

A New Approach To Protecting Indigenous Cultural Heritage In Queensland

Statutory Protection - New Legislation In Queensland

The *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* commenced on 16 April 2004. It received bipartisan support in Parliament and reflects four years of consultation between the State and the broad range of groups affected.

The legislation acknowledges the right of Aboriginal people and Torres Strait Islanders to be involved in the recognition, protection and conservation of their cultural heritage.

For completeness it is noted that the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* also applies in Queensland. However, as it is rarely invoked this paper only considers the Queensland legislation, as this directly impacts on Queensland local government.

Blanket Protection of Aboriginal and Torres Strait Islander cultural heritage

The blanket protection afforded under this new State legislation has a broader application than what applied under the now repealed *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987*, as the definition of Aboriginal and Torres Strait Islander cultural heritage is more comprehensive.

Cultural heritage now includes:

1. A significant Aboriginal or Torres Strait Islander area in Queensland
2. A significant Aboriginal or Torres Strait Islander object
3. Evidence of archaeological or historic significance, of Aboriginal or Torres Strait Islander occupation of an area in Queensland.

There need not be any markings or other physical evidence in the area indicating its cultural heritage significance.

One of the primary sources of information about cultural heritage in a particular area is the Aboriginal people or Torres Strait Islanders responsible for that area. Another is the Cultural Heritage Register and Cultural Heritage Database established under this legislation. These information sources will be discussed in more detail shortly.

Duty of Care

A key feature of the legislation is the creation of a statutory duty of care. The duty is to take all reasonable and practical measures to avoid damaging or destroying cultural heritage.

The duty is placed on any person 'carrying out an activity'. Local government must meet the duty of care whenever they do work on land or water.

The only time when the legislation recognises strict compliance has occurred without any inquiry being taken is when the person doing the activity owns the heritage, or is acting with the owner's agreement; or when the action is necessary because of an emergency, such as bushfires or natural disasters. It would include sandbagging when there is an imminent threat of flood, but not bridge repairs after a flood.

From a practical perspective, to meet the duty of care Indigenous cultural heritage should now become a standard line item in any work budget. It should be taken into account during the first stages of pre-construction planning and design to allow sufficient time for consultation and enable any necessary design modifications to be undertaken at minimal cost.

The duty does not however extend to local government taking steps to ensure others also meet the duty for example: developers, pastoralists, and government departments. They are personally responsible for meeting the duty of care for the particular work they are undertaking.

The legislation provides some guidance about what is 'reasonable' or necessary action to meet the duty of care, by:

- Stating when a Cultural Heritage Management Plan (CHMP) is compulsory.
- Identifying actions that represent 'strict compliance' with the duty of care
- Prescribing Duty of Care Guidelines that provide guidance by suggesting the level of associated risk of damage for certain work in specific areas. The guidelines then suggest what action is reasonable to avoid damage or destruction of cultural heritage.

The penalties for breaching the duty of care consist of a fine, rehabilitation/restoration costs and in some instances a two-year prison sentence. The maximum fine is \$750,000 for a corporation, and \$75,000 for an individual.

Identifying the Aboriginal or Torres Strait Islander Party

During the consultations preceding this new legislation, the difficulties of identifying who within the Aboriginal or Torres Strait Islander community to speak with about cultural heritage was regularly raised.

This legislation has responded to this issue by identifying the Aboriginal or Torres Strait Islander “party” for an area. The legislation does not exclude others from also being consulted, but consultation with others cannot be treated as an alternative to consulting with the Aboriginal or Torres Strait Islander party identified in the Act.

Failure to contact each Aboriginal or Torres Strait Islander party when appropriate constitutes a breach of the duty of care when cultural heritage is harmed.

The Guidelines briefly mentioned already, suggest when consultation should occur. In addition, consultation must occur when cultural heritage information is provided in response to Register and Database searches that will be discussed in more detail shortly.

The Act creates a hierarchy of ‘contact points’ by which to identify the Aboriginal or Torres Strait Islander party. In summary, when the first contact point either does not exist or is not responsible for all of the area, then you go the next contact point in the hierarchy (and so on) for any area where that contact point does not apply. You stop as soon as you reach the applicable contact point. This may sound complicated. In reality it is not something you need to fully understand.

The important thing to remember is to always search the Qld State Cultural Heritage Register to find out the Aboriginal or Torres Strait Islander party(s) for the area. This could change within a 24 hour period, so you cannot rely on past searches.

You would then consult with the party(s) identified about the impact of the proposed work in the area (and only that area) for which that party(s) can speak. One party may only speak for part of the actual work area. For example, for roadwork it may be necessary to speak with a number of parties about different sections of a road.

The descending list of contact points are:

First contact point Aboriginal cultural heritage body - an entity established under this legislation.

Second contact point Registered native title claimant and native title holder

Third contact point	Previously registered native title claimants and previous native title holders, subject to conditions.
Fourth contact point	Aboriginal or Torres Strait Islander person with particular knowledge and traditional responsibility. The legislation requires a public notice to be published in a local newspaper asking for such a person to contact the Council within a specified time.

Sources of Information

The harming of cultural heritage is unlawful if ‘the person knows or ought reasonably to know’ that the area or object was Aboriginal cultural heritage.

The steps necessary to meet the duty of care will in part be dependant upon what work is being undertaken (the type and level of disturbance) and where the work is to take place.

However, for almost any work that will involve ground disturbance the initial step is to ascertain whether there is already information on record about cultural heritage in the area affected.

Initial searches should always be undertaken from the Queensland sources indicated below. This cannot be currently done on-line. The search form and more detail is available in the Members section of LGOnline.

When information about cultural heritage is provided in response to the search, the Aboriginal or Torres Strait Islander party must be consulted before the work commences. Failure to do this would constitute a breach of the duty of care if any harm results from the work.

As the following will be growing sources of information, they should be searched before each individual activity.

1. Search the *Qld State Cultural Heritage Register* - this will provide information about:
 - Cultural heritage management plans registered under the new legislation;
 - Cultural heritage studies approved under the new legislation;
 - Designated landscape areas (approved under earlier legislation);

And

- Aboriginal or Torres Strait Islander parties for the area.

2. Search the *Qld State Cultural Heritage Database* - this will provide information about:

- Cultural heritage records collected by the State over at least the last 50 years. For a number of reasons this information may not be accurate and must be 'tested' with the Aboriginal party;
- Cultural heritage records collected by the State since the new legislation commenced. This will reflect information gathered by the State, and also information provided by others (including local government) and considered sufficiently authoritative to be included on the database.
- The existence of cultural heritage information held that is of a 'secret and sacred' sacred nature. Details will not be provided. However, this general information is sufficient to place an onus on local government to contact the Aboriginal or Torres Strait Islander party to discuss the proposed work.

The other initial sources of information that must be checked are:

3. Commonwealth Databases

- Australian Heritage Places Inventory - www.heritage.gov.au/ahpi/index.html
- Australian Heritage Database - www.deh.gov.au/cgi-bin/ahdb/search.pl

4. Information held by the Council undertaking the work. Some local government have undertaken cultural heritage studies in the past and/or have local knowledge about Indigenous cultural heritage. When this applies to the area affected by proposed work, the Aboriginal or Torres Strait Islander party must first be consulted.

Meeting The Duty Of Care

Clearly the question of how to meet the legislative duty of care is of great interest to people working in local government. There is insufficient time to cover the details here. The LGAQ Native Title and Indigenous Cultural Heritage Manual covers this in detail (electronically available in the Members section, LGOnline).

In summary, best practice would include:

1. Conducting searches of the Information Sources already discussed to find out about recorded cultural heritage in the area and the Aboriginal and Torres Strait Islander party for the area.
2. Reading the Duty of Care Guidelines, working out which 'activity category' the proposed work falls within and following the suggested action - discussed in a little more detail shortly.
3. In some instances, completing a cultural heritage management plan or an agreement with the Aboriginal or Torres Strait Islander party.
4. Asking yourself the questions that the Land and Resource Tribunal considers when determining whether or not there has been a breach of duty of care.
 - What is the likelihood that culture heritage could be harmed, given the activity proposed?
 - What is the nature of the cultural heritage that could be harmed?
 - To what extent has the Aboriginal or Torres Strait Islander party(s) been consulted, and what was the outcome?
 - Has there been any study or survey to locate cultural heritage, and if so what was the extent and outcome of this?
 - Has the Register and Database been searched?
 - What is the extent of action taken to comply with the duty of care Guidelines?; and
 - What is the nature and extent of past uses in the area?

Duty of Care Guidelines

The Duty of Care Guidelines divide activities into five categories. These categories are defined by the nature of the activity and the likelihood it will harm cultural heritage. The action recommended in the Guidelines varies depending on the applicable category.

When it is necessary to consult with the Aboriginal or Torres Strait Islander party, using the legislative cultural heritage management plan process provides time frames and dispute resolution mechanisms not previously available.

Regardless of category an activity must stop and the Aboriginal or Torres Strait Islander party consulted if it ever becomes necessary to excavate, relocate, remove or harm a

cultural heritage find. A cultural heritage find occurs when one of the following comes to light during the activity - either a significant object or, evidence of archaeological or historic significance of Indigenous occupation, or Indigenous human remains.

In summary, the Guidelines recommend the following:

1. Activities involving No Surface Disturbance (Category 1)

“Surface Disturbance” means any disturbance of an area which causes a lasting impact to the land or waters during the activity or after the activity has ceased. As the likelihood of harm is low when there is no surface disturbance, the activity can proceed without any further cultural heritage assessment.

2. Activities causing No Additional Surface Disturbance (Category 2)

“No Additional Surface Disturbance” means surface disturbance not inconsistent with previous surface disturbance. The activity can proceed without any further cultural heritage assessment subject to what has already been discussed.

3. Developed Areas (Category 3)

“Developed Area” means that the area is developed or maintained for a particular purpose such as use as a park, garden, railway, road or other access route, navigation channel, municipal facility or infrastructure facility, such as powerlines, telecommunication lines or electricity infrastructure. The activity can proceed without any further cultural heritage assessment subject to what has already been discussed.

4. Areas previously subject to Significant Ground Disturbance (Category 4)

“Significant Ground Disturbance” means: disturbance by machinery of the topsoil or surface rock layer of the ground, such as by ploughing, drilling or dredging; the removal of native vegetation by disturbing root systems and exposing underlying soil.

An activity in an area previously subject to significant ground disturbance is unlikely to harm cultural heritage and can proceed without any further cultural heritage assessment subject to what has already been discussed and as long as due account is taken of the likelihood of certain features in the area having residual cultural significance.

5. Activities causing additional surface disturbance (Category 5)

If the activity does not fall within any of the previous categories, then it is a Category 5 activity. This indicates there is generally a high risk of harm to cultural heritage. A cultural heritage assessment should be undertaken before commencing the activity and this must include contact with the Aboriginal or Torres Strait Islander party to seek advice about whether any harm could occur, and if relevant the steps needed to avoid this.

Recording Indigenous Cultural Heritage

Earlier in this paper, information sources were considered. You may recall that the Qld State Cultural Heritage Register will include Cultural Heritage Management Plans and Cultural Heritage Studies completed under the new legislation.

These are now the only two ways to record Indigenous cultural heritage such that the information is recognised under this new legislation and is also accessible to the public.

A Cultural Heritage Management Plan (CHMP) is a document providing for how activities for a project are to be managed for their impact on cultural heritage. In some instances the legislation makes these mandatory.

The statutory duty of care is met when a CHMP reached by agreement is approved by the Chief Executive, Department of Natural Resources, Mines & Energy. A CHMP can state that no additional requirements are needed for the particular project.

A CHMP developed but not fully agreed upon can also be approved through a process involving the Land and Resources Tribunal making recommendations to the NRM&E Minister who makes the final decision whether or not to approve the plan.

A CHMP developed in an area where the Aboriginal or Torres Strait Islander party has not responded to notices about the proposed plan will also be considered by the Chief Executive, Department of Natural Resources, Mines & Energy.

A Council will only be involved in a CHMP that it sponsors. However there will be a range of other people (e.g. miners, developers) who will also sponsor a CHMP in a local government area.

A search the Cultural Heritage Register will provide information about every CHMP either being developed or currently approved in a local government area. The numbers of CHMPs registered will clearly increase over time.

A Cultural Heritage Study (CHS) is a comprehensive study of Indigenous cultural heritage in a specified area, conducted with the purpose of recording the findings on the Qld State Cultural Heritage Register. There is no obligation to undertake a CHS. It is a voluntary undertaking and is likely to be a lengthy and expensive exercise.

There is no connection between a CHS and the statutory duty of care. Completing a CHS is insufficient to meet a Councils duty of care to protect or minimise harm to Aboriginal cultural heritage.

The findings and any recommendations in a recorded CHS will need to be considered whenever work is planned in an area that has ever been the subject of a CHS.

An important feature of the CHS process is role of the endorsed party (who is determined by the Aboriginal or Torres Strait Islander party and must be from that group.)

Only the endorsed party can assess the level of significance of areas and objects identified in the study area. Not even the Chief Executive or the Minister can challenge or re-examine an assessment made by an endorsed party about the level of significance of a significant object or area.

The findings in a CHS must include:

- a description that adequately distinguishes it from other cultural heritage studies; and
- a description of the study area that enables accurate location; and
- a description of all Indigenous cultural heritage that has been identified in the study area and a description of its location; and
- the reasons anything identified as Indigenous cultural heritage has been so identified; and
- if the study makes recommendations for the management of Indigenous cultural heritage identified in the study—the recommendations; and
- for each area or object assessed as a significant—the name of each Aboriginal or Torres Strait Islander party that made that assessment; and
- the name and contact details of each endorsed party for the study; and
- the name of each endorsed party for the study who did not take part; and
- the name and contact details of each cultural heritage body for the study area; and
- the name and contact details of each cultural heritage assessor for the study; and
- when the study was completed.

The Chief Executive, Department of Natural Resources Mines and Energy decides whether or not to record the completed CHS. An objection against that decision can be lodged in the Land & Resources Tribunal. The Tribunal makes recommendations to the NRM&E Minister who makes the final decision whether or not to record the study.

The factors that must be considered by the Chief Executive are:

- (a) whether the sponsor has complied with the necessary procedures; and
- (b) whether the findings and recommendations, are consistent with authoritative anthropological, biogeographical, historical and archaeological information about the study area; and

- (c) whether the cultural heritage study includes the information supporting the findings to be recorded, as required under the Act (listed previously); and
- (d) whether the cultural heritage study also includes the following:
 - (i) an explanation of how lawful access to the study area was achieved;
 - (ii) a summarising statement about the existence of Indigenous cultural heritage in the study area;
 - (iii) documented evidence about whether affected land owners/occupiers agree with any recommendations about the future management of heritage;
 - (iv) a description of assessment activities carried out for the study;
 - (v) the signature of each endorsed party (or the party's nominee) who supports the study, and the recording of some or all of the study's findings in the register;
 - (vi) the extent to which any endorsed party does not agree with the recording of the study's findings in the register;
 - (vii) details of each endorsed party for the study who did not take part in the study.

More Information

This paper provides an overview of the new State legislation that provides a blanket protection of Indigenous cultural heritage in Queensland, and introduces a duty of care to be met by anyone doing work on land or in water throughout the State.

It requires many in local government to have a working knowledge about Register searches, the Duty of Care Guidelines, how to identify the Aboriginal and Torres Strait Islander party and more generally how to meet the duty of care. Practically, consideration of Indigenous cultural heritage should now be incorporated into project preplanning and be included as a standard budget line item.

Please feel free to contact me for additional information and assistance. My contact details are Ph: 3000 2219 or deanna_cartledge@lgaq.asn.au

In addition there is a growing source of information available to anyone working in local government on LG Online [www.lgaq.asn.au] in the Members section. After logging in (first time users click 'sign me up' to obtain your personal password) go to 'Development' on the orange status bar, and then select 'Indigenous cultural heritage' on the blue status bar that appears.

The Cultural Heritage Coordination Unit, Department of Natural Resources, Mines & Energy administers the legislation. To contact the Unit phone 3238 3838 or fax 3238 3842.