

EVERICK HERITAGE

30 March 2022

Cultural Heritage Acts Review
Department of Seniors, Disability Services and Aboriginal and
Torres Strait Islander Partnerships
PO Box 15397
City East, QLD 4002

To whom it may concern,

RE: CULTURAL HERITAGE ACTS REVIEW OPTIONS PAPER RESPONSE SUBMISSION

Everick Heritage is a cultural heritage consultancy based in Brisbane, actively working from offices across eastern Australia and under six heritage management jurisdictions. We are Queensland's largest employer of heritage consultants and work on approximately half of the state's designated major infrastructure projects. Additionally, we are the preferred archaeological technical advisors for more than ten Aboriginal Parties. As such, we believe we are well placed to observe the effectiveness of the *Aboriginal Cultural Heritage Act 2003 (Qld)*.

Our response to the Cultural Heritage Acts Review Options Paper is enclosed. This submission is a continuation of Everick's engagement in the Cultural Heritage Acts review process undertaken by the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships, having previously submitted our feedback in 2019 in response to the Cultural Heritage Acts consultation paper. Our submission addresses the proposed options falling under the categories 'providing opportunities to improve cultural heritage protection', 'reframing the definitions of 'Aboriginal party' and 'Torres Strait Islander party', and 'promoting leadership by First Nations peoples in cultural heritage management and decision-making'.

The views expressed in this submission are intended to support Queensland's First Nations people and should be considered secondary to their views and opinions on the matters at hand.

We thank the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships for the opportunity to provide feedback on the proposed legislative amendments.

Yours sincerely,



Tim Robins
Director
Everick Heritage

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Cultural Heritage Acts Review Submission

Response to the 2021 Options Paper released by the Department
of Seniors, Disability Services and Aboriginal and Torres Strait
Islander Partnerships



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Everick Heritage 2022. *Response to 2022 Options Paper*. Everick Heritage Pty Ltd unpublished report prepared for DSDSATSIP.

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Preamble

This submission outlines Everick Heritage's view and advice in response to the 2021 Options Paper.

Everick Heritage ('Everick') is a cultural heritage consultancy based in Brisbane, with offices in Townsville, Cairns, Coffs Harbour, Sydney and Melbourne. We are Queensland's largest employer of heritage consultants and work on approximately half of the state's designated major infrastructure projects. We are also the preferred archaeological technical advisors for more than ten Aboriginal Parties.

As a heritage consultancy actively working under six heritage management jurisdictions, we believe we are well placed to observe the effectiveness of the Aboriginal Cultural Heritage Act 2003 (Qld) (the 'AHCA') in relation to other regimes. Our experience is that the Queensland system of self-assessment and direct negotiations between land users and Aboriginal Parties leads to inconsistent and generally poorer heritage outcomes. This is particularly so for mid-sized and smaller development impacts (including agricultural industries), which continue largely unregulated. As a result, the unregulated destruction of Indigenous heritage sites is currently occurring in Queensland on a vast scale. Legislative reform must be considered urgent in Queensland.

Broadly, we support the proposals within the Options Paper to reform the legislation, provided such reforms incorporate sufficient flexibility to accommodate the complexities of the heritage landscape. We endorse a practical, workable process that protects heritage in a meaningful way.

The views expressed in this submission are intended to support Queensland's First Nations people and should be considered secondary to their views and opinions on the matters at hand.

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Providing opportunities to improve cultural heritage protection

1. Proposal: Duty of Care Guidelines

Replace the current Duty of Care Guidelines with a new framework that requires greater engagement, consultation and agreement making with the Aboriginal party or Torres Strait Islander party to protect cultural heritage.

1.1. Response

1. Do you support this proposal and option? Why or why not?
2. Are there any improvements that could be made?

Everick supports the proposal to remove the Duty of Care Guidelines. The notion that any previous ground disturbance destroys all Aboriginal culture, physically or intangibly, should be rejected. Generally, the concept of 'disturbance' is challenging to capture accurately and should instead be layered on top of the potential values of an area. Vegetation clearing does not result in the universal destruction of heritage sites. This has been demonstrated in our research time and again, as areas that have been mechanically cleared of vegetation still contain subsurface archaeological profiles. We believe that the categories of past ground-disturbing activities should instead be reframed to focus on the future proposed activity and its impact on Aboriginal cultural heritage.

Almost all the most significant heritage sites Everick has identified over the past 20 years have been within lands that have been subject to 'significant ground disturbance'. These sites have been within lands that could be described as Category 4 under the current Duty of Care system and therefore outside the current bounds of cultural investigation.

With the above in mind, we strongly object to the creation of a broad category of prescribed activity that excludes land that has been previously disturbed. If prior disturbance is used to exclude engagement, it should be limited to concepts such as lands that have seen:

- (a) bulk soil removal;
- (b) ploughing to the depth of the cultural horizon; and

- (c) consistent previous activities (i.e. grading of a previously graded track, clearing of any area already subject to clearing etc.).

3. Should consultation occur for all activities in high-risk areas, so there is no excluded activity?

Yes. Everick believes that consultation should occur for all activities in properly defined high-risk areas, as the notion of an 'excluded activity' should be rejected (see below).

This necessarily raises the issue of efficiency and capacity of Aboriginal Parties to respond to an increased level of engagement. We have provided more detailed commentary on supporting Aboriginal Parties below.

4. What are your thoughts on proactively mapping cultural heritage areas?

Everick supports proactively mapping cultural heritage areas. The current DSDSATSIP register does not include all known cultural heritage values, particularly intangible heritage, and many improvements can be made. In a land use / development context, GIS mapping has become the universal language that planners / engineers and builders communicate amongst themselves. Planners layer constraints onto GIS plans to determine appropriate impact mitigation strategies. Engineers then design to these constraints. By generating heritage value mapping, heritage values can be more easily accommodated in planning processes at an early stage.

However, Everick does not believe that mapping can precisely record the complexity and significance of cultural values, both tangible and intangible, within Queensland. Our company has some of the best cultural mapping resources in Australia, and we are well-placed to be aware of its current limitations. The state is too large and the values too complex to be recorded accurately as a desktop exercise. As a result, while cultural mapping has the potential to be an essential tool, it must retain the capacity to be interrogated by vested parties before a particular activity. The system must ensure a level of flexibility that allows both proponents and Aboriginal Parties to reach alternate conclusions as to the cultural heritage significance of an area rather than what may be initially suggested by state-wide cultural mapping.

5. What types of activities and areas should be included in the definitions for:

a) prescribed activity?

Everick appreciates the need for efficiency in any planning system, necessitating definitions of prescribed and excluded activities. We support the concept that developments of a particular size should be classified

as a prescribed activity. The example used in the Victorian system of a three Lot subdivision or larger appears to be effective. This type of development results in an activity that can substantially affect Indigenous heritage values. Construction of new roads, dams, quarries, stormwater / sewerage pipelines and optic fibre trenching are examples of more minor scale activities that can cause significant harm to Indigenous cultural heritage. It should be noted that the importation of fill onto an area can, in some cases, cause irreparable damage to subsurface heritage and should be considered carefully when seeking to define activities with the potential to harm heritage.

If a 'prescribed activity' is included, the legislation must be accompanied by detailed practice directions on interpretation. This will limit instances of misuse and properly considered, will assist in avoiding inefficacy in the planning system.

a) high-risk area?

Everick supports the mapping of high-risk areas with certain caveats. High-risk areas should not be restricted to *known* heritage values but *likely* heritage values.

Known cultural significance is problematic because it reflects an academic research bias or activities-based approach to Aboriginal heritage. This bias does not truly encapsulate the extent of possible heritage throughout Queensland.

There is a possibility that each group may want their own set of procedures and parameters for the mapping of their Country. In this case, consultation with the Aboriginal groups and their technical advisors would be required to set the parameters for this modelling. Following this, there should be a period of submissions where each group that speaks for an area can provide specific knowledge about regions based on their research and expertise.

b) excluded activity?

Everick supports the notion that to maintain an efficient planning system and avoid waste of time and resources; there must be activities that are 'excluded' from further cultural heritage assessment. However, in establishing such activities, the person seeking to rely on this definition should be required to reasonably demonstrate that their activity is unlikely to be harming heritage.

c) significant Aboriginal or Torres Strait Islander area or object?

Everick supports the current definitions of 'significance' of an Aboriginal or Torres Strait Islander area or object. The complexity of interpreting heritage values means a broad definition such as this is essential.

5. Should consultation protocols be developed for each Aboriginal and Torres Strait Islander party?

Yes, this is an excellent idea. Such guidelines should be published and available.

Aboriginal societies are complex and societal relationships are often fluid. It should be the right of Aboriginal Parties to determine their decision-making processes, regarding their cultural obligations and the particular circumstances of their society. For example, the legacy of colonisation and the mission system has resulted in many Aboriginal Parties' families being scattered throughout the state. This was not their choice, and any engagement with Aboriginal Parties should be mindful of and sensitive to this history. For example, it may be necessary for meetings to be convened in a particular place to accommodate some family groups or Elders. Travel may be required to be funded. Carers may be needed to be funded. The current system requires Aboriginal Parties to continually negotiate these issues with new proponents, straining initial engagement, frustrating Aboriginal Parties and in some instances exacerbating their trauma.

Engagement protocols would enable Aboriginal Parties to educate land users on their country before any engagement, providing a better foundation for initial discussions.

6. How should Aboriginal and Torres Strait Islander parties be supported to manage increased consultation about cultural heritage protection?

Everick suggests there should be three categories of support available to Aboriginal Parties.

Firstly, there should be regulatory support to establish general rules / guidelines of engagement for land users. This would free Aboriginal Parties from continually explaining proponents' responsibilities. Land users should be educated about their position and be aware of the dispute resolution processes. This could adequately incorporate guidance on what constitutes free prior and informed consent, including necessary timeframes and decision-making processes.

Secondly, proponents should pay for service and consultation with Aboriginal Parties. Everick accepts that the user-pays system is appropriate. Aboriginal Parties must be given support and should not be expected to provide free prior informed consent. There should be clear guidance on what type of rates are reasonable within the practice directions.

The role of Native Title Applicant and/or Cultural Heritage Traditional Owner can be an exceptionally demanding one that must be undertaken with little guidance and no resourcing. Additionally, Traditional Owners are forced to give up other forms of employment and remuneration to fulfil their engagement obligations under the Acts and perform a regulatory function they are not supported to sufficiently

execute. It is submitted that an essential pillar of a revised heritage regulatory system includes resources for Aboriginal Parties to fulfil their obligations properly.

Finally, we believe the State should be responsible for supporting Aboriginal Parties to develop systems and processes that can accommodate increased engagement by local land users. This should include support of established improved governance and decision-making structures, business development training and guidance on certain models and processes that can support efficient heritage engagement.

7. Should the development of a new assessment framework be led by a First Nations advisory group (with other experts as required)?

Everick strongly supports this proposal. Heritage values are too complex and inherently subjective to be governed by a single set of rules without human oversight. As something we have been advocating for throughout the legislative review process, we believe establishing a committee as proposed in the Options Paper will be integral to providing the necessary practice directions for this element. Reasonable and proportional guidance is needed and would give depth to the legislation.

We propose that one responsibility of the advisory group would be to draft and monitor the implementation of a series of practice directions that would cover issues such as:

- Intangible heritage interpretation;
- Methodological direction;
- Efficient negotiation processes; and
- Reasonable rates of payment.

2. Proposal: Cultural Heritage Mapping and Planning

Integrate cultural heritage protection and mapping into land planning to enable identification of cultural heritage at an early stage and consideration of its protection.

2.1. Response

- 1. Do you support this proposal and option? Why or why not?**
- 2. Are there any improvements that could be made?**

In general, Everick supports this proposal and believes that cultural heritage protection should not sit outside the rest of the planning processes. However, as discussed above, any such mapping must be adequately resourced and retain the capacity to be changed and challenged.

Planners must be responsible for consulting and utilising this register and in certain circumstances, may have to use consultants or other external experts to provide advice.

Regardless of the mapping, Everick believes that the Victorian consultation model is preferable, whereby the proponents carry the onus to prove that their development does not impact heritage. By reversing this burden, the proponent pays for compliance with regulations rather than placing the cost on Aboriginal Parties.

Additionally, there should be an obligation by every consent authority to ensure that the Acts have been complied with. This could be through referral to an independent planning panel or committee to review the work to ensure all requirements have been complied with. This committee should operate through a fee for service.

3. Proposal: Recognising Intangible Heritage

Amend the Cultural Heritage Acts to expressly recognise intangible elements of cultural heritage.

3.1. Response

1. **Do you support this proposal and option? Why or why not?**
2. **Are there any improvements that could be made to the option or definitions?**

Everick strongly supports this proposal. Our experience with various Aboriginal Parties has shown that many groups have difficulty articulating their values to outsiders and lack the confidence to fight for them. They often do not have the resources to challenge large land users on their Country and instead resort to negotiating what they think they can get. We believe better recognition of intangible values in the regulations and legislation would empower Aboriginal Parties to mount a greater defence of these values where required.

3. **Is there an alternative framework or option that might better recognise intangible cultural heritage instead of amending the definitions in the Cultural Heritage Acts?**

Yes, we are strong advocates for:

- (a) Establishment of practice directions that provide practical guides and thresholds for the assessment and management of intangible heritage values.
- (b) Undertaking advanced planning processes such as cultural mapping and cultural landscape assessments.
- (c) Ensuring there is an efficient and well considered dispute resolution process such as through reference to an Indigenous Advisory Panel, which can allow independent and educated evaluation of values and support to Aboriginal Parties.

4. Proposal: Dispute Resolution Mechanism

Provide a mechanism to resolve and deal with issues arising under the Cultural Heritage Acts

4.1. Response

1. **Do you support this proposal? Why or why not?**
2. **Do you support these options? Why or why not?**
3. **Are there any improvements that could be made?**

We strongly support establishing a First Nations advisory panel as an alternative dispute resolution body to the Land Court. We do not believe Land Court proceedings provide an equitable dispute resolution process. It is grossly unethical to expect First Nations community members to have to mount legal proceedings against large corporations on their behalf and on behalf of their communities. To make this the primary form of independent dispute resolution is unacceptable. We cannot see how such a system meets the standards of the *Human Rights Act 2019* (Qld).

In our experience, mediation through the Land Court has not been a successful process for either land users or Aboriginal Parties. It has led to considerable cost but with little practical outcome, as the Land Court is ill-equipped to deal with sensitive cultural matters.

A better solution would be to have a First Nations advisory group. The First Nations advisory group should be comprised of different experts of cultural, legal, planning, and environmental backgrounds. At its core, it should include mostly Indigenous persons.

5. Proposal: Mandatory Compliance Reporting

Require mandatory reporting of compliance to capture data and support auditing of the system.

5.1. Response

1. **Do you support this proposal and option? Why or why not?**
2. **Are there any improvements that could be made?**

Everick strongly supports this proposal and the capacity to hold land users accountable. Without mandatory reporting requirements, as Rowland et al. state, the effectiveness of the Acts are challenging to assess.¹ Mandatory reporting has proven successful in other jurisdictions and should not be difficult to implement.

In many circumstances, for heritage consultants to publish reports on cultural heritage findings would breach contractual confidentiality duties to clients. Without express requirements to register or report a site, persons accessing the public database will fail to appreciate the full breadth of known cultural heritage sites within their search area. Mandatory compliance reporting, combined with the suggested cultural mapping systems discussed above, would significantly improve current insurances regarding the effective management and protection of cultural heritage. Currently, the only entities responsible for overseeing the self-assessment process are Aboriginal Parties, who are not resourced to undertake such a task. Additionally, Aboriginal Parties are poorly positioned to approach land users, often multi-million-dollar companies and corporations with substantial resources, to hold them accountable for failing to exercise their cultural heritage duty of care. Implementing mandatory compliance reporting would reduce the burden on Aboriginal Parties by imposing industry standards and consistency of decision-making processes which are more easily assessable by regulatory and approval bodies.

We do not believe it should be mandatory for the locations or reported cultural heritage to be made publicly available. This should still be done at the discretion of the Aboriginal Parties, having regard to any cultural obligations surrounding the sites.

¹ Michael J Rowland, 'Compliance with Indigenous Cultural Heritage Legislation in Queensland: Perceptions, Realities and Prospects' (2014) 31(5) *Environmental and planning law journal* 329, 343–344 ('Compliance with Indigenous Cultural Heritage Legislation in Queensland').

6. Proposal: Greater Monitoring and Enforcement

Provide for greater capacity to monitor and enforce compliance.

6.1. Response

1. Do you support this proposal? Why or why not?
2. Do you support these options? Why or why not?
3. Are there any improvements that could be made?

Everick supports this proposal.

One of the most significant impacts to First Nations heritage is undoubtedly coming through development activities. Project planners are trained to evaluate risks, the cost of which is then calculated and balanced against other risks / costs. If there is no active monitoring and enforcement of heritage obligations, then they no longer become a risk. There is currently too much temptation to save the cost of heritage management and spend the money to manage other risks or keep as profit.

It is our experience that a common view throughout the development industry is that competitors are not complying with the legislation, so why should we? With more active enforcement this would no longer be the case. Enforcement should include powers to review, audit / inspect and fine / prosecute. Heritage engagement can be expensive, so fines cannot be trivial, or they will not prove an adequate incentive.

Reframing the definitions of 'Aboriginal party' and 'Torres Strait Islander party.'

7. Proposal: Reframing Definitions

Reframe the definitions of 'Aboriginal party' and 'Torres Strait Islander party' so that people who have a connection to an area under Aboriginal tradition or Ailan Kastom have an opportunity to be involved in cultural heritage management and protection.

7.1. Response

1. Do you support Option 1? Why or why not?

2. Do you support Option 2? Why or why not?

3. If you do not support either option, please explain why?

We support any proposal that allows those with obligations to speak for Country to have a voice. We support that which is inclusive as much as is traditionally appropriate and provides as much as possible certainty for land users provided it stays within the framework of Traditional First Nations decision making processes.

We defer to First Nations persons for their response on this matter.

Promoting leadership by First Nations peoples in cultural heritage management and decision-making

8. Proposal: Establishing a First Nations Managerial Body

Establish a First Nations-led entity with responsibilities for managing and protecting cultural heritage in Queensland. The entity could work with existing and future local Aboriginal and Torres Strait Islander groups who manage cultural heritage matters within their respective areas.

8.1. Response

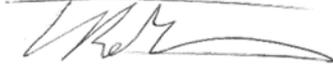
Everick supports all proposals under this section. We defer to First Nations persons for their response on this matter.

9. Proposal: Establishing a First Nations Decision-Making Body

The First Nations independent decision-making entity, in partnership with Aboriginal and Torres Strait Islander peoples, explores the most culturally appropriate approaches for recognising historical connection to an area for the purposes of cultural heritage management.

9.1. Response

We defer to First Nations persons for their response on this matter.



Tim Robins
Director
Everick Heritage Pty Ltd

