16 September 2016

Cultural Heritage Duty of Care Guidelines Review
Cultural Heritage Unit
Department of Aboriginal and Torres Strait Islander Partnerships
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City East QLD 4002
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Dear Review Committee Members,

RE: Cultural Heritage Duty of Care Guidelines Review
Issued pursuant to S. 28 of Aboriginal Cultural Heritage Act 2003 (QLD)

Thank you for the opportunity to comment on the review of the Duty of Care Guidelines. I provide this letter as a submission on behalf of Australia ICOMOS.

ICOMOS – the International Council for Monuments and Sites – is a non-government professional organisation that promotes expertise in the conservation of cultural heritage. ICOMOS is also an advisory body to the World Heritage Committee under the World Heritage Convention. Australia ICOMOS, formed in 1976, is one of over 100 national committees throughout the world. Australia ICOMOS has over 600 members in a range of heritage professions. We have expert members on a large number of ICOMOS International Scientific Committees, as well as on expert committees and boards in Australia. We have a particular interest in Australia’s world and national heritage places.

The review of the Duty of Care Guidelines, issued pursuant to the provisions of s.28 of the Queensland Aboriginal Cultural Heritage Act 2003 (hereafter ‘The Act’), is timely and provides an important opportunity to address concerns relating to The Act as manifest in the deficiencies of the Duty of Care Guidelines (hereafter ‘The Guidelines’).

This submission has been prepared by Dr Matthew Whincop, Australia ICOMOS State Representative for Queensland, in conjunction with Australia ICOMOS members in order to reflect the explicit concerns of Australia ICOMOS members working within the cultural heritage management sector across Queensland. The principle concerns addressed below include:

1. Definitions of Aboriginal cultural heritage;
2. Categories of proposed impact;
3. Meeting the aims and principles of the Act;
4. The cultural heritage management process;
5. Dispute resolution; and
6. Identification of representative Traditional Owners.

Definitions of Cultural Heritage

It is widely recognised in cultural heritage management that Cultural Heritage is not restricted to tangible remains (see Byrne 1991; Ellis 1994; Ross 1996; 2010; Ross et al. 2010a; 2010b; Sullivan 1996; 2008). In accordance with the Indigenous Archaeologies methodology that informs cultural heritage management practice
globally (Atalay 2008; Byrne 2003; 2004; Colwell-Chanthaphonh and Ferguson [eds] 2007; King 2003; Nicholas 2010; Smith and Wobst [eds] 2004), Cultural Heritage incorporates both tangible and intangible heritage (as defined by the UNESCO in 2003, and by the Australian Heritage Commission Ask First guidelines). Intangible heritage includes cultural and behavioural phenomena, including stories, songs, dance and beliefs, and places associated with intangible heritage, such as: places created by Ancestral Beings (some of these places are still occupied by such beings); ceremonial places, not all of which have a material manifestation; story places – or places where stories are situated; and resource places, where people managed and collected resources.

Despite the definition of Aboriginal Cultural Heritage in ‘The Act’ being broad enough to recognise the tangible and intangible heritage places outlined here, and s. 12 of ‘The Act’ expressly recognising that Aboriginal Cultural Heritage does not require physical evidence, ‘The Guidelines’ focus almost entirely on archaeological (i.e. tangible) sites. Even in cases where intangible heritage is well documented, ‘The Act’ in general, and the Guidelines in particular, fail to offer adequate protection.

Cultural heritage also includes the concept of living heritage (as defined by ICROM n.d.; see also Bradley 2001, 2008; David and Thomas (eds) 2008; Gosden and Head 1974; Meskell 2012; Russell 2012; Smith and Burke 2005; Strang 2008). Living heritage includes past cultural activities that are continued into the present (e.g. hunting, fishing and gathering; natural resources management regimes) and the places where such practices are implemented (see Byrne and Nugent 2006; Ross et al. 2011) as well as modern practices that have evolved from earlier traditions and which have value in the creation of cultural identity in the present (e.g. education opportunities provided; reconnection to country; access to cultural bush foods and medicines). ‘The Act’ in general, and ‘The Guidelines’ in particular, fail to offer protection to living heritage.

Australia ICOMOS recommends that ‘The Guidelines’ be reviewed and updated to encompass the full range of definitions of Cultural Heritage and consider implementing a mechanism for protecting intangible cultural heritage.

Categories of Proposed Impact

Many of the categories established in Sections 4 and 5 of ‘The Guidelines’, as the basis for determining impacts of proposed developments, are poorly defined. In particular, all the category definitions are based on the potential impact a development may have on land surface rather than the likely impact on cultural heritage. To meet the aims (and principles) of ‘The Act’, the definitions of proposed impacts needs to consider potential effects on cultural heritage rather than land surfaces. Additionally, there are no guidelines provided for proponents, untrained and unskilled in cultural heritage management, to assess whether a proposed land use might adversely affect cultural heritage (e.g. scarred trees may be affected differently by the cultivation of different crops). In general, there remains inadequate guidance on when and how cultural heritage assessments are required.

Also of concern is the focus on past impact (Category 3 and Category 4 developments) and the recognition of the potential for cultural heritage to survive different levels of past impact. Of particular relevance is the example where the remains of a 4,000-year-old Aboriginal man were identified underneath a bus stop and footpath in the Sydney suburb of Narrabeen despite the footpath overlying a range of service infrastructure (McDonald et al. 2007). Similar examples of Aboriginal cultural heritage sites surviving development are known from the Melbourne and Hobart CBDs, indicating that past disturbance often only has a limited impact on cultural heritage sites and objects. Examples from around the world also show that significant cultural heritage commonly survives continual ploughing over the long-term (e.g. Oltean and Abell 2012).

In addition to these concerns regarding the definition of categories and the application of these definitions in practice, we are concerned that the adverse effects on cultural heritage of some very large-scale developments, such as land clearing, are not adequately captured by the definitions in ‘The Guidelines’. Such wide-area developments and land-surface impacts have the potential to affect a number of archaeological places, which together describe complex cultural landscapes, as well as highly significant intangible heritage. This becomes especially problematic if large-scale development projects are divided into smaller parcels for assessment.

Australia ICOMOS recommends that all Category definitions are revised to ensure that each category requires an assessment of the likely impact of development activity on cultural heritage, not just land surface. Such an assessment must be undertaken by a person trained, skilled and experienced in archaeological site identification, Aboriginal heritage place identification, and cultural heritage management generally, in consultation with Traditional Owners and Aboriginal Parties.

Australia ICOMOS recommends that definitions of impact be expanded to recognise indirect impacts, such as the desecration of ceremonial sites or gender exclusive areas by unauthorised access.
Australia ICOMOS recommends that there be a requirement for an assessment to be undertaken by trained and accredited heritage professionals, in consultation with Traditional Owners or Aboriginal Parties, to assess the potential impact of the proposed development, even for a minor change in land use.

Australia ICOMOS recommends that provision be made for all projects, regardless of defined category, to prepare a Cultural Heritage Management Plan (CHMP) when places of social or spiritual significance to Traditional Owners are identified in the initial assessment.

Australia ICOMOS recommends that the Guidelines develop new categories for large-scale developments, wherein these developments are required to be assessed holistically.

Meeting the Aims and Principles of the Act

The Terms of Reference for the Review of the Duty of Care Guidelines expressly include the focus question: "How can the guidelines be improved to best achieve the purpose of the legislation?". The following section of this submission addresses this question. Section 4 of the ACHA states that:

The main purpose of this Act is to provide effective recognition, protection and conservation of Aboriginal cultural heritage (emphasis added).

To meet this aim, Section 5 outlines five key principles of the Act:

5 (a): recognition of Aboriginal knowledge, culture and traditional practices;
5 (b): Aboriginal people to be regarded as primary guardians of knowledge of heritage;
5 (c): to promote understanding of Aboriginal cultural heritage;
5 (d): to allow Aboriginal people to reaffirm obligations to ‘law and country’; and
5 (e): to establish timely and efficient processes for the management of activities that may harm Aboriginal cultural heritage.

‘The Guidelines’ specifically relate to principles 5 (a), 5 (b), 5 (d) and 5 (e), but only the latter (5e) is actually addressed by ‘The Guidelines’. The other principles are largely ignored by the provisions of ‘The Guidelines’, which allow development proponents to make decisions about the impact of development land surfaces (rather than on Cultural Heritage) without consulting Traditional Owners and/or Aboriginal Parties. This process in ‘The Guidelines’ is contrary to the principles of the legislation, and is also contrary to the Principles of Aboriginal consultation as outlined in the Ask First guidelines (p. 6) developed by the Australian Heritage Commission and specifically referenced as best practice in Section 7 of the Guidelines. By allowing proponents to make the initial assessment of potential impact, Aboriginal people are denied the opportunity to meet their obligations to assess effects on their land, resources and heritage (Principle 5 (d)) and Aboriginal knowledge is not made the primary source of information about heritage (Principles 5 (a) and 5 (c)).

Australia ICOMOS recommends that ‘The Guidelines’ include a primary role for oversight of the Duty of Care process (both determination of categories and review of adverse impact on cultural heritage) by an independent agency (such as an Aboriginal Heritage Council) or by the relevant Aboriginal Party, or by the regulatory authority (particularly through the employment of regionally-based Aboriginal site officers), which should be resourced to undertake such a role.

The Cultural Heritage Management Process

The concept of a ‘duty of care’ is integrally connected to the cultural heritage management process, as outlined in the Australian Heritage Commission Ask First guidelines, including the need for a heritage assessment that identifies Indigenous Heritage Places to be central to the development of a CHMP (Ask First guidelines: p. 12-13). Currently, there is an insufficient link between the Duty of Care Guidelines and Parts 6 and 7 of the Act.

There is currently no mechanism to ensure that a Cultural Heritage Study (CHS) or CHMP involve professionally trained and accredited cultural heritage assessors and/or managers working alongside Traditional Owners, as is required by the Ask First guidelines. Although the guiding principle of the Act – that cultural heritage should be managed by Traditional Owners – requires that the primary source of information about heritage should be provided by Traditional Owners, there is also an important aspect of cultural heritage that includes the scientific (i.e. “anthropological, biogeographical, historical and archaeological” – [Sections 12, 40 and 73]) value of cultural heritage. The assessment of such value should be undertaken by trained, accredited and experienced heritage professionals with appropriate university qualifications in the relevant disciplines.
Australia ICOMOS recommends that the link between the Duty of Care provisions generally and the requirements for a CHS and CHMP is more clearly articulated. This would include provisions to ensure that appropriately skilled and experienced cultural heritage professionals are involved in a CHS and CHMP (anthropologists are more appropriate for assessing intangible cultural heritage sites, while archaeologists are more appropriate for tangible cultural heritage sites), and that such heritage professionals are professionally trained and accredited and have the required qualifications to undertake the necessary assessments. In other States, such provisions are regulated by a permit or registration process - A similar permitting regime should be considered for Queensland.

Australia ICOMOS recommends that the Guidelines reflect the management principles of the Ask First guidelines (see especially pages 14-15) which encourage the integration of the assessment process and the management process.

Dispute resolution

At present, ‘The Guidelines’ contain only a brief and poorly articulated Dispute Resolution process (Section 7.5). ‘The Guidelines’ indicate that the duty of care remains enforced despite an absence of agreement between a proponent and the Aboriginal Party. But ‘The Guidelines’ also imply that a proponent may proceed with development, even without the consent of an Aboriginal Party, providing that the proponent (who is usually unskilled in matters pertaining to the identification of Aboriginal cultural heritage) does not harm Aboriginal cultural heritage, without any requirement for the activity to be monitored by a person with skills and training in heritage identification. This is entirely contrary to the principles of ‘The Act’, and to the principles of the Ask First guidelines to which the Duty of Care Guidelines makes specific reference.

Australia ICOMOS recommends that a well-formulated Dispute Resolution process be developed for inclusion in ‘The Guidelines’ and that such a process establishes a pathway for action on dispute resolution that can be regulated by DATSIP.

Identification of Representative Traditional Owners

The link between the Native Title Act 1993 and identification of Aboriginal Parties is problematic; many Traditional Owners are either not able or not willing to enter into the native title claims process, yet have undisputed connections to place and heritage on their country. The current process disenfranchises considerable numbers of Aboriginal people and denies them the opportunity to meet their cultural obligations to law and country, as provided in the aims and principles of the Act. Unfortunately, there are few other mechanisms to identify Aboriginal Parties.

Australia ICOMOS recommends that DATSIP investigate a range of mechanisms to identify Aboriginal Parties, including the use of the native title process, but such that also recognise Traditional Owner connections to cultural heritage that may fall outside the native title claims process. We suggest the RAP process as set out in the Victorian Aboriginal Heritage Act 2006 is one potentially useful approach.

Australia ICOMOS acknowledges the opportunity to make a submission to the review of the Duty of Care Guidelines under the Aboriginal Cultural Heritage Act. We hope that you will carefully consider the above comment, and we look forward to participating further in the review process as necessary.

Please do not hesitate to contact me or Dr Matthew Whincop for clarification on any of the above. Dr Whincop’s contact details are: 11 Snowden Street, Tarragindi QLD 4121, and 0407 038 584.

Yours faithfully

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President, Australia ICOMOS
References


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