QUEENSLAND'S INDIGENOUS CULTURAL HERITAGE LEGISLATION: A CRITIQUE

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INTRODUCTION

Adequate protection and the proper management of Indigenous cultural heritage remains an area of concern not only for Indigenous communities, but also for government and land users in Australia. Currently a large number of different Commonwealth, State and Territory legislative instruments are designed to regulate, manage and protect Indigenous cultural heritage in Australia.[2] In the words of Evatt, "wide differences in the laws and procedures and in the level of protection provided under the various State and Territory legislative regimes exist".[3] Reviews of the protection that is offered by cultural heritage legislation in Australia have not generally been positive.[4] In this context, Queensland has introduced a new regime to govern Indigenous cultural heritage in the State.[5]

In Queensland the *Aboriginal Cultural Heritage Act* 2003 (Qld) ("*ACHA*") and *Torres Strait Islander Cultural Heritage Act* 2003 (Qld) ("*TSICHA) (*collectively referred to as "*Cultural Heritage Acts")* have changed the nature of protection afforded to Indigenous cultural heritage. This legislation was passed on 28th October 2003 and it commenced on 16th April 2004.[6] These *Cultural Heritage Acts* are in effect identical in their substantive provisions.[7] This new legislation repeals and replaces the Queensland *Cultural Record (Landscapes Queensland and Queensland Estates) Act* 1987 *(Qld) ("Cultural Record Act")* as the primary law for the protection of Indigenous cultural heritage in Queensland.[8] The key changes undertaken in the new legislative regime relate to the aspects of Indigenous cultural heritage which are protected and the processes and protection regimes which have been established. The approach taken under the *Cultural Heritage Acts* is to deal with Indigenous cultural heritage separately from other cultural heritage.[9]

The significant aspects of the *Cultural Heritage Acts* are as follows:

- "Blanket protection" is provided to Indigenous cultural heritage. This is a protection regime which operates throughout Queensland regardless of whether the sites or objects of cultural heritage have been registered or even identified.[10]
- A new general "duty of care" provision is introduced requiring a person to take reasonable and practical measures to be aware of and to avoid damaging or destroying Indigenous cultural heritage. Thus a person is required to exercise due diligence and to take reasonable precautions prior to engaging in any activity which may harm Indigenous cultural heritage. [11]
- Cultural heritage duty of care Guidelines have been notified by the relevant Minister.[12]
- Abolition of the need for permits (required under the previous *Cultural Record Act*), provided that land users comply with a general duty of care.
- A more comprehensive definition of cultural heritage, than in the previous *Cultural Record Act,* is contained in the new legislation.
- Establishment of a detailed regime in relation to Cultural Heritage Management Plans, which are mandatory for most major projects.

- Procedures for conducting Cultural Heritage Studies are set out.
- Establishment of a cultural heritage Register.
- Generally, identifying Indigenous parties in cultural heritage proceedings by reference to the legally recognised native title parties for the area.
- Recognition of Aboriginal and Torres Strait Islander ownership of human remains and burial items, secret and sacred material currently held in State collections, and cultural heritage previously removed from the country.
- Responsibility for the administration of this legislation has been placed with the Department of Natural Resources, Mines and Energy.
- The legislation will operate on all land in Queensland regardless of the tenure of the land.

This legislation has a stated aim of effectively recognising, protecting and conserving Indigenous cultural heritage[13] and that Aboriginal and Torres Strait Islander peoples should be involved in recognising, protecting and conserving their cultural heritage. In this respect, it is a stated fundamental principle of the legislation that "Indigenous people should be recognised as the primary guardians, keepers and knowledge holders of Indigenous cultural heritage".[14] It is the focus of this paper to canvass and review this legislation to determine if it does, indeed, offer adequate practical protection to Indigenous cultural heritage in Queensland and whether it fulfils its aims and fundamental principles.[15] At a time when Indigenous cultural heritage remains an issue in Australia, the question needs to be asked whether the Queensland legislation could be a model of appropriate protection for Indigenous cultural heritage for other States and the Territories to adopt.[16]

1. What were the issues with the previous Queensland Cultural Heritage Legislation?

The *Cultural Record (Landscapes Queensland and Queensland Estates) Act* 1987 *(Qld) (Cultural Record Act)* was the subject of much criticism[17] and this legislation was generally regarded as ineffectual in protecting Indigenous cultural heritage.[18] A review by the Queensland government acknowledged there was inadequate protection for areas and objects that are significant under Indigenous tradition or history.[19]

This Act divided cultural heritage into landscape areas which were used by people or were significant to people ("*Landscapes Queensland"*) and objects or evidence of past human occupation ("*Queensland Estate"*).[20] *Queensland Estate* was defined as evidence of human occupation of Queensland that was more that 30 years in the past and was of historic or pre-historic significance. It was an offence to take, destroy, damage, deface, excavate, expose, conceal or interfere with an item of the *Queensland Estate*[21] or to trespass on landscape areas,[22] unless the activity was undertaken under permits granted by the Minister. Under this legislation certain areas of land could be classed as "designated landscape areas"[23] and the Environmental Protection Agency (EPA) maintained a register of these areas. Apart from the designated landscape areas the only protection offered by this legislation was to "Indigenous archaeological sites" which were capable of objective identification and where physical or tangible evidence of human occupation could be established.[24] Non-archaeological sites which could be identified only by Indigenous peoples, such as sites of spiritual or religious significance, were not afforded protection. This lack of recognition of the continuing cultural value of Indigenous sites or landscapes which had no physical remains of human occupation was a significant failing of this legislation.[25]

Under this legislation the *Queensland Estate* was the property of the Crown and a declaration (and thus protection) that an area was a landscape area could be made only at the Minister's discretion.[26] The failure to transfer legal ownership and control of Indigenous cultural heritage places from the government to the Indigenous peoples was the second major deficiency in this legislation.

It is beyond the scope of this paper to detail all issues with the widely acknowledged insufficient protection offered by this legislation to Indigenous cultural heritage in Queensland.

2. What is Indigenous/Indigenous Cultural Heritage?

The new legislation protects "*Indigenous cultural heritage*" and promotes a broad concept of "*cultural heritage*". This concept focuses on the "culture" of the Indigenous community and is based on a community's traditions and history. The legislation protects the items and sites which are of particular significance to Indigenous peoples in accordance with Indigenous tradition. The definition in the new legislation is a change from the previous *Cultural Record Act's* narrow focus on protection of archeological evidence of human occupation – protection of stones and bones. Under the new legislation a wider range of cultural heritage is protected and there is no requirement that cultural heritage sites or objects display tangible signs of significance or evidence of human occupation. The definitions in the new legislation accord a more holistic view of culture.

The legislation contains the following definitions:
"*Indigenous cultural heritage*" is defined in section 8 as anything that is:[27]

> (a) a significant Indigenous area in Queensland; or
> (b) a significant Indigenous object; or
> (c) evidence, of archaeological or historic significance, of Indigenous occupation of an area of Queensland.

"A *significant Indigenous area*" is defined in s 9 as an area of particular significance to Indigenous people because of either or both of the following:

> (a) Indigenous tradition;
> (b) The history, including contemporary history of any Indigenous party for an area.

A "*significant Indigenous object*" is defined in s 10 as an object of particular significance to Indigenous people because of either or both of the following:

> (a) Indigenous tradition
> (b) The history, including contemporary history of an Indigenous party for an area.

Under the legislation Indigenous cultural heritage has been defined to include both archaeologically and historically significant heritage. However, it also includes areas or geographical features where artefacts and physical markings that might indicate its significance are absent.[28] Thus, an area can comprise a "*significant Indigenous area*" without physical evidence or markings of Indigenous use or occupation of the place/land and without any physical evidence or markings to indicate the cultural heritage significance of the area.[29] However, the Act does not attempt to define what is significant. For example, individual stone flakes may not be significant while a scatter of stone flakes would be significant.
As the legislation states that both "*significant Indigenous areas*" and "*significant Indigenous objects*" are to be of "particular significance" to Indigenous people it would be expected that this significance would be sourced in either Indigenous tradition or history.[30] Thus, it will protect not only traditional (pre-European settlement) areas and materials but will also afford protection to historical (post-European settlement) areas and materials. History encompasses the contemporary history of Indigenous peoples and thus the idea of a "living heritage" is incorporated into the protective regime.[31]
The Aboriginal and Torres Strait Islander Commission has defined cultural heritage as "the

intangible and tangible aspects of the whole body of cultural practices, resources and knowledge systems developed, nurtured and refined by Indigenous peoples and passed on by them as part of expressing their cultural identity".[32] This definition incorporates the intangible elements of heritage, including practices, knowledge systems and spiritual knowledge within its definition. The new definition of cultural heritage in the Queensland *Cultural Heritage Acts* may not be sufficient to protect all intangible elements of heritage, for example, spiritual knowledge.

The legislation allows the Indigenous communities to say which parts of their traditions and history are significant in relation to relevant sites, but it does not stipulate what evidence is required to prove the significance to Indigenous people. Therefore, it is only the Indigenous people's statement of significance that is essential under the legislation. In this way the legislation places the responsibility on Indigenous peoples themselves to determine precisely what their cultural heritage is and to determine the significance of this cultural heritage. Thus, it is for traditional owners to say what is significant and important to them. In this respect, the *Cultural Heritage Acts* do not allow land users to decide the question of significance. With the focus on Indigenous concepts of significance the *Cultural Heritage Acts* depart from Eurocentric concepts of cultural heritage and property.

One area of concern for land users in dealing with Indigenous cultural heritage in the past has been its "invisibility", that is how to identify Indigenous cultural heritage.[33] The new definitions of cultural heritage under the *Cultural Heritage Acts* will not change this and cultural heritage will continue to remain invisible. However, processes are included in the legislation that detail how to manage cultural heritage (for example, the negotiation of cultural heritage managements plans). These are discussed below.

3. How does the Act Protect "Indigenous Cultural Heritage"?

The *Cultural Heritage Acts* place the responsibility on the land users and project developers/ proponents to ensure that they do not offend the legislation and invoke the penalties under the Acts. Project land users need to take all steps to ensure that they do not breach the cultural heritage duty of care and in this way the Acts afford protection to Indigenous cultural heritage in Queensland.

The Duty of Care

The Acts introduce a new concept of protection: a statutory Indigenous cultural heritage duty of care. This duty requires that a person who performs an activity must take "all reasonable and practical measures to ensure that the activity does not harm Indigenous cultural heritage" [34] where the person "knows or ought reasonably to know" that it is Indigenous cultural heritage.[35] Harm is defined as damage or injury to, or desecrations or destruction of the cultural heritage and this could include non-physical harm to cultural heritage.[36] Actual physical harm to cultural heritage is not an essential element of an offence under the Acts. In addition, the legislation prohibits excavating, relocating, taking away or possessing any Indigenous cultural heritage, again where the person ought reasonably to know that it is cultural heritage.[37] Hence, it is both a breach of the cultural heritage duty of care and an offence under the Acts to:[38]

- Unlawfully harm cultural heritage.[39]
- Excavate, relocate or take away cultural heritage.*[40]*
- Unlawfully possess cultural heritage. *[41]*
- Fail to take all reasonable and practical measure to ensure that a land use activity does not harm Indigenous cultural heritage.*[42]*

Standard of Care

All land users must satisfy the duty of care. The question needs to be raised as to what is the duty or

standard of care required and how it is satisfied. In particular, what "reasonable and practical measures" are required by the Act? It should be emphasized that the extent of this duty and what it involves is not absolute. It will depend on the facts and circumstances of each case. The standard of care required is determined by the type of activity undertaken and the likelihood that this activity could destroy or damage Indigenous cultural heritage. The legislation offers guidance as to what is "reasonable" in order to meet the duty of care in that it:

- States when a Cultural Heritage Management Plan (CHMP) is compulsory.[43]
- Designates certain stipulated actions as constituting "strict compliance" with the duty of care.[44]
- Proscribes duty of care Guidelines indicating the potential risk of damage to cultural heritage by certain works in certain areas and suggesting actions that are reasonable to avoid damage to cultural heritage.[45]
- Deems that a person who acts in accordance with the "native title protection conditions", that is conditions attached to exploration permits granted pursuant to the expedited procedure under the *Native Title Act* 1993(Cth), has satisfied that duty of care provisions.[46]

To whom does the Duty of Care Apply?

The *Cultural Heritage Acts* bind all persons, including the State.[47] Therefore, government departments, local authorities, developers, project proponents, pastoralists and any person using land in Queensland will be subject to the duty of care. It is important to remember that this duty of care requirement is imposed on any person who "carries out an activity" on land in Queensland.[48] In this context, this duty is not just imposed on land users but on all development activities. This would include, for example, building a swimming pool in the backyard of a suburban home. Even a part use of the land will be subject to the legislation.

Compliance Options

The *Cultural Heritage Acts* detail the statutory compliance options[49] which need to be taken by land users to avoid liability both in relation to a breach of the cultural heritage duty of care and in relation to a breach of the offence sections of the Acts. Liability under the Acts can be avoided and no offence will be deemed to have been committed where action has been taken in accordance with a compliance option.[50]

Compliance options apply where a person has acted:[51]

- Under the authority of a different provision of the *Indigenous Cultural Heritage Acts*.
- Under an approved Cultural Heritage Management Plan (CHMP) that applies to Indigenous cultural heritage.
- Pursuant to an agreement, including a Native Title agreement, with an Indigenous party where Indigenous cultural heritage is expressly excluded.
- In compliance with cultural heritage duty of care guidelines.
- In accordance with the cultural heritage duty of care.
- Where the person either owns the Indigenous cultural heritage or acts in accordance with the owner's agreement.
- In an emergency situation e.g. natural disasters such as bush fires. This would include sandbagging where an area is in immanent danger of flooding, but it may not always include repairs carried out after the flood.

It is only in the latter two situations, where action is taken in an emergency or where the person owns the cultural heritage or acts in accordance with the owner's agreement, that the legislation recognises strict compliance has occurred without any further inquiry being undertaken.

Duty of Care Guidelines

A person who carries out an activity will be deemed to have complied with the cultural heritage duty of

care if the person acts in compliance with the Cultural Heritage Duty of Care Guidelines.[52] These Guidelines are measures established by the Minister to ensure that activities are managed to avoid or minimise harm to cultural heritage. Compliance with these measures ensures that the protection provisions of the *Cultural Heritage Acts* are not contravened.

Development activities in many areas of the State will occur on lands where there has previously been significant ground disturbance, in which case it would seem that there would be minimum and reduced risk of harm to Indigenous cultural heritage. However, even in areas of significant disturbance it is possible that Indigenous cultural heritage could exist. In areas where there has been little or no ground disturbance then the risk of disturbing Indigenous cultural heritage will be considerable. For example, if an open cut coal mine were to be built in an area of bush land the risk of disturbance is significant. In determining whether development activities are likely to harm cultural heritage land users should closely follow the Guidelines.
Potential activities are grouped into five categories under the Guidelines. These categories reflect the differing nature of activities and the likelihood of these activities potentially harming Indigenous cultural heritage.[53] The Guidelines state the steps which a land user should take for each activity category. Generally, the first question to be addressed in determining under which category an activity will be classed is whether the activity will involve surface disturbance.

However, if there is a need to excavate, relocate, remove or harm a cultural heritage find, then, despite the categorization of that activity in the Guidelines, the activity must cease immediately and the relevant Aboriginal or Torres Strait Islander party must be notified and their advice sought on how best to manage the Indigenous cultural heritage.[54] A cultural heritage find will occur when either a significant object or evidence of archaeological or historic significance of Indigenous occupation or Indigenous human remains is located.[55] The Guidelines will also operate subject to the management of any cultural heritage entered on the Cultural Heritage Register or the Cultural Heritage Database.[56]

The Guidelines recommend the following:

Category 1: Activities involving no surface disturbance.

"Surface disturbance" is defined to mean any disturbance of an area which causes a lasting impact to the land or waters during the activity or after the activity ceases.[57] If the activity involves no surface disturbance then it is unlikely to harm Indigenous cultural heritage and the activity can proceed without further cultural heritage assessment. Activities which come under this category include walking, driving on existing tracks and aerial surveys. Such activities may proceed without further cultural heritage assessment. However this is subject to the need to excavate, relocate, remove or harm a cultural heritage find, and subject to Indigenous cultural heritage being entered on the Cultural Heritage Register or the Cultural Heritage Database

Category 2: Activities causing no additional surface disturbance.

"No additional surface disturbance" means surface disturbance not inconsistent with previous surface disturbance.[58] If the activity causes no additional surface disturbance or takes place on a developed area then it is unlikely to harm Indigenous cultural heritage. For example, no additional surface disturbance is likely to occur on the cultivation of an area which is currently under cultivation; or on the grazing of cattle where cattle are currently grazed; or where tourism takes place in an area where this is already taking place. Additional surface disturbance is unlikely to occur in relation to the use and maintenance of existing roads and power lines, or in relation to the use, maintenance and protection of services (such as electricity infrastructure, water or sewerage disposal) in an area where such services are being provided or in an area adjacent to the existing infrastructure. These activities may proceed without further cultural heritage assessment, subject to the same requirements as listed in relation to Category 1 above.

Category 3: Developed areas.

"Developed area" means that the area is developed or maintained for a particular purpose such as a park, garden, railway, road, or other access route, navigation channel, municipal facility or infrastructure facility, such as power lines, telecommunication lines or electricity infrastructure.[59] These activities may proceed without further cultural heritage assessment, subject to the same requirements as listed in relation to Category 1 above.

Category 4: Areas previously subject to significant ground disturbance.

"Significant ground disturbance" means disturbance by machinery of the topsoil or surface rock layer of the ground, such as by ploughing, drilling or dredging, the removal of native vegetation by disturbing root systems and exposing underlying soil.[60] If the activity takes place in an area that has been subject to significant ground disturbance then the position will be the same as above and the activity will be unlikely to harm Indigenous cultural heritage. The activity can proceed without further cultural heritage assessment, subject to the same requirements as listed in relation to Category 1 above.

However, where features of the landscape have residual cultural heritage significance extra care must be taken if it is necessary to cause additional surface disturbance to the identified feature and landscape. It will be necessary to notify the Indigenous parties and seek their advice as to how best to manage the Indigenous cultural heritage.

Category 5: Activities causing additional surface disturbance.

If the activity causes additional surface disturbance then there will be a high risk of harming cultural heritage. Where the activity does not come within the previous categories then it will be classed as a category 5 activity. Generally category 5 activities involve a high risk of harm to cultural heritage. It is necessary to notify the Aboriginal or Torres Strait Islander parties and seek their advice about how to manage the cultural heritage including advice as to whether any harm could potentially occur and any necessary procedures to be taken to avoid this. In addition, a cultural heritage assessment should be undertaken.

In addition to the categorization of activities, the Guidelines contain a list of features which are likely to have cultural heritage significance which could be damaged by activities taking place on land.[61] These include ceremonial places, carved trees, burial places, rock art, fish traps, artifact scatters, grinding grooves which show past tool making practices, historical camping sites and rock wells. Certain landscape features are also included e.g. caves, coastal dunes and natural wetlands.

What should the land user do as "best practice" and to satisfy the duty of care?

1. *Search the Register and Database:* The first step is always to search the Indigenous Cultural Heritage Database and Indigenous Cultural Heritage Register at the Department of Natural Resources, Mines and Energy. Where a search reveals no listing of cultural heritage it cannot necessarily be taken that the area contains no Indigenous cultural heritage. This is not the end of the duty of care.
2. *Follow the Duty of Care Guidelines:* Land users should follow the cultural heritage duty of care guidelines in making an assessment of the nature of the Indigenous cultural heritage likely to be harmed. An assessment of the nature and extent of past uses in the area affected by the activity and an assessment of the nature of the activity and the likelihood of its causing harm to Indigenous cultural heritage should be made to determine the "activity category" in which the proposed work falls. Then an assessment of the appropriate action should be undertaken.
3. *Consult with the Indigenous parties for the area*: Land users should speak to the local Indigenous peoples/communities in the area in order to ascertain what cultural heritage may exist. As with native title claims it is important to identify the "right" Indigenous parties with whom to deal. [62]
4. *Organise a Cultural Heritage Survey where necessary:* The land user should commission a study or survey to ascertain the existence of any Indigenous cultural heritage which is likely

to be harmed. Archaeologists previously controlled this process but their role in such surveys is no longer essential in Queensland. This differs from many other parts of Australia. In Queensland, Indigenous people can speak for the area without the need for an archaeologist to survey the area. Indigenous people can say "destroy the midden" and establish a mine. The power is in the Indigenous people's hands. Consultation with anthropologists, archaeologists and historians who have knowledge of the area may also be appropriate.

5. *Negotiate and obtain an approved cultural heritage management plan* (CHMP) *or an agreement* with the Aboriginal or Torres Strait Islander party, where necessary.
6. A land user should ask the questions that the Land and Resources Tribunal *considers* when determining whether or not there has been a breach of the duty of care. The Land and Resources Tribunal has discretion in determining the penalties for breach of the duty of care under the legislation.[63] The Tribunal must consider, but is not limited to considering, the following:

- The nature of the activity,
- The likelihood of harm to the cultural heritage given the nature of the activity,
- The nature of the cultural heritage,
- The extent and results of consultation with the Aboriginal or Torres Strait Islander parties,
- The carrying out and extent of study or survey to locate the cultural heritage,
- Whether any search of the Register and Database was made,
- The extent of the compliance with the duty of care Guidelines,
- The nature and extent of past uses in the area.[64]

As noted above if the Guidelines are satisfied then the Indigenous cultural heritage duty of care is satisfied. Any activity undertaken in accordance with a CHMP agreement with the relevant Indigenous party for the area will also satisfy the Indigenous cultural heritage duty of care.

4. Sources of Cultural Heritage Information

A land user's initial step in relation to a proposed activity, especially when that activity involves ground disturbance, is to determine if any information about cultural heritage for the area affected is on record.[65] If the search produces information about cultural heritage then the Aboriginal or Torres Strait Islander party must be consulted prior to commencing any activity on the land. Clearly, failure to do so would be a breach of the duty of care if any harm to cultural heritage results from the work. In Queensland, only two methods of recording Indigenous cultural heritage exist. These are the *Cultural Heritage Register* and the *Cultural Heritage Database.* Hence, both sources must be searched.

In Queensland, searches should be conducted in the following sources prior to conducting an activity.
1. The Queensland State *Cultural Heritage Register*.[66] The Register is to provide a central and authoritative store of Indigenous cultural heritage information[67] and will reveal information about the following:

- Registered Cultural Heritage Management Plans. Information may also be available on approved plans and plans currently being developed in an area. All registered plans will have been registered under the new *Cultural Heritage Acts*.[68]
- Approved Cultural Heritage Studies. These studies will have been

approved under the new *Cultural Heritage Acts*.
• "Designated Landscape Area" (approved under the *Cultural Record Act*), and
• Aboriginal or Torres Strait Islander parties for the area.

2. Queensland State *Cultural Heritage Database:* This database will provide information in relation to:

• Cultural heritage records that have been collected by the State over the last 50 years. The accuracy of this information is not guaranteed by the State and must be "checked" and confirmed with the Aboriginal or Torres Strait Islander party.[69]
• Cultural heritage records collected by the State after the commencement of the *Cultural Heritage Acts*. This will include information collected by the State and information provided by others, such as local authorities, which is considered authoritative.
• The existence of cultural heritage information held that is of a "secret and sacred" nature. Here details will not be provided to the public.[70] However, this general information is sufficient to place an onus on the land user to contact the Aboriginal or Torres Strait Islander party to discuss the proposed work.[71]

3. Commonwealth Databases:
• Australian Heritage Places Inventory,[72] and the
• Australian Heritage Database. [73]

5. Identification of the "relevant or right" Aboriginal or Torres Strait Islander party

Consultation with the Aboriginal or Torres Strait Islander parties must be undertaken in certain situations under this legislation. Failure to contact each Aboriginal or Torres Strait Islander party when appropriate under the legislation will be a breach of the duty of care if the cultural heritage is harmed.[74] Furthermore, consultation will also be required when cultural heritage information is provided in response to Register and Database searches.[75] In addition, consultation and the negotiation with the correct Indigenous party will also be essential to reach a cultural heritage management plan.[76]

In addition, the Acts stipulate how to identify the relevant Indigenous parties.[77] This is based on a hierarchy of consultations and searches by which Aboriginal or Torres Strait Islander parties could be identified. Briefly, what this means is that if the party at the first stage in the contact hierarchy does not exist or is not responsible for the area then the party at the next stage of the contact hierarchy should be located. For example, in the first instance search the Queensland State Cultural Heritage Register to locate the Aboriginal or Torres Strait Islander party for the area. Details of contact and identification have been included in this legislation to overcome problems experienced with the previous *Cultural Record Act* in locating the appropriate Indigenous peoples to discuss cultural heritage issues in a specific area.[78]

It should be noted that more than one Indigenous community could regard the site as significant and thus all Indigenous communities that may be affected should be consulted. It is also possible that any one party may speak only for part of the actual work area. So for example, in the case of installing a pipeline it is possible that it would be necessary to work with different parties in relation to different sections of the pipeline.

Accordingly, the steps in contacting and identifying the relevant parties are as follows:[79]
1. First, contact the Indigenous Cultural Heritage Body for the area. Indigenous cultural heritage bodies

can be established under the Acts and incorporated bodies can apply to be registered as the cultural heritage body for an area.[80] This is an entity that has the role of identifying the correct Aboriginal or Torres Strait Islander party for an area or for a particular part of the area.

2. Secondly, if there is no Indigenous Cultural Heritage Body for the area then contact the native title party for the area. The native title party is defined in the Acts to include the registered native title claimant or the native title holders.[81] They will be the Aboriginal or Torres Strait Islander party for the area.[82]
3. Thirdly, if there is no registered native title claimant or native title holders then contact the previously registered native title claimants and previous native title holders who, in the circumstances, will be the Aboriginal or Torres Strait Islander party for the area.[83]
4. Fourthly, if there is no native title party for the area then contact the Aboriginal or Torres Strait Islander person with particular knowledge of the traditions, customs and beliefs associated with the area or object and who either has responsibility under Indigenous tradition for some or all of the area or is the member of the family or clan that has this responsibility.[84] This person will be the Aboriginal or Torres Strait Islander party for the area. Under the *Cultural Heritage Acts* a public notice should be published in a local newspaper asking for such a person to contact the Council within a specified period of time.[85]

Native Title Party

A native title party is defined in section 34 of the legislation to include not only native title holders and registered claimants whose outer claim boundaries cover part or all of the specific area but also previously registered claimants who have had their native title extinguished, compulsorily acquired or surrendered under a registered Indigenous Land Use Agreement (ILUA).[86] The *Cultural Heritage Acts* permit a native title claimant who has failed the registration test to remain an Aboriginal or Torres Strait Islander party for the area, until another person becomes a registered native title claimant or native title holder for the area. The status of the party as an Aboriginal party or Torres Strait Islander party applies to the whole area despite native title being previously extinguished.[87] By identifying the Aboriginal and Torres Strait Islander party as a native title party the *Cultural Heritage Acts* attempt to facilitate and link native title processes and cultural heritage processes.[88]

Indigenous Cultural Heritage Bodies

The establishment of an Indigenous Cultural Heritage Body appears to be an attempt to establish an additional body to the Native Title Representative Bodies ("NTRBs"). Possibly this new Cultural Heritage body will be in competition with NTRBs. Under the Acts native title claimant groups have to become registered Indigenous Cultural Heritage Bodies.[89] The Acts do place a great deal of reliance on the roles of the NTRBs and Registered Native Title Claimant Groups.[90] For example, when a CHMP is commenced the *Cultural Heritage Acts* include Registered Native Title Claimants and Native Title Representative Bodies in the list of those to whom notice must be given.[91] The Acts anticipate that the NTRBs would have a role in the CHMP process.

The Cultural Heritage Legislation assumes and implies that these bodies are staffed correctly and are sufficiently funded to play a role in cultural heritage.[92] The Minister may provide financial assistance to such a body but funding is not guaranteed.[93] It should be noted that the role that the bodies have under the Cultural Heritage legislation is outside these bodies' original brief and statutory duties and obligations under the *Native Title Act* 1993(Cth).

Rights of the Aboriginal and Torres Strait Islander Parties

Aboriginal and Torres Strait Islander parties have procedural rights in relation to cultural heritage and

have notification rights under the *Cultural Heritage Acts* when either a cultural heritage study or a cultural heritage management plan (CHMP) is proposed. Native title claim groups can negotiate in relation to a compulsory CHMP.

- Sponsors of cultural heritage studies and of CHMPs are required to deal only with Aboriginal and Torres Strait Islander parties (and that means they would be dealing with the native title parties). This effectively excludes anyone who does not have or is not part of a native title claim group or Indigenous cultural heritage body. It also means that the native title applicants under the *Native Title Act* 1993 will ultimately exclusively represent the native title claim groups.
- In addition, the cultural heritage Guidelines provide that the consent of the Aboriginal or Torres Strait Islander party is required to remove, relocate or damage Indigenous cultural heritage.[94] Where the Aboriginal or Torres Strait Islander party is the registered native title claimant or native title holder, this authority is exclusive. In the event that there are overlapping registered native title claimants then the authority is shared. This will still exclude any person who is not represented by the native title claim group. In this way being either a registered native title claimant or being a determined native titleholder is critical to having authority under the Acts.

No provision in the Act deals with the situation where the Aboriginal or Torres Strait Islander party changes. How this could potentially affect the long term viability and enforceability of negotiated cultural heritage agreements is unclear.

The Explanatory Memorandum states that the intent of s 34 is to "provide certainty to all persons in the identification of the appropriate Indigenous people to be involved in the assessment and management of cultural heritage". This legislation appears to provide the land user/proponent with clear guidelines to follow in contacting the "right" Indigenous party. From a land user's perspective, the *Cultural Heritage Acts* make identification of the relevant Indigenous party, with whom land users are conducting their negotiations, much easier. However, this legislation lacks any methodology to assist in identifying the appropriate and correct participants in the Indigenous Cultural Heritage Body.[95] Hence, the *Cultural Heritage Acts* will not necessarily provide certainty to the Indigenous communities as to the right parties being involved.

6. Cultural Heritage Management Plans (CHMP)

The Cultural Heritage legislation establishes the framework for formulating and approving a cultural heritage management plan.[96] A cultural heritage management plan (CHMP) is a plan to state how a project is to be managed in order to minimise the project's impact on Indigenous cultural heritage. When a CHMP is reached by agreement or is approved by the Chief Executive, Department of Natural Resources, Mines and Energy, the statutory duty of care is satisfied. Using the statutory cultural heritage management plan process provides time frames and dispute resolution mechanisms which were previously unavailable under the *Cultural Record Act* and it also replaces the permit regimes under the *Cultural Record Act.*

A cultural heritage management plan is mandatory where no native title or other agreement dealing with Indigenous cultural heritage exists and where:

- A lease, licence, or other form of approval is essential for the development project under an Act;[97]
- An *Environmental Impact Statement* ("EIS") is required.[98] (An EIS will be needed for any high impact development projects in the State);
- A plan may be required where other environmental authority is necessary or under the

Integrated Planning Act (Qld) 1997, for example where the project constitutes a material change of use of land under the *Integrated Planning Act* (Qld) 1997 and where Indigenous cultural heritage is on the Register.[99]

Apart from the above, the parties are free to create their own agreement and to opt out of the legislative requirements.

Apart from the above, CHMPs are a voluntary means of satisfying the "duty of care". Although a plan may not be mandatory, the approval of a plan may be regarded as essential to provide certainty in the management of large scale projects, for example, large-scale mining projects, large commercial and residential developments, and mineral and petroleum exploration.

The Cultural Heritage Management Process[100]

1. To commence a CHMP, notification (by the land user/developer/project proponent) must be given to the following parties:
- The Chief Executive (The Director-General of the Department of Natural Resources, Mines and Energy),
- Each owner and occupier of the relevant land, and
- Each Aboriginal or Torres Strait Islander cultural heritage body for the plan area (or each native title party for the area if there is no cultural heritage body).[101]
- If there is no cultural heritage body or native title party, the land user must give public notice to the Aboriginal and Torres Strait Islander parties.[102]
- Registered Native Title Claimants and Native Title Representative Bodies.[103]

2. The Indigenous parties have 30 days in which to respond to the notice and become an "endorsed party" in the formulation of the plan.[104]

3. Every reasonable effort must be made to reach a CHMP within 84 days, the minimum time for negotiations.[105] The parties must negotiate in a manner that avoids or minimises harm to the Indigenous cultural heritage.[106]

4. Mediation assistance from the Land and Resources Tribunal may be sought if after 28 days (of the consultation period) there is a dispute between the parties in formulating a plan.[107]

5. Approval of the plan: If an agreement is reached then it is referred to the Chief Executive for consideration and approval. The Chief Executive must approve the plan where all parties agree.[108] Moreover, where no endorsed parties are involved, the Chief Executive must ensure that the plan includes provisions to minimise any harm to the Indigenous cultural heritage. Where no endorsed parties are involved and the Chief Executive does not approve the plan, the land user may take the matter to the Tribunal.[109]

6. Where agreement is not reached in relation to a CHMP the land user may apply to the Land and Resources Tribunal either because:

- The mediation fails to result in a plan; [110] or
- The consultation period has expired without an agreement being reached.[111]

'. In making a decision about the CHMP the Tribunal must consider the following:[112]

- The availability and quality of information about the cultural heritage significance of the plan area.

- The nature of the impacts on the project.
- Submissions made by the parties, and
- The nature and extent of past uses of the project area.

The Tribunal must be satisfied that the plan makes provision for:[113]

- Avoiding and minimising damage to cultural heritage.
- Providing effective alternative disputer resolution arrangements (except in the case of a voluntary plan).
- Who is to become owner and who is to be custodian of any cultural heritage that is taken away.

The Tribunal must endeavour to make a recommendation in relation to the CHMP within 4 months.[114]

7. The result of an application to the Land and Resources Tribunal is a recommendation to the Minister.[115] The Minister is not bound by the Tribunal's recommendation and it is the Minister who makes the final decision whether to approve the plan or not. The Minister may:[116]

- Confirm the Chief Executive's refusal to approve the plan.
- Refuse to approve the plan.
- Approve the plan,
- Approve the plan after specified amendments have been met.

8. It is also possible for a CHMP to be considered by the Chief Executive, Department of Natural Resources, Mines and Energy where the Aboriginal or Torres Strait Islander party has not responded to notices about the proposed plan.[117]

Cultural Heritage Management Plan Guidelines

The Cultural Heritage Management Plan Guidelines were gazetted on 22 April 2005.[118]

In addition to the processes outlined in the *Cultural Heritage Acts* for reaching a CHMP the Guidelines provide direction as to the requirements necessary to demonstrate that the land user has made "every reasonable effort" to reach agreement with Indigenous parties about the contents of a CHMP.[119]

The key matters covered in the Guidelines include the following:

- The Guidelines provide that it "is reasonable" to have two Indigenous representatives to participate in CHMP negotiations and discuss the terms of the CHMP.[120]
- The Guidelines consider that it "is reasonable" to have two Indigenous representatives to participate in the preliminary site inspection and/or cultural heritage surveys. However, it is acknowledged that this will vary depending on the size of the project area, the nature of the work involved and timeframes.[121]
- The Guidelines consider that the appointment of a Suitably Qualified Expert is not mandatory and may not always be required - this is a matter that should be negotiated and agreed between the parties. [122] The Guidelines confirm that the *Cultural Heritage Acts* recognise that the Indigenous party is able to provide a land user with complete certainty in relation to the management of land use activities and Indigenous cultural heritage".[123]
- In relation to monitoring, the Guidelines provide that:
  - "Monitoring is not required for land use activities in areas where no Indigenous cultural heritage has been identified or in areas where there is a low potential

for future cultural heritage finds";
▪ A CHMP may "provide for monitoring of land use activities in the immediate area surrounding any Indigenous cultural heritage identified during the cultural heritage survey or in areas where there is a high potential for future subsurface cultural heritage finds (areas such as some creeks and watercourses)"; and
▪ "Where monitoring is agreed between the parties, it is generally reasonable that up to two Indigenous representatives be involved in the cultural heritage monitoring although this will vary depending on the size of the area to be monitored the nature of the work involved and timeframes".[124]

The inclusion in the Guidelines that a refusal by a land user to agree to monitoring of project activities in areas where there is no identified Indigenous cultural heritage is not "unreasonable" may have a significant impact on project budgets. [125] Hence, this Guideline is essentially pro-development.

It should be emphasised that what is "reasonable" and "unreasonable" in the Guidelines in respect of CHMP negotiations and satisfaction of the "duty of care" remain to be tested in the Land and Resources Tribunal. Once the Tribunal makes determinations in these matters then the parties involved in cultural heritage negotiations will have a clearer indication in relation to the "reasonable" measures needed to safeguard Indigenous cultural heritage.

In the context of accessing land for a CHMP and other voluntary studies the *Cultural Heritage Acts:*

- Provide that existing access powers under other Acts (such as the *Mineral Resources Act* 1989*, Petroleum Act* 1923*, Transport Infrastructure Act* 1999) can be used to access land for cultural heritage studies and CHMPs.[126]
- Confer new rights of access to land by broadening any existing rights of entry that a land user may enjoy over someone else's land, such as a lease, licence or permit, to allow access for the purpose of conducting any necessary cultural heritage activities.[127]
- Allow for voluntary studies or other research situations where the land owner's consent will be required.

7. What is a "cultural heritage study" and when would it be required?

A Cultural Heritage Study (CHS) is a comprehensive study of Indigenous cultural heritage in a specified area. Generally the purpose of a Cultural Heritage Study is to have that study recorded on the Queensland State *Cultural Heritage Register*.[128] The findings in a recorded CHS must be considered whenever an activity is undertaken in an area that has been studied.

Cultural Heritage Studies are voluntary and there is no obligation under the legislation to undertake such a study. The CHMP Guidelines indicate that a study should be undertaken in the following circumstances:[129]

- When it is necessary to identify and assess the Indigenous cultural heritage values of an area.
- When required for an EIS (Environmental Impact Statement), and
- To meet the duty of care. However, there is no automatic connection between a Cultural Heritage Study and the statutory duty of care. The completion of such a study will not in itself meet a land user's duty of care to protect Indigenous cultural heritage.

The *Cultural Heritage Acts* establish a framework for conducting Cultural Heritage Studies. Any person may sponsor a study; however, the Aboriginal or Torres Strait Islander party (who is the "endorsed party") is responsible for assessing the level of significance of the areas or objects included in the study.[130] The

role of the Indigenous endorsed party is a critical aspect of the CHS process. It is only the Indigenous endorsed party which can evaluate the degree of significance of significant areas and significant objects identified in the study area. Neither the Chief Executive nor the Minister has power to question or re-consider an endorsed party's assessment of the significance of a significant object or area.[131] While the legislation allocates responsibility for assessing levels of significance of their culture to the Indigenous endorsed party it is required under the Acts that any assertion of cultural heritage significance must be consistent with authoritative anthropological, biogeographical, historical and archaeological information.[132]

Matters that must be included in a CHS include:[133]

- A description that adequately distinguishes it from other cultural heritage studies,
- A description of the study area that enables accurate location,
- A description of all Indigenous cultural heritage that has been identified in the study area and a description of its location, and
- The reason that what has been identified as Indigenous cultural heritage has been so identified,
- If the study makes recommendations for the management of Indigenous cultural heritage identified in the study, then those recommendations must be included,
- For each area or object assessed as significant the name of each Aboriginal or Torres Strait Islander party that made that assessment, and
- The name and contact details of each endorsed party for the study,
- And the name and details of each cultural heritage body for the study area, and
- The name and contact details of each cultural heritage assessor for the study , and
- When the study was completed.

Recording of the results of a study in the *Cultural Heritage Register* is determined by the Chief Executive (The Director-General of the Department of Natural Resources, Mines and Energy). In deciding whether to record a study the Chief Executive must have regard to the results and the nature of consultations that have taken place. The Chief Executive may also:[134]

- Consult with the endorsed parties, the cultural heritage assessors, the owners, occupiers, and users of the relevant land, and may:
- Seek advice from experts, and relevant local governments.

Before a study is recorded in the Register the Chief Executive must be satisfied with the criteria set out in section 73. These include:

- Whether the sponsor has complied with the procedures and requirements for conducting the study,
- Whether the findings and recommendations are consistent with existing authoritative information such as anthropological, bio-geographical, historical and archaeological information about the area, and that
- The study includes all information required under the Acts (listed above), including the extent to which any endorsed party does not agree to the recording of the study.
- Whether the Cultural Heritage Study includes the following information:[135]
    - An explanation as to how lawful access to the study area was achieved.
    - A summarizing statement about the existence of Indigenous cultural heritage in the study area.
    - Documented evidence about whether affected land owners/occupiers agree with any recommendations about future management of heritage.
    - The signature of each endorsed party (or the party's nominee) who supports the study, and the recoding of some or all of the study's findings in the register.

- Details of each endorsed party for the study who did not take part in the study.

The sponsor, an endorsed party, an owner or occupier of part of the study area lands or a relevant local government may object to the decision of the Chief Executive in relation to registration.[136] The matter will be referred to the Tribunal. After hearing the case the Tribunal must make a recommendation to the Minister.[137] While the Minister must have regard to the Tribunal's recommendation, the Minister is not bound by it.[138]

8. Ownership of Indigenous Cultural Heritage

Ownership of Indigenous cultural heritage is a defence against the protective provisions of the legislation.[139] Generally the State owns Indigenous cultural heritage.[140] However, there are important exceptions:

- On the commencement of the *Cultural Heritage Acts* ownership of Indigenous human remains became vested in the Indigenous people with a traditional or familial link to those remains.[141]
- Objects which are secret or sacred under Indigenous tradition and that are in the custody of the Queensland Museum or the State are deemed to be owned by the Indigenous people who have a traditional or familial link with those objects.[142] (Here the legislation provides a positive recognition of ownership of secret and sacred material currently held in the State collections.)
- A person's ownership of cultural heritage is confirmed if, prior to the commencement of the Acts, the person owned the cultural heritage.[143]
- Any other cultural heritage is owned by the State. This legislation gives residual custodianship of cultural heritage to the State.
- The question of "ownership" also arises in relation to intellectual property rights and ownership of information once it is in a management plan and/or database. The legislation does not clarity this.
- A continuing issue is the limited access by the traditional owners to cultural sites both on Crown land and privately owned land.

9. Penalties and Offences

The Acts stipulates penalties of up to $75,000 for individuals and up to $750,000 for corporations for infringement of the offence sections.*[144]* Furthermore, rehabilitation and restoration costs can also be imposed.*[145]* In addition to the fines, if a person fails to discharge his or her obligations under the duty of care and if harm is done to Indigenous cultural heritage this can result in one or more of the following:

- Criminal prosecution and imprisonment for up to two years (in extreme cases).*[146]*
- Indigenous parties could request an injunction under the *Land and Resources Act* 1999 (Qld).*[147]*
- The Minister could issue a stop order. Failure to comply with a stop order can lead to a penalty of $1,275,000.*[148]*

In determining penalties for breach of an offence under the Acts the courts are directed to consider several factors prior to convicting.[149] There are several defences that can be raised automatically such as acting under an approved cultural heritage management plan.

Injunctions and Stop Work Orders

It should be emphasised that the result of non-compliance with the Acts is not restricted to prosecutions and penalties as discussed above. The Land and Resources Tribunal can also issue stop work orders and injunctions. Pursuant to section 53 of the *Land and Resources Tribunal Act* 1999 the Tribunal has exclusive jurisdiction to issue cultural heritage injunctions. In particular, injunctions can be granted to prevent or preclude any act taking place that would contravene the protection provisions of the *Cultural*

Heritage Acts. This jurisdiction is crucial and central to the protection of Indigenous cultural heritage in Queensland. To date, several such orders made have been issued by the Tribunal.[150] The consequences of these types of orders will, in fact, be commercial loss to projects, and may extend beyond commercial and legal risks to include damage to reputation and damage to long term relationships with Indigenous communities.

The Minister has power to issue a "Ministerial stop order" of up to 30 days in certain circumstances, for example where breaches of the legislation could occur.[151] There is no indication in the *Cultural Heritage Acts* as to precisely what is to happen when the Minister satisfies himself or herself as to the necessity of such an order nor how long such an assessment should in fact take. The penalty for knowingly contravening a stop order is $1.275 million. Furthermore, the Minister also has power to take a "preservation step" by purchasing or compulsorily acquiring land under the *Acquisition of Land Act* 1967.

9. Transitional Provisions

It should also be noted that existing agreements under the previous *Cultural Record Act* remain effective.[152] Permits issued under the previous legislation will also continue and existing approvals made prior to the commencement of the new legislation are covered or new approvals can be sought under the new legislation.[153]

10. Cultural Heritage and Native Title

The Queensland Cultural Heritage legislation is the first comprehensive and detailed cultural heritage legislation which has been enacted since the *Native Title Act* (Cth) 1993.

Native title and cultural heritage are, indeed, very different concepts in law. Native title is recognized by the common law[154] and is defined by the *Native Title Act* (Cth) 1993.[155] Cultural heritage and the rights and responsibilities associated with it are grounded entirely in legislation.[156] However, in practical terms, there is an interrelationship and an association between the two concepts especially where sites of significance, in accordance with a community's Indigenous traditions, are involved.[157] Cultural heritage aspects will be of relevance both in relation to determinations of native title and to proof of native title. Many native title determinations have included cultural heritage matters.[158] For example, in the *Wik Consent Determination* the native title rights included provision to "maintain and protect places of importance under traditional laws, customs and practices in the determination area".[159] Cultural heritage factors will frequently be relevant in proving a native title claim. For example, evidence of traditional and customary use of ceremonial or sacred sites and physical evidence of bora rings, middens or artwork may be of assistance to a claimant community in establishing traditional connections in accordance with traditional laws and customs to the traditional lands.[160]

However, despite the relevance of cultural heritage to native title it is appropriate that separate cultural heritage protection legislation be implemented. Native title claims are unlikely to succeed in many areas where cultural heritage exists due to the extinguishment of native title by the grants of certain tenures. Unlike native title, Indigenous cultural heritage cannot be extinguished by inconsistent historical tenures and thus cultural heritage and the cultural significance of sites and objects will remain although native title has been extinguished. The tenure history of the land is irrelevant in terms of application of the cultural heritage legislation. Indigenous cultural heritage has the potential to exist in or on land or waters anywhere in Queensland. Accordingly, this legislation is applicable to all land in Queensland and that includes fee simple land, exclusive leasehold tenures as well as unallocated State land.[161] The *Cultural Heritage Acts* will, in this sense, be more comprehensive in their operation than the Commonwealth *Native Title Act* 1993.

The *Cultural Heritage Acts* have, arguably, encouraged the combining of the native title processes and the

cultural heritage processes by identifying Aboriginal or Torres Strait Islander parties as registered native title claimants or native title holders.[162] The inclusion of the same parties in both native title and cultural heritage processes should promote the streamlining of negotiations in both areas. Cultural heritage, not only in Queensland but also in other States, will certainly impact on the content of native title agreements both in relation to claimant applications and future act agreements. Many Indigenous communities will choose to deal with both native title and cultural heritage claims simultaneously. The *Native Title Act* does not include a process for identifying Indigenous cultural heritage or culturally significant sites. This is also the position under the Indigenous heritage legislation in most other States.[163] Despite this, generally one of the first steps in native title negotiations is the signing of a negotiation protocol which includes an Indigenous cultural heritage protocol or a site survey process to identify cultural heritage. In this way Indigenous cultural heritage surveys would appear to have become an accepted informal step prior to the commencement of activities which involve land disturbance. In view of this, miners/developers have been warned that "until a survey is carried out, heritage issues will remain nebulous and elusive and may cloud native title negotiations".[164] Under the Queensland legislation a survey and management in such circumstances is no longer optional. It is understood that in Queensland it is common practice for CHMPs to be included as a schedule in negotiated Indigenous Land Use Agreements (ILUAs) under the *Native Title Act* 1993 (Cth).

Finally, under the *Cultural Heritage Acts* native title holders and registered native title claimants have preferential treatment in relation to certain procedural rights.[165] Refer to the discussion above in relation to the identification of the "right" Indigenous party.

One area where cultural heritage issues arise is in relation to the expedited procedure regime under the *Native Title Act*.[166] Here certain activities can be dealt with speedily where the future acts are likely to have a minimum affect on native title, for example the granting of exploration permits/licences. Both native title holders and registered native title claimants may object to the expedited procedure.[167] A frequently cited reason for objection is the concern about the disturbance of cultural heritage. Statutory protection of cultural heritage could mean fewer objections to the implementation of the expedited procedure.[168]

11. Commonwealth Cultural Heritage Regime

It is relevant to see how the Queensland Indigenous cultural heritage legislation works in the context of the Commonwealth regime and to outline the level of protection afforded to Indigenous cultural heritage by the Commonwealth legislation. The Commonwealth government made radical changes to its previous national heritage regime with the implementation of *Environmental Protection and Biodiversity Conservation Act* 1999, the *Environment and Heritage Legislation Amendment Act* 2003, the *Australian Heritage Council Act* 2003 and the *Australian Heritage Council (Consequential and Transitional Provisions) Act* 2003.[169]

Pursuant to the Commonwealth *Environment and Heritage Legislation Amendment Act No. 1* 2003[170] a National Heritage List of places of outstanding national heritage value is to be maintained.[171] This list will comprise places of natural, cultural, Indigenous and historic significance. Additionally, a Commonwealth Heritage List of heritage places that are owned or managed by the Commonwealth is established.[172] The Act prescribes criteria for listing and management of National and Commonwealth Heritage places.[173] Requirements where development proposals impact on National or Commonwealth Heritage places are stipulated.[174] An Australian Heritage Council has been established to advise the Minister for the Environment and Heritage on the listing and protection of heritage places[175] and at least two of its six members must be Indigenous people. If a place with possible Indigenous heritage is nominated to be included in the National or Commonwealth Heritage Lists then the Council must seek the

views of Indigenous people with rights or interest in the place as part of the assessment process. This Council also has the responsibility for maintaining the previously established Register of the National Estate.[176]

How is Indigenous cultural heritage protected by the Commonwealth?

First, under the Commonwealth's *Environmental Protection and Biodiversity Conservation Act* 1999 ("*EPBC Act*"), national heritage is included in a list of matters which have "national environmental significance" (NES matters).[177] Severe penalties are imposed any anyone taking action, without approval, where such action could have a significant impact on an NES matters.[178] Action includes a project, development, undertaking or an activity or a series of activities.[179] Penalties are therefore imposed on anyone who takes action that either results or could result in a significant impact on the national heritage values, and to the extent that they are Indigenous heritage values, of a place.[180] Indigenous people may request an injunction/declaration in the Federal Court to prevent any activities having a significant impact on the Indigenous heritage values of a listed place.[181] Indigenous people are to be involved in the management plans for places with Indigenous cultural heritage. National heritage places on Indigenous lands are to be managed through conservation agreements. In these ways Indigenous cultural heritage places on the Commonwealth's Heritage Lists will be protected by the Commonwealth legislative regime. Generally Indigenous cultural heritage listed on the Queensland Register will be protected by and subject to Queensland jurisdiction.

Secondly, Indigenous cultural heritage receives some protection by the provisions of the Commonwealth's *Aboriginal and Torres Strait Islander Heritage Protection Act* ("ATSIHPA") 1984. This legislation deals specifically with Indigenous cultural heritage and has not been repealed by the new Commonwealth cultural heritage regime. It continues to supplement the State legislative Indigenous cultural heritage regime to provide emergency protection for significant Indigenous areas that are under "serious and immediate threat of injury or desecration" and Indigenous objects which are under "threat of injury or desecration".[182] The Act allows the Minister (Commonwealth Minister for Environmental and Heritage) to make declarations protecting significant Indigenous areas and significant Indigenous objects.[183] Applications must be made by or on behalf of an Indigenous group.[184] Protection can last for up to 60 days.[185] The Minister must not make a declaration prior to consulting with the appropriate State or Territory Minister in which the relevant area or object is situated as to whether any law exists which would provide effective protection of the area or object from injury or desecration.[186] It includes a range of penalties for offences. [187] This legislation offers limited protection to Indigenous cultural heritage in an emergency situation and no protection at the design or development stages of land use projects.

A review of the Commonwealth's cultural heritage legislation was undertaken in the mid-1990s by Justice Evatt,[188] and formed the basis of the *Aboriginal and Torres Strait Islander Protection Bill (No1)* 1998. However, the Bill has never been enacted into law despite debate as to the need for further Commonwealth cultural heritage protection.[189] While the protection offered to cultural heritage under the new Commonwealth regime is substantial, it is available only where the Indigenous cultural heritage has Heritage List status.

CONCLUSION

What do the Queensland *Cultural Heritage Acts* mean for land users? Cultural heritage will today be a relevant consideration in almost all major development projects in Queensland as cultural heritage will continue to exist even where native title has been extinguished. Therefore, land users must be familiar with the detail of the *Cultural Heritage Acts* prior to undertaking their projects. Land users are required to have a working knowledge of Register searches, Duty of Care Guidelines, how to identify the Aboriginal or Torres Strait Islander party and more generally how to meet the duty of care. Not only must they be

cognizant of their duty of care obligations but they must ensure that the relevant measures have been incorporated into the project to enable them to show that they have taken all reasonable and practical steps to ensure that their activities do not harm Indigenous cultural heritage. Land users and developers scheduling new major projects need to plan for a CHMP negotiation process as CHMPs will be mandatory for most major projects in Queensland. While the *Cultural Heritage Acts* place a burden on the land user this is offset by the defences contained in the legislation and the duty of care guidelines.

What level of protection do the *Cultural Heritage Acts* offer in relation to Indigenous cultural heritage? In essence, what has changed with the *Cultural Heritage Acts* is a completely new statutory approach to Indigenous cultural heritage in Queensland. The Queensland approach is one that recognizes ownership rights of cultural heritage and cultural responsibilities. A blanket protection of Indigenous cultural heritage in Queensland is provided under the new legislation. Additional protection is offered in terms of the offence provisions and fines which punish on the basis of culpability. The possibility of injunctions and stop work orders also provide further protection. It was also seen that this legislation includes defences in certain reasonable circumstances. The concepts of "duty of care" and "harm" would appear to be clear and simple in their operation. Under the *Cultural Heritage Acts* the focus is on land users negotiating an agreed consensus with the relevant Indigenous communities in relation to the impact that a project may have on significant Indigenous sites and objects. Certainly, *Cultural Heritage Acts* do offer significant levels of protection for Indigenous cultural heritage in Queensland particularly in relation to their application of the "duty of care" standard and the cultural heritage management planning processes.

Clearly then, the *Aboriginal Cultural Heritage Act* 2003 (Qld) and the *Torres Strait Islander Cultural Heritage Act* 2003 (Qld) are a significant improvement on the previous legislation. They clarify many issues and obligations in relation to Indigenous cultural heritage and demonstrate an endeavour to preserve Indigenous heritage in Queensland. As was shown, the policy underlying these legislative provisions is that there is a significant record of Indigenous occupation in Queensland which should not be destroyed. While the legislation appears to deliver a message to land users that project managers should not destroy a square inch of Indigenous cultural heritage without the permission of the Indigenous traditional land owners, the focus of the *Cultural Heritage Acts,* and the related Guidelines, might be seen as facilitating resource development in the State. Essentially, how this legislation is interpreted by the Land and Resource Tribunal and how this legislation is administered and resourced by the State government will be the ultimate determinate of the measure of protection which is afforded to Indigenous cultural heritage in Queensland.

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[2] *Aboriginal and Torres Strait Islander Protection Act 1984* (Cth); *Protection of Movable Cultural Heritage Act* 1986 (Cth)**;** *Australian Heritage Commission Act* 1975 (Cth); *Environmental Protection and Biodiversity Conservation Act* 1999 (Cth); *Environment and Heritage Legislation Amendment Act* 2003 (Cth), *Australian Heritage Council Act* 2003, (Cth); *Australian Heritage Council (Consequential and Transitional Provisions) Act* 2003 (Cth); *Heritage Act* 1995 (Vic); *Aboriginal Lands Act* 1991 (Vic); *Archaeological and Aboriginal Relics Preservation Act* 1972 (Vic); *Heritage Act* 1977 (NSW); *National Parks and Wildlife Act* 1974 (NSW); *Environmental Planning and Assessment Act* 1979 (NSW); *Aboriginal Heritage Act* 1972 (WA); *Aboriginal Heritage Act* 1988 (SA); *Aboriginal Relics Act* 1975 (Tas); *Historic Cultural Heritage Act* 1995 (Tas); *Aboriginal Cultural Heritage Act* 2003 (Qld); *Torres Strait Islander Cultural Heritage Act* 2003 (Qld); *Heritage Act* 2004 (ACT); *Northern Territory Aboriginal Sacred Sites Act* 1989 (NT).

[3] See Evatt E, "An Overview of State and Territory Aboriginal Heritage Legislation" (1998) 4 (16) *Indigenous Law Bulletin* 4.

[4] See generally, Fourmile H; "Aboriginal Heritage Legislation and Self-Determination" (1989) 7 *Australian-Canadian Studies* 45; Tehan M, "To Be or Not to Be (Property) Anglo-Australian Law and the Search for Protection of Indigenous Cultural Heritage" (1996) 15 (2) *University of Tasmania Law Review*, 267; Tehan M, "Customary Title, Heritage Protection and Property Rights in Australia: Emerging Patterns of Land Use in the post-*Mabo* Era", (1998) 7 *Pacific Rim Law and Policy Journal;* "State and Territory Laws on Cultural Heritage" 1996 *Indigenous Law Resources, Reconciliation and Social Justice Library;* Kerwin D, and Leon M, A Comment on Aboriginal Cultural Heritage Protection in Australia, 5 (16) 2002 *Indigenous Law Bulletin,* 14; Fulcher J, "Cultural Heritage Law and Practice" *AMPLA Yearbook* 1998, 556; Taubman A, "Protecting

Aboriginal Sacred Sites: the Aftermath of the Hindmarsh Island Dispute" (2002) 19 (2) *Environmental and Planning Law Journal*, 140; Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report 2000,* Chapter 4: "Indigenous Heritage"; *The Laws of Australia* (Vol 1) "Aborigines" – Cultural Heritage Section, Law Book Co Ltd.

[5] *Aboriginal Cultural Heritage Act* 2003 (Qld); *Torres Strait Islander Cultural Heritage Act* 2003 (Qld).

[6] See generally: Black M, "Indigenous Cultural Heritage Law Reform", June 2004 *Proctor*, 11; Watson N and Black R, "New Cultural Heritage Legislation: One Small Step for Murris, One Giant Leap Forward for the Queensland Government" (2001) 5 (13) *Indigenous Law Bulletin*, 8; Snape K, "Queensland's New Cultural Heritage Laws", (2003) 6 (5) *Native Title News* 75; Gregory S and Gregory H, " Cultural Heritage – A New Challenge for the Queensland Land Development Industry" (2004) 19 (4) *Property Law Bulletin*; Briggs J, "Aboriginal *Cultural Heritage Act* 2003 (Qld) - Some Practical Implications for Land Users, April 2004 (2) (7) *Local Government Reporter*, 105.

[7] As the legislation is substantially the same with parallel provisions in both the *ACHA* and the *TSICHA* all references to this legislation will, unless otherwise specified, be to both pieces of legislation.

[8] Cultural heritage has also been dealt with in a number of Acts in Queensland. These include the *National Trust of Queensland Act* 1963 (Qld), the *Aboriginal Relics Act* 1967 (Qld) (subsequently repealed 1987) and the Queensland *Heritage Act* 1992. While places and objects of Indigenous cultural heritage significance could be listed by the Queensland Heritage Council and accorded protection under *Heritage Act* 1992 where the criteria for registration can be established, the *Heritage Act* 1992 is designed to deal generally with non-Indigenous heritage.

[9] The view taken in both the *National Trust of Queensland Act* 1963 (Qld) and the *Cultural Record Act* was that all cultural heritages should enjoy the same legislative protection. The current approach, which recognizes that recognizes that Indigenous and non-Indigenous attitudes to cultural heritage are different, was also taken in the *Aboriginal Relics Act* 1967 (Qld).

[10] Contrast this with the position under the Queensland *Heritage Act* 1992 which offers protection only to those items listed by the Queensland Heritage Council. One of the reasons for this difference in approach is that Aboriginal and Torres Strait Islander peoples will not always have rights of access to land to ascertain and identify their cultural heritage.

[11] Section 23.

[12] Section 28.

[13] Section 4.

[14] Section 5(b).

[15] For an Indigenous perspective of cultural heritage legislation see Fourmile H, "Aboriginal Heritage Legislation and Self-Determination" *supra* note 4 at 46, who states that: "The following ten points could be regarded as a "check list" for what we [Indigenous peoples] require of our legislation:

1. Aboriginal ownership of Aboriginal cultural heritage and property to be vested in the local community of origin;
2. Management and control of cultural heritage to be exercised by the local community and its appointees;
3. Opposition to centralized authority and administration with, in so far as is possible power and authority to take actions for the protection of heritage to be vested with local communities, Any centralized administrative strictures should be all-Aboriginal with the representatives elected from local community bodies, The roles and functions of such administrative bodies should be limited in coordination, liaison, policy formulation, research and training in accordance with the communities' needs;
4. Local autonomy over cultural matters;
5. A comprehensive definition of what constitutes Aboriginal cultural heritage to include land, sites, objects, languages, ancestral remains, folk-lore, customs and traditions, cultural knowledge and history relating to both pre- and post-European contact periods;
6. Employment of Aboriginal people, appointed by the local communities, in the principal roles of inspectors, rangers, wardens, etc.;
7. Local community permission and approval to be required for any research into Aboriginal cultural heritage;
8. Aboriginal hunting, fishing and gathering rights to be restored;
9. Unrestricted right of access be granted to sites and areas of cultural significance to aboriginal peoples on Crown, private and lease lands; and
10. The right to negotiate with land owners heritage agreements for the care and enjoyment of sites and areas of Aboriginal significance situated on private land."

[16] In 2005 the Victorian government introduced a new Bill to manage Indigenous cultural heritage in that State: *Aboriginal Heritage Bill* 2005 (Vic). See also the UNWIP 22ND Session, July 2004, Statement by the Sub-Commission on the Promotion and Protection of Human Rights and Working Group on Indigenous Populations, call for Co-operation with other United Nations bodies in the sphere of Indigenous Issues and the call for discussion on issues of Indigenous cultural heritage. See generally, Kerwin D, and Leon M, "A Comment on Aboriginal Cultural Heritage Protection in Australia" (2002) 5 (16) *Indigenous Law Bulletin,* 14; Kennedy J, "Operative Protection or Regulation of Destruction? The Validity of Permits to Destroy Indigenous Cultural heritage Sites" (2005) 6 (14) *Indigenous Law Bulletin* 20.

[17] See Fourmile H, "The Queensland *Heritage Act* 1992 and the *Cultural Record (Landscapes Queensland and Queensland*

Estate) Act 1987: Legislative Discrimination in the Protection of Indigenous Cultural Heritage"; Fourmile H; "Aboriginal Heritage Legislation and Self-Determination" *supra* note 4; Jago M, and Hancock N, "The Case of the Missing Blanket: Indigenous Heritage and State Regimes" (1998) 4(16) *Indigenous Law Bulletin* 18. Memmott P and Long S, "The Significance of Indigenous Place Knowledge to Australian Cultural Heritage" (1998) 4 (16) Indigenous *Law Bulletin* 9; Watson N and Black R, *supra* note 6; Richie D "Australian Heritage Protection Law: An Overview" AIATSIS Workshop on Heritage Protection Law, Feb 1006.

[18] However, see *Lillian Colonel for and behalf of the Jarowair People v New Acland Coal Pty Ltd* [2002] QLRT 13, where the Land and Resources Tribunal granted an interlocutory injunction to prevent a mining company working in an area where a site of Indigenous cultural heritage was claimed.

[19] See the *Review of Queensland's Indigenous Cultural Heritage Legislation: Discussion Paper,* 1999.

[20] Sections 5 and 10 *Cultural Record Act*. *Landscapes Queensland* was defined in section 10 as areas or features within Queensland that have been or are being used or altered in some way by humans and are of significance to humans for anthropological, cultural, historic, or prehistoric or societal reason.

[21] Section 56 *Cultural Record Act*.

[22] Section 24 *Cultural Record Act*.

[23] Sections 17(1) and 19(1) – (4) *Cultural Record Act*.

[24] Sections 33 (1)(a), 56 *Cultural Record Act*.

[25] Memmott P, "The Significance of Indigenous Place Knowledge to Australian Cultural Heritage" (1998) 1 *Indigenous Law Bulletin* 26.

[26] Sections 27 and 56 *Cultural Record Act*.

[27] Note that parallel provisions repeat the above definitions in the TSICHA.

[28] Section 12.

[29] Section12(2).

[30] Aboriginal tradition is defined in section 36 of the Queensland *Acts Interpretation Act* 1954 as:
"The body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people, and includes any such traditions, observances, customs and beliefs relating to particular persons, areas, objects or relationships".

[31] Sections 9 and 10.

[32] Aboriginal and Torres Strait Islander Commission (ATSIC) "Our Culture our Future: Proposals for the Protection and Recognition of Indigenous Cultural and Intellectual Property", (1999) 4 (4) *AILR* 115.

[33] Briggs J, "Aboriginal *Cultural Heritage Act* 2003 (Qld) - Some Practical Implications for Land Users, April 2004 (2) (7) *Local Government Reporter*, 105.

[34] Section 23 (1) provides 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**)". This is subject to s21 of the Act. Section 21 allows the person entitled to use land to continue using the surface of the land, despite the existence of Aboriginal cultural heritage, provided no harm is done to the Aboriginal cultural heritage.

[35] Section 24 provides that a person must not harm Aboriginal cultural heritage if the person "knows or ought reasonably to know" that it is Aboriginal cultural heritage. Under section 24 no defence of honest and reasonable mistake is allowed in relation to the duty of care.

[36] Schedule 2.

[37] Section 25 provides that a person must not excavate, relocate or take away Aboriginal cultural heritage if the person knows or out reasonably to know that it is Aboriginal cultural heritage. Section 26 provides that a person must not have in the person's possession an object that is Aboriginal cultural heritage if the person knows or ought reasonably to know that the object is Aboriginal cultural heritage. Additional offences are contained in sections: 17, 18, 27, 29 and 30.

[38] Sections 23(1).

[39] Section 24(1).

[40] Section 25 (1).

[41] Section 26(1).

[42] Section 23.

[43] Section 23 (1) (a).

[44] Section 23 (1) (b) – (h).

[45] Section 25.

[46] Section 26

[47] Section 3.

[48] Section 23(1).

[49] Sections 23, 24, 25, 26.

[50] Sections 23(1), 24(1), 25(1), 26(1).

[51] Sections 23(3), 24(2), 25(2, 26(2).

[52] Section 23(3(a)); s28. Cultural Heritage Duty of Care Guidelines: gazetted 16 April 2004; www.nrm.qld.gov.au/cultural_heritage/legislation/duty_of_care.html
Section 28 provides that the Minister may gazette 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.

[53] Section 23(2).

[54] Section 23(4).

[55] Section 23(3).

[56] Section 23. The Aboriginal Cultural Heritage Register and the Aboriginal Cultural Heritage Database are discussed below.

[57] Section 23 (3).

[58] Section 23 (3) (b).

[59] Section 7.

[60] Section 7.

[61] Section 23(2) (b). See Item 6 Guidelines.

[62] See the discussion below.

[63] Section 107.

[64] Section 107.

[65] Refer to the discussion in the duty of care Guidelines.

[66] Sections 46-51.

[67] Refer to the discussion below.

[68] Sections 46, 49

[69] Section 38-45. Some 14,000 sites and places and objects have been recognized over the past 50 years.

[70] Sections 42, 51. Protection is afforded to secret or sacred information under the *Queensland Cultural Heritage Acts* in that access to the database is not available generally but is restricted to those with a genuine reason for its use. Furthermore, where a person knows that information is of a secret or sacred nature it must not be disclosed in any reports or documents submitted to the Minister about cultural heritage. Section 29(2).

[71] Section 48.

[72] www.heritage.gov.au/ahpi/index.html
The Australian Heritage Places Inventory was established pursuant to the *Australian Heritage Council Act* 2003 (Cth) The Register and Inventory all continue under the *Australian Heritage Council Act* 2003 (Cth). See Part V ss 21, 22. The Australian Places Heritage Inventory, it is a *joint* database containing information on places listed in Commonwealth *and* State and Territory Heritage Registers. It enables the user to access Heritage Registers of the various States and their local governments. The Heritage Inventory Register essentially provides additional information (to the information provided by the Australian Heritage Database (below)) on State and local heritage.

[73] www.deh.gov.au/cgi-bin/ahdb/search.pl
The Australian Heritage Database contains more than 20,000 natural, historic and Indigenous places. It includes places in: the World Heritage List, the National Heritage List, the Commonwealth Heritage List and the Register of the National Estate. Searching the database allows the person to view a place's description, its status, its significance physical condition and a photograph if available. A Register of the National Estate, in which places included in the National Estate were to listed, was originally established pursuant to section 22 of the *Australian Heritage Commission Act* 1975 (Cth). The National Estate was defined as consisting of "those places, being components of the natural environment of Australia or the cultural environment of Australia, that have aesthetic, historic, scientific or social significance or their special value for future generations as well as for the present community". This definition could include sites and places of significance to Indigenous people. However, until the repeal in 1990 of section 23(5) of *Australian Heritage Commission Act*, Aboriginal cultural heritage was not covered. Pursuant to the *Australian Heritage Council Act* 2003 (Cth) the Australian Heritage Council was established and one of its functions is to maintain the Register of the National Estate, which as noted above is included in the Australian Heritage Database.

[74] See duty of care Guidelines above which indicated when consultation should take place.

[75] Refer to the discussion below.

[76] Section 36.

[77] Sections 34, 35. See s36 re registration as an Aboriginal cultural heritage body.

[78] See Cartledge, D "A New Approach to Protecting Indigenous Cultural Heritage in Queensland" *Heritage Services Conference* 2004, Rockhampton.

[79] Ibid.

[80] Sections 36-37. Section 36 allows the Minister, on the application of a corporation, to register the corporation as the Aboriginal Cultural Heritage Body for the area. A corporation is stated to be an Aboriginal body incorporated for the furthering of the interests of Aboriginal people in relation to land or cultural matters.

[81] Section 36.

[82] Sections 34 -35.

[83] Sections 35-36.

[84] Section 35(7).

[85] Section 35(7).

[86] Section 34. Section 35 states that the native title party for an area is the "Aboriginal party" (or "Torres Strait Islander party") for the area for the purposes of the Acts.

[87] Section 35

[88] Section 34 (Part 4).

[89] Section 34

[90] Sections 34 and 35.

[91] Section 91.

[92] See Watson and Black, supra note 6.

[93] Section 90.

[94] Sections 66-70.

[95] Similarly the legislation lacks any methodology in choosing the appropriate persons to act as assessors in cultural heritage surveys and in addition the legislation is devoid of any methodology to assist in resolving conflict between participants in a dispute as what may constitute Indigenous cultural heritage.

[96] Section 87. See generally Div. 3 Preparing to develop a CHMP; and also Div 4 Development of a CHMP. A CHMP is approved by the Chief Executive – the Director-General of the Department of Natural Resources, Mines and Energy.

[97] Section 88(1)(a)(i).

[98] Section 87.

[99] See sections 87, 88, 89. The Cultural Heritage legislation links with the Integrated Development Assessment System (IDAS) by amending the Integrated Planning Regulation 1998 to provide that the Department of Natural Resources and Mines acts as a concurrence agency for development applications involving a material change of use under a planning scheme affecting an area identified on the registers of Aboriginal or Torres Strait Islander cultural heritage.

[100] See sections 91, 92, 93, 94, 96-99, 103-108, 111-120.

[101] Section 91.

[102] Section 96.

[103] Section 91.

[104] Section 93-94; 96, 99. Note the discretion to extend the time period.

[105] See Schedule 2 Dictionary- definition of "consultation period".

[106] Section 102-3.

[107] Section 106.

[108] Section 107.

[109] Section 108(2).

[110] Section 112.

[111] Section 113.

[112] Section 118(4).

[113] Section 118(1) – (3).

[114] Section 118(1).

[115] Section 117.

[116] Section 120.
[117] Section 119.
[118] See http://www.nrm.qld.gov.au/cultural_heritage/pdf/champguidelines.pdf
[119] Section 105.
[120] Clause 2.6.
[121] Clause 2.8.2
[122] Clause 2 .3
[123] Clause 2 .9.
[124] Clause 2.10.3.
[125] Carter, "Aboriginal Cultural Heritage in Queensland – 18 Months On" 7(5) October 2005 *Native Title News*.
[126] Section 150.
[127] Section 153.
[128] See also sections 20-22A *Heritage Act* 1992 (Qld).
[129] Clause 2.8.6.
[130] Section 53.
[131] Section 23.
[132] Section 23.
[133] Sections 44-46.
[134] Section 72.
[135] Section 58.
[136] Section 76.
[137] Section 78.
[138] Section 79.
[139] Section 24(2) (b). While the *Cultural Heritage Acts* restrict the general public's destruction of cultural heritage a legal owner of Indigenous cultural heritage is permitted to damage or destroy this heritage irrespective of whether the wider community has been consulted
[140] Section s 20(2).
[141] Section 15.
[142] Section 19.
[143] Section 160.
[144] See sections 23-26. A penalty can also be imposed for failing to notify the Department of Natural Resources Mines and Energy of Aboriginal cultural heritage which may be identified during an activity conducted pursuant to a cultural heritage management plan.
[145] Section 58.
[146] Section 24(1)(a)(i).
[147] This is discussed below.
[148] Section 32(6).
[149] See generally sections 58-59.
[150] *Wulgurukaba Aboriginal Corporation v Nelly Bay Harbour Pty Ltd* [2001] QLRT 98. In this case an Aboriginal group successfully obtained an injunction to allow for the proper removal of skeleton remains.
[151] Section 32.
[152] Section 161.
[153] Sections 163, 164 and 165.
[154] *Mabo v Commonwealth* (1992) 172 CLR 1.
[155] Native title rights are defined in section 223 *Native Title Act* 1993 (Cth).
[156] *Aboriginal Cultural Heritage Act* 2003 (Qld); *Torres Strait Islander Cultural Heritage Act* 2003 (Qld).
[157] Olney J in *Hayes v Northern Territory* (1999) 97 FCR 32 at [56]stated that "Any form of native title which did not recognize the need to protect sacred and significant sites would debase the whole concept of the recognition of traditional rights in relation to land".

[158] See Neate G, "An Overview of Native Title in Australia – Some Recent Milestones and the Way Ahead" *11th Annual Cultural Heritage and Native Title Conference, Building Partnerships and Finding solutions for Better Outcomes*, Brisbane, July 2004.

[159] *Wik Peoples v Queensland*, consent determination of native title, 3 October 2000, Order 3 (g).

[160] See Nicholls D, and Bredhauer J, "Queensland's Indigenous Cultural Heritage Laws" 4th Queensland Environment Conference, 2002, Queensland.

[161] See generally, Sheehan J, "Linking Cultural Heritage and Native Title," *Land Rights Queensland,* 2000.

[162] Section 34 (Part 4).

[163] See, for example, the Queensland's *Heritage Act* (1992) which does not define or provide a process for identifying culturally significant site. See sections 23-32.

[164] Hunt M, "Native Title and Aboriginal Heritage Issues Affecting Oil and Gas Exploration and Production" 2001 (8) (3) *Murdoch University Electronic Journal of Law.*

[165] Sections 3, 24, 35.

[166] Sections 29(7), 237, 32 NTA.

[167] Section 32 NTA.

[168] See Neate, supra note 148.

[169] The previous Commonwealth legislation governing cultural heritage, the *Australian Heritage Commission Act* 1975, was repealed and the Australian Heritage Commission was dissolved. The new laws commenced on 1st January 2004.

[170] This Act amends the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth).

[171] Section 324C *Environment and Heritage Legislation Amendment Act No. 1* 2003 (Cth).

[172] Section 341J *Environment and Heritage Legislation Amendment Act No. 1* 2003 (Cth). Native title rights will remain unaffected by any entry on a National or Commonwealth Heritage List. See section 8 *Environment Protection and Biodiversity Conservation Act* 1999 (Cth).

[173] Section 324 D *Environment and Heritage Legislation Amendment Act No. 1* 2003 (Cth).

[174] Section 41ZC- 41 ZD.*Environment and Heritage Legislation Amendment Act No. 1* 2003 (Cth).

[175] *Australian Heritage Council Act* 2003 (Cth).

[176] Sections 21 and 22 *Australian Heritage Council Act* 2003 (Cth). See footnote 73 above. The Register of the National Estate contains a list of important natural, Indigenous and historic places. It was established under the *Australian Heritage Commission Act* 1975 (Cth) which has since been repealed. However, the Register of the National Estate has been retained under the *Australian Heritage Council Act* 2003 (Cth).

[177] See Division 1 Sections 12-25F *EPBC Act* 1999 (Cth).

[178] Section 15A, 15C, 17B, 19, 20A, 22A, 24A, 25.*EPBC Act* 1999 (Cth).

[179] Section 523 *EPBC Act* 1999 (Cth).

[180] Section 15B-C. For definitions of "environment" see again ss 11-25 *EPBC Act* 1999 (Cth). The EPBC Act defines "environment" to include the heritage values, thus the Act provides protection for the values of Commonwealth Heritage places.

[181] Generally see section 15 *EPBC Act* 1999 (Cth).

[182] Sections 9(1)(b) and 12 (1)(b) ATSIHPA.

[183] Section 9 ATSIHPA. A "significant Aboriginal area" means:

- An area of land in Australia or beneath Australian waters;
- An area of water in Australia;

being an area of particular significance to Aboriginal in accordance with Aboriginal tradition.
A "significant Aboriginal object" means an object including Aboriginal remains of particular significance to Aboriginal peoples in accordance with Aboriginal tradition. Section 3(1).
"Aboriginal" is defined as meaning a member of the Aboriginal race of Australia and includes a descendent of the indigenous inhabitants of the Torres Strait Islands. Section 3(1).

[184] Section 9 ATSIHPA.

[185] Section 10 ATSIHPA.

[186] Section 13(2) ATSIHPA.

[187] A person who contravenes a declaration regarding a significant Aboriginal area is guilty of an offence. In the case of a natural person the maximum fine is $10,000 or imprisonment for a period not exceeding 5 years, or both. In the case of a body corporate the maximum fine will be $50,000. See Section 22(1). A person who contravenes a provision of a declaration in relation to a significant Aboriginal object or significant Aboriginal objects is guilty of an offence punishable on conviction: in

the case of a natural person the maximum fine is $5,000 or imprisonment of a period not exceeding 2 years, or both; or if the person is a body corporate, by a fine not exceeding $25,000. See section 22(2).

[188] Report by Hon Elizabeth Evatt AC, Review of the *Aboriginal and Torres Strait Islander Heritage Protection Ac*t 1984, Parliamentary Paper no 170 of 1996. This Report contained some one hundred and fifteen recommendations including the following: setting minimum standards within the Act, making the Act more effective, protecting Aboriginal objects, deciding the significance of an Aboriginal issue, recognition and Respect for aboriginal customary law regarding disclosure of restricted information, establishing an Aboriginal cultural heritage committee, encouraging agreement, an Aboriginal heritage protection agency and aboriginal cultural heritage advisory council.

[189] A second Bill *(Bill No 2)* was debated and amended by the Senate in 1999. The government rejected the Senate's 1999 amendments. However, *Bill No 3* never eventuated. See Evatt, "Review of the *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984" (1997) 2*AILR* 433; See generally the (1998) 4 (16) *Indigenous Law Bulletin* Special Heritage Thematic Issue; Fulcher J, "Changes Proposed to the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act* 1984 and their Impact on Project Developments" (1999) 2 *Australian Environmental Law News* 67; Boer, B "The Legal Framework of Heritage Conservation", *Cultural Conservation – Towards a National Approach, Special Australian Heritage Publication,* Series Number 9, 1994; Tehan *supra* note 4. A number of cases highlight issues with this Commonwealth Indigenous cultural heritage regime. See *Tickner v Bropho* (1993) 40 FCR 183 (Swan Brewery Case); *Norville v Chapman* (1995) 133 ALR 226 and *Kartinyeri v Commonwealth* (1998) 195 CLR 337 (Hindmarsh Island Cases); *Minister for Aboriginal and Torres Strait Islander Affairs v WA* , unreported Federal Court May 1996 (Crocodile Farm Case).