

Indigenous Cultural Heritage Acts Review

Key issues and
draft recommendations

November 2009

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Executive summary

Aboriginal and Torres Strait Islander cultural heritage is protected by the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003* (the Acts), which also regulate activities that may have an impact on cultural heritage. The Department of Environment and Resource Management (DERM) is reviewing the Acts to examine their efficacy and efficiency.

A review paper was released in 2008 inviting submissions to the review, and after the five-month consultation period, 69 submissions were received. Generally, submissions indicated the Acts are performing well. However, a number of changes to the Acts, supporting policy and other matters have been recommended to improve them.

The draft recommendations address issues raised in submissions.

All interested parties are invited to make a submission on the draft recommendations. For more information about how you can have your say, see the 'Making a submission' section at the end of this paper.

Summary of draft recommendations

The draft recommendations have been organised under the parts of the Acts to which they most directly relate. Unless otherwise stated, DERM will be responsible for the implementation of the final recommendations, if endorsed by the Queensland Government. For key terms see 'Introduction'.

Part 1—Preliminary

1. Implement an awareness and capacity-raising strategy aimed at:
 - providing tailored information to key stakeholders about the operation of the Acts, including case studies demonstrating their practical operation
 - increasing awareness of the role mediation can play in reaching an agreement
 - establishing a best-practice cultural heritage management training program for state and local government
 - increasing the capacity of Aboriginal or Torres Strait Islander parties to make agreements recognising and protecting cultural heritage
 - promoting the benefits and practical protection achieved by recording cultural heritage on the cultural heritage databases and registers
 - promoting the role of authorised officers and the steps they can take to protect cultural heritage
 - raising awareness of the requirement to report ancient Aboriginal and Torres Strait Islander human remains to DERM.
2. Analyse the interaction between the Acts and *Queensland Heritage Act 1992* (QHA), and consider:
 - gaps in the protection of cultural heritage
 - opportunities for the Acts and QHA to operate in an integrated and seamless manner
 - whether the application of the Acts and QHA should remain mutually exclusive
 - opportunities for recognising and protecting cultural heritage significant to historical owners
 - opportunities for recognising and protecting scientific and other values associated with Aboriginal or Torres Strait Islander cultural heritage, which are not derived from Aboriginal tradition or Islander custom.

Part 2—Ownership, custodianship and possession of Aboriginal and Torres Strait Islander cultural heritage

As for recommendation one—implement an awareness and capacity-raising strategy.

Part 3—Protecting Aboriginal and Torres Strait Islander cultural heritage

3. Amend the Acts to:
 - require cultural heritage agreements and management plans to be made with all or each Aboriginal or Torres Strait Islander parties or party
 - require cultural heritage agreements and native title agreements to expressly include cultural heritage management as a subject, in order to satisfy the duty of care
 - allow nominees, where authorised, to negotiate and sign cultural heritage agreements on behalf of Aboriginal or Torres Strait Islander parties.
 - ensure established cultural heritage agreements and management plans continue to comply with duty of care when Aboriginal or Torres Strait Islander parties change
 - establish a code stipulating when proponents must seek to make a cultural heritage agreement with Aboriginal or Torres Strait Islander parties. The code will have regard to the relative risk of an activity to cultural heritage, heritage in developed areas and buried heritage (building on the current cultural heritage duty-of-care guidelines)

- develop a process allowing activities to proceed if a cultural heritage agreement cannot be reached with the relevant Aboriginal or Torres Strait Islander parties. The process will:
 - be accessible only where there is no native title party or cultural heritage body
 - be accessible only where proposed activities are small-to-medium scale and low-to-medium risk to cultural heritage
 - stipulate a notification period for establishing Aboriginal or Torres Strait Islander parties and require proponents to advertise as part of the notification process
 - outline the steps a proponent must take in attempting to reach agreement with Aboriginal or Torres Strait Islander parties

When a cultural heritage agreement is not reached within 60 days, a member of a relevant professional organisation (e.g. archaeologists, anthropologists, historians) can certify the proponent has established a plan for managing cultural heritage that meets prescribed standards. Such plans must take into account the information about cultural heritage provided by Aboriginal or Torres Strait Islander parties.

This process will not apply where a cultural heritage management plan is required.

- develop minimum standards for cultural heritage agreements, studies and management plans. Proponents/sponsors will be required to provide information about:
 - efforts to consult with Aboriginal or Torres Strait Islander parties
 - the cultural heritage assessment methodology used (if applicable)
 - any cultural heritage within the area subject to the agreement, study or plan, in enough detail to enable the future enforcement of the Acts
 - how the cultural heritage will be managed (if applicable)
 - how discoveries of cultural heritage will be managed in the course of projects (if applicable)
 - the parties to cultural heritage agreements and the relevant area (if applicable)
 - ensure an Indigenous land use agreement will only satisfy the duty of care where the parties to it are also Aboriginal or Torres Strait Islander parties
 - require cultural heritage agreements to be in writing.
4. Consider, in collaboration with other Queensland Government agencies, incorporating duty of care into the Integrated Development Assessment System (IDAS). A first step could be noting the duty of care on the IDAS application form.
5. Improve integration of DERM's native title and cultural heritage policies and procedures to encourage native title agreements to address cultural heritage, where appropriate.

Also, as for recommendation one—implement an awareness and capacity-raising strategy.

Part 4—Native title parties, Aboriginal and Torres Strait Islander parties and cultural heritage bodies

6. Amend the Acts to:
- consider all native title claims that have not been determined to be 'failed' claims, for the purposes of the Acts
 - recognise the last standing 'failed' native title claim as the Aboriginal or Torres Strait Islander party for an area:
 - where the claim has passed a registration test under the Native Title Act 1993
 - for a period of 12 months from the date it 'failed'
 - require Aboriginal and Torres Strait Islander parties to be at least 18 years old
 - provide for the option of a standard fee for services provided by cultural heritage bodies.
7. Establish a link-up and mentoring program to share and build the capacity of cultural heritage bodies, Aboriginal or Torres Strait Islander organisations and the corporate and government sectors.

8. Investigate opportunities for providing shared administrative capacity between cultural heritage bodies and other organisations, including:
 - fee-for-service arrangements
 - regional Indigenous economic development entities
 - shared service providers subsidised by corporate and government entities that need to comply with the Acts
 - encouraging Aboriginal and Torres Strait Islander corporations with existing complementary capacity to register as cultural heritage bodies.

Part 5—Collection and management of Aboriginal and Torres Strait Islander cultural heritage information

9. Amend the Acts to:
 - ensure cultural heritage information provided to DERM in cultural heritage agreements, studies and management plans is recorded on the databases and registers (as appropriate)
 - allow public access to information on the databases, including general information about cultural heritage and possible Aboriginal or Torres Strait Islander parties. Information identified as secret and sacred by an Aboriginal or Torres Strait Islander party will not be publicly accessible. Detailed information about cultural heritage will only be available to people who need it to satisfy their duty of care.
10. Investigate a cost-recovery charge for searching the databases and registers. Aboriginal and Torres Strait Islander parties will be able to access information about their cultural heritage for free.
11. Work collaboratively with government and external organisations to include cultural heritage information from other sources on the databases. At a minimum, cross-references could be established.
12. Implement a standard that provides for database and register search requests to be met within 20 business days.
13. Develop and publish a policy establishing criteria for the inclusion of information on the databases. The policy will ensure information about the authoritativeness of database entries is recorded.

Part 6—Cultural heritage studies

14. Amend the Acts to:
 - make the Land Court's decision about the registration of a cultural heritage study final
 - establish a process recognising a previous cultural heritage study when a proponent seeks to establish a cultural heritage agreement or management plan:
 - requiring no further assessment of cultural heritage, where the relevant Aboriginal or Torres Strait Islander parties had the opportunity to participate in the cultural heritage study
 - potentially reducing the time taken to establish a cultural heritage agreement or management plan
 - require land owners to allow reasonable access to their properties for the purpose of a cultural heritage study.
15. Establish cultural-heritage-study guidelines to support the increased role of cultural heritage studies.
16. Develop and publish a policy establishing criteria for recording a cultural heritage study.

Part 7—Cultural heritage management plans

17. Amend the Acts to:
 - make the Land Court's decision about the approval of a cultural heritage management plan final

- allow nominees, where authorised, for endorsed parties to sign cultural heritage management plans on behalf of the endorsed parties
- extend the cultural heritage management plan consultation period to 84 business days
- make sponsors of cultural heritage management plans responsible for the distribution of documents to relevant parties, upon referral to the Land Court

Part 8—Investigation and enforcement

18. Publish information about investigation and enforcement procedures, including successful prosecutions, on the DERM website.

19. Investigate options for enhancing DERM's investigation and compliance effort.

See also recommendation one—implement an awareness and capacity-raising strategy.

Part 9—Miscellaneous provisions

20. Amend the Acts to:

- include a requirement to review the Acts again in seven years, for efficacy and efficiency.

21. Consult with the Department of Justice and the Attorney-General with a view to removing the right of an accused person to elect to have a matter heard on indictment.

Introduction

Effective legislation is central to ensuring Aboriginal and Torres Strait Islander culture, traditions and customs are celebrated and protected. The main purpose of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003* is to effectively recognise, protect and conserve Aboriginal and Torres Strait Islander cultural heritage. The Acts are currently administered by the Minister for Natural Resources, Mines and Energy and Minister for Trade, and DERM.

The Acts establish five principles underlying their main purpose:

- Recognising, protecting and conserving cultural heritage should be based on respect for Aboriginal and Torres Strait Islander knowledge, cultural and customary practices.
- Aboriginal and Torres Strait Islander people should be recognised as the primary guardians, keepers and knowledge holders of cultural heritage.
- It is important to respect, preserve and maintain the knowledge, innovation and practices of Aboriginal and Torres Strait Islander communities, and to promote understanding of cultural heritage.
- Activities recognising, protecting and conserving cultural heritage are important because they allow Aboriginal and Torres Strait Islander people to reaffirm their obligations to Aboriginal tradition and Island custom.
- There is a need to establish timely and efficient processes for the management of activities that may harm Aboriginal and Torres Strait Islander cultural heritage.

Indigenous Cultural Heritage Acts Review

The Indigenous Cultural Heritage Acts Review is assessing the efficacy and efficiency of the Acts—recognising their main purpose and underlying principles. The community has been asked three key questions, to determine how well the Acts are performing:

- Have the Acts done what they set out to do?
- What is working well, and why?
- What can be improved, and how?

On 22 September 2008, the then Minister for Natural Resources and Water released a review paper calling for submissions to the review.

Consultation has included:

- two meetings of the review's consultative committee—comprising key stakeholder organisations
- a submission period of over five months—69 submissions were received from individuals, Aboriginal and Torres Strait Islander organisations, industry, professional organisations and government
- a series of regional meetings with key stakeholders.

As DERM does not directly oversee much of the operation of the Acts, the review has relied primarily upon submissions to identify issues with their performance.

Review findings

In light of the submissions, draft recommendations have been developed, proposing changes to the Acts, supporting policy and other matters. Amendments to the Acts are recommended to clarify and enhance their operation.

Overall, the review found:

- generally, the Acts are working well.
- clearer standards and processes are required to simplify compliance with the duty of care and increase its effectiveness
- awareness of the Acts and capacity to negotiate agreements about the management of cultural heritage is often limited.

The draft recommendations respond to the issues raised in submissions and reinforce the purpose and principles of the Acts.

Key issues and draft recommendations

The draft recommendations and issues are organised under the parts of the Acts to which they most directly relate. To put the recommendations in context, they are preceded by a summary of the relevant parts of the Acts and a statement about what the recommendations seek to achieve.

Unless otherwise stated, DERM will be responsible for the implementation of the final recommendations, if endorsed by the Queensland Government. The recommendations apply equally to both Acts.

Commonwealth Indigenous heritage law reform

In August 2009, the Commonwealth Government released a discussion paper canvassing possible reforms to the legislative arrangements for protecting traditional areas and objects.

As the Commonwealth legislation is superior, any changes to it may have implications for Queensland legislation and how it protects Aboriginal and Torres Strait Islander cultural heritage.

The Queensland Government will work with the Commonwealth Government on the protection of Aboriginal and Torres Strait Islander cultural heritage.

The proposed Commonwealth reforms broadly align with the draft recommendations to reform the Queensland Acts.

Submissions to the Commonwealth review are scheduled to close in November 2009. For further information about Commonwealth law reform, contact the Department of Environment, Water, Heritage and the Arts <www.environment.gov.au>.

Glossary

Aboriginal or Torres Strait Islander party—A native title party or Aboriginal and Torres Strait Islander person with particular knowledge about the traditions, observances, customs or beliefs associated with an area (see Part 4 of the Acts).

CHB—Cultural heritage body (see Part 5 of the Acts).

CHMP—Cultural heritage management plan (see Part 7 of the Acts).

CHS—Cultural heritage study (see Part 6 of the Acts).

Cultural heritage—Objects and areas of particular significance to Aboriginal and Torres Strait Islander people and evidence of Aboriginal and Torres Strait Islander occupation of Queensland (see Part 2 of the Acts).

Cultural heritage agreement—‘Another agreement’ under s 23(3)(a)(iii) of the Acts, which is not a native title agreement or a cultural heritage management plan (see Part 3 of the Acts).

Cultural heritage databases—A place for recording information about Aboriginal and Torres Strait Islander cultural heritage (see Part 5 of the Acts).

Cultural heritage registers—A place for recording information about cultural heritage studies and cultural heritage management plans (see Part 5 of the Acts).

DERM—The Department of Environment and Resource Management.

Duty of care—Taking all reasonable and practicable measures to ensure the activity does not harm Aboriginal and Torres Strait Islander cultural heritage (see Part 3 of the Acts).

Native title agreement—An Indigenous land use agreement, native title determination and some other agreements under the *Native Title Act 1993* (Commonwealth) (see Schedule of the Acts).

Native title party—Defined by reference to the Commonwealth Native Title Act (see Part 4 of the Acts).

Proponent—A person undertaking an activity, such as development or exploration, who has a duty of care under the Acts.

The Acts—*Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003*

The Minister—The Minister administering the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003*

QHA—*Queensland Heritage Act 1992*.

Part 1—Preliminary

The main purpose of the Acts is to effectively recognise, protect and conserve Aboriginal and Torres Strait Islander cultural heritage.

The Acts define Aboriginal and Torres Strait Islander cultural heritage as:

- areas or objects of particular significance to Aboriginal or Torres Strait Islander parties because of Aboriginal tradition or Island custom
- areas or objects of particular significance to Aboriginal or Torres Strait Islander people because of the history, including contemporary history, of an Aboriginal or Torres Strait Islander party for the area
- archaeological or historical evidence of Aboriginal or Torres Strait Islander occupation of an area
- areas immediately surrounding an object or structure that is evidence of Aboriginal or Torres Strait Islander occupation.

Significant areas do not need to include markings or other physical evidence and can be identified through anthropological, biogeographical, historical and archaeological information.

Issues raised in submissions

The following issues were raised in submissions:

- the key barriers to achieving the main purpose and principles of the Acts include:
 - low awareness of the Acts and duty of care
 - limited capacity—among Aboriginal and Torres Strait Islander parties, and proponents—to manage cultural heritage in accordance with the Acts
- the definitions of Aboriginal and Torres Strait Islander cultural heritage recognise archaeological and historic significance, but the Acts do not establish a process to protect these values if they are not particularly significant to an Aboriginal or Torres Strait Islander party
- socio-economic and capacity imbalances can prevent Aboriginal and Torres Strait Islander parties from exercising the rights and opportunities afforded to them under the Acts
- the interaction and jurisdiction of the Acts and QHA is not clear, particularly with respect to gaining recognition of historical owner heritage.

Aims of the recommendations

The recommendations aim to:

- increase awareness of the Acts
- increase the capacity of organisations and people with key roles under the Acts
- investigate the possibility of recognising heritage values that may not be significant to Aboriginal and Torres Strait Islander parties.

Recommendations

1. Implement an awareness and capacity-raising strategy aimed at:

- providing tailored information to key stakeholders about the operation of the Acts, including case studies demonstrating their practical operation
- increasing awareness of the role mediation can play in reaching an agreement
- establishing a best-practice cultural heritage management training program for state and local government
- increasing the capacity of Aboriginal and Torres Strait Islander parties to make agreements recognising and protecting cultural heritage
- promoting the benefits and practical protection achieved by recording cultural heritage on the cultural heritage databases and registers

- promoting the role of authorised officers and the steps they can take to protect cultural heritage
 - raising awareness of the requirement to report ancient Aboriginal and Torres Strait Islander human remains to DERM.
2. Analyse the interaction between the Acts and *Queensland Heritage Act 1992* (QHA), and consider:
- gaps in the protection of cultural heritage
 - opportunities for the Acts and QHA to operate in an integrated and seamless manner
 - Whether the application of the QHA and the Acts should remain mutually exclusive
 - opportunities for recognising and protecting cultural heritage significant to historical owners
 - opportunities for recognising and protecting scientific and other values associated with Aboriginal or Torres Strait Islander cultural heritage, which are not derived from Aboriginal tradition or Islander custom.

Queensland Heritage Act 1992

The purpose of the QHA is the conservation of Queensland's cultural heritage through:

- registering heritage places
- establishing agreements to encourage the conservation of heritage places
- regulating the development of heritage places
- protecting and conserving submerged objects of significance
- regulating the excavation of sites that contain, or may contain, objects of significance to Queensland's cultural heritage.

Part 2—Ownership, custodianship and possession of Aboriginal or Torres Strait Islander cultural heritage

Aboriginal and Torres Strait Islander people, with traditional or familial links to cultural heritage, own it, if it comprises:

- human remains
- secret and sacred objects in the custody of the Queensland Government
- cultural heritage lawfully taken away from an area after the Acts commenced.

With the exception of human remains, the Acts affirm the ownership of Aboriginal or Torres Strait Islander cultural heritage lawfully obtained by a person before their commencement.

The Acts do not affect the ownership of land.

In support of the declaration of ownership, the Acts state that:

- persons holding Aboriginal or Torres Strait Islander human remains, who are not the owners, must give the remains to DERM
- persons with knowledge of Aboriginal or Torres Strait Islander human remains, who are not the owners, must inform DERM
- the Queensland Government (including the Queensland Museum) must follow the instructions of the owners of human remains and secret and sacred objects.

The Queensland Museum may accept the custody of Aboriginal and Torres Strait Islander cultural heritage.

Key issues raised in submissions

The following issues were raised in submissions:

- a lack of suitable keeping places and restricted access to country can prevent the owners of secret and sacred objects and human remains from repatriating them
- no mechanism exists for non-traditional owners of artefacts to prove they have obtained them legally and ethically
- unfounded concerns about impacts on property rights sometimes deter the owners of land from disclosing knowledge of Aboriginal or Torres Strait Islander cultural heritage.

Recommendations

As for recommendation one—implement an awareness and capacity-raising strategy.

Note: While there is some merit in requiring the registration of Aboriginal and Torres Strait Islander artefacts, such a system would require intensive administration and would primarily capture people who would otherwise comply with the Acts.

Part 3—Protection of Aboriginal and Torres Strait Islander cultural heritage

The Acts establish a cultural heritage duty of care, which requires a person carrying out an activity to take all reasonable and practicable measures to ensure the activity does not harm Aboriginal or Torres Strait Islander cultural heritage.

Penalties can be imposed on persons:

- breaching the duty of care
- harming cultural heritage
- excavating and removing cultural heritage
- unlawfully possessing cultural heritage.

The cultural heritage duty of care is satisfied if a person is acting:

- under an approved cultural heritage management plan
- under a native title agreement, or another cultural heritage agreement with an Aboriginal or Torres Strait Islander party
- in compliance with the duty-of-care guidelines
- in compliance with native title protection conditions (for mineral exploration).

Cultural heritage duty-of-care guidelines—outlining reasonable and practicable measures to a person may take to avoid or minimise harm to Aboriginal cultural heritage—have been established under the *Aboriginal Cultural Heritage Act 2003*.

The Minister may order a person to stop an activity that is harming, or that will harm, Aboriginal or Torres Strait Islander cultural heritage.

Key issues raised in submissions

The following issues were raised in submissions:

- the Acts and duty-of-care guidelines do not provide enough detailed and practical instruction, creating uncertainty about compliance
- it is often difficult for proponents to identify Aboriginal and Torres Strait Islander parties, where there is no native title party or cultural heritage body
- as cultural heritage agreements need only be with an Aboriginal or Torres Strait Islander party, proponents sometimes choose to deal with the most convenient party
- there are no minimum standards in place to ensure the outcomes of cultural heritage agreements and management plans properly address cultural heritage management
- the cultural heritage outcomes achieved under the Acts are variable
- awareness of the duty of care is low
- many proponents are unaware of duty of care as it is not incorporated into the general development assessment process
- many Aboriginal and Torres Strait Islander parties are unaware of the protection the Acts afford cultural heritage (e.g. the process for obtaining a stop order)
- agreements and native title agreements, never intended to relate to cultural heritage, have been used to comply with the duty of care
- it is difficult for proponents to comply with the Acts where native title parties change, as the duty of care is ongoing.

Aims of the recommendations

The recommendations aim to:

- recognise cultural heritage knowledge and responsibility is shared, and provide an opportunity for all Aboriginal and Torres Strait Islander parties to be involved in cultural heritage management
- establish processes that:
 - define when proponents must attempt to consult with Aboriginal or Torres Strait Islander parties
 - facilitate proponents identifying Aboriginal and Torres Strait Islander parties with certainty
 - allow proponents to progress an activity, where a cultural heritage agreement cannot be reached with all or each Aboriginal or Torres Strait Islander parties or party, in a reasonable time
 - ensure agreements meet minimum cultural heritage management standards
- ensure information about cultural heritage and management agreements is recorded and used by DERM to assess the performance and further the purpose of the Acts
- ensure agreements used to comply with the duty of care were intended to relate to cultural heritage
- minimise uncertainty for proponents when Aboriginal or Torres Strait Islander parties change due to a change in native title parties
- increase awareness and compliance with duty of care
- simplify compliance with the Acts by encouraging future native title agreements to deal with cultural heritage, where applicable.

Recommendations

3. Amend the Acts to:

- require cultural heritage agreements and management plans to be made with all or each Aboriginal or Torres Strait Islander parties or party
- Require cultural heritage agreements and native title agreements to expressly include cultural heritage management as a subject, in order to satisfy the duty of care
- allow nominees, where authorised, to negotiate and sign cultural heritage agreements on behalf of Aboriginal or Torres Strait Islander parties.
- ensure established agreements and cultural heritage management plans continue to comply with duty of care when Aboriginal or Torres Strait Islander parties change
- establish a code stipulating when proponents must seek to make a cultural heritage agreement with Aboriginal or Torres Strait Islander parties. The code will have regard to the relative risk of an activity to cultural heritage, heritage in developed areas and buried heritage (building on the current cultural heritage duty-of-care guidelines)
- develop a process allowing activities to proceed if a cultural heritage agreement cannot be reached with the relevant Aboriginal or Torres Strait Islander parties. The process will:
 - be accessible only where there is no native title party or cultural heritage body
 - be accessible only where proposed activities are small-to-medium scale and low-to-medium risk to cultural heritage
 - stipulate a notification period for establishing Aboriginal or Torres Strait Islander parties and require proponents to advertise as part of the notification process
 - outline the steps a proponent must take in attempting to reach agreement with, Aboriginal or Torres Strait Islander parties

When an agreement is not reached within 60 days, a member of a relevant professional organisation (e.g. archaeologists, anthropologists, historians) can certify the proponent has established a plan for managing cultural heritage that meets prescribed standards. Such plans must take into account the information about cultural heritage provided by Aboriginal or Torres Strait Islander parties

This process will not apply where a cultural heritage management plan is required.

- develop minimum standards for cultural heritage agreements, cultural heritage studies and cultural heritage management plans. Proponents/sponsors will be required to provide information about:
 - efforts to consult with Aboriginal or Torres Strait Islander parties
 - the cultural heritage assessment methodology used (if applicable)
 - any cultural heritage within the area subject to the agreement/study/plan, in enough detail to enable the future enforcement of the Acts
 - how the cultural heritage will be managed (if applicable)
 - how discoveries of cultural heritage will be managed in the course of projects (if applicable)
 - the parties to cultural heritage agreements and the relevant area (if applicable)
 - ensure an Indigenous land use agreement will only satisfy the duty of care where the parties to it are also Aboriginal or Torres Strait Islander parties
 - require cultural heritage agreements to be in writing.
4. Consider, in collaboration with other Queensland Government agencies, incorporating duty of care into the Integrated Development Assessment System (IDAS). A first step could be noting the duty of care on the IDAS application form.
5. Improve integration of DERM's native title and cultural heritage policies and procedures to encourage native title agreements to address cultural heritage, where appropriate.

Also, as for recommendation one—implement an awareness and capacity-raising strategy.

Part 4—Native title parties, Aboriginal and Torres Strait Islander parties, and cultural heritage bodies

Aboriginal and Torres Strait Islander parties are Aboriginal or Torres Strait Islander people with relevant authority and knowledge for an area. They must be consulted during cultural heritage studies and in the development of cultural heritage management plans.

Under certain circumstances, the Aboriginal and Torres Strait Islander party for an area is determined by reference to the Commonwealth Native Title Act. A person is a native title party, and therefore an Aboriginal or Torres Strait Islander party if:

- the person is a registered:
 - native title holder
 - native title claimant
- the person was a registered native title claimant or native title holder, and:
 - their native title claim has failed and there is no other registered native title claimant
 - they have surrendered their native title under an Indigenous land use agreement
 - their native title has been compulsorily acquired or otherwise extinguished.

If no native title party exists, a person is an Aboriginal or Torres Strait Islander party for an area if they are:

- Aboriginal or Torres Strait Islander and have particular knowledge about traditions, observances, customs or beliefs associated with the area
- responsible, under Aboriginal tradition or Islander custom, for the area and objects within it
- a member of a family or clan group with responsibility, under Aboriginal tradition or Islander custom, for the area and objects within it.

Cultural heritage bodies are responsible for identifying Aboriginal or Torres Strait Islander parties for an area. The Minister may register and deregister a corporation as a cultural heritage body for an area.

Key issues raised in submissions

The following issues were raised in submissions:

- recognising the ‘last standing claim’ as the native title party can produce perceived unfair outcomes where:
 - claims have been struck out in close succession
 - native title parties are no longer engaged in the native title process and therefore cannot demonstrate the continued relevance of their exclusive procedural rights
- the meaning of a ‘failed’ claim is unclear
- there are practical difficulties where Aboriginal or Torres Strait Islander parties are minors
- the capacity, resources and performance of cultural heritage bodies are variable, and at times poor.

Note: Generally, submissions acknowledged that linking the Acts to native title processes is an efficient and fair approach—making use of a robust system for identifying the correct people for country and avoiding duplication.

Aims of the recommendations

The recommendations aim to:

- ensure links to the Native Title Act do not produce unfair outcomes
- recognise sound native title claims are often withdrawn, reorganised and resubmitted, and provide time for this to occur without a loss of procedural rights under the Acts

- improve the capacity and income stability of cultural heritage bodies, consequently increasing the levels of service they provide
- ensure the process for identifying Aboriginal and Torres Strait Islander parties is as simple as possible.

Recommendations

6. Amend the Acts to:
 - consider all native title claims that have not been determined to be 'failed' claims, for the purposes of the Acts
 - recognise the last standing 'failed' native title claim as the Aboriginal or Torres Strait Islander party for an area:
 - where the claim has passed a registration test under the *Native Title Act 1993*
 - for a period of 12 months from the date it 'failed'
 - require Aboriginal and Torres Strait Islander parties to be at least 18 years old
 - provide for the option of a standard fee for services provided by cultural heritage bodies.
7. Establish a link-up and mentoring program to share and build the capacity of cultural heritage bodies, Aboriginal or Torres Strait Islander organisations and the corporate and government sectors.
8. Investigate opportunities for providing shared administrative capacity between cultural heritage bodies and other organisations, including:
 - fee-for-service arrangements
 - regional Indigenous economic development entities
 - shared service providers subsidised by corporate and government entities that need to comply with the Acts
 - encouraging Aboriginal and Torres Strait Islander corporations with existing complementary capacity to register as cultural heritage bodies.

Part 5—Collection and management of Aboriginal and Torres Strait Islander cultural heritage information

The purpose of the cultural heritage databases is to collect a broad range of information about Aboriginal and Torres Strait Islander cultural heritage. Information is managed by DERM and may be used for research and planning purposes.

Information is not generally publicly accessible. Aboriginal and Torres Strait Islander parties have access to information about their cultural heritage. Access may also be granted if it is necessary for research or if DERM believes a person needs to be aware of the information to satisfy their duty of care.

The Aboriginal and Torres Strait Islander cultural heritage registers capture information collected through the operation of the legislation, and contain details about cultural heritage:

- studies
- management plans
- bodies.

The registers are publicly accessible and have been established as research and planning tools.

Key issues raised in submissions

The following issues were raised in submissions:

- the databases are not as comprehensive as they could be, and their potential as a planning tool is not realised
- government, Aboriginal and Torres Strait Islander organisations, natural resource management bodies and other organisations have established cultural heritage databases, which are often more locally comprehensive than the databases
- there is a low level of understanding about the functions and role of the databases and registers
- cultural heritage assessments often duplicate effort. Duplication could be reduced if more information was available on the databases
- enforcement of the Acts is more effective where cultural heritage is recorded on the databases or registers
- the databases are not transparent:
 - they lack clear standards for the inclusion of information
 - information is not publicly available
- it would be culturally insensitive to publicly disclose some information held on the databases.

Aims of the recommendations

The recommendations aim to:

- improve the comprehensiveness of the databases and registers
- facilitate awareness and understanding of Aboriginal and Torres Strait Islander cultural heritage
- provide information to proponents to help identify Aboriginal and Torres Strait Islander parties
- ensure the databases complement those operated by Aboriginal and Torres Strait Islander organisations, rather than replace them
- enable the protection of cultural heritage and the effective enforcement of the Acts
- ensure DERM has enough information about the operation of the Acts to assess their performance
- establish an agreed service standard for searches of the databases and registers.

Recommendations

9. Amend the Acts to:
 - ensure cultural heritage information provided to DERM in cultural heritage agreements, studies and management plans is recorded on the databases and registers (as appropriate)
 - allow public access to information on the databases, including general information about cultural heritage and possible Aboriginal or Torres Strait Islander parties. Information identified as secret and sacred by an Aboriginal or Torres Strait Islander party will not be publicly accessible. Detailed information about cultural heritage will only be available to people who need it to satisfy their duty of care.
10. Investigate a cost-recovery charge for searching the databases and registers. Aboriginal and Torres Strait Islander parties will be able to access information about their cultural heritage for free.
11. Work collaboratively with government and external organisations to include cultural heritage information from other sources on the databases. At a minimum, cross-references could be established.
12. Implement a standard that provides for database and register search requests to be met within 20 business days.
13. Develop and publish a policy establishing criteria for the inclusion of information on the databases. The policy will ensure information about the authoritativeness of database entries is recorded.

Part 6—Cultural heritage studies

Cultural heritage studies are comprehensive assessments of Aboriginal or Torres Strait Islander cultural heritage, and can be undertaken by any person at any time.

Aboriginal or Torres Strait Islander parties must be invited to participate in the development of a cultural heritage study and the Acts require the person undertaking the study to:

- consult with Aboriginal or Torres Strait Islander parties
- conduct the cultural heritage study in a way that maximises its quality and authority.

In addition to Aboriginal or Torres Strait Islander parties, people with relevant knowledge and skills—such as an Aboriginal or Torres Strait Islander person with particular knowledge, an anthropologist or an archaeologist—may be involved in the process.

DERM is responsible for deciding whether to record a cultural heritage study on the cultural heritage registers. If DERM's decision is disputed, the Minister makes the final decision, taking into account the recommendations of the Land Court.

Key issues raised in submissions

The following issues were raised in submissions:

- cultural heritage studies are rarely used, and their potential for the forward assessment and protection of Aboriginal and Torres Strait Islander cultural heritage has not been realised
- there is little incentive to complete a cultural heritage study as they do not have a defined role in development planning under the Acts
- there is no minimum standard for recording a cultural heritage study, and therefore uncertainty about the quality of the information on the registers
- recording information about cultural heritage on the databases and registers is often not possible without a right of access to land.

Aims of the recommendations

The recommendations aim to:

- encourage the assessment of cultural heritage at the planning stage of an activity
- increase the use of cultural heritage studies and the comprehensiveness of the cultural heritage registers
- establish a transparent process for recording a cultural heritage study
- define a process to reduce the time taken to establish cultural heritage agreements and management plans, where a cultural heritage study has already been completed
- reduce the time taken for a cultural heritage study to be recorded, after referral to the Land Court.

Recommendations

14. Amend the Acts to:

- make the Land Court's decision about the registration of a cultural heritage study final
- establish a process recognising a previous cultural heritage study when a proponent seeks to establish a cultural heritage agreement or management plan:
 - requiring no further assessment of cultural heritage, where the relevant Aboriginal or Torres Strait Islander parties had the opportunity to participate in the cultural heritage study
 - potentially reducing the time taken to establish a cultural heritage agreement or management plan
- require land owners to allow reasonable access to their properties for the purpose of a cultural heritage study.

15. Establish cultural-heritage-study guidelines to support the increased role of cultural heritage studies.
16. Develop and publish a policy establishing criteria for recording a cultural heritage study.

Part 7—Cultural heritage management plans

Cultural heritage management plans establish how projects will be managed to avoid or minimise harm to Aboriginal and Torres Strait Islander cultural heritage. Guidelines have been developed under the *Aboriginal Cultural Heritage Act 2003*.

The proponents of many projects requiring an environmental assessment must also develop a cultural heritage management plan.

Aboriginal and Torres Strait Islander parties must be invited to participate in the development of the plan, and a minimum consultation period of 84 days applies.

Cultural heritage management plans formulated by agreement are approved as a matter of course. When parties do not agree, mediation may be pursued. If parties cannot agree, the Minister makes the final decision about the adequacy of a cultural heritage management plan, taking into account the recommendation of the Land Court.

Key issues raised in submissions

The following issues were raised in submissions:

- the consultation period is too short to allow full deliberations by Aboriginal and Torres Strait Islander parties
- the plans can be lengthy and costly if mediation or a hearing in the Land Court is required
- the role of a nominee for an endorsed party is unclear.

Aims of the recommendations

The recommendations aim to:

- increase the consultation period, bringing the process into line with the Native Title Act.
- clarify the role of nominees for endorsed parties and ensure Aboriginal or Torres Strait Islander parties authorise endorsed parties
- reduce the time taken for a cultural heritage management plan to be approved, after referral to the Land Court
- align the Land Court's role under the Acts with its role under other legislation.

Recommendations

17. Amend the Acts to:

- make the Land Court's decision about the approval of a cultural heritage management plan final
- allow nominees, where authorised, for endorsed parties to sign cultural heritage management plans on behalf of the endorsed parties
- extend the cultural heritage management plan consultation period to 84 business days
- make sponsors of cultural heritage management plans responsible for the distribution of documents to relevant parties, upon referral to the Land Court.

Part 8—Investigation and enforcement

The Acts establish investigation and enforcement powers to protect Aboriginal and Torres Strait Islander cultural heritage. They allow DERM to appoint authorised officers who have the power to enter places, seize evidence and require people to provide assistance, information and documents.

Key issues raised in submissions

The following issues were raised in submissions:

- awareness of the role authorised officers play in protecting cultural heritage is low among Aboriginal and Torres Strait Islander parties.
- it is difficult to obtain information about investigation and enforcement procedures
- only three compliance actions have been finalised in the courts, suggesting that DERM's compliance and investigation effort is not adequately enforcing the Acts
- investigation and enforcement is central to ensuring compliance with the Acts—creating a tangible incentive for compliance with the duty of care
- there is an inherent difficulty in proving the prior existence of some Aboriginal and Torres Strait Islander cultural heritage once it has been disturbed, limiting the likelihood of a conviction for an offence under the Acts.

Aims of the recommendations

The recommendations aim to:

- compel and encourage compliance with the Acts
- encourage and empower community involvement in the implementation of the Acts.

Recommendations

18. Publish information about investigation and enforcement procedures, including successful prosecutions, on the DERM website.

19. Investigate options for enhancing DERM's investigation and compliance effort.

See also recommendation one—implement an awareness and capacity-raising strategy.

Part 9—Miscellaneous provisions

Part 9 of the Acts deals with miscellaneous provisions including:

- delegating Ministerial powers
- negotiating and obtaining access to land for the assessment of cultural heritage
- establishing advisory committees
- purchasing or compulsory acquiring land to protect cultural heritage
- proceedings for an offence
- reviewing the Acts
- approved forms
- regulation-making power.

Issues raised in submissions

The following issues were raised in submissions:

- matters heard on indictment can require significant resources, deterring the pursuit of alleged offences in the courts
- some other legislation does not afford an accused the right to elect to have a matter heard on indictment, where penalties are similar
- it is good practice to periodically review the performance of legislation.

Aims of the recommendations

The recommendations aim to:

- ensure the future assessment of the performance of the Acts
- articulate fair and effective proceedings for an offence under the Acts.

Recommendations

20. Amend the Acts to:

- include a requirement to review the Acts again in seven years, for efficacy and efficiency.

21. Consult with the Department of Justice and the Attorney-General with a view to removing the right of an accused person to elect to have a matter heard on indictment.

Making a submission

All submissions will be treated confidentially, and must include the name and address of the person making the submission.

Submissions must be received by **19 February 2010**.

Submissions can be made online, by post, by fax, or by contacting DERM.

For further information or to make a submission, contact DERM via:

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Website: www.derm.qld.gov.au

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