



Consultation Paper

Review of the Cultural Heritage Acts



Acknowledgement

We acknowledge the Aboriginal and Torres Strait Islander people as the Traditional Owners and Custodians of our State of Queensland.

We recognise their connection to land, sea and community.

We respect their culture and identity which have been bound up with the land and sea for generations.

We recognise the values, places, resources, stories and cultural obligations of Traditional Owners and Custodians in Queensland.

We pay our respects to the Aboriginal and Torres Strait Islander ancestors of this land, their spirits and their legacy.

The foundations laid by these ancestors give strength, inspiration and courage to current and future generations.

Message from the Deputy Premier

Queensland's Aboriginal and Torres Strait Islander people are part of the world's oldest living culture, whose histories and contributions continue to shape our communities, workplaces and state today.

Protecting this cultural heritage is important to the Queensland Government.

Current legislation establishes Traditional Owners in the role of the management of Aboriginal and Torres Strait Islander cultural heritage but also enables land users to consider a range of ways to meet their cultural heritage duty of care.

There have been significant developments with respect to cultural heritage in the native title sphere over the life of the legislation.

In view of these changes, my department is undertaking a review of the Cultural Heritage Acts.

This review is an opportunity to ensure the appropriate balance between protecting and conserving cultural heritage, and facilitating the business and development activity that is vital to our State.

The review will also ensure the Acts operate in a way that is consistent with the government's broader objective to reframe the relationship with Aboriginal and Torres Strait Islander Queenslanders.

I am pleased to formally commence the review with the release of this consultation paper and invite you to have your voice heard.

The Honourable Jackie Trad MP

Deputy Premier

Treasurer

Minister for Aboriginal and Torres Strait Islander Partnerships

1 Background

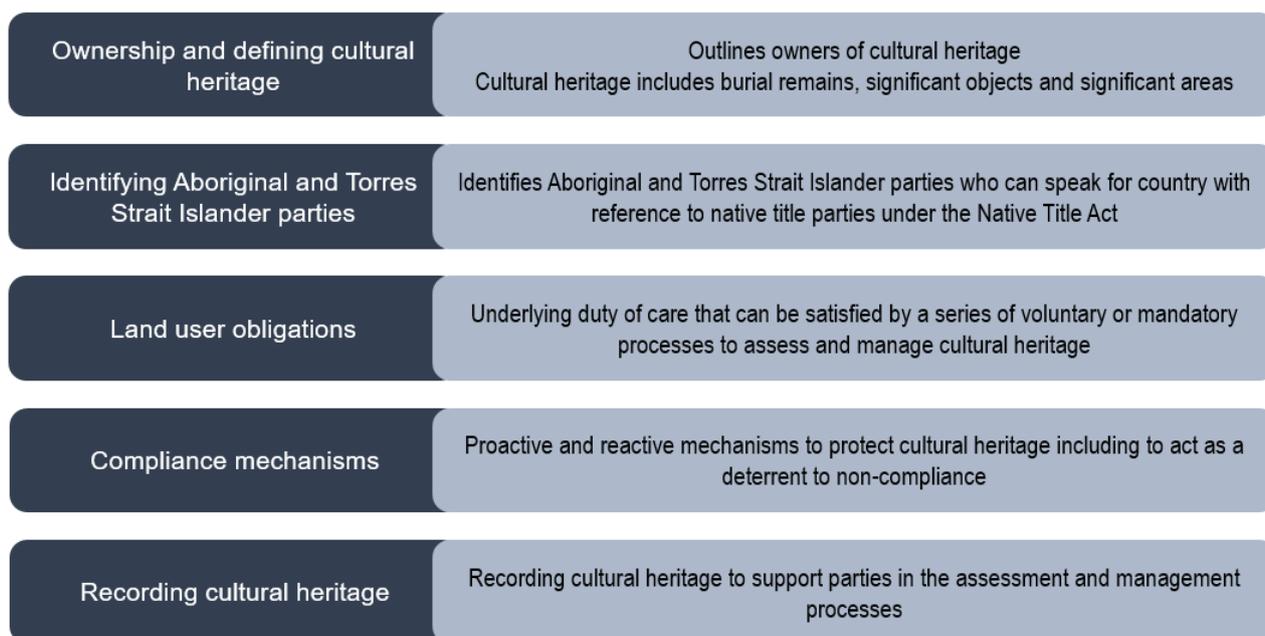
The Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP) is undertaking a review of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003* (the Cultural Heritage Acts).

The Cultural Heritage Acts operate separately but in an identical manner, and recognise the distinction between Aboriginal traditional law and custom, and Torres Strait Ailan Kustom.

The underlying principles of the Cultural Heritage Acts include:

- recognising that Aboriginal and Torres Strait Islander peoples are the primary guardians, keepers and knowledge holders of cultural heritage
- activities involving recognition, protection and conservation are important because they allow Aboriginal and Torres Strait Islander peoples to reaffirm their obligations to 'law and country'
- there is a need to establish timely and efficient processes for the management of activities that may harm Aboriginal and Torres Strait Islander cultural heritage.

The key components of the Cultural Heritage Acts are summarised in the diagram below.



2 Review scope

The review will examine whether the legislation:

- is still operating as intended
- is achieving outcomes for Aboriginal and Torres Strait Islander peoples and other stakeholders in Queensland
- is in line with the Queensland Government's broader objective to reframe the relationship with Aboriginal and Torres Strait Islander peoples
- should be updated to reflect the current native title landscape.

The review will also examine whether the legislation is consistent with contemporary drafting standards.

3 Key steps

The key steps in the review are set out below:

- 2nd quarter 2019 – consultation paper inviting submissions
- 2nd and 3rd quarters 2019 – public consultation
- 3rd and 4th quarters 2019 – policy development and opportunities for further consultation
- 1st and 2nd quarters 2020 – Parliamentary processes considering proposed changes.

4 How to use this consultation paper

The aim of this consultation paper is to facilitate discussion of key themes for the purposes of the review. The paper provides a brief legislative history, an overview of the key components of the Cultural Heritage Acts, discussion points and questions, and a summary of legislation in other jurisdictions.

5 How to make a submission

You are invited to make a submission on the matters raised in this consultation paper or on other issues that are relevant to you. Please send your submissions and comments by Friday 26 July 2019 via:

Email: CHA_Review@atsip.qld.gov.au; OR

Mail: CHA Review - Department of Aboriginal and Torres Strait Islander Partnerships
PO Box 15397
CITY EAST QLD 4002

Please note that all submissions will be publicly available and published on DATSIP's website.

For further information including details of upcoming public consultation sessions refer to www.atsip.qld.gov.au/reviewcha.

6 Legislative history

- 1967 *Aboriginal Relics Preservation Act 1967* commenced and it focused on identification and management of Aboriginal cultural heritage by professional archaeologists
- 1987 *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* commenced and it continued focus on archaeological basis for managing cultural heritage and dealt with all Queensland heritage both Aboriginal and Torres Strait Islander and historic heritage
- 1992 *Queensland Heritage Act 1992* commenced and included provisions for registering places of Aboriginal and Torres Strait Islander significance
- 1994 Commonwealth *Native Title Act 1993* commenced and it provided a national framework for the recognition and protection of native title and for its co-existence with the national land management system
- 1998–2003 *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* was reviewed
- 2004 *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003* commenced
- 2007 Amendments made to confer jurisdiction on the Land Court (transferred from the Land and Resources Tribunal)
- 2008-10 Five year statutory review of the Cultural Heritage Acts conducted which included a discussion paper, issues paper inviting submissions and development of a draft Bill
- 2009 Amendments made to replace reference to *Integrated Planning Act 1997* with *Sustainable Planning Act 2009*
- 2010 Amendments made to insert the 'last claim standing' provision (that is, a registered native title claimant whose claim has failed, and: (A) their claim was the last claim registered under the Register of Native Title Claims for the area; (B) there is no other registered native title claimant for the area; and (C) there is not, and never has been, a native title holder for the area.
- 2011 Amendments made in relation to an execution of a warrant by an authorised officer and updating information on the register
- 2015 Amendments made to omit referral agency and assessment provisions for other state agencies which had become redundant
- 2016–17 Cultural Heritage Duty of Care Guidelines reviewed, which included a discussion paper inviting public submissions and issues analysis
- 2018 Amendments made via the *Revenue and Other Legislation Amendment Act 2018* to clarify the 'last claim standing' provision

7 Ownership and defining cultural heritage

What the Cultural Heritage Acts say

The Cultural Heritage Acts recognise Aboriginal and Torres Strait Islander ownership of human remains (other than those lawfully buried), secret and sacred objects in State collections and of items of cultural heritage removed from an area under legislative authority. Ownership is by those Aboriginal or Torres Strait Islander peoples with a traditional or familial link with the human remains or secret or sacred objects. In other circumstances the State retains ownership of cultural heritage.

At the same time, the Cultural Heritage Acts also make clear that the owner or occupier of land is entitled to the continued use and enjoyment of the land to the extent the use and enjoyment does not harm the cultural heritage.

The Cultural Heritage Acts define cultural heritage as being anything that is a significant Aboriginal or Torres Strait Islander object and any area with evidence of archaeological or historic significance. Areas may be of significance due to tradition, history or contemporary history and the Cultural Heritage Acts recognise that it is not necessary for these areas to contain markings or other physical evidence.

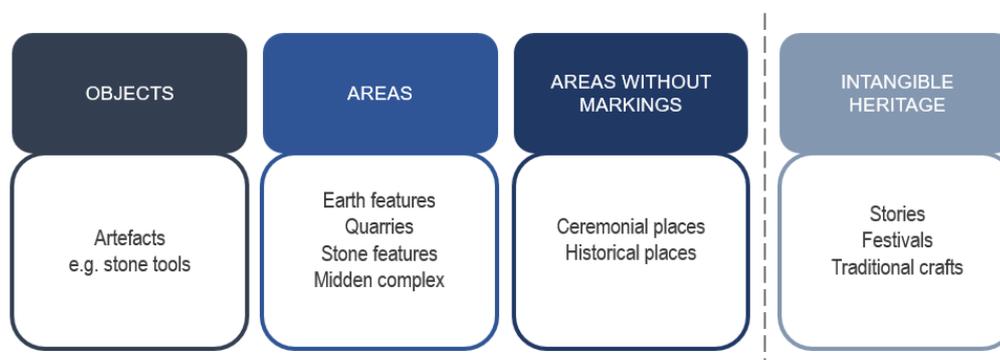
The Cultural Heritage Acts also provide for a Cultural Heritage Study (CHS) to be undertaken to develop a comprehensive assessment of cultural heritage in an area. The findings of the study are presented to the Minister who may record the results on the State register. There are currently six registered CHSs in Queensland.

Discussion points

During the review of the Duty of Care Guidelines in 2016–17 (as referred to under ‘6 Legislative history’), DATSIP received feedback from some stakeholders expressing support for:

- recognising the significance of broader cultural landscapes in assessing the impacts on cultural heritage arising from land use activities
- defining ‘intangible heritage’ and including it in the assessment and management processes e.g. adopting the United Nations Educational, Scientific and Cultural Organisation’s convention definition that includes oral traditions, performing arts, rituals, festivals and traditional crafts.

DEFINING CULTURAL HERITAGE



Question

Is there a need to revisit the definitions of cultural heritage - if yes, what definitions should be considered? What additional assessment and management processes should be considered?

8 Identifying Aboriginal and Torres Strait Islander parties

What the Cultural Heritage Acts say

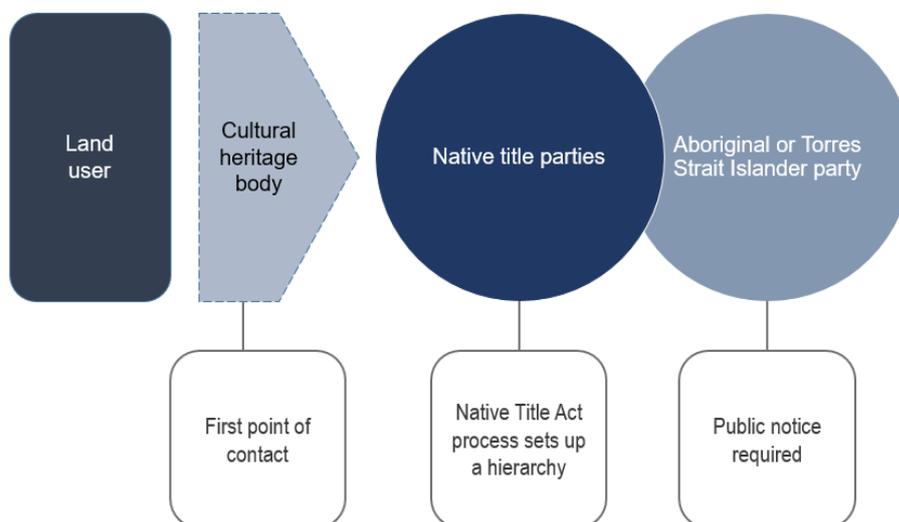
The intent of the Cultural Heritage Acts is to facilitate the involvement of Traditional Owners in the assessment and management of cultural heritage, whether or not their native title continues to exist.

To identify Traditional Owners, the Cultural Heritage Acts rely on the definitions of native title parties in the Commonwealth *Native Title Act 1993*. The Cultural Heritage Acts provide that the following Aboriginal and Torres Strait Islander peoples are the appropriate party who should be consulted based on the hierarchy set up in the Native Title Act:

- registered native title holders
- registered native title claimants
- previously registered native title claimants, if the claim was the last claim registered and there is no other registered native title holder or claimant – this is the ‘last claim standing’ provision
- if there are no native title parties - the Aboriginal or Torres Strait Islander people with particular knowledge about traditions, observances, customs or beliefs associated with the area who have responsibility, or are a member of a family or clan group with responsibility.

The Cultural Heritage Acts also provide a role for Aboriginal and Torres Strait Islander cultural heritage bodies to assist land users to identify the Aboriginal or Torres Strait Islander parties for an area and serve as the first point of contact for cultural heritage matters. Cultural heritage bodies apply to the Minister for registration.

IDENTIFYING WHO TO CONSULT



There are currently 284 native title parties and 69 registered cultural heritage bodies in Queensland.

Discussion points

Submitters to the Queensland Parliamentary Economics and Governance Committee in relation to the *Revenue and Other Legislation Amendment Act 2018* raised the need to revisit the provisions for identifying Aboriginal and Torres Strait Islander parties and bodies. This included the need to consider alternatives to the last claim standing approach such as:

- giving the Minister the discretion to decide who the Aboriginal or Torres Strait Islander party is where there is clear court evidence about all of the issues that have been in dispute between the groups, and include a right to object to the decision
- reconsidering the roles and responsibilities of cultural heritage bodies to deliver certainty for proponents
- extending the role of Native Title Representative Bodies to provide a certification for the identification of the Aboriginal or Torres Strait Islander parties - similar to that found in section 203BE(5) of the *Native Title Act 1993* (Cth).

Other jurisdictions, such as Victoria and South Australia, have developed a different approach to identifying Aboriginal parties. Victoria has established Registered Aboriginal Parties (RAPs) that are body corporates appointed and overseen by an Aboriginal Heritage Council (made up of Aboriginal representatives). The role of RAPs is to act as the primary source of advice on Aboriginal heritage matters, to consider applications and permits, to approve or refuse cultural heritage management plans and to enter into cultural heritage agreements. There are currently 12 appointed RAPs.

South Australia has established Recognised Aboriginal Representative Bodies (RARBs) that are body corporates approved by an Aboriginal Heritage Committee made up of Aboriginal representatives. RARBs may enter into local heritage agreements with land users that are then brought to the Minister for authorisation. There are currently two RARBs in South Australia.

Questions

Is there a need to revisit the 'last claim standing' provision – if yes, what alternatives should be considered?

Is there a need to revisit the identification of Aboriginal and Torres Strait Islander parties – if yes, who should be involved and what roles, responsibilities and powers should they have?

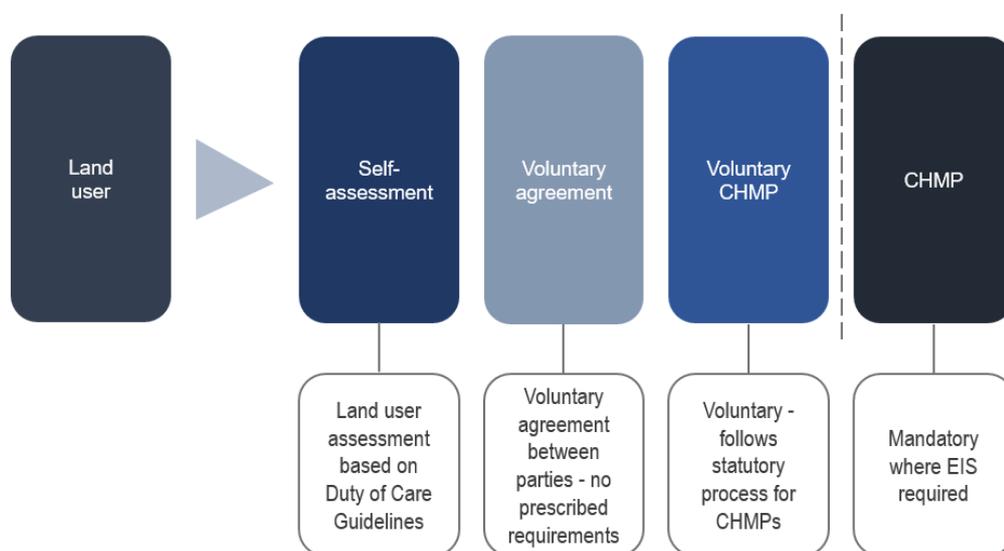
Should there be a process for Aboriginal and Torres Strait Islander parties to apply to be a 'Registered Cultural Heritage Body' to replace the current native title reliant model?

9 Land user obligations

What the Cultural Heritage Acts say

The Cultural Heritage Acts set out how cultural heritage is assessed and managed. This is founded on a duty of care that places an obligation on land users to take all reasonable and practicable measures to ensure their activities do not harm Aboriginal or Torres Strait Islander cultural heritage. To satisfy the duty of care, a land user must assess the risk of harm to cultural heritage arising from their activity through a series of voluntary or mandatory processes to assess the risk to cultural heritage and manage those impacts.

ASSESSMENT AND MANAGEMENT



A land user may undertake a self-assessment by following the Duty of Care Guidelines (which were gazetted by the Minister in 2004).

A land user may decide to develop a voluntary agreement with Aboriginal and Torres Strait Islander parties. There are no prescribed requirements for these types of agreements.

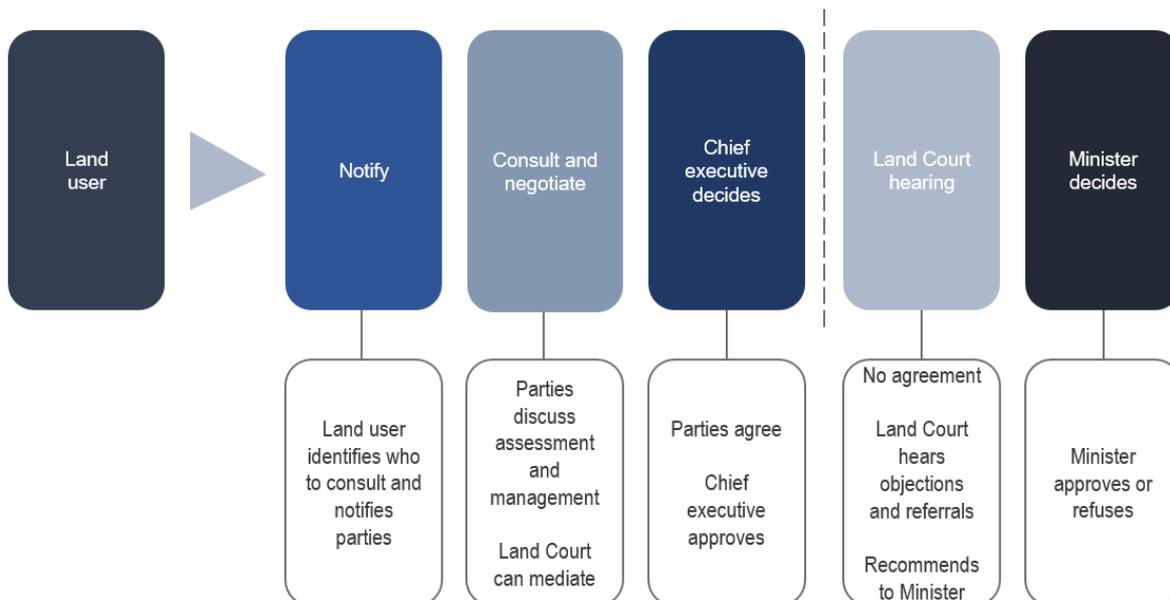
The Cultural Heritage Acts also set out statutory processes for the development of a Cultural Heritage Management Plan (CHMP).

A mandatory CHMP is required for projects that require an Environmental Impact Assessment unless there is an existing agreement or a native title agreement. The CHMP sets out the agreed approach of the parties to the assessment and management of cultural heritage in the project area.

Land users may also choose to develop a voluntary CHMP which follows the statutory process and gives increased certainty to the project timeframes.

There have been 358 CHMPs registered in Queensland.

CHMP PROCESS



Discussion points

During the review of the Duty of Care Guidelines in 2016–17, DATSIP received feedback from some stakeholders advocating the need to:

- provide a greater level of oversight of self-assessment and voluntary processes e.g. reporting on self-assessment practices or recording voluntary agreements
- provide access to dispute resolution assistance for parties negotiating voluntary agreements - this issue was also raised in the 2013 Australian Government Productivity Commission Inquiry Report, “Mineral and Energy Resource Exploration” noting that facilitation should be affordable, independent and not unnecessarily increase timelines
- reconsider the threshold for formal cultural heritage assessments e.g. Victoria prescribes a list of high impact activities (e.g. mining, construction, residential development, subdivision of land, quarrying) that threshold the CHMP process - this has resulted in approximately 3000 CHMPs over the last five years.

Questions

Is there a need to bolster the oversight mechanisms for self-assessment and voluntary processes – if yes, what should this entail?

Is there a need for dispute resolution assistance for parties negotiating voluntary agreements – if yes, who should provide these services and what parameters should be put around the process?

Is there a need to reconsider the threshold for formal cultural heritage assessments– if yes, what assessment and management processes should be considered?

10 Compliance mechanisms

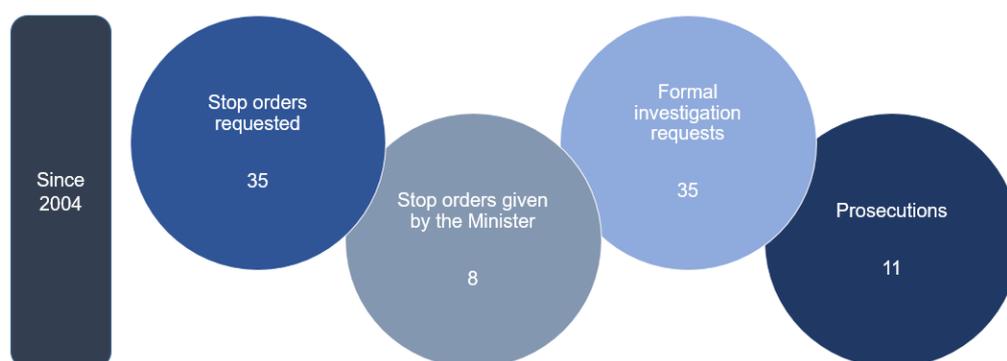
What the Cultural Heritage Acts say

The Cultural Heritage Acts provide for a series of proactive and reactive mechanisms designed to protect cultural heritage and promote compliance.

The Minister may give a stop order for an activity if there are reasonable grounds for concluding that the activity will harm or have a significant adverse impact on Aboriginal or Torres Strait Islander cultural heritage. A stop order is designed for emergency action for up to 30 days with the option for a further 30 days. The Minister may also acquire land by purchase for the purpose of cultural heritage preservation or build structures or take other measures necessary for protection. A further protection action that may be available to parties is a Land Court injunction under the *Land Court Act 2000*.

In terms of reactive mechanisms, the Cultural Heritage Acts provide for a series of offences and corresponding penalties applicable to individuals and corporations. The Chief Executive may also appoint authorised officers to conduct investigations and enforcement activities under the Cultural Heritage Acts.

COMPLIANCE DATA



Discussion points

During the review of the Duty of Care Guidelines in 2016–17, DATSIP received feedback from some stakeholders suggesting that:

- government should provide a greater regulatory presence and be adequately resourced to do so, including auditing of developers and being more active in prosecuting non-compliance
- penalties paid for breaches should go to the communities whose cultural heritage was destroyed.

Other jurisdictions have provided for similar mechanisms to Queensland to protect cultural heritage. Examples of additional mechanisms adopted by other jurisdictions include interim protection orders for up to three months or an ongoing protection declaration over an area, improvement notices served on land users to remedy the contravention of a CHMP and cultural heritage audits undertaken if the Minister believes there may be contravention of a CHMP.

Question

Is there a need to bolster the compliance mechanisms designed to protect cultural heritage – if yes, what needs to be improved and what additional measures should be put in place?

11 Recording cultural heritage

What the Cultural Heritage Acts say

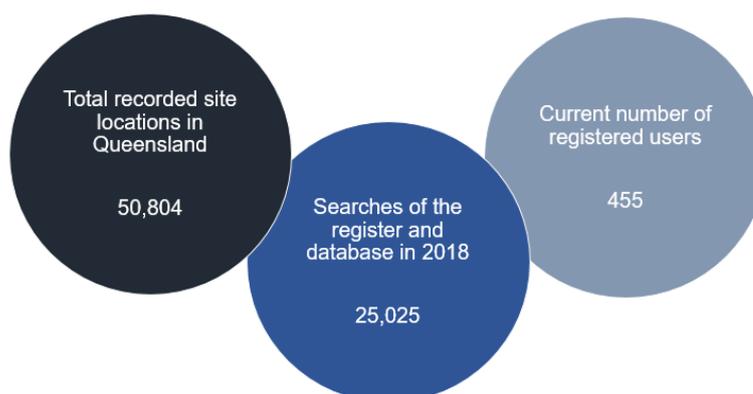
The Cultural Heritage Acts provide for a register and a database that are important research and planning tools for Aboriginal and Torres Strait Islander parties, land users, researchers and planners in assessing and managing cultural heritage.

The register is publicly available and includes information about Aboriginal and Torres Strait Islander parties, registered Aboriginal and Torres Strait Islander cultural heritage bodies, Cultural Heritage Studies, Cultural Heritage Management Plans and designated land use areas.

The database records cultural heritage and may be made available to Aboriginal and Torres Strait Islander parties if the information relates to the party's area of responsibility, to land users if the information is necessary for them to satisfy their duty of care and to researchers.

The DATSIP provides an online portal for the database and register. Parties may apply to be a registered user.

REGISTER AND DATABASE



Discussion points

During the review of the Duty of Care Guidelines in 2016-17, DATSIP received feedback from some stakeholders about the register and the database such as:

- the database does not provide a complete picture of cultural heritage as there is no mandatory requirement to register cultural heritage
- reliance on the database by land users for self-assessment, where there are no recorded sites, has led to the exclusion of Aboriginal or Torres Strait Islander parties from the process
- there are often sensitivities around the information that may be included on the database and Aboriginal and Torres Strait Islander parties should be involved in the decision making process.

Question

Is there a need to make improvements to the processes relating to the cultural heritage register and database – if yes, what needs to be improved and what changes should be considered?

Question

Do you have any other input, ideas or suggestions on how the Cultural Heritage Acts could be improved to achieve their objectives of recognising, protecting and conserving cultural heritage?

12 Other jurisdictions

Jurisdiction	Legislation
<p>Victoria</p>	<p><i>Aboriginal Cultural Heritage Act 2006 (Vic)</i> <i>Aboriginal Heritage Regulations 2018 (Vic)</i> (Reviewed in 2016)</p> <p>Protects ancestral remains, objects, places and protects intangible heritage that is registered</p> <p>Assessment and management practices including permitting and cultural heritage management plans</p> <p>Registered Aboriginal Parties (RAPs) speak for country and are the relevant statutory authorities for approving cultural heritage management plans and granting cultural heritage permits on their country. RAPs can enter into cultural heritage protection agreements with private and public landowners. The act recognises native title holders under the <i>Native Title Act 1993 (Cth)</i> and parties under the <i>Traditional Owner Settlement Act 2010 (Vic)</i> by prioritising these groups in the RAP appointment process</p> <p>The Chief Executive of the Department is the relevant statutory authority for areas where no RAP has been appointed, and consults with Traditional Owners before determining cultural heritage management plans and cultural heritage permit applications in these areas</p> <p>The Victorian Aboriginal Heritage Council (made up of Victorian Traditional Owners) appoints and oversees RAPs and assists in resolving disputes between RAPs and land users</p> <p>Protection mechanisms include penalties, stop orders, interim and ongoing protection declarations and cultural heritage audits</p> <p>Victorian Civil Administrative Tribunal can hear disputes about management plans and protection declarations</p> <p>Information and mapping to inform management</p>
<p>South Australia</p>	<p><i>Aboriginal Heritage Act 1988 (SA)</i> <i>Aboriginal Heritage Regulations 2017 (SA)</i> (Reviewed in 2016)</p> <p>Protects ancestral remains, objects and sites</p> <p>Provides for authorisation of excavation for; damage, disturbance and interference with Aboriginal heritage; sale and removal of Aboriginal objects by the Minister - Minister publishes notice and consults broadly with interested Aboriginal parties</p> <p>Aboriginal Heritage Committee (made up of Aboriginal representatives) advises the Minister on authorisations, appointment of inspectors, some land-use agreements and approves the appointment of Recognised Aboriginal Representative Bodies (RARBs) - other than for pre-qualified Anangu Pitjantjatjara Yankunytjatjara (APY) and Maralinga Tjarutja (MT) traditional owner bodies. All other bodies corporate apply - registered native title holders/claimants and Indigenous land use agreement (ILUA) parties</p> <p>RARBs know and make known the knowledge and views of all traditional owners who have heritage interests on country. RARBs may enter into local heritage agreements that are approved by the Minister where they 'satisfactorily deal with heritage'</p> <p>The same standard applies to Ministerial approval of other agreements under the Act such as native title mining agreements and ILUAs</p> <p>Protection mechanisms include penalties, enforcement of agreements and suspension or revocation of RARB appointments</p> <p>Information and mapping to inform management</p> <p>Maintains register</p>

<p>New South Wales</p>	<p><i>National Parks and Wildlife Amendment (Aboriginal Ownership) Act 1996 (NSW)</i> <i>National Parks and Wildlife Act 1974 (NSW)</i> <i>National Parks and Wildlife Regulation 2009 (NSW)</i> (Under review since 2017) Consulting on draft Aboriginal Cultural Heritage Bill – proposed approach set out below: Protect ancestral remains, objects, declared Aboriginal cultural heritage (ACH) and intangible heritage ACH Assessment pathway is created as a staged process of consulting with local consultation panels and developing an Aboriginal Cultural Heritage Management Plan Local consultation panels (LCPs) speak for country and advise Aboriginal Cultural Heritage Authority on management of ACH. The LCP's are supported by local coordination bodies. Native Title holders and Joint Management Boards will speak for their areas. LCPs will be appointed via community processes. Aboriginal Cultural Heritage Authority (made up of Aboriginal representatives) appoint and oversee LCPs and the ACH Bill Protection mechanisms to include interim protection orders, stop orders and remediation directions, and maintain penalties Information and mapping to inform better decision making, ACH management and strategic planning</p>
<p>Tasmania</p>	<p><i>Aboriginal Heritage Act 1975 (Tas)</i> (Amended in 2017, currently under review) Protects ancestral remains, objects, sites and places (relics) Aboriginal Heritage Council established to advise the Minister (up to 10 members who must be Aboriginal) A permit, issued by the Minister, is required to authorise any harm to a relic Minister issues guidelines which describe due diligence which may serve as a defense to unintentional interference with Aboriginal heritage Minister may declare protected sites Offences and penalties provided for infringements All findings of relics must be reported to the Secretary</p>
<p>Western Australia</p>	<p><i>Aboriginal Heritage Act 1972 (WA)</i> (Under review since 2018) Protects ancestral remains, objects and sites Minister can approve impact on cultural heritage by land user Aboriginal Cultural Material Committee provides advice to the Minister No statutory requirements for consultation Minister may declare protected areas Offences and penalties provided for infringements Maintains register</p>

<p>Northern Territory</p>	<p><i>Northern Territory Aboriginal Sacred Sites Act 2006 (NT)</i> Protects sacred sites within the meaning of the Aboriginal Land Rights (Northern Territory) Act 1976 Aboriginal Areas Protection Authority (12 members including 10 Aboriginal traditional custodians) established to facilitate discussions between custodians and land users and consider applications for authority to carry out work Offences and penalties provided for infringements Maintains register</p> <p><i>Heritage Act 2011 (NT)</i> Automatically protects all Aboriginal and Macassan archaeological places and objects, as well as allowing for individual sites to be permanently declared as heritage places The Act establishes the Heritage Council, which has 11 members including a representative of the Aboriginal Areas Protection Authority, which administers the <i>Northern Territory Aboriginal Sacred Sites Act 2006 (NT)</i> Offences and penalties provided for infringements Maintains Heritage Register The Heritage Branch (which administers <i>the Heritage Act 2011 (NT)</i>) also maintains a register of archaeological places</p>
<p>Australian Capital Territory</p>	<p><i>Heritage Act 2004 (ACT)</i> Act deals with protection of Aboriginal, non-indigenous and natural heritage Protects Aboriginal objects and places Heritage Council (12 members including 1 from the Aboriginal community and 1 or more experts in Aboriginal culture or history), functions include advising about effect of development on heritage significance Representative Aboriginal Organisations can be declared by the Minister – consulted about entering objects/places on register Minister may enter into Heritage agreements with owner to protect heritage Protection mechanisms include heritage directions by Council, application to Supreme Court for heritage order Offences and penalties provided for infringements Maintains register</p>
<p>Commonwealth</p>	<p><i>Australian Heritage Council Act 2003 (Cth)</i> <i>Environment Protection and Biodiversity Conservation Act 1999 (Cth)</i> Australian Heritage Council advises Minister on nominating, conserving and protecting places on the National Heritage List or Commonwealth Heritage list Focus on places of national significance Queensland listed places include the Great Barrier Reef Marine park, Quinkan Country (in the south-east region of Cape York Peninsula) and Ngarrabullgan (also known as Mount Mulligan) Penalties for significant impact on indigenous heritage values</p> <p><i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)</i> Protects areas and objects that are of particular significance to Aboriginal people Allows the Environment Minister, on the application of an Aboriginal person or group of persons, to make a declaration to protect an area, object or class of objects from a threat of injury or desecration</p>