

CULTURAL
HERITAGE
ISSUES RAISED
IN THE CONTEXT
OF A
NATIVE TITLE
NOTIFICATION
PROCESS

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1. BACKGROUND

1.1 Notification

The Commonwealth *Native Title Act 1993* requires notification and an opportunity to comment to be given to native title parties by the State before certain future acts can validly proceed.

1.2 Comments

Comments received by a Department or Agency in response to a notification sometimes raise concern about potential damage to cultural heritage by the doing of the future act.

1.3 What is cultural heritage

Cultural heritage is defined as anything that is:

- (a) A significant Aboriginal or Torres Strait Islander area in Queensland; or
- (b) A significant Aboriginal or Torres Strait Islander object; or
- (c) Evidence, of archaeological or historic significance, of Aboriginal or Torres Strait Islander occupation of an area of Queensland.

A significant area or object must be particularly significant to Aboriginal or Torres Strait Islander people because of either or both of the following:

- (a) Aboriginal tradition or Island custom;
- (b) the history, including contemporary history, of any Aboriginal or Torres Strait Islander party for the area.

In the same way as non-Indigenous heritage values are capable of protection, it is not necessary for an area to contain markings or other physical evidence indicating Aboriginal or Torres Strait Islander occupation or otherwise denoting the area's significance for the area to be protected as a significant area.

1.4 It is an offence not to take all reasonable and practicable measures to ensure your activity does not harm cultural heritage

Section 23 of the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* (the legislation), provides that a person who carries out an activity must take all reasonable and practicable measures to ensure the activity does not harm cultural heritage (the "cultural heritage duty of care"). Maximum penalties for breaching the duty of care are \$750,000 for a corporation and \$75,000 for an individual.

A person will comply with the duty of care in relation to cultural heritage if the person is acting in accordance with:

- a) The duty of care guidelines gazetted under the legislation (copy attached);
- b) Native title protection conditions (these relate to exploration tenements under the *Mineral Resources Act 1989*);
- c) An agreement with the Aboriginal or Torres Strait Islander party for the area;
or
- d) A cultural heritage management plan approved under Part 7 of the legislation.

You should also undertake a search of the Cultural Heritage Database and the Cultural Heritage Register, administered by the Cultural Heritage Coordination Unit, Department of Natural Resources, Mines and Energy.

Application forms to undertake a free search of the Cultural Heritage Register and the Database may be obtained by contacting the Cultural Heritage Coordination Unit on (07) 3238 3838.

1.5 Injunctions

Injunctions to prevent an offence under the legislation may be applied for by an Aboriginal or a Torres Strait Islander party and other applicants. Applications are made to the Land and Resources Tribunal.

1.6 Stop Orders

The Minister for Natural Resources, Mines and Energy may issue a Stop Order for up to 60 days where he believes an activity is harming or may harm Indigenous cultural heritage.

1.7 “Cultural heritage” may exist on private property

Indigenous cultural heritage values should not be confused with native title. As with non-Indigenous heritage values, Indigenous cultural heritage can exist on an area regardless of the land tenure. The existence of Indigenous cultural heritage in an area does not mean that native title exists over that area.

1.8 “Cultural heritage” is also protected by Commonwealth legislation

The Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* provides that the Federal Minister, where requested by an applicant, may make a temporary or permanent declaration of an area in order to protect a place which is considered to be of Aboriginal heritage significance. Such a declaration is likely to prevent any further work on a particular site.

2. OTHER CONSIDERATIONS

2.1 Natural justice

- Natural justice dictates that any comments received following a notification must be properly considered when making a decision whether or not to proceed with a future act.

2.2 Lack of specific detail

- In some instances, customary law may prevent native title holders providing specific details of why an area is significant, or disclosing the precise location of a significant site. Accordingly, whenever cultural heritage concerns are raised, a decision-maker must proceed with caution.

2.3 Cultural heritage clearance

- Previously unidentified cultural heritage values may exist on or under the area in question. It is prudent for a project proponent to undertake a systematic inspection of the area to be affected (commonly called a “cultural heritage survey” or “cultural heritage clearance”) to establish if cultural heritage values are present in an area. Such an inspection should be undertaken in conjunction with the Aboriginal or Torres Strait Islander party for the area.

2.4 Cultural heritage management plans

- Previously unidentified cultural heritage may also be discovered as a result of works carried out. Should cultural heritage be discovered in the course of works, it is an offence for a person to knowingly harm, excavate, relocate, remove or possess the object without the agreement of the Aboriginal or Torres Strait Islander party for the area or in accordance with a cultural heritage management plan approved under Part 7 of the legislation. Failure to do so may also mean that the person is in breach of the duty of care under section 23 of the legislation.
- Discovery of cultural heritage at the operation stage of a project inevitably requires work to stop for a period and results in unscheduled costs - proponents should be advised to negotiate a cultural heritage management plan, or other form of agreement, with the Aboriginal or Torres Strait Islander party for the area at an early stage of their project development plan.

3. GUIDELINES

The way in which a decision-maker deals with cultural heritage comments will depend on several factors including:

- the content of the comments provided –
ie. are the concerns general or are they specific, for example alleging the existence of known places of cultural significance at the site?
- the level of impact likely to result from an approval –
eg. an approval to place a mooring buoy in the sea is likely to cause less impact than an approval to construct a new road on a previously undisturbed area.
- whether or not a cultural heritage survey of the site has previously been undertaken to identify places or objects of cultural heritage significance.

Commonly the comments that are received from native title parties raising cultural heritage issues are unspecific. They may include:

- (a) expressing an objection to the proposed activity on the basis that their cultural heritage will be affected or damaged;
- (b) requesting a dialogue with the proponent in order to discuss cultural heritage concerns directly;
- (c) requesting a cultural heritage inspection be carried out (generally at the proponent's expense) to ascertain the status of any cultural heritage in the project area;
- (d) expressing a desire that conditions be imposed on the proposed activity by the approving Department or Agency.

In all of the above circumstances the Department or Agency that issued the notification must consider the issues raised by the native title parties in response to the notification.

It is recommended that in all cases where cultural heritage issues are raised, a copy of the comments be provided to the project proponent. Depending on the responses received, information available, or advice received from the Cultural Heritage Coordination Unit, NRM&E, the Department or Agency that issued the notification may, at the same time, decide to:

- proceed with the future act; or
- require more information from the project proponent on how cultural heritage issues are to be addressed; or
- impose certain conditions to protect cultural heritage at the time of approving the future act; or
- require confirmation from the relevant native title party that the cultural heritage issues have been resolved, before proceeding with the future act.

It is always preferable that the project proponent and the native title parties themselves reach agreement on how to deal with any cultural heritage issues raised.

The following sample responses to project proponents and native title parties may help to illustrate the recommended approach.

4. SAMPLE RESPONSE TO A PROJECT PROPONENT

Sir/Madam

I refer to your recent proposal to

As required by the *Native Title Act 1993* (Cth), native title parties have been given the right to comment before I make a decision on this proposal. Attached for your information are the comments that have been provided.

I wish to inform you that Aboriginal and Torres Strait Islander cultural heritage is protected under the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* whether or not they are known or recorded.

Section 23 of the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* (the legislation), provides that a person who carries out an activity must take all reasonable and practicable measures to ensure the activity does not harm Indigenous cultural heritage (the "cultural heritage duty of care"). Maximum penalties for breaching the duty of care are \$750,000 for a corporation and \$75,000 for an individual.

A person will comply with the duty of care in relation to Indigenous cultural heritage if the person is acting in accordance with:

- (a) the duty of care guidelines gazetted under the legislation (copy attached);
- (b) the Native title protection conditions (these relate to exploration tenements under the *Mineral Resources Act 1989*);
- (c) An agreement with the Aboriginal or Torres Strait Islander party for the area; or
- (d) A cultural heritage management plan approved under Part 7 of the legislation.

You should also undertake a search of the Cultural Heritage Database and the Cultural Heritage Register, administered by the Cultural Heritage Coordination Unit, Department of Natural Resources, Mines and Energy.

Application forms to undertake a free search of the Cultural Heritage Register and the Database may be obtained by contacting the Cultural Heritage Coordination Unit on (07) 3238 3838.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) also provides protection for Indigenous heritage.

Then add one of the following as appropriate to the circumstances:

- Before proceeding with your proposal you should ensure that appropriate protection measures are in place to ensure you meet your duty of care under section 23 of the legislation so as not to harm cultural heritage.

OR

- It is recommended that before proceeding with your proposal you contact the native title party concerned to discuss the comments that have been provided.

OR

- You should contact the native title party concerned to resolve the matters that have been raised. I do not intend to further consider your proposal until I receive advice from you that the cultural heritage issues raised have been appropriately addressed.

-

OR

- You should contact the native title party concerned to resolve the matters that have been raised. I will further consider your proposal when I receive confirmation from the native title party concerned that the matters have been appropriately addressed.

-

PLUS

Where appropriate, add as a condition of the approval:

If any Aboriginal or Torres Strait Islander, cultural heritage or significant archaeological or historical sites, objects or places are identified or located, you must cease operations immediately and notify the Aboriginal or Torres Strait Islander party for the area and seek their advice and assistance on how best to proceed so as to avoid or minimise harm to the cultural heritage. You should also notify the Director, Cultural Heritage Coordination Unit, Department of Natural Resources, Mines and Energy on (07) 3238 3838 detailing the cultural heritage and the location of the find. You must not recommence operations until you have an agreement with the Aboriginal or Torres Strait Islander party for the area or have been further advised by the Director, Cultural Heritage Coordination Unit.

5. SAMPLE RESPONSE TO NATIVE TITLE PARTY PROVIDING THE COMMENTS:

Sir/Madam,

Thank you for the comments you provided on the above notification.

The project proponent has been advised that Aboriginal and Torres Strait Islander cultural heritage is protected under the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* (the legislation) whether or not they are known or recorded.

The project proponent has also been advised of the cultural heritage duty of care to take all reasonable and practicable measures to avoid harming cultural heritage. The proponent has been advised that it is an offence to interfere with any cultural heritage without the agreement of the Aboriginal or Torres Strait Islander party for the area, or in accordance with duty of care guidelines, or a cultural heritage management plan approved under Part 7 of the legislation or native title protection conditions.

Add one of the following as appropriate to the circumstances:

- The project proponent has been requested to ensure that appropriate protection measures are in place to avoid damage to indigenous cultural heritage. Having considered all matters relevant to the application, including your comments, I have decided to issue the permit subject to appropriate conditions.

OR

- I have written requesting the project proponent to contact you to discuss the matters you raised in your comments. Having considered all matters relevant to the application, including your comments, I have decided to grant the permit subject to appropriate conditions.

OR

- I have written requesting the project proponent to contact you to discuss the matters you raised in your comments. I do not intend to further consider this proposal until I receive advice from the project proponent or yourself, that the cultural heritage issues you raised have been appropriately addressed.

OR

- I have written requesting the project proponent to contact you to discuss the matters you raised in your comments. I do not intend to further consider this proposal until I am satisfied that appropriate measures are in place to protect the cultural heritage of the site. Would you please inform me of the outcome of your discussions with the project proponent.

6. DUTY OF CARE GUIDELINES

Aboriginal Cultural Heritage Act 2003 – Section 28 – Duty of Care Guidelines – Gazettal Date: 16 April 2004.

Aboriginal Cultural Heritage Act 2003

PART 1 – Information to Assist in Using these Guidelines

1.0 Preamble

1.1 The *Aboriginal Cultural Heritage Act 2003* commenced on 16 April 2004. The Act binds all persons, including the State, and is intended to provide effective recognition, protection and conservation of Aboriginal cultural heritage.

Principles Underlying the *Aboriginal Cultural Heritage Act 2003*

1.2 The following fundamental principles underlie the Act's main purpose:

- (a) the recognition, protection and conservation of Aboriginal cultural heritage should be based on respect for Aboriginal cultural and traditional practices;
- (b) Aboriginal people should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage;
- (c) it is important to respect, preserve and maintain knowledge, innovations and practices of Aboriginal communities and to promote understanding of Aboriginal cultural heritage;
- (d) activities involved in recognition, protection and conservation of Aboriginal cultural heritage are important because they allow Aboriginal people to reaffirm their obligations to “law and country”;
- (e) there is a need to establish timely and efficient processes for the management of activities that may harm Aboriginal cultural heritage.

Distinction between Aboriginal cultural heritage and Native Title

1.3 Aboriginal cultural heritage values should not be confused with native title. As with non-Aboriginal heritage values, Aboriginal cultural heritage can exist on an area regardless of the nature of land tenure. The existence of Aboriginal cultural heritage in an area does not mean that native title exists over that area.

Definition of Aboriginal cultural heritage

1.4 The Act defines Aboriginal cultural heritage as anything that is:

- (d) a significant Aboriginal area in Queensland; or
- (e) a significant Aboriginal object; or
- (f) evidence, of archaeological or historic significance, of Aboriginal occupation of an area of Queensland.

A significant Aboriginal area or object must be particularly significant to Aboriginal people because of either or both of the following:

- (c) Aboriginal tradition;
- (d) the history, including contemporary history, of any Aboriginal Party for the area.

Aboriginal cultural heritage areas do not have to contain physical markings

- 1.5 In the same way as non-Aboriginal heritage values are capable of protection, it is not necessary for an area to contain markings or other physical evidence indicating Aboriginal occupation or otherwise denoting the area's significance for the area to be protected as a significant Aboriginal area under the *Aboriginal Cultural Heritage Act 2003*.

Role of the Aboriginal Party

- 1.6 The views of the Aboriginal Party for an area are key in assessing Aboriginal cultural heritage and managing any activity likely to excavate, relocate, remove or harm Aboriginal cultural heritage.
- 1.7 In assessing a significant Aboriginal area the legislation provides that regard may also be had to authoritative anthropological, biogeographical, historical and archaeological information.
- 1.8 Before an area can be registered on the Aboriginal Cultural Heritage Register, the person seeking to register the area must be able to demonstrate that the application is consistent with this information.
- 1.9 Appropriately qualified persons such as anthropologists, archaeologists and historians can also provide valuable assistance in this regard.

Due Diligence – The Precautionary approach

- 1.10 The *Aboriginal Cultural Heritage Act 2003* requires that a person must exercise due diligence and reasonable precaution before undertaking an activity which may harm Aboriginal cultural heritage.

Aboriginal cultural heritage duty of care

- 1.11 Section 23(1) of the *Aboriginal Cultural Heritage Act 2003* states that a person who carries out an activity must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage (the "cultural heritage duty of care").
- 1.12 Section 23(2) of the *Aboriginal Cultural Heritage Act 2003* states that without limiting the matters that may be considered by a Court required to decide whether a person has complied with the cultural heritage duty of care in carrying out an activity, the Court may consider the following:
- (a) the nature of the activity, and the likelihood of its causing harm to Aboriginal cultural heritage;
 - (b) the nature of the Aboriginal cultural heritage likely to be harmed by the activity;

- (c) the extent to which the person consulted with Aboriginal parties about the carrying out of the activity, and the results of the consultation;
- (d) whether the person carried out a study or survey, of any type, of the area affected by the activity to find out the location and extent of the Aboriginal cultural heritage, and the extent of the study or survey;
- (e) whether the person searched the database and register for information about the area affected by the activity;
- (f) the extent to which the person complied with cultural heritage duty of care guidelines;
- (g) the nature and extent of past uses in the area affected by the activity.

Meeting the Duty of Care

1.13 Section 23 of the Act provides that a person who carries out an activity is taken to have complied with the cultural heritage duty of care in relation to Aboriginal cultural heritage if -

- (a) the person is acting –
 - (i) under the authority of another provision of this Act that applies to the Aboriginal cultural heritage; or
 - (ii) under an approved Cultural Heritage Management Plan that applies to the Aboriginal cultural heritage; or
 - (iii) under a native title agreement or another agreement with an Aboriginal Party, unless the Aboriginal cultural heritage is expressly excluded from being subject to the agreement; or
 - (iv) in compliance with gazetted cultural heritage duty of care guidelines; or
 - (v) in compliance with native title protection conditions, but only if the cultural heritage is expressly or impliedly the subject of the conditions; or
- (b) the person owns the Aboriginal cultural heritage, or is acting with the owner's agreement; or
- (c) the activity is necessary because of an emergency, including for example, a bushfire or other natural disaster.

Duty of Care Guidelines

1.14 Section 28 states that the Minister may by gazette notice notify guidelines ("cultural heritage duty of care guidelines") identifying reasonable and practicable measures for ensuring activities are managed to avoid or minimise harm to Aboriginal cultural heritage.

1.15 There is no offence in not complying with the cultural heritage duty of care guidelines. However, complying with the guidelines affords strict compliance with the cultural heritage duty of care. Where Aboriginal cultural heritage is harmed by an activity, and the activity is not otherwise covered by sections 23(3), 24(2), 25(2) or 26(2) of the *Aboriginal Cultural Heritage Act 2003*, failure to have complied with the guidelines may result in prosecution under the Act. Maximum penalties for contravening the cultural heritage duty of care are \$75,000 for an individual and \$750,000 for a corporation.

Another Option for Legal Protection

- 1.16 The *Aboriginal Cultural Heritage Act 2003* expressly recognises that the views of the Aboriginal Party for an area are key in assessing and managing any activity which is likely to harm Aboriginal cultural heritage. Under the Act, there is provision for voluntary agreements and Cultural Heritage Management Plans with the relevant Aboriginal Party. You have a complete defence under the Act in relation to any activity undertaken in accordance with such agreements or Cultural Heritage Management Plans.

Other Information

- 1.17 *Ask First – A guide to respecting Indigenous heritage places and values*, released by the Australian Heritage Commission, provides a practical guide to consulting and negotiating with Aboriginal people about their cultural heritage. Available from the Australian Heritage Commission website:
<http://www.ahc.gov.au/publications/indigenousheritage/index.html>
- 1.18 The Land and Resources Tribunal can assist in the provision of mediation in relation to Aboriginal cultural heritage matters.
- 1.19 Persons and organisations involved in activities likely to impact on Aboriginal cultural heritage may wish to consider strategic planning in relation to cultural heritage as well as training, monitoring, audit and review of their cultural heritage management systems.
- 1.20 Should you require assistance in determining your responsibilities under these guidelines, you should contact the Cultural Heritage Coordination Unit, Department of Natural Resources, Mines and Energy on (07) 32383838.

PART 2 – Guidelines under section 23(1) of the *Aboriginal Cultural Heritage Act 2003*: Reasonable and Practicable Measures for Ensuring Activities are Managed to Avoid or Minimise Harm to Aboriginal Cultural Heritage

2.0 Introduction

- 2.1 These guidelines have been gazetted as cultural heritage duty of care guidelines by the Minister for Natural Resources, Mines and Energy under section 28 of the *Aboriginal Cultural Heritage Act 2003* and identify reasonable and practicable measures for ensuring that activities are managed to avoid or minimise harm to Aboriginal cultural heritage in a way that meets the duty of care requirements under section 23 of the *Aboriginal Cultural Heritage Act 2003*.
- 2.2 These guidelines recognise that it is unlikely that Aboriginal cultural heritage will be harmed where:
- (a) the current or proposed activity is on an area previously subject to significant ground disturbance and the activity will impact only on the area subject to the previous disturbance; or

- (b) the impact of the current or proposed activity is unlikely to cause any additional harm to Aboriginal cultural heritage than that which has already occurred¹.

2.3 It is important to note that these guidelines do not permit activities which, although causing no surface disturbance or no additional surface disturbance to an area, may harm scarred or carved trees or rock art without the agreement of the Aboriginal Party for the area or a Cultural Heritage Management Plan undertaken pursuant to Part 7 of the *Aboriginal Cultural Heritage Act 2003*.

3.0 Definitions

3.1 The definitions used in the *Aboriginal Cultural Heritage Act 2003* apply in relation to these guidelines.

3.2 In addition to the definitions used in the *Aboriginal Cultural Heritage Act 2003*, the following definitions are used within these guidelines:

“Cultural Heritage Find,” means a significant Aboriginal object or, evidence of archaeological or historic significance of Aboriginal occupation of an area of Queensland, or Aboriginal human remains, found in the course of undertaking an activity covered by these guidelines.

“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.

“No Additional Surface Disturbance” means surface disturbance not inconsistent with previous surface disturbance.

“Significant Ground Disturbance” means:

- (i) disturbance by machinery of the topsoil or surface rock layer of the ground, such as by ploughing, drilling or dredging;
- (ii) the removal of native vegetation by disturbing root systems and exposing underlying soil.

“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.

4.0 The nature of the activity and the likelihood of its causing harm to Aboriginal cultural heritage – Section 23(2)(a)

Activities involving No Surface Disturbance (Category 1)

4.1 Where an activity involves no Surface Disturbance of an area it is generally unlikely that the activity will harm Aboriginal cultural heritage and the activity will comply with these guidelines.

¹ This is not to say that a particular area may not continue to have importance under Aboriginal tradition or history even though it has been subject to significant ground disturbance. The Melbourne Cricket Ground, for example, is located on the site of an important Aboriginal meeting place – whilst this important value continues to exist it cannot generally be further harmed by maintenance or use as the area has been completely developed.

- 4.2 In these circumstances, it is reasonable and practicable for the activity to proceed without further cultural heritage assessment.
- 4.3 The following are examples of activities that may proceed under category 1:
- (a) walking²
 - (b) driving along existing roads and tracks (within the existing alignment) or other infrastructure footprint
 - (c) aerial surveys
 - (d) navigating through water
 - (e) cadastral, engineering, environmental or geological surveys using methods (such as GPS systems) which do not cause surface disturbance
 - (f) photography

Activities causing No Additional Surface Disturbance (Category 2)

- 4.4 Where an activity causes No Additional Surface Disturbance of an area it is generally unlikely that the activity will harm Aboriginal cultural heritage or could cause additional harm to Aboriginal cultural heritage to that which has already occurred, and the activity will comply with these guidelines.
- 4.5 In these circumstances, subject to the measures set out in paragraphs 4.7 – 4.11, it is reasonable and practicable for the activity to proceed without further cultural heritage assessment.
- 4.6 The following are examples of activities that may generally proceed under category 2:
- (a) Cultivation of an area which is currently subject to cultivation
 - (b) Grazing cattle on an area where cattle are currently grazed
 - (c) Use and maintenance of existing roads, tracks and powerlines within the existing infrastructure alignment, or other infrastructure footprint
 - (d) Use, maintenance and protection of services and utilities (such as electricity infrastructure; water or sewerage disposal) on an area where such services and utilities are currently being provided
 - (e) Use, maintenance and protection of services and utilities (such as electricity infrastructure; water or sewerage disposal) on an area immediately adjacent to where such services and utilities are currently being provided providing the activity does not involve additional surface disturbance
 - (f) Tourism and visitation activities on an area where such activities are already taking place

Excavating, relocating, removing or harming Aboriginal cultural heritage

- 4.7 If at anytime during the activity it is necessary to excavate, relocate, remove or harm a Cultural Heritage Find the activity should cease immediately. You must notify the Aboriginal Party for the area and seek their advice and agreement as to how best this may be managed to avoid or minimise harm to the Aboriginal cultural heritage. Paragraph 6.0 sets out examples of features highly likely to constitute or contain a Cultural Heritage Find.

² Although activities such as walking through a culturally significant place are permitted under this guideline, it is important to be aware that merely being present in a culturally significant place may cause offence to Aboriginal people and, where this is known, due respect should be paid to these cultural sensitivities.

Reaching Agreement

- 4.8 It is advisable that the terms of any agreement you reach with the Aboriginal Party for the area be recorded and documented in the event of future disputes.

Failure To Reach Agreement

- 4.9 Where agreement cannot be reached with the Aboriginal Party for the area, you continue to have a duty of care obligation under section 23 of the *Aboriginal Cultural Heritage Act 2003* and must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage including, where necessary, through the development of a Cultural Heritage Management Plan under Part 7 of the *Aboriginal Cultural Heritage Act 2003*.

Aboriginal Cultural Heritage Register and Aboriginal Cultural Heritage Database

- 4.10 An activity under category 2 that will excavate, relocate, remove or harm Aboriginal cultural heritage entered on the Aboriginal Cultural Heritage Register or the Aboriginal Cultural Heritage Database should not proceed without the agreement of the Aboriginal Party for the area or a Cultural Heritage Management Plan undertaken pursuant to Part 7 of the *Aboriginal Cultural Heritage Act 2003*.
- 4.11 Information regarding Aboriginal cultural heritage entered on the Aboriginal Cultural Heritage Register or the Aboriginal Cultural Heritage Database may be obtained from the Cultural Heritage Coordination Unit.

5.0 The nature and extent of past uses in the area affected by the activity - Section 23(2)(g)

Developed Areas (Category 3)

- 5.1 Where an activity is proposed in a Developed Area it is generally unlikely that the activity will harm Aboriginal cultural heritage and the activity will comply with these guidelines.
- 5.2 In these circumstances, subject to the measures set out in paragraphs 5.8 - 5.12, it is reasonable and practicable that the activity proceeds without further cultural heritage assessment.
- 5.3 The following are examples of activities that may generally proceed within a Developed Area:
- (a) Use and maintenance of existing roads, tracks and powerlines within the existing alignment, or other infrastructure footprint;
 - (b) Use and maintenance of services and utilities (such as electricity infrastructure; water or sewerage disposal) on an area where such services and utilities are currently being provided.

Areas previously subject to Significant Ground Disturbance (Category 4)

- 5.4 Where an activity is proposed in an area, which has previously been subject to Significant Ground Disturbance it is generally unlikely that the activity will harm Aboriginal cultural heritage and the activity will comply with these guidelines.

- 5.5 In these circumstances, subject to the measures set out in paragraphs 5.6 - 5.12, it is reasonable and practicable that the activity proceeds without further cultural heritage assessment.
- 5.6 In some cases, despite an area having been previously subject to Significant Ground Disturbance, certain features of the area may have residual cultural heritage significance. These features are set out in paragraph 6.0 of these guidelines.
- 5.7 It is important to be informed about any cultural heritage significance that may attach to these features and extra care must be taken prior to proceeding with any activity that may cause additional surface disturbance to the feature, or the area immediately surrounding the feature which is inconsistent with the pre-existing Significant Ground Disturbance. In these circumstances, it is necessary to notify the Aboriginal Party and seek:
- (a) Advice as to whether the feature constitutes Aboriginal cultural heritage; and
 - (b) If it does, agreement as to how best the activity may be managed to avoid or minimise harm to any Aboriginal cultural heritage.

Excavating, relocating, removing or harming a Cultural Heritage Find

- 5.8 If at anytime during the activity it is necessary to excavate, relocate, remove or harm a Cultural Heritage Find the activity should cease immediately. You must notify the Aboriginal Party for the area and seek their advice and agreement as to how best this may be managed to avoid or minimise harm to the Aboriginal cultural heritage. Paragraph 6.0 sets out examples of features highly likely to constitute or contain a Cultural Heritage Find.

Reaching Agreement

- 5.9 It is advisable that the terms of any agreement you reach with the Aboriginal Party for the area be recorded and documented in the event of future disputes.

Failure To Reach Agreement

- 5.10 Where agreement cannot be reached with the Aboriginal Party for the area, you continue to have a duty of care obligation under section 23 of the *Aboriginal Cultural Heritage Act 2003* and must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage including, where necessary, through the development of a Cultural Heritage Management Plan under Part 7 of the *Aboriginal Cultural Heritage Act 2003*.

Aboriginal Cultural Heritage Register and Aboriginal Cultural Heritage Database

- 5.11 An activity under category 3 or category 4 that will excavate, relocate, remove or harm Aboriginal cultural heritage entered on the Aboriginal Cultural Heritage Register or the Aboriginal Cultural Heritage Database should not proceed without the agreement of the Aboriginal Party for the area or a Cultural Heritage Management Plan undertaken pursuant to Part 7 of the *Aboriginal Cultural Heritage Act 2003*.

- 5.12 Information regarding Aboriginal cultural heritage entered on the Aboriginal Cultural Heritage Register or the Aboriginal Cultural Heritage Database may be obtained from the Cultural Heritage Coordination Unit.

Activities causing additional surface disturbance (Category 5)

- 5.13 A category 5 activity is any activity, or activity in an area, that does not fall within category 1, 2, 3 or 4.
- 5.14 Where an activity is proposed under category 5 there is generally a high risk that it could harm Aboriginal cultural heritage. In these circumstances, the activity should not proceed without cultural heritage assessment. Cultural heritage assessment should involve consideration of the matters a Court may consider under section 23(2) of the *Aboriginal Cultural Heritage Act 2003*, set out in paragraph 1.12 of the Preamble to these guidelines.
- 5.15 Particular care must be taken where it is proposed to undertake activities causing additional surface disturbance to the features likely to have cultural heritage significance, set out in paragraph 6.0 of these guidelines.
- 5.16 It is important to be informed about any cultural heritage significance that may attach to these features and extra care must be taken prior to proceeding with any activity that may cause additional surface disturbance of the feature, or the area immediately surrounding the feature. Where an activity is proposed under category 5, it is necessary to notify the Aboriginal Party and seek:
- (a) Advice as to whether the feature constitutes Aboriginal cultural heritage; and
 - (b) If it does, agreement as to how best the activity may be managed to avoid or minimise harm to any Aboriginal cultural heritage.

Excavating, relocating, removing or harming a Cultural Heritage Find

- 5.17 If at anytime during the activity it is necessary to remove or relocate or harm a Cultural Heritage Find the activity should cease immediately. You must notify the Aboriginal Party for the area and seek their advice and agreement as to how best this may be managed to avoid or minimise harm to the Aboriginal cultural heritage. Paragraph 6.0 sets out examples of features highly likely to constitute or contain a Cultural Heritage Find.

Reaching Agreement

- 5.18 It is advisable that the terms of any agreement you reach with the Aboriginal Party for the area be recorded and documented in the event of future disputes.

Failure To Reach Agreement

- 5.19 Where agreement cannot be reached with the Aboriginal Party for the area, you continue to have a duty of care obligation under section 23 of the *Aboriginal Cultural Heritage Act 2003* and must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage including, where necessary, through the development of a Cultural Heritage Management Plan under Part 7 of the *Aboriginal Cultural Heritage Act 2003*.

Aboriginal Cultural Heritage Register and Aboriginal Cultural Heritage Database

- 5.20 An activity under category 5 that will excavate, relocate, remove or harm Aboriginal cultural heritage entered on the Aboriginal Cultural Heritage Register or the Aboriginal Cultural Heritage Database should not proceed without the agreement of the Aboriginal Party for the area or a Cultural Heritage Management Plan undertaken pursuant to Part 7 of the *Aboriginal Cultural Heritage Act 2003*.
- 5.21 Information regarding Aboriginal cultural heritage entered on the Aboriginal Cultural Heritage Register or the Aboriginal Cultural Heritage Database may be obtained from the Cultural Heritage Coordination Unit.

6.0 The nature of the Aboriginal cultural heritage likely to be harmed by the activity - Section 23(2)(b)

- 6.1 The following features are highly likely to have cultural heritage significance. These features include, but are not limited to:
- **Ceremonial places:** The material remains of past Aboriginal ceremonial activities come in the form of earthen arrangements or bora grounds and their associated connecting pathways, and stone circles, arrangements and mounds. Indigenous people used these places for ceremonies, including initiation and inter-group gatherings.
 - **Scarred or carved trees:** Scars found on large mature trees often indicate the removal of bark by Indigenous people to make material items like canoes, containers, shields and boomerangs. Carved trees generally feature larger areas of bark that have been removed and carved lines deeply etched into the timber. Carvings include geometric or linear patterns, human figures, animals and birds.
 - **Burials:** Pre-contact Aboriginal burials are commonly found in caves and rock shelters, midden deposits and sand dunes. Burial sites are sensitive places of great significance to Indigenous people.
 - **Rock art:** Queensland has a rich and diverse rock art heritage. Rock art sites can include engravings, paintings, stencils and drawings. Paintings, stencils and drawings may have been done for everyday purposes, but are often used for ceremonial and sacred functions. Engravings include designs scratched, pecked or abraded into a rock surface.
 - **Fish traps and weirs:** Fish traps and weirs are stone or wooden constructions designed to capture aquatic animals, predominantly fish. Traps are considered as structures made predominantly from stone to form a type of pen or enclosure. Weirs are constructions designed to block the natural flow of water in creeks, streams and other watercourses.
 - **Occupation sites:** These are places where the material remains of human occupation are found. Such sites contain discarded stone tools, food remains, ochre, charcoal, stone and clay hearths or ovens, shell middens and shell scatters, including deposits found in rock shelters and caves. These deposits may be buried. Other evidence of occupation sites includes the remains of Aboriginal dwellings or "gunyahs".
 - **Quarries and artefact scatters:** Quarries are places where raw materials such as stone or ochre were obtained through either surface collection or sub-surface quarrying. Stone collected or extracted from stone quarries was used for the manufacture of stone tools. Ochre, a type of coloured clay, was utilised by Indigenous people in rock art and for body and wooden tool decoration.

- **Grinding grooves:** Grinding grooves represent the physical evidence of past tool making or food processing activities. They are generally found near water sources. The presence of long thin grooves may indicate where the edges of stone tools were ground. Food processing activities such as seed grinding can leave shallow circular depressions in rock surfaces.
- **Contact Sites:** The material remains of Indigenous participation in the development of Queensland after the arrival of European settlers. These include former or current Aboriginal missions, native mounted police barracks and historical camping sites.
- **Wells:** Rock wells are reliable water sources that have been altered by Indigenous people for the storage of water. The presence of wells often indicates the location of routes frequently travelled by Indigenous people in the past.

6.2 Landscape features, which may also have cultural heritage significance include:

- **Rock outcrops**
- **Caves**
- **Foreshores and coastal dunes**
- **Sand Hills**
- **Areas of biogeographical significance, such as natural wetlands**
- **Permanent and semi-permanent waterholes, natural springs.**
- **Particular types of native vegetation³**
- **Some hill and mound formations**

6.3 The views of the Aboriginal Party for an area are key in helping assess the Aboriginal cultural heritage significance of these kinds of features.

6.4 Appropriately qualified persons such as anthropologists, archaeologists and historians can also provide valuable assistance.

7.0 The extent to which the person consulted with Aboriginal parties about the carrying out of the activity and the results of the consultation - Section 23(2)(c)

7.1 The views of the Aboriginal Party for an area are key in assessing and managing any activity likely to excavate, relocate, remove or harm Aboriginal cultural heritage.

7.2 *Ask First – A guide to respecting Indigenous heritage places and values*, released by the Australian Heritage Commission, provides a practical guide to consulting and negotiating with Aboriginal people about their cultural heritage. Available from the Australian Heritage Commission website:

<http://www.ahc.gov.au/publications/indigenousheritage/index.html>

7.3 Any activity undertaken in accordance with an agreement with the relevant Aboriginal Party for the area satisfies the Aboriginal cultural heritage duty of care under the *Aboriginal Cultural Heritage Act 2003*.

³ Unless otherwise provided for under these guidelines (such as provisions in relation to scarred trees or places entered onto the Aboriginal Cultural Heritage Register or Database), the control and maintenance of native vegetation by pruning and lopping may proceed, subject to the provisions of the *Vegetation Management Act 1999* and other relevant legislation.

Reaching Agreement

- 7.4 It is advisable that the terms of any agreement you reach with the Aboriginal Party for the area be recorded and documented in the event of future disputes.

Failure To Reach Agreement

- 7.5 Where agreement cannot be reached with the Aboriginal Party for the area, you continue to have a duty of care obligation under section 23 of the *Aboriginal Cultural Heritage Act 2003* and must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage including, where necessary, through the development of a Cultural Heritage Management Plan under Part 7 of the *Aboriginal Cultural Heritage Act 2003*.

8.0 Whether the person carried out a study or survey, of any type, of the area affected by the activity to find out the location and extent of Aboriginal cultural heritage, and the extent of the study or survey - Section 23(2)(d)

- 8.1 A cultural heritage study or a cultural heritage survey should be carried out where it is necessary to identify and assess the Aboriginal cultural heritage values of an area, for example where an activity is likely to excavate, relocate, remove or harm Aboriginal cultural heritage.
- 8.2 A cultural heritage study or survey can be undertaken as part of the process for developing a Cultural Heritage Management Plan under Part 7 of the *Aboriginal Cultural Heritage Act 2003*.
- 8.3 Although it may be a useful reference point, you should not rely solely on information contained within the Aboriginal Cultural Heritage Register or the Aboriginal Cultural Heritage Database in deciding whether or not to undertake a cultural heritage study or survey. Neither should you rely solely on archaeological information about an area, as this may not address the particular significance of the area as a result of Aboriginal tradition or the history of the Aboriginal Party for the area.
- 8.4 As highlighted in *Ask First – A guide to respecting Indigenous heritage places and values*, you should not rely solely on previous work to identify significant Aboriginal cultural heritage, as the Aboriginal people involved in previous studies or surveys may not have disclosed the existence of cultural heritage places as they may not have been under immediate threat at the time the earlier study was undertaken.
- 8.5 Further guidance on when a cultural heritage study or survey is required may be obtained by:
- (a) Seeking the views of the Aboriginal Party for the area and ascertaining from the Aboriginal Party as to whether a study or survey is required;
 - (b) Seeking information from the Aboriginal Cultural Heritage Register and the Aboriginal Cultural Heritage Database as to whether there are any known cultural heritage values that could be affected by your activity⁴;

⁴ It is important to note that an assessment needs to be made as to whether your activity will indirectly harm Aboriginal cultural heritage not located directly within the area of actual activity eg., damming a creek may impact on Aboriginal cultural heritage down stream from the dam.

- (c) Seeking advice from appropriately qualified persons such as anthropologists, archaeologists and historians;
- (d) Assessing the nature of the Aboriginal cultural heritage likely to be harmed;
- (e) Assessing the nature of the activity and the likelihood of its causing harm to Aboriginal cultural heritage;
- (f) Assessing the nature and extent of past uses in the area affected by the activity;
- (g) Seeking further advice from the Cultural Heritage Coordination Unit.

8.6 The Aboriginal Party for the area must be given the opportunity to be involved in undertaking the cultural heritage study or survey and their advice must be sought as to how best to manage any activity, which may harm cultural heritage identified by the study or survey.

9.0 Whether the person searched the database and register for information about the area affected by the activity - Section 23(2)(e)

9.1 An activity that will excavate, relocate, remove or harm Aboriginal cultural heritage entered on the Aboriginal Cultural Heritage Register or the Aboriginal Cultural Heritage Database should not proceed without the agreement of the Aboriginal Party for the area or a Cultural Heritage Management Plan undertaken pursuant to Part 7 of the *Aboriginal Cultural Heritage Act 2003*.

9.2 Information regarding Aboriginal cultural heritage entered on the Aboriginal Cultural Heritage Register or the Aboriginal Cultural Heritage Database may be obtained from the Cultural Heritage Coordination Unit.