'. DATSIP could highlight this provision to land users at a suitable conference or forum. Land users need to demonstrate to DATSIP what active steps they undertook to consult with the Aboriginal Party for the area.
- Issue 8: Many land users believe that the DATSIP cultural heritage database is a

complete picture of what exists on the ground i.e. like a heritage register. Land users are not aware of inconsistencies within the database.

- Solution 8: The database should be ground-truthed by Aboriginal Parties as part of their Part 6 Study with LGAs. In any case, a mere search of the database should not meet part of a land users' DOC.
- Issue 9: Under the current five categories of the DOCG, most lot on plans would have a mix of activity categories on their lot. Land users may self-assess that the whole area has been subject to significant ground disturbance and proceed with their activity, even though areas of the land have not been subject to significant ground disturbance and there is no evidence that the rest of the area has had significant ground disturbance.
- Solution 9: DATSIP should require evidence to support claims that there has been significant ground disturbance of an area. DATSIP or another regulatory body should be reasonably satisfied that the standard of proof presented by the land user shows that **all** the land in question has been subject to significant ground disturbance and the proposed activity is **consistent** with prior disturbance.
- Issue 10: Archaeologists are undertaking 'Due Diligence' cultural heritage reporting without involving the Aboriginal Party.
- Solution 10: The Cultural Heritage Assessment process must include engagement with the recognised Aboriginal Party for the area (as per sections 34-36 of the Act) where the project is proposed. The process must be transparent, such that the Aboriginal Party has input into the management of their own cultural heritage. 'Due Diligence' reporting that effectively cuts out the Aboriginal Party is no longer acceptable (i.e. the current status quo). If a Due Diligence report is undertaken, the Aboriginal Party must be consulted and given a chance to review the report and provide comment on the assessment's methodology, execution, conclusions and recommendations. DATSIP should act as the facilitator of this process to ensure that the opinion of the Aboriginal Party is given a genuine voice.

- 2) *Is there a need for dispute resolution assistance for parties negotiating voluntary agreements- if yes, who should provide these services and what parameters should be put around the process?* Yes. Jabree considers that dispute resolution assistance is needed. It seems that mediation could fill a large gap in the current system where parties unable to reach a negotiated agreement, must then seek recourse from the Land Court. There were three mediation options proposed in DATSIPs DOCG Review Issues paper, although it was unclear how they would operate. In any case the mediator would need to ensure they conduct the process in an impartial manner. Financial assistance should be available to Aboriginal Parties to access

this service and be provided by DATSIP (or another government department) in order to address any potential equity issues or imbalances of power.

- 3) *Is there a need to reconsider the threshold for formal cultural heritage assessments- if yes, what assessment and management processes should be considered?* Yes. The current CHMP system is not working, with only 358 CHMPs registered in Queensland since the Act commenced. The threshold for a mandatory CHMP currently encompasses those projects that sit under mining, petroleum and gas and developments, which are declared by the state as a coordinated project. The declaration of a coordinated project (which used to be called a controlled action), is used very rarely. The threshold must be increased to cover all high impact projects such as large-scale residential developments. In South East Queensland, most of the development is residential housing. The state government, under the SEQ Regional Plan, has declared that an extra 1.9 million people and another 800,000 new homes will be in SEQ by the year 2041. In the current situation, developments to establish these 800,000 new homes will not trigger a CHMP, thus the developments will occur, with little, to no, cultural heritage assessments. If this type of development was to occur in Victoria, it would trigger a CHMP. The Victorian Government's list of high impact activities includes subdivision of land, quarrying, construction and residential development. The Queensland legislation should be brought into line with other jurisdictions and the threshold for CHMPs widened, so that Aboriginal Cultural Heritage assessments are undertaken when needed.

### ***Compliance Mechanisms:***

- 1) *Is there a need to bolster the compliance mechanisms designed to protect cultural heritage- if yes, what needs to be improved and what additional measures should be put in place?* Yes. There is a strong need to bolster compliance mechanisms and additional measures to be put in place.
- Issue 1: There has only been 11 prosecutions in Queensland under the Act. It is often difficult for an Aboriginal group to mount a legal case particularly if they do not have the financial means to support the case. Even if they did win, the Aboriginal group does not receive the financial compensation, as a fine under the Act's penalty provisions goes to the government.
  - Solution 1: Financial and legal support needs to be available to Aboriginal Parties. Compensation should be paid to the Aboriginal Party for breaches of the Act and destruction of their cultural heritage.
  - Issue 2: The Act has not been subject to significant scrutiny in the courts and there is a lack of enforcement on the ground.

- Solution 2: The missing link is education of land users and enforcement on the ground. DATSIP needs to hold regular education campaigns that include a forum where case studies are discussed and both Aboriginal Parties and land users are included.
- Issue 3: It is too easy for land users to state that their activity sits under Category 1-4 of the DOCG and thus does not require consultation with the Aboriginal Party. Case studies of Tynday and Villawood (Appendix 1) demonstrate where Jabree needed the support of enforcement.
- Solution 3: The onus is usually left to the Aboriginal Party to self-fund the process to ensure compliance with the Act. Enforcement officers need to be actively assessing development applications through a service like the State Assessment Referral Agency (SARA). They should also be operating on-the-ground assessing developments that have commenced, to determine what DOCG category they sit under and if they have met the DOC. If not, the land user should be drawn into a Qld Government dispute resolution process with the Aboriginal Party (which may ultimately include compensation and / or fines).
- Issue 4: Sec23(2e) of the Act demonstrates how a land user can meet part of their DOC by undertaking a search of the DATSIP database, which is often highly inaccurate. There is broad anecdotal evidence available to Jabree that some land users consider that the DATSIP database contains an exhaustive list of Aboriginal cultural heritage sites across Queensland.
- Solution 5: The DATSIP database needs ground-truthing as explained in detail under Solution 6 of Land User Obligations of this submission. At the very least, the Act needs integrating into the *Planning Act 2016* and rolled into the SARA system. There needs to be a trigger for an Aboriginal Cultural Heritage assessment as part of an Operational Works development application.
- Issue 5: Sec23(3f) of the Act states that ‘the extent to which the person has complied with the cultural heritage guidelines’ will be used by a court to decide whether a person has met their DOC. The five categories under the DOCG used to determine this are confusing and Clause 1.1.5 states “*There is no offence in not complying with the cultural heritage duty of care guidelines...*”. This is seen as a green light to land users and undermines the Acts purpose and intent.
- Solution 6: The five categories under the DOCG should be clarified, amended and reduced to three categories. Clause 1.15 of the DOCG, being: “*There is no offence in not complying with the cultural heritage duty of care guidelines...*” needs to be removed.

## ***Recording Cultural Heritage:***

*Is there a need to make improvements to the processes relating to the cultural heritage register and database- if yes, what needs to be improved and what changes should be considered?* Yes. The number of searches of the DATSIP database do not reflect the number of development applications in Queensland in any given year. There is a need to educate land users about the database and how to appropriately undertake a search request. Furthermore, the DATSIP database needs ground-truthing due to inaccuracies and inconsistencies. Issues with changes in datum and the accuracy of some GPS devices has resulted in anomalies with the recorded location of many registered sites on the database. There is a need to review site points recorded on the database.

Many land users believe that the DATSIP database is a definitive answer to what Aboriginal Cultural Heritage sites exist on the ground. However, the database does not include sites that have yet to be identified as more land in Queensland is opened to development. Jabree is not advocating for complete removal of the database, just removal from Sec23(2e) as a consideration in meeting the DOC.

The database also needs to showcase a best practice model and take into consideration the cultural landscape when land users undertake a search of the database. Currently, adjoining sites and those in the vicinity of the lot and plan that the search request is under, are not included in the search request report, as it includes only those sites that have been mapped on that particular lot and plan. Search requests need to include a wider area to encompass the overall cultural landscape.

There is also a huge need for sites of significance that are listed on the database and register to be monitored, in line with other heritage registers. Conservation Management Plans also need to be enacted with Aboriginal Parties.

### ***Other aspects***

#### ***Jabree Limited would like to raise the following points regarding the Cultural Heritage Acts Review:***

- The Queensland Government should be doing more to support collaborative relationships between Aboriginal Parties, professions involved in the industry and land users. The interpretation of the Act and DOCG by different professions (e.g. lawyers, archaeologists etc.) and people within those professions, is often very different. An appropriately funded DATSIP Cultural Heritage Unit could educate land users and

cultural heritage professionals about the operation of the Act and DOCG using best practice examples. Regular forums should be in place that bring Aboriginal Parties and land users together to flush out any issues with how the legislation is working on the ground.

- The Queensland government needs to actively promote a better relationship with LGAs and to advocate for a better relationship between LGAs and Aboriginal Parties.
- Significant cultural heritage finds have been made within Jabree’s area of interest in many different locations such as: The Gold Coast Aquatic Centre, Southport; Tamborine Village Roundabout, Tamborine; Yarrabilba Housing Development, Yarrabilba; Riverstone Crossing Development, Upper Coomera. None of these locations could have been considered 100% “previously undisturbed”. The DOCG categories require clarifying to appropriately recognise, protect and conserve Aboriginal Cultural Heritage sites before development erases them forever.
- There is an ongoing problem with land users and their consultants conducting self-assessments sometimes resulting in significant harm to Aboriginal cultural heritage sites. Government enforcement around this issue needs to be urgently addressed.
- There is a lack of awareness in the development and town planning community about the provisions of the *Aboriginal Cultural Heritage Act 2003 (Qld)* and the DOCG. This can be remedied by a statewide education campaign including a DATSIP presence at development and planning institute annual conferences.
- A best practice model needs to be developed and showcased around what is working well.
- The review scope is not clear, especially around the point of assessing that the legislation is ‘...achieving outcomes for Aboriginal and Torres Strait Islander peoples and other stakeholders in Queensland’. How is this being undertaken? There is no clarity to the review methodology on how the review team will be weighing submissions and making decisions on what changes are needed with the legislation. Moving forward, a clear methodology needs to be articulated.

I look forward to ongoing updates from you as part of the Cultural Heritage Acts Review process.

Yours sincerely



Wesley Aird  
Director

Appendix 1 Case Studies

Development	Location	Description	CH Identified	Developer Response	Jabree Action / Details	Remedy within the DOC Guidelines
Developer A	Foxwell Rd Coomera	Residential property development – significant cut / fill in an area where aerial photos couldn't rule out prior significant ground disturbance	Two scarred trees	Design already completed; trees could be preserved by installing a retaining wall that would ultimately cover the scars to some degree.  This developer was not even aware of the ACHA or DOCG; he assumed his DA covered all his compliance obligations.	There was no guarantee that the trees' root systems or trunks would survive the substantial earthworks to be conducted around them. Jabree entered into agreements with the developer through developer's lawyer to mitigate and start the process of developing case studies for legislative reform submissions	Proposed inclusion of proof of prior disturbance as per section 4.3; the results of this assessment would have led to consideration of sections 4.1, 4.2 and 4.4
Tynday Pty Ltd (Wongawallan Views Estate)	Tamborine-Oxenford Rd Wongawallan	Rural-residential property development	No CH identified but property within 100m of Wongawallan Creek on a gradual rise with flat areas; located within 500 metres of Wongawallan chert quarry	Met on site but not a positive outcome; developer engaged Converge to undertake a CH assessment that categorised the site as Category 4 with no residual heritage – statement that site cleared with heavy machinery 60+ yrs. ago and no disturbance to take place near creek.	Right to Information application lodged to view the Converge assessment and potentially have it peer reviewed. The assessment was withheld from application.	Proposed inclusion of proof of prior disturbance as per section 4.3; Proposed inclusion of Areas of Cultural Heritage Sensitivity (section 4.1) would trigger consultation with Aboriginal Party / Cultural Heritage Body (sections 4.2 and 4.4) based on proximity to Wongawallan Creek

Development	Location	Description	CH Identified	Developer Response	Jabree Action / Details	Remedy within the DOC Guidelines
Villawood (Helensvale Property Development)	Country Club Drive Helensvale	Residential property development adjacent to Coombabah Creek	Stone artefacts identified by Everick Consultants	Developer refused to engage with Jabree; developer engaged Everick consultants; report produced by Everick sent to Jabree to show “consultation”	Jabree engaged Lynley Wallis to peer review the Everick report and found it to be non-compliant with the ACHA and DOCG primarily because no engagement undertaken with Jabree; legal submission to DATSIP re: non-compliance	Proposed inclusion of Areas of Cultural Heritage Sensitivity (section 4.1) would trigger consultation with Aboriginal Party / Cultural Heritage Body (sections 4.2 and 4.4) based on proximity to Coombabah Creek
Yarrabilba (Lend Lease)	Yarrabilba	Master planned residential community south of Logan Village	1000s stone artefacts, rock shelters (at least 11)	Enter into CHMA for entire development area despite <u>parts of site</u> being subject to prior significant ground disturbance previously by pine plantation, rural development and WWII army camp	Highly significant finds on the surface and sub-surface; highlights fact that a development area can be Category 2 in some places and Category 5 in others i.e. a development site cannot necessarily be considered disturbed in its entirety	Proposed amendment to definition of “significant ground disturbance” (section 4.1); reinforce the idea that project sites may have a range of disturbed / non-disturbed and sensitive / non-sensitive sub-parts / areas