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**NATIVE TITLE****Inside:**

Queensland legislation  
now in force to  
protect indigenous  
cultural heritage

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## Queensland moves to protect Aboriginal cultural heritage

The Queensland Government's new regime to protect indigenous cultural heritage began on 16 April 2004. The commencement of the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* signifies the beginning of a more comprehensive regime for the recognition, protection and conservation of Aboriginal cultural heritage. Senior Associate Ben Zillmann and Lawyer Rochelle Spedding report.

In conjunction with the start of the new legislation, the Minister for Natural Resources, Mines and Energy has released the cultural heritage duty of care guidelines (*guidelines*) under the *Aboriginal Cultural Heritage Act 2003*. These give direction on the measures to be put in place to ensure activities are managed to avoid or minimise harm to cultural heritage. Compliance with the guidelines discharges the 'duty of care obligation' imposed by the Act.

### Cultural heritage duty of care guidelines

Our *Focus: Native Title* September 2002<sup>1</sup> and August 2003<sup>2</sup> provided a detailed overview of the new legislative regime. One important aspect of the new legislation is the introduction of a 'duty of care' provision that puts a positive obligation on any person carrying out an activity to take all reasonable and practical measures to ensure that the activity does not harm Aboriginal cultural heritage.

The *Aboriginal Cultural Heritage Act 2003* provides for the Minister to develop 'cultural heritage duty of care guidelines' to provide a guide to project proponents as to what measures are needed to ensure that Aboriginal cultural heritage is not harmed.

<sup>1</sup><http://www.aar.com.au/pubs/nat/foatsep02.htm>

<sup>2</sup><http://www.aar.com.au/pubs/nat/foataug03.htm>

The guidelines (which have not been previously released for public consultation) focus on six matters specified in the Act that are to be considered in determining whether the duty of care has been discharged:

- the nature of the activity, and its likelihood of causing harm to Aboriginal cultural heritage;
- the nature and extent of past uses in the area affected by the activity;
- the nature of the Aboriginal cultural heritage likely to be harmed by the activity;
- the extent to which consultation was conducted with the Aboriginal parties;
- whether a study or survey of the area affected by the activity was carried out to find out the location and extent of the Aboriginal cultural heritage; and
- whether the Aboriginal Cultural Heritage Database and Aboriginal Cultural Heritage Register was searched for information about the area affected by the activity.

*It is not compulsory to comply with the guidelines. However, compliance is deemed to satisfy a person's 'duty of care' obligation under the Act*

The type of activities that may affect Aboriginal cultural heritage are divided into five categories under the guidelines:

- **Category 1 – Activities involving no surface disturbance** (surface disturbance is disturbance that causes a lasting impact to the land or waters).  
Examples include walking; driving on existing roads; conducting aerial surveys and cadastral, engineering, environmental or geological surveys using methods that do not cause ground disturbance.
- **Category 2 – Activities causing no additional surface disturbance** (disturbance not inconsistent with previous surface disturbance).  
Examples include grazing cattle on an area where cattle are currently grazed; use and maintenance of existing roads, tracks and powerlines within existing infrastructure; use, maintenance and protection of services and utilities where such services are currently being provided or on an area adjacent,

provided the activity does not involve additional surface disturbance.

- **Category 3 – Activities in developed areas** (areas developed or maintained for a particular purpose, such as a park, garden, railway, road or infrastructure facility).

Examples include use and maintenance of existing roads, tracks and powerlines within the existing alignment; and use and maintenance of services and utilities on an area where such services are currently being provided.

- **Category 4 – Activities in areas previously subject to significant ground disturbance** (an area previously affected by disturbance by machinery of the topsoil or surface rock layer of the ground or the removal of native vegetation).
- **Category 5 – Activities causing additional surface disturbance** (an activity that does not fall within the above four categories).

Categories 1 and 2 relate to the nature of the activity being undertaken and the likelihood of harm, and categories 3 and 4 relate to past uses of the area.

## When activities may proceed

For activities falling within categories 1 – 4, the guidelines recognise that it is generally unlikely that any harm will come to Aboriginal cultural heritage. Therefore, apart from some specific matters, if an activity falls within one of these categories, the guidelines provide that the activity may proceed without any further cultural heritage assessments.

### Category 1

The guidelines allow the activity to proceed without any further cultural heritage assessments or conditions attached.

### Categories 2 – 4

The guidelines allow activities in these categories to proceed without any further cultural heritage assessments, provided that:

- if it is necessary to excavate, relocate, remove or harm a 'cultural heritage find' then the activity must cease and the Aboriginal party for the area must be notified. The project proponent must seek agreement from the Aboriginal party on how to best minimise the harm to the Aboriginal cultural heritage.

- if the activity requires the excavation, relocation, removal or harm to Aboriginal cultural heritage that is entered onto the Register or Database, the activity cannot proceed without the agreement of the Aboriginal party for the area, or a Cultural Heritage Management Plan (**CHMP**) approved by the relevant government agency.
- if agreement cannot be reached with the Aboriginal party, then it is still necessary to comply with the duty of care obligation in the Act, and to take all reasonable steps to ensure that the activity does not harm the Aboriginal cultural heritage (which may mean the development of a CHMP).

*The certainty provided by compliance is likely to be attractive to project proponents*

#### Category 5

These are activities that generally pose a high risk of harm to Aboriginal cultural heritage. The guidelines provide that the activity should not proceed without a 'cultural heritage assessment': this will typically involve an evaluation of the potential impact of the activities on cultural heritage, the performance of a cultural heritage survey, and consultation with the relevant Aboriginal parties.

The procedures listed above under categories 2 – 4 also apply to proceeding with activities under category 5.

#### Additional requirements

The guidelines outline certain features that are 'highly likely' to have cultural heritage significance, and which may constitute a cultural heritage find. These include such things as ceremonial places, scarred trees,

burial sites, rock art, grinding grooves, contact sites and wells.

In addition, certain landscape features that may also have cultural heritage significance include rock outcrops, caves, foreshores and coastal dunes, sand hills, waterholes and natural springs.

If there are certain features that may have cultural heritage significance, then care needs to be taken if the activity may cause additional disturbance to the feature or the area surrounding the feature. In these circumstances, before proceeding with the activity, the guidelines state that the project proponent should notify the Aboriginal party and ask whether the feature constitutes Aboriginal cultural heritage and, if it does, negotiate an agreement as to how to best manage the activity to minimise harm.

### No authorisation to impact cultural heritage

It will be noted that when cultural heritage is actually found and will be affected by an activity, then the guidelines simply state that an agreement with the Aboriginal parties will need to be reached or a CHMP obtained under the Act. That is, the guidelines themselves do not actually contain any procedures 'authorising' any impact on cultural heritage.

### Relevance of guidelines

It is not compulsory to comply with the guidelines. However, compliance with the guidelines is deemed to satisfy a person's duty of care obligation under the Act. The certainty provided by compliance is likely to be attractive to project proponents in situations where proponents cannot rely on an existing CHMP or agreement with the relevant Aboriginal party.



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