



Aboriginal Cultural Heritage Act 2003

Cultural Heritage Management Plan Guidelines

Gazettal Date: 22 April 2005

Part 1 – Introduction

1.2 When is a Cultural Heritage Management Plan Required under Part 7?

A Cultural Heritage Management Plan (a “plan”) is required to be developed and approved under Part 7 of the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* (“the legislation”) where an Environmental Impact Statement (“EIS”) is required for a project under other legislation.

Alternatively, a person (“the sponsor”) may voluntarily develop and gain approval of a plan under Part 7 even though there is strictly no legal requirement to do so.

The ability to voluntarily develop a plan is an important feature of the legislation because any activities undertaken in accordance with an approved plan meet the cultural heritage duty of care established by the legislation.

The voluntary development of a plan under Part 7 of the legislation provides a land user with complete certainty that they are acting lawfully under the legislation and are meeting the cultural heritage duty of care requirements.

1.3 What is a Cultural Heritage Management Plan under Part 7?

A cultural heritage management plan is a State-approved agreement between the sponsor of the plan and an Aboriginal party about how a project is to be managed to avoid harm to Aboriginal cultural heritage and to the extent that harm cannot reasonably be avoided, to minimise harm to Aboriginal cultural heritage.

Importantly, an agreement can only receive State approval as a cultural heritage management plan if it has complied with the statutory process contained in Part 7 of the legislation.

The legislation requires each party to negotiate and make every reasonable effort to reach agreement about the provisions of the plan.

The plan can have any form or structure agreed between the parties. A plan is intended to address the assessment and management of Aboriginal cultural heritage in relation to land use activities of the sponsor. It is not required to include other matters not related to the proper assessment and management of Aboriginal cultural heritage.

1.4 What are the Advantages of Developing an Approved Cultural Heritage Management Plan?

Part 7 of the legislation establishes a statutory process for addressing cultural heritage with certainty, in a timely and cost effective manner.

You have a complete defence under the legislation in relation to any activity undertaken in accordance with an approved plan.

Maximum penalties for unlawfully harming Aboriginal cultural heritage or for breaching the cultural heritage duty of care are \$1 187 000 for a corporation and \$117 800 for an individual.

1.5 What is the Statutory Process for Development of a Cultural Heritage Management Plan?

Part 7 of the legislation sets out the statutory process for developing a plan.

In short, this process involves a statutory one-month notification of an intention to develop a plan, followed by a maximum three month negotiation/consultation with the Aboriginal party on the terms of the plan.

An Aboriginal party seeking to become involved in negotiation/consultation about the development of the plan should respond in writing to the sponsor within 30 days from the notice day.

Where an Aboriginal party fails to respond in writing within the 30 day notice period, a sponsor may refer a proposed plan to the Cultural Heritage Unit for approval. In these circumstances, the plan will be approved only if it makes sufficient provision to either avoid harm to Aboriginal cultural heritage or to the extent that harm cannot be reasonably avoided, minimises harm to Aboriginal cultural heritage.

1.5.1 Mediation Assistance

Mediation assistance in relation to disputes arising during the negotiation/consultation process is available through the Land Court. However parties are requested to narrow down any issues of disagreement before seeking Land Court mediation assistance.

1.5.2 Failure to Reach Agreement

Sometimes the parties will reach agreement on many aspects of the plan without reaching agreement on all aspects. In these circumstances, the parties should seek to cooperate in narrowing down the issues in dispute before the Land Court.

In circumstances where agreement cannot be reached, the proposed plan may be referred to the Land Court.

Following consideration of the matter, the Land Court will make a recommendation to the Minister administering the Act, or a delegated officer, for a decision.

1.6 Additional Information

Additional information about any matter arising from these guidelines, including assistance in identifying the Aboriginal party for the area, may be obtained by contacting the Cultural Heritage Unit on 1300 378 401

Part 2 – Cultural Heritage Management Plan Guidelines

2.0 Preamble

These guidelines have been gazetted under Section 85 of the legislation and are designed to help choose a suitable methodology for developing a plan.

A failure to conform with these guidelines is not a ground for refusing to approve a plan. These guidelines should be read in conjunction with Part 7 of the legislation when seeking to develop a plan.

2.1 Extent of Recorded/Known Aboriginal Cultural Heritage

Prior to issuing a notice under Part 7 of the legislation the sponsor should undertake a search of the Aboriginal Cultural Heritage Register and Aboriginal Cultural Heritage Database to determine whether there is any existing record of Aboriginal cultural heritage in the plan area. This information should be provided to the Aboriginal party during the consultation process to develop the plan.

2.2 Consultation/Negotiation to Seek Agreement Upon the Terms of the Plan

In developing a plan under Part 7 of the legislation it is important to involve the Aboriginal party as early as possible in the planning process and it may be advisable to provide the Aboriginal party with an informal briefing on the nature of the proposal prior to issuing the notice under the legislation.

Consultation/negotiation is aimed at providing the Aboriginal party with information about the nature of the project in order to seek agreement on the terms of the plan.

Depending on the experience of the parties, the nature of the project and whether or not a suitable template plan is available, it may be possible for the parties to agree to the terms of the plan at the first meeting. For this to occur, each party should be given the opportunity to assess the plan prior to the meeting.

Face to face meetings may be required. As with any negotiation, face to face meetings should be respectful and mindful of the other party's role, sensitivity, constraints and objectives. In order for both parties to actively and positively participate in the process, each party should do all that is reasonable to assist the other party perform their role in an independent and informed manner.

It should not be assumed that all parties have the ability to easily transport themselves to meetings. In such cases the sponsor may consider options to facilitate attendance, such as the location and time of meetings and assistance with the reasonable costs of enabling parties to attend.

2.3 Choosing a Methodology to Develop a Plan

The process for developing a plan involves consideration of a range of matters to best determine how a particular project may be managed to avoid harm to Aboriginal cultural heritage and to the extent that harm cannot reasonably be avoided, to minimise harm to Aboriginal cultural heritage.

It is important to note that where a statutory requirement exists to develop a plan because an EIS is required under legislation, then the plan must make provision for alternative dispute resolution before it can be approved. This requirement does not apply where a plan is developed voluntarily for approval.

In addition to the matters set out in section 105(2) of the legislation, the following matters may be discussed or agreed during consultation:

1. The nature of project activities within the plan area;
2. The extent of the project area to be subject to the plan;
3. The identity and number of representatives (or committee) to attend meetings;
4. The number and location of future meetings and whether use can be made of telephone conferences, the internet or exchange of correspondence;
5. Survey of the project area to be subject to the plan, if required, including timing for the cultural heritage survey¹;
6. The identity of a suitably qualified expert (such as an archaeologist) if one is required²;
7. Management of the sponsor's land use activities in or around Aboriginal cultural heritage identified during the survey, including contingency planning for cultural heritage finds during implementation of the plan;
8. Other considerations;
9. Cost of developing and implementing the plan.

More information on each of these matters is contained in the following paragraphs.

2.4 The Nature of Project Activities Within the Plan Area

In order to assess the scope for potential harm, the Aboriginal party should be provided with as much relevant information as possible about the nature of project activities within the plan area.

This should include a precise description of the nature of the project and ancillary works associated with the project as well as a description of the machinery to be used during the project.

2.5 The Extent of the Project Area Subject to the Plan

It is important that the views of the Aboriginal party be sought in seeking to reach agreement about the extent of the project area to be included in the plan, which may vary depending on the nature and extent of past land uses of the area. Agreement may be possible based upon a desktop study of the area however it may be necessary to undertake a preliminary assessment and site inspection of the project area with the Aboriginal party to seek agreement about what areas should be included within the plan area and which areas may be excluded.

Alternatively, the sponsor may seek to include the whole project area within the plan. This could be done for a variety of reasons, including, for example, because the exact location of the sponsor's land use activities are yet to be determined. In these circumstances a preliminary site inspection may not be required, as a cultural heritage survey will be undertaken in due course when developing or implementing the plan.

The preliminary assessment may consider the nature and extent of past land use activities within the area to help determine to what extent a cultural heritage survey is required within the project/plan area. There is a low risk, for example, that an area subject to previous significant ground disturbance will continue to contain or constitute Aboriginal cultural heritage. However, this will not always be the case

¹ 1 It is important to note that a cultural heritage survey undertaken in developing or implementing a cultural heritage management plan is not the same as a cultural heritage study initiated under Part 6 of the *Aboriginal Cultural Heritage Act 2003* for the purpose of recording the findings in the Aboriginal Cultural Heritage Register.

² The involvement 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.

as certain areas may continue to have residual cultural heritage significance despite the nature and extent of past disturbance.

2.6 The Identity and Number of Representatives (or Committee) to Attend Meetings

It is important to determine at the outset who can deal with what matters, who is able to speak with authority on various issues and make binding decisions at meetings or, alternatively, determine how these decisions are to be made (who 'speaks for country' within the area).

The number of representatives to attend future meetings about developing the plan should also be agreed. In most circumstances, it is reasonable that two Aboriginal representatives be involved in future meetings to discuss the terms of the plan. Advice should be sought from the Aboriginal party as to who these representatives should be and whether, in the circumstances, a gender balance (male/female) is required.

The Aboriginal party and the sponsor may also discuss arrangements for the attendance of a suitably qualified expert or legal representative in the event that either the Aboriginal party or the sponsor requests this to occur.

2.6.1 Overlapping registered Native Title Claims

Where there are overlapping registered native title claims it is reasonable that two Aboriginal representatives be involved from each registered native title claimant group. Although all parties should use their best efforts to work together in order to keep separate meetings to a minimum, it may be reasonable to agree to separate meetings with the representatives of each registered native title claimant group depending on the circumstances (including cultural sensitivity).

2.7 The Number and Location of Future Meetings - Use of Telephone Conferences, the Internet or Exchange of Correspondence

Face to face meetings may be required to agree on the terms of the plan.

The number of meetings will vary, and may increase or decrease, depending on a number of factors such as the nature of the project, the extent of the plan area, the past experience of the parties in addressing Aboriginal cultural heritage issues and whether or not the parties are able to use a template plan as the basis for agreement.

It should not be assumed that all parties have access to telephone, the internet or email. This will depend on the circumstances and it should not be assumed that these mechanisms for negotiation are available for use.

2.8 Survey of the Project Area to be Subject to the Plan, Including Timing for the Cultural Heritage Survey

Consultation on the terms of the plan should include provision about whether or not a cultural heritage survey is to be undertaken before or after finalizing the terms of the plan and how this is to be managed. The plan, for example, may comprehensively set out the complete process (including for a cultural heritage survey) for the identification and management of Aboriginal cultural heritage, if and when a decision is made to proceed with the project.

2.8.1 Purpose of a Cultural Heritage Survey

The purpose of the survey is to identify and record what, if any, Aboriginal cultural heritage is located within the project/plan area. The Aboriginal party should provide information about any known Aboriginal cultural heritage within the plan area.

2.8.2 Participants

In most circumstances, it is generally reasonable that two Aboriginal representatives be involved in the preliminary site inspection and/or cultural heritage survey, although this will vary depending on the size of the project area, the nature of the work involved and timeframes. It is a matter that should be agreed.

Advice should be sought from the Aboriginal party as to who these representatives should be and whether, in the circumstances, a gender balance (male/female) is required.

The parties may also want to consider the involvement of a suitably qualified expert, such as an archaeologist, to assist with the survey. More information on the appointment of an expert is contained in paragraph 2.9.

Where there are overlapping registered native title claims, it is generally reasonable that two Aboriginal representatives be involved from each registered native title claimant group, although again this will vary depending on the size of the plan area, the nature of the work involved and timeframes. It is a matter that should be agreed.

All parties should use their best efforts to work together in order to keep separate surveys to a minimum, however, separate surveys may be required depending on the circumstances (including cultural sensitivity).

The sponsor's representative (s) may also be involved in the cultural heritage survey.

2.8.3 Failure to Attend

The parties are responsible for ensuring that any person participating in the cultural heritage survey is physically capable of undertaking the survey and has the required knowledge to perform survey activities.

Agreement should be reached on the procedure to be followed where one or other party is unable to attend.

Where either party is unable to attend on the agreed date of the cultural heritage survey another representative should be substituted to attend.

2.8.4 Workplace Health and Safety

The Aboriginal party, their representative or nominee must follow the sponsor's reasonable instructions and requirements (including induction) relating to the workplace health and safety of persons conducting the cultural heritage survey or engaged in other cultural heritage activities.

2.8.5 Survey Area

Unless otherwise agreed, the cultural heritage survey should be limited to those areas where actual project activities will, or are likely to occur.

2.8.6 Recording of Aboriginal Cultural Heritage

The cultural heritage survey should accurately identify, record and map Aboriginal cultural heritage. A copy of the survey report, including the location and significance of sites or objects identified in the survey, should be provided to the sponsor within a reasonable time after the survey is complete.

The parties should agree how cultural heritage identified during the survey is to be managed. This may include the removal and storage of Aboriginal cultural heritage objects and the avoidance of areas of particular significance to the Aboriginal party.

The cultural heritage survey must also record why a particular area or object is significant under the legislation.

2.8.7 Sponsor's Obligations

Throughout the cultural heritage survey, the sponsor should provide things such as:

- fresh drinking water;
- appropriate first aid facilities; and
- all necessary meals and accommodation.

2.8.9 Concluding the Survey

If not agreed beforehand, the cultural heritage survey should make recommendations for the future management and protection of Aboriginal cultural heritage identified during the survey.

In particular, the recommendations may relate to the removal and storage of Aboriginal cultural objects identified during the survey.

The results of the cultural heritage survey may be included in, or attached to, the plan.

2.9 The Appointment of a Suitably Qualified Expert (if one is required)

The legislation recognises that the Aboriginal party is able to provide a sponsor with complete certainty in relation to the management of land use activities and Aboriginal cultural heritage. However, sometimes, appropriately qualified experts (such as an archaeologist) can assist in the development and implementation of the plan, particularly in relation to cultural heritage survey and reporting.

The appointment and identity of a suitably qualified expert, where one is required, should be agreed between the parties. A party seeking the involvement of a suitably qualified expert should be able to justify to the other party why the involvement of the expert is required.

Where an archaeologist, or other suitably qualified expert, is engaged, it is appropriate to engage only one for a project and a decision will need to be made on the identity of that person in circumstances where there are, for example, overlapping registered native title claims.

2.10 Managing land use activities in or around Aboriginal cultural heritage

2.10.1 The Aim of the Plan

The plan should make provision regarding the management of the sponsor's activities in and around the area immediately surrounding Aboriginal cultural heritage, including any Aboriginal cultural heritage identified during the survey, as well as contingency planning for cultural heritage finds during implementation of the plan.

2.10.2 Management of Activities – No Identified Cultural Heritage

Where no Aboriginal cultural heritage is identified during a survey completed before a plan is finalised, the plan may be referred to the State for approval on the basis that no further cultural heritage assessment is necessary, although contingency planning should be made for future cultural heritage finds (see paragraph 2.10.4).

2.10.3 Management of Activities – Identified Cultural Heritage

The plan should provide information about how Aboriginal cultural heritage will be managed. There are a number of options as to how this may be achieved. These options include avoidance of identified Aboriginal cultural heritage (this can be assisted by appropriate fencing and signage) or removal and storage of the Aboriginal cultural heritage or the relocation of objects within the plan area in a way likely to minimise the impact of project activities on them.

The plan may also provide for the monitoring of land use activities in the immediate area surrounding any Aboriginal cultural heritage identified during a cultural heritage survey or in areas where there is high potential for future subsurface cultural heritage finds (areas such as some creeks and watercourses).

Monitoring is not required for land use activities in areas where no Aboriginal cultural heritage has been identified or in areas where there is low potential for future cultural heritage finds, although contingency planning should be made in the plan for dealing with cultural heritage finds uncovered during future land use activities (see paragraph 1.10.4).

The requirement for, and the extent of, monitoring should be agreed between the parties.

Where monitoring is agreed between the parties, it is generally reasonable that up to two Aboriginal 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. Advice should be sought from the Aboriginal party as to who these representatives should be and whether, in the circumstances, a gender balance (male/female) is required. It is a matter that should be agreed.

In situations where project works require monitoring in more than two locations simultaneously, the sponsor may consider engaging additional monitors or vary the works program so the appointed monitors can properly observe all works requiring monitoring. Again, this is a matter that should be agreed.

Where there are overlapping registered native title claims it may be reasonable for two Aboriginal representatives to be involved from each registered native title claimant group although this will vary depending on the circumstances. In particular it will depend on which Aboriginal party(s) identified the cultural heritage, the size of the project area, the nature of the work involved and timeframes.

All parties should use their best efforts to work together in order to keep the use of separate monitoring to a minimum, however, separate monitoring may be required depending on the circumstances (including cultural sensitivity).

The sponsor's representative (s) may also be involved in these activities.

2.10.4 Contingency Planning for Cultural Heritage Finds during Implementation of the Plan

While any cultural heritage survey should be as comprehensive as possible, the plan should make provision for what to do in relation to cultural heritage finds not previously identified.

The plan may provide that cultural heritage finds should not be removed or interfered with until the Aboriginal party, or their nominee, has assessed or removed the find.

Relevant protocols relating to cultural heritage finds may include an undertaking by the sponsor to cease or restrict work on or near the identified site/item. Provision should be made for all work that threatens the existence and preservation of the find to cease. The parties may agree on time frames associated with notification of the find and need for any inspection/clearance within a specified time to avoid undue delay.

The Parties may agree on a procedure/protocol that requires the sponsor to notify the Aboriginal party, or their nominee, within 48 hours of the find. The notification could:

- contain a description of the find,
- outline the proposed remedial or operational procedures to be put in place to protect the find from harm, (including any notification/request that the find details be recorded and that the find be removed and relocated),
- contain an invitation to the Aboriginal party to inspect the find, and/or
- require the Aboriginal party to respond within 72 hours as to whether they accept the remedial measures, wish to suggest their own remedial measures, or wish to inspect the find.

It may not be necessary in all cases to cease work. If the work can proceed without risk to the find the plan activities should be allowed to continue to the extent that the level of potential harm is not increased. This may entail the imposition of a buffer zone around the find or proceeding with only low intensity work in the vicinity.

Once again, the plan should make provision for issues associated with what to do with the identified items, e.g. accurate recording of the find, including location details, determine the level of significance and if the find can be moved the parties should come to an arrangement as to when and how the find should/can be relocated.

2.10.5 Access to Cultural Heritage

The plan may make provision for Aboriginal parties to visit cultural heritage areas within the plan area and how this is to occur, including notification and compliance with health and safety requirements³.

2.10.6 Periodic Review

The plan may make provision for periodic review to ensure the sponsor and the Aboriginal party are complying with the terms of the plan.

³ It should be noted that such access will be subject to appropriate landholder consent if visitation of the area is unrelated to the activities of the sponsor.

2.11 Other considerations for the Plan

The plan may also provide for matters including:

- Handling sensitive information;
- Communication of correspondence and information, including timeframes for response;
- Dealing with Aboriginal cultural heritage finds after the plan has been approved;
- Reporting of Aboriginal cultural heritage, including cultural heritage finds;
- The continuing involvement of the Aboriginal party over any additional project stages within the plan area;
- The procedure where one party fails to abide by the terms of the plan;
- Cultural awareness training/induction for employees;
- Disputes;
- Review/Variation;
- Extension of the plan area;
- Assignment;
- Ongoing liaison as required between the sponsor and the Aboriginal party.

2.12 Cost of Developing and Implementing the Plan

The cost of developing and implementing the plan is the responsibility of the sponsor. However, costs should be negotiated between the parties and determined and assessed in accordance with what is reasonable in the circumstances.

Factors relevant as to what is reasonable in the circumstances include:

- The nature of the work undertaken;
- The location or remoteness of the location;
- Whether the work requires parties to stay overnight, away from home;
- Timeframes for undertaking the work;
- The size of the plan area;
- The number of representatives undertaking the work;
- Industry standards.