
Compliance with Indigenous cultural heritage legislation in Queensland: Perceptions, realities and prospects

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Since 1959, various pieces of legislation have been enacted in Queensland which include provisions for the protection of Indigenous cultural heritage. To date there has been very limited assessment of compliance with or the efficacy of these laws. The number of prosecutions under both Commonwealth and State legislative regimes is difficult to measure, but deemed to be low. This article explores a broad range of explanations both for the lack of prosecutions and also for the lack of research on compliance in general. It provides examples of prosecutions and attempted prosecutions under the various legislative regimes in Queensland, demonstrating that the reasons for compliance/non-compliance are complex. It is proposed that cultural heritage legislation in Queensland needs to be developed and controlled by a responsible government authority that can set standards and monitor all aspects of cultural heritage management. Cultural heritage management should also be incorporated at every level of environmental planning. Reporting of all cultural heritage activities should be mandatory. The current largely self-assessable and minimally regulated legislation fails to meet best practice cultural heritage management standards and its effectiveness is also difficult to measure.

INTRODUCTION

The focus of this article is on compliance with cultural heritage legislation. The themes discussed were triggered by a brief discussion on OzArch, the major Australian archaeological listserv, in March 2010 concerning the number of prosecutions that have occurred under Australia's cultural heritage legislative regimes. The initiator of the discussion noted: "I am surprised that no-one has done an analysis of prosecutions under the various State Acts – attempts, successes, failures",¹ though was apparently unaware of an unpublished PhD thesis² that reviewed in some detail prosecutions in the States of New South Wales and Victoria. The OzArch discussion did not develop any detailed insights into the issues raised and ended with a general perception that the number of prosecutions in Australia had been low and this was attributed to a view that administrators probably found the path to prosecution too difficult. The authors thought it likely that there was a broader range of explanations both for the lack of prosecutions and also for the lack of research on compliance in general and

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¹ Hope J, New South Wales Aboriginal Heritage Amendments Introduced (message posted to the OzArch Listserv, 2 March 2012).

² North MA, "Protecting the Past for the Public Good: Archaeology and Australian Heritage Law" (PhD thesis, University of Sydney, 2006).

investigated these issues for Queensland. Examples of prosecutions and attempted prosecutions under the various legislative regimes in Queensland are provided. It is demonstrated that the reasons for compliance/non-compliance are complex and while the examples discussed here are Queensland-specific, they are likely to have more general significance. Other indicators of compliance are discussed but there is minimal data on these indicators for Queensland, where the current legislative regime requires limited reporting to the administering government department and enables a largely self-assessable and minimally regulated approach to cultural heritage recording and management.

AUSTRALIAN CULTURAL HERITAGE LEGISLATION

Australia is a federation of six States, two internal Territories and seven external Territories. The Australian Constitution gives State governments primary responsibility for land management. Nevertheless, the Commonwealth government has considerable powers it can use to influence the States through its tax and funding arrangements. The Commonwealth, States and Territories have all developed their own laws and policies with respect to cultural heritage. The development of cultural heritage legislation in Australia has therefore been complex and in most cases is under review.³ Specific reviews are available for South Australia,⁴ New South Wales,⁵ Tasmania⁶ and Queensland.⁷ A number of recent Queensland case studies are also relevant.⁸ Further complexity has been added in recent years by the introduction of native title legislation,⁹ which also includes provisions for dealing with cultural heritage. A comprehensive review of Australian Indigenous cultural heritage legislation was undertaken by the Hon Dr Elizabeth Evatt in 1996. She found numerous failings with State, Territory and Commonwealth legislative regimes and her report recommended the adoption of a national policy as the basis for laws relating to Indigenous cultural heritage.¹⁰ Unfortunately, few of her recommendations have been implemented.

The Commonwealth government administers the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) which enables it to respond to requests to protect traditionally important areas and objects if it appears that State or Territory laws are not providing effective protection. The

³ Byrne D, Brayshaw H and Ireland T, *Social Significance: A Discussion Paper* (New South Wales National Parks and Wildlife Service Research Unit, Cultural Heritage Division, Sydney, 2001); Colley S, *Uncovering Australia: Archaeology, Indigenous People and the Public* (Allen and Unwin, Sydney, 2002); Pearson M and Sullivan S, *Looking After Heritage Places: The Basics of Heritage Planning for Managers, Landowners and Administrators* (Melbourne University Press, Melbourne, 1995); Smith L, "A History of Aboriginal Heritage Legislation in South-eastern Australia" (2000) *Australian Archaeology* 50, pp 109-118; Smith L, "Towards a Theoretical Framework for Archaeological Heritage Management", in Fairclough G, Harrison R, Jameson J and Schofield J (eds), *The Heritage Reader* (Routledge, New York, 2008), pp 55-75.

⁴ Wiltshire KD and Wallis LA, "A History of Aboriginal Heritage Protection Legislation in South Australia" (2008) 25 EPLJ 98.

⁵ Byrne, Brayshaw and Ireland, n 3; Packham A, "Between a Rock and a Hard Place: Legislative Shortcomings Hindering Aboriginal Cultural Heritage Protection" (2014) 31 EPLJ 75.

⁶ McGowan A, "Background to Changing Cultural Heritage Legislation in Tasmania" (1990) 31 *Australian Archaeology* 61.

⁷ Ellis B, "Rethinking the Paradigm: Cultural Heritage Management in Queensland" (*Ngulaig* 10, Aboriginal and Torres Strait Islander Studies Unit, University of Queensland, St Lucia, 1994); Ross A, "More than Archaeology: New Directions in Cultural Heritage Management" (1996) 10 *Queensland Archaeological Research* 17; Trigger D, "Aborigines, Anthropologists and the Aborigines Relics Issue in Queensland" in Lauer PK (ed), *Occasional Papers in Anthropology* (Anthropology Museum, University of Queensland, St Lucia, 1980) p 148.

⁸ Cole N and Buhrich A "Endangered Rock Art: Forty Years of Cultural Heritage Management in the Quinkan Region, Cape York Peninsula" (2012) 75 *Australian Archaeology* 66; De Rijke K, "The Symbolic Politics of Belonging and Community in Peri-urban Environmental Disputes: The Traveston Crossing Dam in Queensland, Australia" (2012) 82 *Oceania* 278; Godwin L, "The Bureaucracy, the Law and Blacks Palace: A History of Management of One Site in the Central Queensland Highlands" (*Ngulaig* 18, Aboriginal and Torres Strait Islander Studies Unit, University of Queensland, St Lucia, 2001).

⁹ Harrison R, McDonald J and Veth P, *Native Title and Archaeology: Australian Aboriginal Studies No 1* (Australian Institute of Aboriginal and Torres Strait Islander Studies Press, Canberra, 2005); Sculthorpe G, "Recognising Difference: Contested Issues in Native Title and Cultural Heritage" (2005) 15 *Anthropological Forum* 171.

¹⁰ Evatt E, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Office of the Minister for Aboriginal and Torres Strait Islander Affairs, Canberra, 1996).

effectiveness of this legislation has long been the subject of concern.¹¹ The Commonwealth also administers the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) that established a National Heritage List, which includes natural, Indigenous and historic places that are of outstanding heritage value to the nation. The Act also established the Commonwealth Heritage List, which provides for protection of places on Commonwealth lands and waters under Australian Government control.¹² These Acts are currently administered by the Department of the Environment. The Commonwealth government also administers the *Protection of Movable Cultural Heritage Act 1986* (Cth), the intent of which is to prevent objects of cultural significance to Australia being exported out of the country. This Act is administered by the Attorney-General's Department, Ministry for the Arts.¹³ The *Native Title Act 1993* (Cth), which also deals with aspects of Indigenous cultural heritage, is administered by the National Native Title Tribunal, an impartial, independent administrative agency formed in January 1994 and reporting to the Commonwealth Attorney-General.¹⁴ Thus there are at least four Commonwealth Acts relating to Indigenous cultural heritage with different reporting arrangements.

UNDERSTANDING COMPLIANCE

Australian (and international) heritage protection has relied on a number of mechanisms to obtain compliance which range from the simple to the complex. Legislation is the obvious means of persuading landowners and land users to manage their impact on cultural heritage, but non-legal mechanisms may also play an important role.¹⁵

A key concern is to define what is to be protected and how it is to be protected. In Australia and elsewhere, definitions have shifted in recent years from objects, relics and sites to broader concepts of place, to cultural landscapes and to intangible aspects of the past. The listing of places on databases and registers is a fundamental feature of heritage legislation and is usually supported by stop work orders and other enforcement provisions. Such provisions have been present in all Queensland heritage legislative regimes and their effectiveness should be assessable but, as will be discussed below, this has not been the case. Blanket protection provisions for places listed on registers and databases is a key element of heritage legislation and has been a key feature of Queensland legislation, though its provisions have been considered to be so weak as not to achieve the desired objective.¹⁶ But a failure of process owing to lack of political will and limited human resources and funding is likely to be a more significant issue than a weakness of the definition or legislation per se.

The provision of penalties in legislation is arguably the most common approach to obtaining compliance. However, from a cultural heritage perspective, penalties are only effective if they prevent behaviours that damage the cultural heritage in the first instance. Penalties are also of little use if they are so low that they do not deter damage to heritage places. Equally, however, there is no guarantee that high penalties will prevent damage,¹⁷ and caveats on developers undertaking further development may be a more powerful tool in ensuring compliance. Other important provisions include protection through State ownership, the restrictions on trade or sale of items, the posting of warning signs at sites, the reservation of significant areas, restrictions on access to sites, and controls on people's activities at or within the vicinity of cultural heritage places. Prosecutions or lack of prosecutions under heritage legislation are therefore not the only, and possibly not the most important, measure of compliance. Nevertheless, examples of prosecutions/attempted prosecutions will be discussed that

¹¹ Evatt, n 10.

¹² See <http://www.environment.gov.au/topics/heritage/heritage-places/register-national-estate>.

¹³ See <http://www.environment.gov.au/heritage/laws/indigenous/index.html>.

¹⁴ See <http://www.ag.gov.au/LegalSystem/NativeTitle/Pages/default.aspx>.

¹⁵ A brief but useful discussion of the broad concepts is provided by Parrott H, "Legislating to Protect Australia's Material Cultural Heritage: Guidelines for Cultural Resources Professionals" (1990) 31 *Australian Archaeology* 75.

¹⁶ Jago M and Hancock N, "The Case of the Missing Blanket: Indigenous Heritage States Regimes" (1994) 4 *Indigenous Law Bulletin* 18.

¹⁷ Packham, n 5.

highlight a range of reasons for successes and failures. Of broader concern is that any legislation that is not given political, administrative or financial support will be ineffective. Legislation must also change in response to public opinion and the experience of its administrators or it will become ineffective.

In Queensland, cultural heritage legislation and policy development has been starved of political, administrative and financial support over many years and this situation is not improving. A number of mechanisms are therefore available for obtaining compliance with cultural heritage legislation and a range of indicators are required to provide measures that the cultural heritage record is being successfully managed. Owing to the lack of mandatory reporting, this is difficult to demonstrate for Queensland. For example, the Department of Aboriginal and Torres Strait Islander and Multicultural Affairs (DATSIMA) Annual Report for 2012-2013, under the heading "Aboriginal and Torres Strait Islander cultural heritage managed", records that 40 new cultural heritage management plans were processed, 14,000 cultural heritage searches were undertaken and that three cultural heritage bodies were registered.¹⁸ These are a measure of process, not a measure of how well, if at all, cultural heritage is managed. The annual report contains only one measurable performance indicator, which was that all searches were completed in the customer service timeframe of 20 business days.

QUEENSLAND HERITAGE LEGISLATION

In Queensland, limited protection was provided to Aboriginal artefacts from 1959 under provisions of the *Queensland Forestry Act 1959-1978* (Qld).¹⁹ Since 1967, there have been four major pieces of legislation specifically relating to the protection of Aboriginal and Torres Strait Islander cultural heritage in Queensland: the *Aboriginal Relics Preservation Act 1967-1976* (Qld), the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld), and the current *Aboriginal Cultural Heritage Act 2003* (Qld) and *Torres Strait Islander Cultural Heritage Act 2003* (Qld). The last two are essentially identical (apart from recognising island custom or Ailan Kastom as recognised by Torres Strait Islanders).

The Torres Strait Regional Authority was to receive a funded or part-funded cultural heritage position to implement the *Torres Strait Islander Cultural Heritage Act* but this has not eventuated. Although a number of cultural heritage bodies have been established for the Torres Strait Islands, it appears that most cultural heritage issues have been dealt with through native title agreements or Indigenous land use agreements which are a form of other agreement under the *Torres Strait Islander Cultural Heritage Act*.²⁰ One consultant who has worked in the Torres Strait has noted that processes are ad hoc and that it is likely that many developments occur without consideration of cultural heritage issues.²¹ It is difficult to measure the extent of compliance with the *Torres Strait Islander Cultural Heritage Act* but indicators available would suggest that it is extremely low and ad hoc and the Act will not be discussed further in this article.

The various Acts have been administered over the years by a number of different government departments too numerous to mention here in full (in excess of 20). The *Aboriginal Cultural Heritage Act* is currently administered by DATSIMA and previously by the Department of Environment and Resource Management. Historical heritage was first protected under provisions of the Cultural Record Act and later by the *Queensland Heritage Act 1992* (Qld). The *Queensland Heritage Act* was also administered by the Department of Environment and Resource Management (though in a different section) and is now administered by the Department of Environment and Heritage Protection. The

¹⁸ Queensland Government, *Department of Aboriginal and Torres Strait Islander and Multicultural Affairs Annual Report 2012-2013*, p 30.

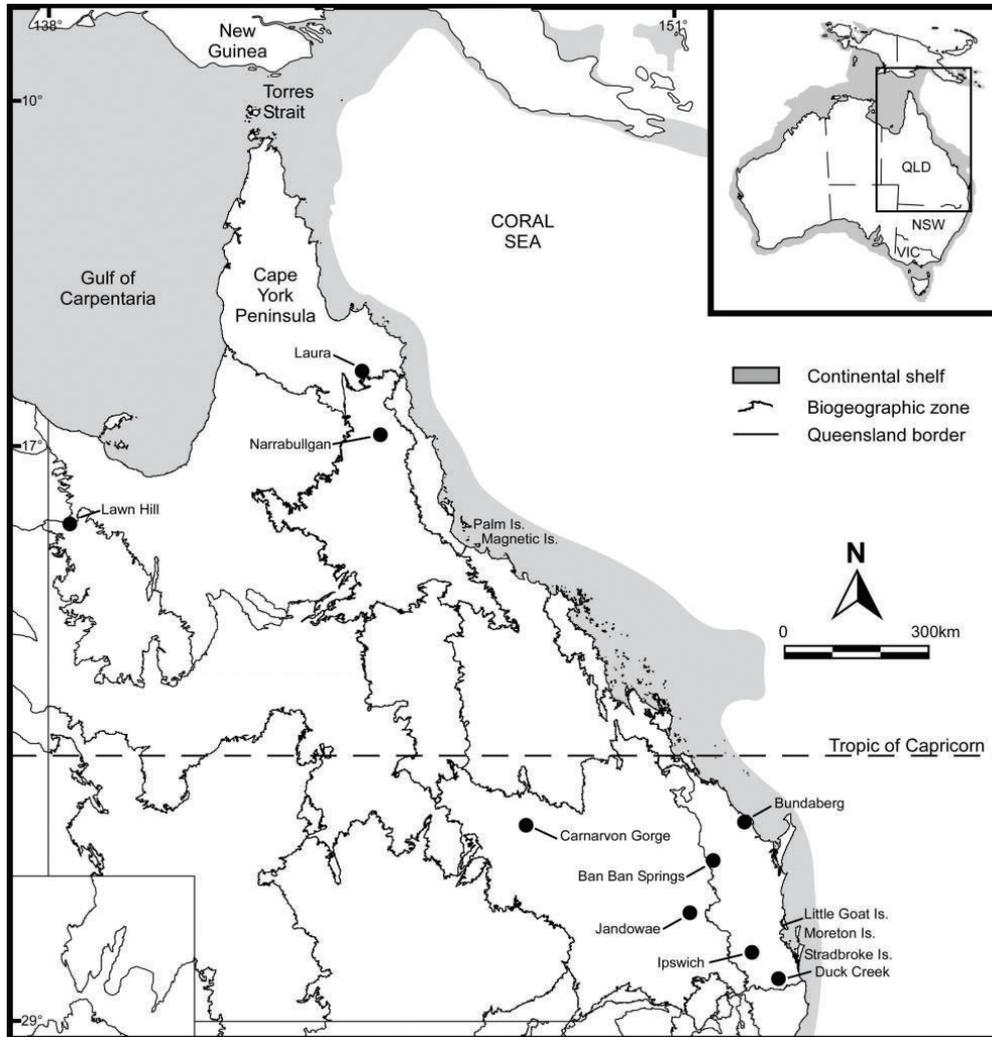
¹⁹ Long S, *Gidyea Fire: A Study of the Transformation and Maintenance of Aboriginal Place Properties on the Georgina River* (PhD thesis, University of Queensland, 2005) p 8.

²⁰ See <http://www.datsima.qld.gov.au/datsima/aboriginal-torres-strait-islander/aboriginal-torres-strait-islander-peoples/aboriginal-and-torres-strait-islander-cultural-heritage/cultural-heritage-bodies>.

²¹ Garrick Hitchcock, Arafura Consulting, personal communication, 7 November 2012.

legislative regimes and role of government relating to the management of historical and Indigenous heritage in Queensland have been and are thus currently distinctly different (apart from the period covered by the Cultural Record Act).

FIGURE 1 Queensland, Australia, place names referred to in article



ABORIGINAL RELICS PRESERVATION ACT (1967 TO 1987)

The preamble to the *Aboriginal Relics Preservation Act* (the Relics Act) stated that it was: “An Act to provide for the Preservation of Anthropological, Ethnological, Archaeological and Prehistoric Aboriginal Relics”. This was a limited definition and the use of the term “relic” was seen to imply that Aboriginal people were also considered “relics of the past”,²² though at s 4 the Act did provide that “[t]ribal rites [were] unaffected by the Act”. Part 3 of the Act provided for the establishment of an advisory committee (the “Relics Committee”, which included Aboriginal representation) to give advice to the Minister on a range of issues including recommending the declaration of significant sites. Inspectors and wardens were appointed and given significant powers. For example, inspectors were given the power of force to enter a place and powers of arrest (ss 6 and 7). Section 20 provided that:

²² Ellis, n 7.

“A person shall not take, deface, damage, uncover, expose, excavate, cover, conceal or interfere with or be in possession of a relic the property of the Crown or, upon an Aboriginal site, do any act likely to endanger any relic thereon or thereunder” and s 21 contained a number of provisions for controlling archaeological excavation and research. These were strong compliance powers for the times but, as discussed below, the extent to which they were used is difficult to determine. Under the provisions of s 21 archaeologists were required to obtain permits and from 1981 permits were not issued without evidence of consultation and approval of the appropriate Aboriginal traditional owners.

The Relics Act was described as a leader in its field²³ but its underlying philosophy was sharply criticised by anthropologists.²⁴ It was claimed that the Relics Act was “similar in many ways to its Victorian counterpart, is equally ineffective and the administrative arrangements are totally inadequate”.²⁵ In 1979, the government agency responsible, the Archaeology Branch, had an Officer in Charge, an administrative and education officer, a field and research archaeologist, seven Aboriginal rangers and 300 honorary wardens.²⁶ For a State the size of Queensland (1.7 million square kilometres, or nearly seven times the size of the British Isles), the Archaeology Branch was under-staffed and under-resourced from its commencement and this is a situation that has continued to the present.

Writing in 1980, Trigger²⁷ noted that during the 12 years since the Relics Act had been proclaimed, very few charges had been brought against trespassers on declared sites or against people interfering with relics and that few convictions had occurred. He also noted that the Archaeology Branch’s focus was on public education but that it remained uncertain how successful this had been. Difficulties did include proving that offences had occurred prior to 1967 (before which the Act had no jurisdiction), and proving that the accused “knew” they were damaging a relic. People who had artefacts were astutely aware of this, and when challenged claimed they had collected items prior to 1967. It was also concluded that the Relics Act gave little, if any, consideration to Aboriginal people and their capacity and right to maintain, change and manage their material culture over time.²⁸

The long-term Officer in Charge of the Archaeology Branch who administered the Relics Act noted that environmental legislation in Queensland at the time was weak in that developers only had to “take account” of environmental matters. However, by using two sections of the Relics Act (ie (a) that relics were the property of the Crown and (b) may not be interfered with) “pressure was gently and bureaucratically applied and archaeological surveys became a requirement as part of environmental assessment within the State”.²⁹ In March 1983, a seminar was held at the Archaeology Branch to address Environmental Impact Study (EIS) issues and a structure for writing reports was tabled.³⁰ There was an increase in the number of EISs undertaken following this meeting,³¹ permits

²³ McKinlay JR, *Archaeology and Legislation* (New Zealand Archaeological Association, Monograph 5, Wellington, 1973) pp 70-74.

²⁴ Anderson C, “Queensland” in Peterson N (ed), *Aboriginal Landrights: A Handbook* (Australian Institute of Aboriginal Studies, Canberra, 1981) pp 94-96; Trigger, n 7.

²⁵ Coutts PJF, “A Public Archaeologist’s View of Future Directions in Cultural Resource Management” in Ward GK (ed), *Archaeology at ANZAAS Canberra* (The Canberra Archaeological Society Inc, Australian National University, Canberra, 1986) p 219.

²⁶ Sutcliffe KA, “Cultural Resource Management in Queensland” in McKinlay JR and Jones KL (eds), *Archaeological Resource Management in Australia and Oceania: Papers from the 49th ANZAAS Congress, Auckland, January 1979* (New Zealand Historic Places Trust, Wellington, 1979) pp 56-66.

²⁷ Trigger, n 7, p 149.

²⁸ Trigger, n 7, p 150.

²⁹ Sutcliffe KA, “Where Lies the ‘Public’ in Public Archaeology: A Justification for Cultural Resource Management” (1987) 6 *American Archaeology* 235 at 238.

³⁰ Queensland Government, Department of Aboriginal and Islanders Advancement (Archaeology Branch), *The Archaeological Component of Environmental Impact Studies: Seminar and Discussion* (unpublished report, 1983).

³¹ Richardson N, *The Archaeological Component of Environmental Impact Studies in Queensland* (Archaeological Branch, Department of Community Services, Brisbane, 1988).

required clear evidence that the traditional owners had been consulted³² and the first EIS survey by an Aboriginal consultancy company was undertaken in 1985.³³

Prosecutions under the Relics Act

There is limited information on four prosecutions/attempted prosecutions under the Relics Act and the full details of each case have been difficult to locate. These include:

- In 1970, an art site in Carnarvon Gorge known as The Tombs was allegedly defaced. Two people were charged on 28 May 1970 but no further details could be located.
- In 1984, a ceremonial stick was taken from Lawn Hill Gorge. The stick could not be located and investigations were said to be proceeding but no further details could be located.
- In 1985, three people had entered the declared site at Laura but insufficient evidence could be obtained to proceed with a prosecution.
- In 1985, a person was charged with the theft of skeletal material from Duck Creek. The individual was fined \$200 but appealed on the basis that the forensic evidence stated that the material was “part-Aboriginal”. The conviction was upheld along with a strict probation order.³⁴

Government records should be of a standard such that it is possible to locate more information on these prosecutions, but this is not the case. Many early departmental files are poorly organised. Departmental names and responsibilities have also changed many times over the years and files shifted with them, which has resulted in a considerable loss of information. As noted above, there have been over 20 departmental name changes and changes in legislative responsibility since 1967. The Queensland State Reporting Bureau can provide court transcripts of prosecutions but the cost of these is high and the search parameters are limited. It was concluded that further investigation was unlikely to add greatly to understanding the reasons for pursuing prosecutions in these cases. At the time of the Relics Act there was no State of the Environment reporting requirement and the first Queensland State of the Environment Report as required by the *Environmental Protection Act 1994* (Qld) and *Coastal Protection and Management Act 1995* (Qld) was not produced until 1999. However, it must be noted that reporting of prosecutions is not a mandatory requirement of State of the Environment reports.

Compliance issues under the Relics Act: An example from Stradbroke and Moreton Islands

The Archaeology Branch had been proactively recording and managing sites on Stradbroke and Moreton Islands since 1971 largely through its Aboriginal ranger program. In 1981, however, the rate of sand mining on Stradbroke Island increased dramatically. Damage to some sites was reported at Blue Lake Creek on Stradbroke Island in 1981 and was investigated by the Archaeology Branch. Newspaper accounts of mining impacts were emotive and entangled cultural heritage issues with general environmental issues. Early discussion between Aboriginal people on the island and the Senior Aboriginal Ranger clearly indicated that mining was important to their economic wellbeing and they did not want to “rock the boat” but wished that the mining company would take more care. The Aboriginal community therefore faced a dilemma and the Archaeology Branch had the difficult task of having to balance Aboriginal views, legal responsibilities and emotive responses among a number of groups.

The Archaeology Branch investigated the possibility of undertaking legal action and found that the mining company had cut through a dune between two signs placed there in 1972 marking the location of middens and damaged further sites that were not signed or recorded on any maps. Thus the mining company had apparently done the “right thing” and the prospects of obtaining a conviction were considered to be limited. Such action would also have done little to remedy the damage already

³² Richardson, n 31; Rowland MJ, “Archaeological Research, Site Recording, and Management, Archaeology Branch, Department of Community Services, Brisbane” (1986) 23 *Australian Archaeology* 105.

³³ Kunja Aboriginal Consultants, *Report on Archaeological Survey of the Naccowlah Block Authority to Prospect 259P in South West Queensland* (unpublished report, EIS files, Archaeology Branch, Department of Community Services, Brisbane, 1985).

³⁴ Information held in a research file by author MJ Rowland.

caused. Legal action might also have led to further polarisation between Stradbroke Islanders, archaeologists and miners. Instead, the company involved was persuaded to employ an archaeologist to record sites on the remainder of the leases in order to avoid further damage, and the Archaeology Branch also developed the area as a focus for further research.

A site survey was undertaken and radiocarbon dates were obtained from the site. When it was proposed that the lease be mined, the Archaeology Branch developed a proposal for the preservation of some sites and the excavation of others. A number of surveys and excavations were subsequently undertaken on both Stradbroke Island and Moreton Island in consultation with the Aboriginal community on the islands and involving funding and personnel from the mining company, the Archaeology Branch and two universities. This approach was considered more successful in achieving the ongoing recording and conservation of sites than following a legalistic approach.³⁵

In sum, this example demonstrates some of the complexities in achieving compliance with legislation. The Archaeology Branch initially undertook investigations with a view to pursuing legal action as was required by legislation but the chances of success were considered to be minimal (signage at the site was inadequate in identifying the extent and nature of the site). The Archaeology Branch had to strike a balance between protecting sites and protecting the interests of Aboriginal people, an issue not fully appreciated by other people including the media. The Archaeology Branch took the step of engaging the mining company in research and management of all leases on Stradbroke and Moreton Islands. This was done within the complex milieu of emotive comments from some conservationists and archaeologists and the media.

CULTURAL RECORD (LANDSCAPES QUEENSLAND AND QUEENSLAND ESTATE) ACT (1987 TO 2004)

The preamble to the *Cultural Record (Landscapes Queensland and Queensland Estate) Act* (the Cultural Record Act) indicates that it was: “An Act to provide for the preservation and management of all components of Landscapes Queensland and the Queensland Estate; to foster dissemination of knowledge of Landscapes Queensland and the Queensland Estate; to promote understanding of the historic continuum evidenced within Queensland and for related purposes”. “Landscapes Queensland” was defined as areas or features within Queensland that:

- (a) have been or are being used, altered or affected in some way by humans; and
- (b) are of significance to humans for any anthropological, cultural, historic, prehistoric or societal reason, and includes any item of the Queensland Estate found therein.

The Cultural Record Act therefore substantially broadened the definition of the types of places protected in comparison with the Relics Act. The concept that all cultural heritage (Aboriginal, Torres Strait Islander and European) was part of the Queensland Estate was also a major point of difference. “Landscapes Queensland” and “Queensland Estate” concepts were very broad definitions. However, as was the case with the Relics Act, whether or not the concepts translated into successful cultural heritage management related more often to resourcing issues than to the definitions themselves.

Provisions were provided for the establishment of designated landscape areas (Pt 3). Permits were required by archaeologists to undertake surveys and excavations and a range of obligations were placed on the permitted party (ss 27-31). Guidelines established as a result of these provisions required that archaeologists produce reports and site cards to certain standards. A range of other enforcement provisions were also established (Pt 6). As was the case with the Relics Act, no direct link to environmental planning legislation was established, but through s 33 of the Cultural Record Act, which provided for blanket protection by way of Crown ownership of all cultural heritage, developers were encouraged to include cultural heritage in their EISs. However, there is no easy way to assess how many cultural heritage impact studies relative to the number of developments were undertaken.

³⁵ Rowland MJ, “Clean Up Your Own Backyard First! Problems and Complexities in Archaeological Resource Management – Stradbroke and Moreton Islands” in Coleman RJ, Covacevich J and Davies P (eds), *Focus on Stradbroke* (Boolarong Publications, Brisbane, 1984) pp 44-53; Rowland, n 32.

Prosecutions under the Cultural Record Act

Only one prosecution appears to have been undertaken under provisions of the Cultural Record Act. In 1987/1988, the crew of a Main Roads Department road gang allegedly painted over some rock engravings at Laura on Cape York. Records show that the Department at the time was seeking restitution. However, again, for reasons outlined above it, has not been possible to locate further details. It can be noted that neither the Relics Act nor the Cultural Record Act were ever administered by a department with a specialised compliance unit and this must go some way to explaining the apparent limited number of prosecutions under these Acts.

Compliance issues under the Relics Act and Cultural Record Act: An example from Magnetic Island

The first environmental terms of reference for a development proposal at Nelly Bay on Magnetic Island were drafted in 1985 and the first archaeological surveys undertaken in 1986 under provisions of the Relics Act. However, major activities commenced in 1988 and subsequent investigations were undertaken under provisions of the Cultural Record Act. Many complex issues arose and only a few issues relevant to compliance are raised here.

In 1988, stone artefacts were found on the reef at Nelly Bay. In the heated debate over this development there were letters to various papers suggesting that the artefacts had been “planted” but this was investigated and was considered to be impossible on archaeological and geomorphological grounds.³⁶ The Archaeology Branch developed a proposal to salvage the artefacts.

On 2 February 1989, the Commonwealth government notified the Archaeology Branch that they had received a letter requesting protection from destruction of a number of scarred trees at Nelly Bay under s 9 of the *Aboriginal and Torres Strait Islander Heritage Protection Act*. Two independent reports on the trees, one by an anthropologist and one by an archaeologist, were obtained by the Archaeology Branch, both of which supported the view that the trees were culturally modified. However, the Archaeology Branch considered the evidence was minimal and sought the expertise of officers of the Queensland Forestry Department. The Forestry Department produced a detailed report indicating the trees were not older than 120 years and the scars around 32 years old (hence about mid-to-late 1950s) and probably resulted from the impacts of cyclones that passed over the islands at that time. The report was queried by a resident of Nelly Bay (who did appear to have some expertise in the area) and the Archaeology Branch therefore had the Forestry report reviewed separately by two experts from the Department of Botany, University of Queensland who fully supported the Forestry Department conclusions.

The events on Magnetic Island were complex and involved officers of the Queensland Government and two Commonwealth government departments. It also involved a wide range of residents of Magnetic Island, many archaeologists and other professionals and the media. Most of the archaeologists and anthropologists and the Archaeology Branch took a professional approach to a range of complex issues. In terms of seeking compliance with legislation, difficulties were magnified by the emotive response of island residents and some archaeologists and anthropologists and the media. In particular, it was clear that some local residents of the island used Aboriginal people and Aboriginal cultural heritage issues to pursue their own agendas. It is also disappointing to note that while so much recording and collecting was undertaken, we still know so little of the archaeology of this area. Thus while there was general compliance with cultural heritage legislation, there is little to show for the work undertaken.

ABORIGINAL CULTURAL HERITAGE ACT AND TORRES STRAIT ISLANDER CULTURAL HERITAGE ACT (2004 TO PRESENT)

The Cultural Record Act came under initial review when a Labor government came to power in 1989 after a long period of conservative government. Subsequently, the government delayed any further

³⁶ “Aboriginal Artefacts Join the Battle for Nelly Bay” *Townsville Bulletin* (13 April 1988) p 4.

action because of developing native title discussions and ultimately native title legislation. The review leading directly to the *Aboriginal Cultural Heritage Act* and the *Torres Strait Islander Cultural Heritage Act* recommenced in 1998.

The *Aboriginal Cultural Heritage Act* preamble states that it is: “An Act to make provision for Aboriginal cultural heritage, and for other purposes”. However, the main purpose of this Act is more clearly stated at s 4: “to provide effective recognition, protection and conservation of Aboriginal cultural heritage”. The explanatory notes to the Act further expand on the purpose as: “providing proper protection for significant Aboriginal cultural heritage and creating [a] flexible and workable process for addressing land use impacts with certainty”. Section 3, like the previous Acts, provides blanket protection by binding all persons including the Crown. Section 5 gives greater powers to Aboriginal people. In particular: “Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage”.³⁷ Part 2 also provides Aboriginal people with ownership of their cultural heritage in the form of human remains and secret sacred objects,³⁸ and Aboriginal cultural heritage lawfully taken away from an area, but “[o]therwise, the State owns Aboriginal cultural heritage”.³⁹

Sections 8 and 9 provide a definition of Aboriginal cultural heritage which includes anything that is a significant Aboriginal object or area in Queensland or evidence of archaeological or historic significance. At s 12(2) it is noted that for an area to be a significant Aboriginal area, it is not necessary for the area to contain markings or physical evidence. This is a broader definition of cultural heritage than in the Relics Act, though arguably not within the Cultural Record Act.

Part 3 of the *Aboriginal Cultural Heritage Act*, which relates to duty of care provisions, is promoted as one of the Act’s major strengths and marks a distinct change from previous legislation. Gazetted duty of care guidelines provide guidance to persons undertaking land-use activities and involve a self-assessable risk assessment process with very little oversight by government. As was the case with previous legislation, the *Aboriginal Cultural Heritage Act* is not linked to overall State environmental planning processes, apart from s 88 which provides that a cultural heritage management plan under Pt 7 may be required for a project if an environmental assessment is required under another Act. Part 6 is concerned with cultural heritage studies. The aim of this section is to protect areas of special significance.

Part 7 of the Act is concerned with cultural heritage management plans and is considered a fundamental part of the Act. This part establishes a process for developers and Aboriginal parties for an area to come to agreement on managing cultural heritage within that area. Part 8 of the Act includes a range of enforcement provisions including stop work orders and penalty provisions.

A key feature of the *Aboriginal Cultural Heritage Act* was that the Minister was required to review the “efficacy and efficiency” of the Act within five years of its commencement.⁴⁰ A review paper and fact sheet was released in September 2008 with public submissions to be received by 28 February 2009. In November 2009, the Department of Environment and Resource Management released a series of recommendations for public comment which addressed issues raised in submissions. Submissions in response to those recommendations closed in February 2010. In October 2010, the Department proposed a number of legislative changes and administrative actions to improve the efficiency and efficacy of the Acts. The legislative proposals were developed in the *Indigenous Cultural Heritage Acts Amendment Bill 2011* (Qld) exposure draft which was released for public comment. An overview of the non-legislative outcomes was also made available. Submissions to the legislative and non-legislative changes closed at the end of January 2011. The Department concluded that most changes could be achieved through a combination of minor legislative and non-legislative

³⁷ *Aboriginal Cultural Heritage Act 2003* (Qld), s 5(b).

³⁸ *Aboriginal Cultural Heritage Act 2003* (Qld), Pt 2, s 14(c).

³⁹ *Aboriginal Cultural Heritage Act 2003* (Qld), s 20(2).

⁴⁰ *Aboriginal Cultural Heritage Act 2003* (Qld), s 157.

changes. A major emphasis was on the need for education. Legislative amendments were introduced into the Queensland Parliament on 29 November 2011. The legislative changes are minor and as yet the Bill has not been enacted.⁴¹

Prosecutions under the Aboriginal Cultural Heritage Act

Between the implementation of the Act in April 2004 and 2007, the Compliance Information Register Management System (CIRMS) recorded 79 notifications and included one prosecution for unlawful possession (see below). The remainder included: formal warnings (2); prosecutions pending (1); still under investigation (9); insufficient evidence (3); legislative exemption (3); stop work orders issued (6); and finalised, no further action taken (54).⁴² The category “finalised, no further action taken” is particularly large but is not explained any further in the State of the Environment report. More recent overall figures are not available. However, two substantial prosecutions were undertaken. In July 2010, Xstrata Mount Isa Mines was fined \$80,000 for breaching their duty of care when a bulldozer damaged stone artefacts while upgrading a road.⁴³ In November 2011, MCG Quarries Pty Ltd was fined \$80,000 and ordered to pay costs of \$2,402 for disturbing 30 to 35 Aboriginal artefacts and therefore also breaching their duty of care.⁴⁴

Compliance issues under the Aboriginal Cultural Heritage Act

The Bundaberg Axe and the Jandowae Axe

In 2006, a “rare old archaic Aboriginal stone axe hand tool” found at Bustard Creek near the township of 1770 on the Queensland coast was listed for sale on eBay. The person advertising the axe was located and pleaded guilty in the Bundaberg Magistrate’s court. The individual received 120 hours community service and was required to pay legal and court costs. Later, in October 2007, Customs received a referral at Brisbane International Airport that a person who was departing on a flight to America had a “rock in the shape of a cutting tool” in their hand luggage. It was alleged that the item had been located in the Burnett Heads area sometime in the last couple of years by the person’s brother. However, his wife later confirmed that it was from Jandowae. In this case, the Department of Natural Resources and Water compliance unit decided that prosecution was not worth pursuing. The axe was returned to the Barungum people and the Department gained some limited media attention.⁴⁵ Prosecution proceeded in the case of the Bundaberg axe but not in the case of the Jandowae axe and the reasons for this are unclear, but in the case of the Jandowae axe it is apparent that obtaining positive publicity for the legislation may have been a motivating factor.

Little Goat Island, Pumicestone Passage

In March 2006, Rowland, as Principal Archaeologist with the Department of Natural Resources, Mines and Water, visited Little Goat Island in Pumicestone Passage to inspect alleged damage to Little Goat Island Shell Midden.⁴⁶ The island had previously been assessed for its cultural heritage values in a proposed nomination of the island as a nature refuge under the *Nature Conservation Act 1992*

⁴¹ See <http://www.datsima.qld.gov.au/datsima/aboriginal-torres-strait-islander/aboriginal-torres-strait-islander-peoples/aboriginal-and-torres-strait-islander-cultural-heritage>.

⁴² Queensland Government, Department of Environment and Heritage Protection, *State of Environment Queensland 2007* (DEHP, Brisbane, 2007) p 336; Queensland Government, Department of Environment and Heritage Protection, *State of Environment Queensland 2011* (DEHP, Brisbane, 2012) p 247.

⁴³ Queensland Government, *Department of Environment and Resource Management Annual Report 2010-2011*, <http://www.theaustralian.com.au/business/latest/xstrata-fined-over-aboriginal-site/story-e6frg90f-1225889986169?nk=342bd4bf3aaaa1b5f85a96f989615985>.

⁴⁴ Nolan R, “Mining Company Fined for Disturbing Heritage Site” (media statement, Department of Environment and Heritage Protection 2011-2012, 25 November 2011) available at <http://statements.qld.gov.au/Statement/Id/77847>.

⁴⁵ “USA-bound Axe United with Traditional Owners” *Natural State Magazine* (Department of Natural Resources and Water, Queensland, 2008) p 13.

⁴⁶ Rowland MJ, *An Inspection of Aboriginal Sites on Little Goat Island, Pumicestone Passage, Caboolture Shire (7th March 2006)* (Report to Cultural Heritage Coordination Unit, Department of Natural Resources, Mines and Water, Brisbane, 2006).

(Qld).⁴⁷ The area of alleged damage was located adjacent to a recently surveyed area marked by surveyor's tape. A copy of a 2005 survey plan suggested that damage to the midden may have been done by a surveyor searching for an earlier survey peg. The area of disturbance was over a maximum area of 1m by 1m and limited to a depth of 15cm.

Under the *Aboriginal Cultural Heritage Act*, a significant Aboriginal area is defined as an area of particular significance to Aboriginal people because of either or both of the following: (a) Aboriginal tradition; and (b) the history, including contemporary history, of an Aboriginal party for the area.⁴⁸ However, it can also be noted that in identifying a significant Aboriginal area, regard may be had to authoritative anthropological, biogeographical, historical and archaeological information.⁴⁹ The Act also provides that a "person must not harm Aboriginal cultural heritage if the person knows or ought reasonably to know that it is Aboriginal cultural heritage".⁵⁰ Finally, the Act provides that Aboriginal parties are responsible for assessing the level of significance of areas and objects included in the study area that are or appear to be significant areas and significant Aboriginal objects.⁵¹

Given the above provisions of the Act it was difficult for the principal archaeologist to argue that "harm" had or had not been done to Aboriginal cultural heritage since that is primarily the responsibility of the Aboriginal party for the area. However, it was possible to confirm that the site was a midden and not a natural deposit and that it had been disturbed by a number of environmental factors. It was also argued that the alleged disturbance reported to the Department of Natural Resources, Mines and Water was most likely caused by a surveyor searching for an early survey peg. The disturbance in this area was minimal. Although the exact dimensions of the midden were not recorded (which would require sub-surface testing) the area disturbed was likely to be a very small percentage (less than 1%) of the midden area. It was recommended that since further activity was proposed in the area (ie the building of a house) that the advice of the Aboriginal party for the area be sought in respect to what might constitute further harm to the sites on the island. It was also argued that given the extent of information about the site at the time of the disturbance it might be difficult to prove that a person should know or ought reasonably to know that it was Aboriginal cultural heritage. No further action was therefore undertaken.

North Ipswich Park

In this case, earthworks were occurring at North Ipswich that were allegedly disturbing a stone working area or quarry. Rowland, as the Principal Archaeologist with the Department of Environment and Resource Management inspected the site and was able to determine it was a natural deposit of water-rolled stones and gravel. It is suggested that this is a common compliance issue where local residents were attempting to use cultural heritage as a means of stopping development.

The Aboriginal Cultural Heritage Act and compliance

The Department of Environment and Resource Management review (see above) of the *Aboriginal Cultural Heritage Act* concluded that it was working well and required only minor legislative and non-legislative changes. However, the Department's compliance scoping study,⁵² other reports including the government's own State of the Environment reports,⁵³ and a number of submissions to the *Aboriginal Cultural Heritage Act* review indicate that problems with the Act are numerous and

⁴⁷ Reid J and Connolly M, *Little Goat Island. Nomination for Nature Refuge (Nature Conservation Act 1992) Cultural Heritage Values* (Report to the Environmental Protection Agency, Brisbane, 2004).

⁴⁸ *Aboriginal Cultural Heritage Act 2003* (Qld), s 9.

⁴⁹ *Aboriginal Cultural Heritage Act 2003* (Qld), s 12(5).

⁵⁰ *Aboriginal Cultural Heritage Act 2003* (Qld), s 24(1).

⁵¹ *Aboriginal Cultural Heritage Act 2003* (Qld), s 53(2)(a).

⁵² Comerford E, *Exploring Motivations for Non-compliance with DERM Legislation: A Scoping Study Using Perceptions of DERM Staff* (Department of Environment and Resource Management, Queensland, 2011).

⁵³ Queensland Government (2007, 2012), n 42; Schnierer E, *Caring for Culture* (Policy and Research Unit of the New South Wales Aboriginal Land Council, Parramatta, 2010); Schnierer E, Ellsmore S and Schnierer S, *Australia: State of the Environment 2011; State of Indigenous Cultural Heritage 2011* (Commonwealth of Australia, Canberra 2011).

wide-ranging. As Schnierer notes,⁵⁴ there are some significant gaps between the intent of the Act and its practical application. A major problem is that too few of the Act's provisions require mandatory reporting so that measuring compliance with the Act requires substantial guess work. This is at odds with government policy which increasingly focuses on the need for State of the Environment reporting.

The definition of cultural heritage in the Act is broader than in previous legislation and gives a greater role to Aboriginal people in assessing significance.⁵⁵ However, some Aboriginal people indicated that it does not protect intangible cultural heritage (eg knowledge, stories, song, dance etc) nor does it recognise Indigenous intellectual property rights. They also noted that the Act requires that consultation occurs with Aboriginal parties rather than giving them real control over their heritage.⁵⁶ Under the legislation, anyone undertaking an activity has a duty of care not to harm cultural heritage. This duty of care is set out in gazetted guidelines which are a core feature of the Act. However, consultation with an Aboriginal party is only required for Category 5 activities (see Figure 2⁵⁷).

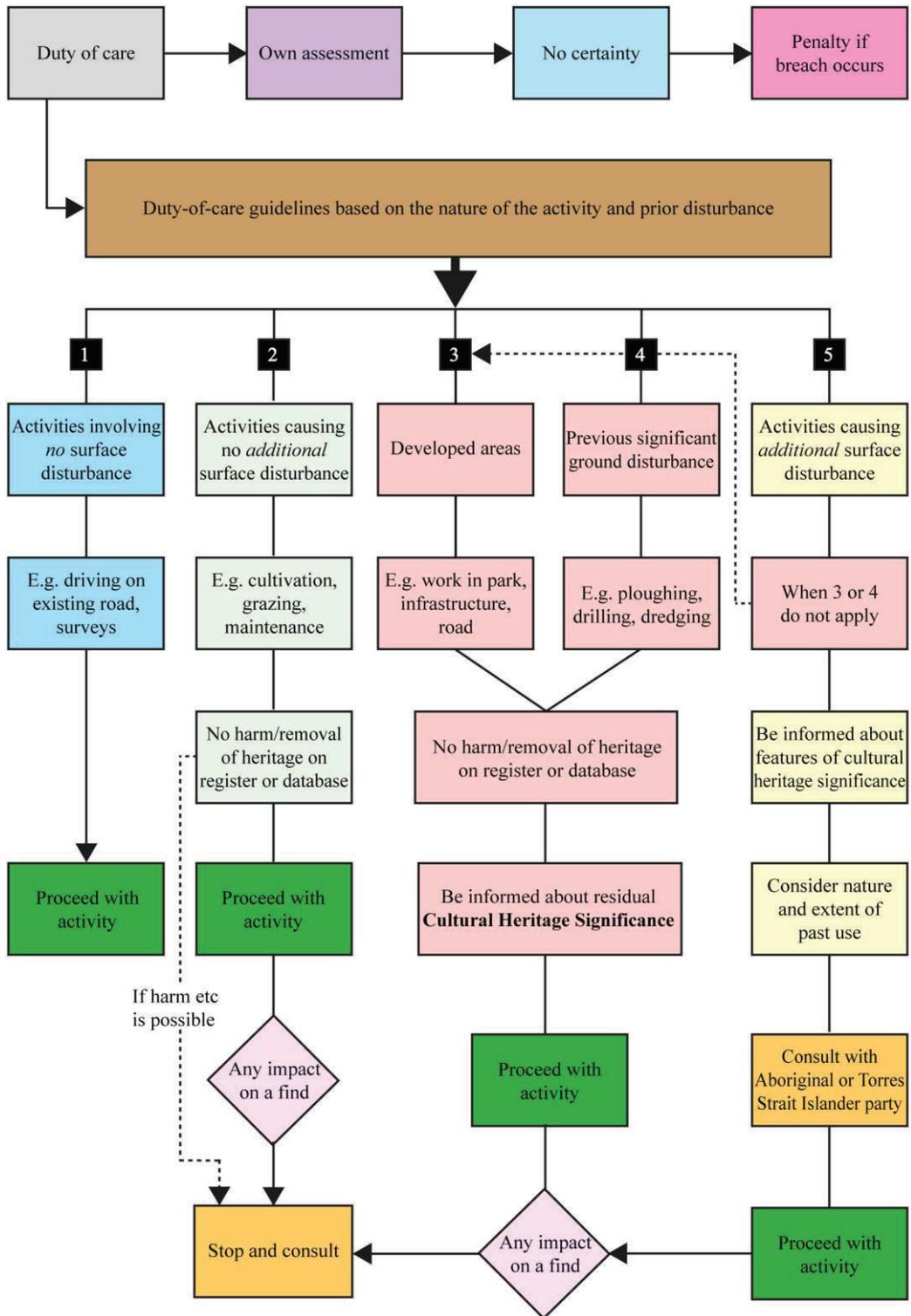
⁵⁴ Schnierer, n 53, p 17.

⁵⁵ *Aboriginal Cultural Heritage Act 2003* (Qld), ss 8-11.

⁵⁶ Schnierer, n 53 p 22; Schnierer, Ellsmore and Schnierer, n 53, p 14; Australian Archaeological Association Inc, "Queensland Indigenous Cultural Heritage Acts Review Submission" (28 February 2009). See also Australian Archaeological Association Inc, "AAA Response to Reforms to ATSI Heritage Protection Act 1984" (November 2009) <http://www.environment.gov.au/system/files/pages/080619b8-678d-4d4a-905a-a287b0ab0fb7/files/dr-i-mc-niven-australian-archaeological-association-ltd.pdf>.

⁵⁷ Figure 2 is a modified version of a figure produced by the Department of Aboriginal and Torres Strait Islander and Multicultural Affairs available at <https://web.archive.org/web/20130501193716/http://www.datsima.qld.gov.au/resources/atsis/people/indigenous-cultural-heritage/ch16.pdf>.

FIGURE 2 Duty of care flow diagram



There is an assumption that Category 1 to 4 “low impact” activities will have destroyed most cultural heritage values, which may not be the case,⁵⁸ and the guidelines do not account for buried archaeological deposits.⁵⁹ According to Schnierer,⁶⁰ Aboriginal parties were also critical of the fact that some cultural heritage management plans did not address the ongoing management and preservation of cultural heritage, though there is no easy way of measuring this.

The Department of Environment and Resource Management compliance scoping study⁶¹ identified a lack of mandatory reporting of agreements between developers and Aboriginal parties and a lack of monitoring to determine if developers were upholding their duty of care as key problems with the *Aboriginal Cultural Heritage Act*. Officers could only guess how many people undertaking activities were complying with the legislation (ie meeting their duty of care). It was thought that only a small number of searches of the database were undertaken on behalf of developers relative to the number of known developments in the State and this is borne out by available figures. For example, between January 2005 and October 2006, 7,037 searches were undertaken which is almost certainly a fraction of development approvals in Queensland.⁶² Furthermore, the number of searches undertaken cannot be considered a strong indicator that developers have undertaken a genuine duty of care in respect to cultural heritage management.

Under the *Aboriginal Cultural Heritage Act*, cultural heritage management plans are required for certain high-level impact activities (ie where an EIS is required under other legislation or where excavation or relocation of cultural heritage is proposed). In 2011-2012, the Department processed 1,088 environmental authority applications under the *Environmental Protection Act 1994* and 2,090 development applications under the *Sustainable Planning Act 2009* (Qld).⁶³ In 2011-2012 however, only 40 new cultural heritage management plans were registered with the Department.⁶⁴ A cultural heritage management plan may be initiated voluntarily to avoid breaching the cultural heritage duty of care and agreements may also be developed under native title or other agreements so that it is difficult to measure the extent of compliance. These weaknesses in the cultural heritage management plan process are recognised in the State of the Environment report for 2011:

There appears to have been a minor decline in Cultural Heritage Management Plans over time. Since there are no mandatory reporting requirements, the reasons for this are difficult to assess. The number of CHMPs per year (20-30) does, however, appear small given the number of major projects that are likely to be undertaken each year in Queensland.⁶⁵

While the triggers for cultural heritage management plans are different under the Victorian Act (*Aboriginal Heritage Act 2006* (Vic)) over 800 cultural heritage management plans have been prepared since that Act came into operation in 2007 and Victoria is about one-third the size of Queensland.⁶⁶ The authors believe that the Victorian *Aboriginal Heritage Act* provides a far better legislative model for cultural heritage compliance but it is not possible to discuss it in detail here.⁶⁷

⁵⁸ Schnierer, Ellsmore and Schnierer, n 53, p 30.

⁵⁹ Australian Archaeological Association Inc, n 56.

⁶⁰ Schnierer, n 53, pp 48-49.

⁶¹ This study interviewed 46 staff in respect to the following Acts: *Nature Conservation Act 1992* (Qld)/*Recreation Areas Management Act 2006* (Qld); *Environmental Protection Act 1994* (Qld); *Land Act 1994* (Qld); *Aboriginal Cultural Heritage Act 2003* (Qld); *Queensland Heritage Act 1992* (Qld); and *Vegetation Management Act 1999* (Qld).

⁶² Comerford, n 52, p 161.

⁶³ Queensland Government, Department of Environment and Heritage Protection, *Annual Report 2011-2012*, p 18.

⁶⁴ Department of Environment and Resource Management, n 43, p 35.

⁶⁵ Queensland Government (2012), n 42, p 220.

⁶⁶ Schnierer, n 53, p 12.

⁶⁷ See <http://www.dpc.vic.gov.au/index.php/aboriginal-affairs/aboriginal-cultural-heritage>.

The provision in the Queensland *Aboriginal Cultural Heritage Act* for alternative agreements which exist outside the cultural heritage management plan framework,⁶⁸ removes a number of development activities from the purview of the Department and alternative agreements are not incorporated into the database or register and are therefore not available for incorporation into a knowledge system. Alternative agreements also cannot be reviewed to ensure they meet high standards. There is no way of knowing how many alternative agreements have been developed.⁶⁹

Contributors to the Department scoping study also noted that many developers and landholders were simply unaware that they have a duty of care, with some assuming that this only applied to some land tenures. Aboriginal cultural heritage sits outside the environmental planning approvals process for the State, so developers are not provided with a “tick box” as part of the approval process and therefore may overlook their duty of care. Again, however, this cannot be easily measured. It was suggested that some local governments were also not aware of the duty of care guidelines, yet they were responsible for providing many development approvals. The Victorian *Aboriginal Heritage Act* by comparison is linked to the Victorian planning system.

The Department scoping study noted that the scale of fines was probably sufficient to achieve compliance, but a lack of resources (funds, staff and equipment) were considered to pose a substantial barrier to achieving compliance. Contributors to the scoping study suggested the need for an education campaign to improve compliance, but without the necessary resources this would not be possible. At the time of the scoping study, the Department was also proposing to shift the focus of compliance from an existing dedicated compliance unit to the Cultural Heritage Unit, which did not have the time, resources or expertise to undertake compliance investigations, and considered it a problem where it might be called on to be both the investigator and the expert witness. Balancing a policing role with community engagement role was also considered as a problem.⁷⁰ The Department of Aboriginal and Torres Strait Islander and Multicultural Affairs, to which the Cultural Heritage Unit was moved in April 2012, does not have a compliance unit and has no expertise in this area.

The lack of mandatory reporting also means that fewer sites are being added to the database than prior to the current legislation. The following figures are available for the years 2000-2006:⁷¹

| Number of sites added to the database 2000-2006 | | | | | | | |
|---|-------|------|-------|------|------|------|------|
| Year | 2000 | 2001 | 2002 | 2003 | 2004 | 2005 | 2006 |
| Sites added | 1,216 | 961 | 1,226 | 675 | 749 | 276 | 294 |

Between the end of June 2006 and June 2010, there was an increase in sites recorded on the database from 23,613 to 27,698 (figures are not available by year), an increase of 4,085 or approximately 1,000 per year and it is noted that growth of the database is now sporadic and inconsistent.⁷² This is in conflict with s 44 of the *Aboriginal Cultural Heritage Act*, which encourages a person undertaking their duty of care to search the database. It would also seem to defeat the purpose of s 39(2) which makes the database “a research and planning tool to help Aboriginal Parties, researchers and other persons in their consideration of the Aboriginal cultural heritage values of an area”. Section 30 of the Act does require that “a person who is involved in putting an approved cultural heritage management plan into effect must take all reasonable steps to ensure the chief executive is advised about all Aboriginal cultural heritage revealed to exist because of any activity carried out under the plan”. There are penalties for not doing this but the provision has not been enforced. The database and register are not up-to-date and are a poor basis for risk assessment and planning. A review of the database was undertaken in September 2009. The review recognised an

⁶⁸ *Aboriginal Cultural Heritage Act 2003* (Qld), s 23(3)(a)(iii).

⁶⁹ Schnierer, n 53, pp 48-49.

⁷⁰ Comerford, n 52.

⁷¹ Queensland Government (2007), n 42, p 354.

⁷² Queensland Government (2012), n 42, p 161.

urgent need to upgrade the database to provide access to up-to-date information to assist persons in meeting their duty of care.⁷³ However, the review dealt with the structural nature of the database, not its content which, as noted above, due to the lack of mandatory reporting and standards for recording, continues to decline. Of the many potential natural and human impacts on cultural heritage places, there are currently no procedures in place for monitoring the physical condition of Aboriginal places in Queensland. Those places that are reported rarely report site condition. A number of weaknesses in the database are recognised in the State of the Environment 2011 report where it is also noted that “a further impediment to the collection of relevant information for the database occurs because there are no provisions, regulations or guidelines in the Acts that make express requirements for the production of reports as part of the management process”.⁷⁴

Since the commencement of the *Aboriginal Cultural Heritage Act* in 2004, Ban Ban Springs in the Wide Bay-Burnett region, Narrabullgan (Mount Mulligan) in North Queensland and an area of Palm Island have been added to the register as cultural heritage studies under Pt 6 of the Act. The number of cultural heritage studies is extremely low and is generally attributed to lack of guidelines and public education.⁷⁵ However, the reasons are likely to be more wide-ranging, including lack of funding and no clear indication that undertaking a study will result in long-term management of such places.

Permits are no longer required by archaeologists to undertake surveys or excavations as was the case under previous legislation and as required under the Victorian *Aboriginal Heritage Act*. Hence the State no longer has an idea of what work consultant archaeologists are undertaking and no control over the standards of work undertaken. The limited opportunity for the regulatory authority to monitor development and ensure that best practice cultural heritage management is undertaken further lessens the effectiveness of the Act.

SUMMARY

This review has highlighted that there have been more prosecutions or attempted prosecutions under Queensland heritage legislation than is usually credited, though equally less than one might have anticipated. Details of the early prosecutions are difficult to locate. There have been numerous occasions when prosecutions have not been pursued. While there is an underlying assumption that this may be due to political factors, most often prosecutions were not pursued because it was considered that for a number of reasons they would not be successful. In many cases it was also thought that a better approach might be to engage developers in research and management at a broader level. This was certainly the case in relation to Stradbroke and Moreton Islands. Nevertheless, on some occasions prosecutions have been pursued to promote the legislation. Prosecutions have not proceeded or have not been successful for a number of reasons. Many reports of alleged damage to cultural heritage turn out in fact not to be cultural heritage. The interpretation of the law by courts can make prosecution difficult as can poor reports by archaeologists and anthropologists. The emotive response of conservationists through the media does not assist in pursuing prosecution.

Compliance with legislation in Queensland is probably similar to New South Wales and Victoria where North notes it is:

[D]ifficult to know with any certainty whether the [heritage] laws are truly acting as an effective moral force. It remains possible legislation is merely under-enforced, with verification of compliance difficult or that Government heritage agencies have chosen to seek negotiated outcomes rather than to institute legal proceedings.⁷⁶

⁷³ Queensland Government (2012), n 42, p 220.

⁷⁴ Queensland Government (2012), n 42, p 220.

⁷⁵ Queensland Government (2012), n 42, p 162.

⁷⁶ North, n 2, p 60.

North also notes that while more archaeological work is being undertaken due to legal compliance requirements, the “public good” outcomes are few and far between.⁷⁷ He argues that in its current form, Australian heritage legislation does not promote the use of the archaeological heritage, even for research purposes, but merely its preservation as data which may never be analysed. The issue of commercial archaeology and the resultant production of a large “grey literature” have been raised by Ford, who estimates that 93% of the archaeology done in the United Kingdom is commercial and is largely inaccessible.⁷⁸ The figures are probably similar for Australia. There is also an argument that the “grey literature” is of a very poor quality and that academic archaeologists do not value it. It has also been noted that there has been a slowing, or at least no significant increase in research effort because compliance-driven archaeology does not include research as part of its core business.⁷⁹

North proposes that a broad-based environmental duty of care, if implemented throughout all levels of government and across jurisdictions, can achieve a “public good conservation” outcome.⁸⁰ This he believes can be achieved by integrating archaeology into planning systems, which is generally the case in Australia. In a footnote he implies that the *Aboriginal Cultural Heritage Act* was integrated into the *Integrated Planning Act 1997* (Qld).⁸¹ However this was not the case and can be seen as a fundamental weakness. The *Integrated Planning Act* was replaced by the *Sustainable Planning Act 2009* (Qld), and although under core matters for planning, s 89(2) defines “valuable features” to include “areas or places of indigenous cultural significance” the legislation is not integrated into the planning process. The *Queensland Heritage Act* was by comparison integrated into both planning Acts as is the Victorian *Aboriginal Cultural Heritage Act*. This is recognised in the State of the Environment Report 2011, where there is a recognised need for “[i]ntegration of the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* into the *Sustainable Planning Act 2009*, as has occurred with the *Queensland Heritage Act 1992*”.⁸² This, however, has not been implemented.

North in his review found a small number of court cases centred on archaeological issues.⁸³ Rather than indicating a high level of compliance, North thought it more likely to reflect a lack of will by government, interest groups, landowners and archaeologists to bring cases forward. He notes that cost was certainly a factor and that it was also possible that issues might be resolved by out-of-court settlement, but there was little empirical data to support this. North notes that it is unlikely that courts will engage in a discussion of the nature and significance of heritage.⁸⁴ What the courts will do is determine if legislation has been correctly applied and therefore if there is a need for the value of the archaeological heritage to be clearly articulated. In fact, North found in many cases that the value of the archaeological heritage was poorly articulated and that Aboriginal community views on the value of heritage were also not incorporated.

In New South Wales, it should be easier to measure compliance with cultural heritage legislation since people need a “Permit to Destroy”, but this of course only recognises regulated destruction, not unregulated destruction. Hunt notes that the New South Wales “legislation is too weak, and compliance, even with what exists, is rarely ensured. Even Land and Environment Court orders are ignored by companies, as no-one ensures they are implemented”.⁸⁵ One of the ways in which

⁷⁷ North, n 2, pp 6, 97.

⁷⁸ Ford M, “Hidden Treasure” (2012) 464 *Nature* 826.

⁷⁹ Brown S, “Mute or Mutable? Archaeological Significance, Research and Cultural Heritage Management in Australia” (2008) 67 *Australian Archaeology* 19.

⁸⁰ North, n 2, p 98.

⁸¹ North, n 2, p 119.

⁸² Queensland Government (2012), n 42, p 220.

⁸³ North, n 2, pp 230-231.

⁸⁴ North, n 2, pp 252-253.

⁸⁵ Hunt J, “Protecting Aboriginal Heritage in New South Wales” (CAEPR Topical Issue No 3/2012, Australian National University, Canberra, 2012) p 44.

Aboriginal cultural heritage is being destroyed in New South Wales relates to inadequate protections and arrangements within the land-use planning and development applications processes, and it was clear to Hunt that Aboriginal cultural heritage protection needed to be built into planning laws.⁸⁶

For Queensland, Schnierer⁸⁷ found support for the duty of care in principle but many problems with its implementation were identified including lack of public awareness and problems with the duty of care guidelines themselves (ie if an area is already disturbed the activity is considered unlikely to harm cultural heritage and no consultation is therefore necessary). It is clear that assessment of duty of care should be the responsibility of the regulatory authority, as it is in other States and Territories. This would provide greater certainty for developers. Since the early 1990s there has been an increase generally in negotiated agreements between mining companies and Aboriginal landowners. Negotiated agreements do have the potential to protect Indigenous cultural heritage, but only where underlying weaknesses in the bargaining position of Indigenous people are addressed.⁸⁸

Under current Queensland legislation, everybody has a duty of care not to harm cultural heritage and while thousands of searches of the database occur there have been very few cultural heritage management plans produced. It might be expected that as a result of these searches more cultural heritage management plans would be undertaken, but there is no way of measuring the relationship. While it appears that at least some developers undertake cultural heritage surveys as part of their duty of care, this currently does not add to our understanding of cultural heritage in the State because of the lack of mandatory reporting. During 2011-2012 it is reported that 15,937 searches were undertaken of the database but clearly very few of these would appear to have resulted in further action.⁸⁹ Again, because of the lack of mandatory reporting, it is unknown what follow-up occurred.

The 2008 review of the Queensland Acts resulted in a set of 27 recommendations including 12 proposed amendments to the Acts and 15 recommendations relating to improving the administration of the Acts. An awareness-raising and capacity-building program was seen to be the main delivery mechanism for the non-legislative recommendations and to improve the operation of the Acts. For many of the non-legislative recommendations to be effective, they should in fact be legislative requirements (eg “(4) Investigate options for a State planning instrument to ensure planning and development proposals are consistent with the Acts”). Others seem to be weak or badly worded (eg “(7) Ensure cultural heritage information provided to DERM in cultural heritage agreements, studies and management plans is recorded on the Database and Register”). There needs to be a legislative requirement to provide such information or else the current random situation will continue to persist.⁹⁰

PROSPECTS

In 2006, in *Cameron/Hoolihan (Gugu Badhun) v Queensland* [2006] NNTTA 3, an early determination under the *Native Title Act*, it was claimed (at [37]) that:

[T]he above brief and non-exhaustive overview of the current state of mining, environmental and cultural heritage law impacting on relatively low impact mining activities, highlights that Queensland possess[es] a comprehensive and well integrated regime that aims to an appropriate level of environmental and cultural protection.

As demonstrated in this article, a more exhaustive review suggests that there is only a superficial relationship between environmental laws and the *Aboriginal Cultural Heritage Act*. Available figures would suggest that many developments occur without assessment of cultural heritage values although

⁸⁶ Hunt, n 85, p 6.

⁸⁷ Schnierer, n 53, p 47.

⁸⁸ O’Faircheallaigh C, “Negotiating Cultural Heritage? Aboriginal-Mining Company Agreements” (2008) 39 *Development and Change* 25.

⁸⁹ Queensland Government, Department of Environment and Resource Management, *Annual Report 2010-2011* (DERM, Brisbane).

⁹⁰ Queensland Government, Department of Environment and Resource Management, *Indigenous Cultural Heritage Acts Review: Non-legislative Outcomes* (DERM, Brisbane, 2012).

this is difficult to determine with any accuracy owing to the lack of mandatory reporting requirements. This is also recognised in the Queensland Government's State of the Environment Report 2011.⁹¹

In August 2009, the Australian Government released a discussion paper, *Indigenous Heritage Law Reform*,⁹² which focused on ways to achieve some Australian-wide standards in cultural heritage management. The Australian Archaeological Association responded in November 2009 with a number of points including a concern that proponents would take the lead role in identification of Indigenous heritage, which it pointed out had failed to protect heritage in Queensland. It was also recommended that all heritage reports should be assessed by an independent regulatory authority and registered as part of a management process.⁹³ The Queensland Government submission was diametrically opposed to this in arguing that it was important that an accreditation process should allow for the protection of cultural heritage without providing for the direct assessment and approval of activities by State and Territory governments.⁹⁴ This is in conflict with the Queensland Government's views expressed in the Queensland State of Environment Report 2011 as noted above.

In December 2012, the Productivity Commission issued a paper, *Mineral and Energy Resource Exploration*, seeking submissions on non-financial barriers to mineral and energy resource exploration. The Queensland submission⁹⁵ expressed disappointment that the terms of reference did not include native title as it "impose[s] significant costs and barriers on the resource industry". It also stated that the government was committed to reducing the regulatory burden on Queensland industries. The submission concluded that mandatory reporting to government should be flexible and non-prescriptive in relation to managing cultural heritage.⁹⁶ Again, this is in conflict with the Queensland Government position as expressed in the State of the Environment Report 2011.

In September 2013, the Productivity Commission produced a report for comment with a final report released in March 2014.⁹⁷ Among other issues, the report noted that all heritage surveys should be recorded and registers should be maintained which map and list all known Indigenous heritage sites. It did not address management issues strongly but did suggest a more direct role by government than is the current situation in Queensland. The Queensland Government⁹⁸ response to this enquiry indicated that it was the position of the government to reduce the level of regulatory burden on Queensland's industries, noting that to obtain accreditation would be contrary to Queensland's commitment to reduce that regulatory burden. The submission also indicated that the Queensland Government is strongly opposed to any system of management that relies on a centralised State sponsored register and is opposed to mandatory reporting. Here there is a logical inconsistency as it is recognised that the government does maintain under current legislation a cultural heritage database and cultural heritage register to assist land users in assessing the potential cultural heritage values of an area. But the development of the database currently occurs only as a result of activities undertaken in some areas and in response to certain activities. The database is therefore incomplete and unreliable.

⁹¹ Queensland Government (2012), n 42, p 220.

⁹² Australian Government, Department of the Environment, Water, Heritage and the Arts, "Indigenous Heritage Law Reform Discussion Paper" (Canberra, 2009) <http://www.environment.gov.au/consultation/indigenous-heritage-law-reform>.

⁹³ Australian Archaeological Association Inc, n 56.

⁹⁴ Queensland Government, "Submission on Indigenous Heritage Law Reform Paper Discussion Paper" (2010) <http://www.environment.gov.au/system/files/pages/080619b8-678d-4d4a-905a-a287b0ab0fb7/files/qld-government.pdf>.

⁹⁵ Queensland Government, Department of Natural Resources and Mines, "Queensland Government Submission: Productivity Commission Issues Paper: Mineral and Energy Resource Exploration" (March 2013) http://www.pc.gov.au/_data/assets/pdf_file/0017/122633/sub025-resource-exploration.pdf, p 4.

⁹⁶ Queensland Government, n 95, p 20.

⁹⁷ Australian Government, Productivity Commission, Mineral and Energy Resource Exploration Productivity Commission Inquiry Report No 65 (2013) http://www.pc.gov.au/_data/assets/pdf_file/0003/128469/resource-exploration.pdf.

⁹⁸ Queensland Government, Department of Natural Resources and Mines, "Queensland Government Submission: Productivity Commission Draft Report: Mineral and Energy Resource Exploration" (July 2013) http://www.pc.gov.au/_data/assets/pdf_file/0008/124946/subdr053-resource-exploration.pdf.

The view expressed in this article therefore differs in a number of respects from those expressed by the Native Title Tribunal and Queensland Government. The Native Title Tribunal view is brief and difficult to evaluate. The Queensland Government is primarily concerned with reducing the regulatory burden on developers. It is argued that a successful cultural heritage management regime should apply in the case of all developments. Reporting of all cultural heritage surveys should be mandatory and should be made to a regulatory body that can set standards for all aspects of heritage assessment and management. It is argued that this would provide greater certainty in all aspects of cultural heritage management and is the basis of cultural heritage regimes worldwide.

CONCLUSION

There have been some improvements in cultural heritage legislation and policies in Australia in recent years, particularly in a broadening of the definition of “heritage” and in the involvement of Indigenous people in the assessment and management process. Nevertheless, the divergent approaches to Indigenous cultural heritage management at the Commonwealth, State and Territory levels continues to create considerable uncertainty for Aboriginal people and others undertaking activities in areas containing Indigenous cultural heritage.⁹⁹ These problems were recognised as long ago as 1996 in the Evatt Report and although there have been various moves by the Commonwealth to develop national standards, nothing has so far eventuated. Rather than developing a holistic approach to cultural heritage management, there is also a continuing divide between natural, Aboriginal and historic heritage. The care and management of Australia’s Indigenous cultural heritage has always been significantly under-resourced (both in terms of funding and human resources) and this is certainly the case in Queensland where resources have recently declined and appear unlikely to increase in the immediate future.

In discussing the broad issue of compliance, it is essential to understand what it is that people are being asked to comply with. Clearly the answer is legislation. But more broadly it needs to be asked: What is cultural heritage and what is it that is being protected? The Relics Act and the Cultural Record Act were both criticised for being too narrow in their definition of cultural heritage. In an early critique of the current *Aboriginal Cultural Heritage Act*, Godwin and Weiner refer to the clumsy and simplistic device of separating cultural places and information into two categories: the secret/sacred and the open/unrestricted domain.¹⁰⁰ Long provides an extensive critique of Queensland heritage legislation and offers instead a very broad definition as “everyday people-environment interactions”.¹⁰¹ However, he does not address how this concept can be legislated for or managed and this is a fundamental problem – Can heritage legislation protect the intangible remains of the past? Should other forms of agreement recognise the continuation of the more esoteric aspects of cultural heritage?

As noted by Byrne, Australia’s embrace of Aboriginal heritage as part of its national heritage in the 1960s has not, unfortunately, meant an end to treating Aboriginal culture as the “other” of white Australian culture.¹⁰² He notes that the “otherness” of Aboriginal people has been changeable, mutating between the 18th and 19th centuries, from a vision of noble savagery to one of ugly brutishness. The current Queensland heritage legislation, which creates a direct link between developers and Aboriginal parties with very little government oversight, while superficially progressive, again creates an “otherness” that may have a range of negative outcomes.

The current Queensland cultural heritage legislation relies on a duty of care which is, in most cases, self-assessable. It is all too easy for a person undertaking an activity to satisfy that duty of care by undertaking a search of the database and proceeding with an activity. The legislation is not linked

⁹⁹ Sculthorpe, n 9, p 175; Shearing S, “One Step Forward? Recent Developments in Australian State and Territory Indigenous Cultural Heritage Laws” (2006) 3 *Macquarie Journal of International and Comparative Environmental Law* 35.

¹⁰⁰ Godwin L and Weiner JF, “Footprints of the Ancestors: The Convergence of Anthropological and Archaeological Perspectives in Contemporary Aboriginal Heritage Studies” in David B, Barker B and McNiven IJ (eds), *The Social Archaeology of Australian Indigenous Societies* (Aboriginal Studies Press, Canberra, 2006) p 137.

¹⁰¹ Long, n 19, p 370.

¹⁰² Byrne D, “Deep Nation: Australia’s Acquisition of an Indigenous Past” (1996) 20 *Aboriginal History* 100.

to the State environmental and planning legislation so there is little opportunity for the administering body to check if developers are meeting their obligations under the Act. There are no mandatory provisions for reporting cultural heritage, so the database and register established under the Act are inconsistent and outdated. Yet the database and register are supposed to be an up-to-date and correct list of cultural heritage for those people undertaking a search as part of their duty of care. Cultural heritage management plans are only required if a permit is required under another Act and many developments may not take cultural heritage into account. Developers can undertake other agreements under s 23(3) of the *Aboriginal Cultural Heritage Act* and these do not have to be reported to the administering body. The number of such agreements is likely to be high. There is no opportunity for the administering body to set standards and cultural heritage management plans tend to focus on issues of work practice, payment and other issues not directly related to cultural heritage.

Sutton¹⁰³ has noted a marked contrast between progressive public and political rhetoric about empowerment and self-determination and the raw evidence of disastrous failure in major aspects of Aboriginal Australian affairs policy since the early 1970s. This is supported by the Productivity Commission report on *Overcoming Indigenous Disadvantage* which demonstrates just how disadvantaged Aboriginal people still are.¹⁰⁴ Banks notes that in many indicators things have actually become worse for Aboriginal people or remained static. To overcome this, Banks recommends that the first and most obvious challenge is to develop and implement effective policies and programs. But more fundamentally, he notes that it is important to generate the information needed to assess which policies are working and how much progress has been achieved. The same reasoning can be applied to cultural heritage management. In Queensland, however, the processes and procedures are currently not in place where even this basic information is available for assessment. Given the largely self-assessable nature of the legislation in Queensland, many developers have taken on a pseudo-government role in employing Aboriginal people through the cultural heritage management plan process. The government itself has little oversight as to what is happening in respect to these issues or to the management of cultural heritage. Many other developments occur within the State with only the most superficial attention to cultural heritage. Queensland's "flexible and non-prescriptive" approach to Indigenous cultural heritage might be seen as more a lack of concern than as a genuine attempt to empower Aboriginal people. The management of European heritage is not treated with the same degree of flexibility.

While the current legislation remains in place in Queensland, the government and others may be satisfied with rhetoric about giving control to Aboriginal people and some Aboriginal groups will be managing their cultural heritage well. But there will be no strategic approach to cultural heritage management, no capacity-building, an enormous pile of consultancy survey reports of very mixed quality, little or no research and therefore no attention to the "big picture" of a cultural heritage management strategy for the State. Aboriginal people will have been "othered" as they have so often been in the past. They will be dependent on resources provided by big developers but left to fend for themselves when the developers depart. The government may be satisfied, along with lawyers and some consultants, but the ground may resemble earlier periods of a handout mentality with all the associated negative connotations. While treating Indigenous cultural heritage separately from European cultural heritage was done for the very best of intentions, in the long-term the results will be largely negative. Finally, there appears to be a reluctance by the government to engage in meaningful debate concerning the legislation and we are therefore reminded of the wise Aboriginal bureaucrat Kerry Pholi's epiphany that: "Excessive restrictions on 'respectful' discourse in Aboriginal policy debate will only create an intellectual ghetto, where only those deemed appropriately respectful will be permitted to discuss an increasingly impoverished range of ideas."¹⁰⁵

¹⁰³ Sutton P, *The Politics of Suffering: Indigenous Australia and the End of the Liberal Consensus* (Melbourne University Press, Melbourne, 2009).

¹⁰⁴ Banks G, "Are We Overcoming Indigenous Disadvantage?" (Lecture presented in Reconciliation Australia's *Closing the Gap Conversations* series, 7 July 2009) http://www.pc.gov.au/_data/assets/pdf_file/0013/90310/cs20090707.pdf.

¹⁰⁵ Pholi K, "Silencing Dissent Inside the Aboriginal Industry" (2012) 55(12) *Quadrant Online* 1.

In keeping with the themes of this article, it is proposed that cultural heritage legislation in Queensland needs to be developed and controlled by a responsible government authority with clear Indigenous control structures that can set standards and monitor all aspects of cultural heritage management. Cultural heritage management should be incorporated at every level of environmental planning. Reporting of all cultural heritage activities should be mandatory. The current largely self-assessable legislation fails to meet best practice cultural heritage management and its effectiveness is also difficult to measure. These conclusions are consistent with those reached in the recent Productivity Commission Inquiry Report.¹⁰⁶

¹⁰⁶ Australian Government, n 97.