ABORIGINAL CULTURAL HERITAGE BILL 2003

EXPLANATORY NOTES

Short Title

The Act will be known as the *Aboriginal Cultural Heritage Bill 2003*

Policy Objectives of the Bill

The policy objectives of the Bill are:

- To recognise Aboriginal ownership of certain human remains; secret and sacred material in State collections; and items of cultural heritage removed from an area under the authority of the legislation. In other circumstances the State retains a residual ownership of cultural heritage generally to ensure effective protection and regulation.
- To recognise the fundamental right of Aboriginal people to be involved in the process of assessment and management of activities that may harm their cultural heritage.
- To provide certainty of process and timeframes for the assessment of cultural heritage and the management of possible impacts upon it.
- To establish a duty of care for all persons to take reasonable and practicable steps to prevent harming cultural heritage. The legislation sets out key indicia as to how the duty of care may be met. The duty of care is key to ensuring the legislation is flexible and workable and not unduly prescriptive.
- To establish mandatory triggers, as well as set timeframes and procedures, for the assessment of cultural heritage where high impact activities are proposed (ie. those activities requiring an Environmental Impact Statement or where a material change in land use is proposed over an area entered on the Aboriginal cultural heritage register).

- To create penalties intended to act as a deterrent and to reflect the importance attached to safeguarding the cultural heritage values of Queensland.
- To establish a register of Aboriginal cultural heritage. Information may be placed on the register following a cultural heritage study to assess the significance of an area, as well as other information necessary to help the consideration of Aboriginal cultural heritage - maximum penalties apply to protect heritage entered on the register.
- To establish a database of Aboriginal cultural heritage. The database will contain information about cultural heritage values collated by the Environmental Protection Agency since the 1930s. Information may be added to the database without undertaking a formal cultural heritage study. Information may be provided from the database on an "as needs basis" to ensure the sensitivity and integrity of the information is respected.
- To ensure that cultural heritage activities undertaken in accordance with the terms of a native title agreement, or otherwise pursuant to an agreement with the appropriate Aboriginal parties, will remain valid under the new legislation.

Reasons for the Bill

On 24 December 1998, the Government announced a review of the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* to address inadequacies in the current legislative framework. The *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* fails to provide adequate protection to Indigenous cultural heritage by focusing on the protection of archaeological evidence of human occupation of Queensland. It fails to protect areas of Queensland, significant solely because of their significance under Aboriginal tradition or the history of traditional owners of country. The *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* also provides little guidance about how proponents may address cultural heritage matters with certainty, in a timely and cost efficient manner.

The Bill addresses these issues by providing proper protection for significant Aboriginal cultural heritage and creating flexible and workable processes for addressing land use impacts with certainty.

Achieving the Policy Objectives of the Legislation

Where there is a traditional or familial link, the legislation recognises Aboriginal people's ownership of burial remains not otherwise lawfully interred; ownership of secret and sacred material in State collections; and items of cultural heritage removed from an area under the authority of the legislation.

In other circumstances, the State will retain a residual ownership of cultural heritage generally in order to ensure effective protection and regulation and to maintain the integrity of the land tenure system (such as where Aboriginal cultural heritage is *in situ* on freehold land). The legislation makes it clear that the State does not claim title to the land upon which the cultural heritage is located.

Importantly, the legislation recognises the fundamental right of Aboriginal people to be involved in the process of assessment and management of activities that may harm their cultural heritage. At the same time, the legislation provides certainty of process and timeframes for the assessment of cultural heritage and the management of possible impacts upon it.

The legislation facilitates the identification of the Aboriginal people who should be involved in the cultural heritage assessment and management process. This is done by linking into the procedures under native title legislation or, where no native title claim has been registered over an area, by using a process of public notification. At present, disputes can arise between traditional owner groups because, in the absence of any legislative guidance, developers can favour one traditional owner group over another in situations where there may be more than one registered native title claim to an area. This practice may be contrary to the provisions of native title legislation. It is also inappropriate for any registered native title claimant group to be excluded from the consideration of cultural heritage issues within the area of their claim. Each registered native title claimant group has established a *prima facie* case in the Federal Court that they may hold native title and, consequently, until the native title claims are resolved it is appropriate that each set of registered claimants be involved in the process. (Approximately 58% of the State of Queensland is currently subject to registered native title claims.)

The creation of a duty of care underpins the legislation. The duty of care will require persons to take all reasonable and practicable steps to prevent harming cultural heritage. The legislation sets out key indicia as to how the duty of care may be met. Factors relevant to whether the duty of care has been met can relate to the nature of the proposed activity; the likelihood of

damage to Aboriginal cultural heritage; and the nature and extent of any consultation with the traditional owners. Duty of care guidelines will be gazetted under the legislation stating ways in which the duty of care can be met.

Additionally, the legislation establishes certain mandatory triggers for the assessment and management of cultural heritage where high impact activities are proposed, ie., those requiring an Environmental Impact Statement or a material change of use over a registered cultural heritage area under the *Integrated Planning Act 1997*. Importantly, this trigger can be extended by regulation to cover additional activities. Other mandatory triggers for the cultural heritage management planning process occur where it is proposed to excavate, relocate or remove cultural heritage or where a material change of use is proposed over an area entered on the register of cultural heritage.

To achieve certainty of timeframe and process, the legislation establishes a four month period, which can be extended by agreement, to develop a cultural heritage management plan about the assessment of cultural heritage and the management of impacts upon it.

The cultural heritage management planning process established by the legislation reflects existing best practice. The process requires notification and consultation with Aboriginal parties. Consultation must relate to how an activity may be managed in order to avoid or minimise harm to cultural heritage.

Where agreement cannot be reached between the parties, the Land and Resources Tribunal can assist with the provision of mediation or a recommendation about the terms of the cultural heritage management plan. Importantly, in light of the need to protect cultural heritage at both a State and national level, the final decision on the terms of a cultural heritage management plan rests with the State.

The legislation allows a cultural heritage management plan to be developed voluntarily. This is an important feature of the legislation intended to encourage industry to adopt best practice in circumstances where the legislation does not automatically require a mandatory cultural heritage management plan. The incentive for industry to do so is that any activity undertaken in accordance with a cultural heritage management plan approved under the legislation satisfies the duty of care under the legislation.

The duty of care (coupled with the ability to initiate voluntary cultural heritage management plans) is key to ensuring the legislation is flexible

and workable without being unduly prescriptive in relation to particular activities unlikely to affect cultural heritage values. The duty of care removes the need for an excessive number of mandatory triggers for certain activities such as small mining, most mineral exploration and prospecting.

At the same time, the legislation enables guidelines for complying with the duty of care to be gazetted. Guidelines will be gazetted following appropriate consultation with relevant stakeholders and industry groups.

The legislation has been drafted to ensure that it dovetails into the procedures and timeframes set up under native title legislation. The new legislation will link into existing processes under State and federal native title legislation to ensure that all proper authorities are obtained from native title parties and that they are directly involved in the assessment and management planning process.

Penalties under the legislation are intended to act as a deterrent and to reflect the importance attached to safeguarding the cultural heritage values of Queensland. To reflect this, the most serious offences have been made indictable. Given that some offences may not come to light for some time, this will also enable more serious offences to be brought before the court more than twelve months after they have been committed.

The legislation will establish a register of Aboriginal cultural heritage. Information may be placed on the register following a comprehensive cultural heritage study to assess the significance of an area - maximum penalties apply to protect heritage entered on the register. Responsibility for assessing the levels of significance of cultural heritage is a matter for the Aboriginal party for the area although such an assessment must be consistent with authoritative anthropological, biogeographical, historical and archaeological information. The legislation also establishes a cultural heritage database. The database will contain information about the 14,000 or so places of cultural heritage value collated by the Environmental Protection Agency since the 1930s. Information may be added to the database without the necessity of undertaking a formal cultural heritage study. Information may be provided from the database on an "as needs basis" to ensure the sensitivity and integrity of the information is respected.

Transitional provisions ensure that activities undertaken in accordance with the terms of a native title agreement, or otherwise pursuant to an agreement with the appropriate Aboriginal parties or where, before the legislation commences, arrangements have been put in place to address cultural heritage as part of an Environmental Impact Statement approval obtained after the commencement of the legislation will be valid under the new legislation.

Alternative ways of achieving the objective

The *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* is inadequate in both the protection it provides to Aboriginal cultural heritage as well as the guidance it provides to proponents to assist in addressing cultural heritage matters with certainty, in a timely and cost efficient manner. In these circumstances, the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* must be repealed.

Administrative cost to government of implementation

The Government has allocated $3.5M over the next four years to implement the legislation. Costs are associated with the establishment of the Aboriginal Cultural Heritage Register, Aboriginal Cultural Heritage Database, funding to assist Aboriginal Cultural Heritage Bodies meet their responsibility under the legislation to identify traditional owners for country and the placement of Regional Cultural Heritage Officers to assist in effective implementation across the State.

Costs associated with legislative compliance will be accommodated by existing functions and activities.

Compliance with fundamental legislative principles

The Bill has been drafted with due regard to the fundamental legislative principles outlined in section 4 of the *Legislative Standards Act 1992*. Aspects of the Bill that raise possible breaches of fundamental legislative principles are outlined below.

Section 15 – Ownership of Aboriginal human remains

The Bill provides that Aboriginal people own Aboriginal human remains to which they have a traditional or familial link (other than those lawfully buried) regardless of who may have owned the human remains before the commencement of the section. The Bill does not make it an offence to possess the Aboriginal human remains but does make it an offence for a person not to take all reasonable steps to ensure the human remains are taken into the custody of the State as soon as practacatible. This will enable repatriation to occur in a culturally appropriate manner in accordance with Aboriginal tradition. Aboriginal cultural heritage legislation must strike a balance between the rights of individuals to hold other cultural heritage objects lawfully obtained before the commencement of the legislation with

the right of Aboriginal people to have their responsibilities in relation to their human remains respected.

Section 32 – Stop Orders

The Bill enables the Minister to grant 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 cultural heritage. A stop order may be granted for an initial period of 30 days and renewed once for a further period of 30 days. For legislation to be effective in protecting significant Aboriginal cultural heritage values it is important that a balance be struck between the rights of the individual and the need for the community to be able to provide an effective deterrent to ensure land users take proactive measures to meet their duty of care obligations to take all reasonable and practicable measures not to harm Aboriginal cultural heritage. Given the complexities of the issues relating to the protection and management of Aboriginal cultural heritage, including remoteness, an initial 30 day period, followed by a possible 30 day extension, is appropriate to resolve issues relating to the likelihood of harm. The stop order is a necessary power to ensure protection and is limited. At the end of the period, and in the absence of any resolution, the State would need to seek a permanent injunction in the Land and Resources Tribunal and/or initiate a prosecution under the legislation.

Section 36 – Registration of an Aboriginal Cultural Heritage Body

The Bill enables the Minister to register an incorporated body as an Aboriginal cultural heritage body providing it meets certain criteria under the legislation. The sole function of an Aboriginal cultural heritage body is to identify the right Aboriginal party for an area for a person, such as a land user, who needs to know under the legislation. The Minister may cancel the registration of an Aboriginal cultural heritage body if the Minister is satisfied that the entity is no longer the appropriate body to identify the right Aboriginal party for the area. The cancellation of the registration of the Aboriginal cultural heritage body does not adversely affect the rights and liberties of the individuals affected by the decision as under the legislation, in the absence of an Aboriginal cultural heritage body, notices must be sent directly to the Aboriginal parties for the area as defined in sections 34 and 35.

Consultation

The following State agencies were consulted during the preparation of the Bill:

- Department of Aboriginal and Torres Strait Islander Policy;
- Department of the Premier and Cabinet
- Department of Natural Resources and Mines;
- Department of Main Roads;
- Environmental Protection Agency;
- Department of Education;
- Arts Queensland;
- Treasury Department;
- Department of Local Government and Planning;
- Department of Primary Industries;
- Department of Justice; and
- Department of State Development.

NOTES ON CLAUSES

PART 1—PRELIMINARY

Clause 1 of the Bill sets out the short title of the proposed Act.

Clause 2 of the Bill provides for the commencement of the proposed Act on a date to be fixed by proclamation.

Clause 3 of the Bill provides that the proposed Act will bind the State, as well as the Commonwealth and other States to the extent the power of Parliament permits, but makes it clear that the State will not be liable to be prosecuted for an offence under the proposed Act.

Clause 4 of the Bill sets out the main purpose of the proposed Act as being to provide effective recognition, protection and conservation of Aboriginal cultural heritage.

Clause 5 of the Bill sets out the fundamental principles underlying the main purpose of the proposed Act. The principles are aimed at acknowledging the importance of Aboriginal people in assessing and managing their cultural heritage and the need to establish timely and efficient processes to enable this to occur. The intent of this clause is to give fundamental guidance to people dealing with Aboriginal cultural heritage.

Clause 6 of the Bill sets out how the main purpose of the proposed Act is to be achieved. The intent of this clause is to set out the major features in the proposed Act that seek to achieve the effective recognition, protection and conservation of Aboriginal cultural heritage.

Clause 7 of the Bill refers to the dictionary in schedule 2 that defines particular words used in the proposed Act.

Clause 8 of the Bill defines the meaning of "Aboriginal cultural heritage".

Clause 9 of the Bill defines the meaning of "significant Aboriginal area".

Clause 10 of the Bill defines the meaning of "significant Aboriginal object".

Clause 11 of the Bill includes as evidence of occupation, the area immediately surrounding the object or structure, to the extent that the surrounds cannot be separated. The intent in this clause, which is currently in the *Cultural Record (Landscapes Queensland and Queensland Estate) Act* 1987, is to recognise that often the area surrounding an object or structure will need protection in order to effectively protect the object or structure.

Clause 12 of the Bill provides that it is not necessary for an area to contain markings or other physical evidence indicating Aboriginal occupation for the area to be a significant Aboriginal area. The clause gives examples including a ceremonial place, a burial place or the site of a massacre.

Clause 13 of the Bill provides that the Act is not to be interpreted in a way that would prejudice rights of ownership of Aboriginal people in their cultural heritage held for traditional purposes or native title. The intent of this clause is to continue the protection of customary rights provided under the *Cultural Record (Landscapes Queensland and Queensland Estate) Act*

1987 and ensure that the Bill is consistent with the *Native Title Act 1993 (Cth)*.

PART 2—OWNERSHIP, CUSTODIANSHIP AND POSSESSION OF ABORIGINAL CULTURAL HERITAGE

Clause 14 of the Bill sets out the object and intent of part 2.

Clause 15 of the Bill provides that Aboriginal human remains are owned by the Aboriginal people who have a traditional or familial link with the human remains. The intent of this clause is to confer legal ownership of Aboriginal human remains in the appropriate Aboriginal people regardless of who claims ownership before the Bill commences.

Clause 16 of the Bill deals with human remains in the custody of the State. The clause makes provision for the owner of the human remains to ask the State entity with custody of the remains to continue to be the custodian of the remains or, alternatively the person can ask to have the human remains returned. The intent of this clause is to enable Aboriginal people to have a level of control in relation to the repatriation process for human remains in the custody of the State.

Clause 17 of the Bill provides that a person who possesses Aboriginal human remains but does not have a traditional or familial link with the human remains must take all reasonable steps to ensure that the human remains are taken into the custody of the chief executive. This section does not apply to Aboriginal human remains in the custody of the State because the chief executive is already aware of the existence of these Aboriginal human remains. The intent of this clause is to promote the return of Aboriginal human remains to their rightful owners in accordance with Aboriginal tradition.

Clause 18 of the Bill provides that a person who knows of the existence and location of Aboriginal human remains must advise the chief executive as soon as it is practicable to do so. The intent of this clause is to promote the reporting of locations of Aboriginal human remains so they may be dealt with in accordance with Aboriginal tradition.

Clause 19 of the Bill provides that Aboriginal cultural heritage of a secret or sacred nature in the custody of the State becomes owned by the

Aboriginal people who have a traditional or familial link with the object on commencement of the legislation. The intent of this clause is to confer legal ownership of secret and sacred cultural heritage in the custody of the State on the appropriate Aboriginal people. The clause also makes provision for the Aboriginal owner of the object to ask the State entity with custody of the secret or sacred object to continue to be the custodian or to have the object returned.

Clause 20 of the Bill provides that, except in certain circumstances, the State retains a residual ownership of Aboriginal cultural heritage. The clause clarifies that the State does not own the title to land where the cultural heritage is located. This allows the State to best protect the Aboriginal cultural heritage regardless of where is it found. The intent of this clause is to ensure that Aboriginal people with a traditional or familial link to certain Aboriginal cultural heritage, and not the State, own Aboriginal cultural heritage that is human remains, or secret and sacred material in the custody of the State or Aboriginal cultural heritage lawfully taken away from an area. The clause confirms, and does not interfere with, the rights of ownership in Aboriginal cultural heritage, not comprising Aboriginal human remains, lawfully obtained by other people before the proposed Act commences.

Clause 21 of the Bill provides that the owner or occupier is entitled to continued use and enjoyment of land despite the existence of Aboriginal cultural heritage to the extent that the use and enjoyment does not harm or conceal the cultural heritage. The intent of this clause is to continue the positions existing under the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987*.

Clause 21 of the Bill provides that the owner or occupier is entitled to continued use and enjoyment of land despite the existence of Aboriginal cultural heritage to the extent that the use and enjoyment does not harm the cultural heritage. The intent of this clause is to continue the positions existing under the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987*.

Clause 22 of the Bill makes provision for the Queensland Museum to act in relation to Aboriginal cultural heritage.

PART 3—PROTECTION OF ABORIGINAL CULTURAL HERITAGE

Clause 23 of the Bill sets out the cultural heritage duty of care. People must take all reasonable and practicable measures to avoid harming Aboriginal cultural heritage. This is a cornerstone of the protection afforded under the proposed Act. The clause gives detailed guidance about what the court is to consider when examining an alleged breach of the duty of care. A person does not breach the duty of care if the person is acting under the Act or in accordance with a native title agreement, or other agreement, with the Aboriginal party or an approved cultural heritage management plan, or in compliance with the duty of care or duty of care guidelines, or in accordance with native title protection conditions; or the person owns the cultural heritage or is acting with the owner's consent; or the act is necessary because of an emergency. The intent in this clause is to prevent harm to Aboriginal cultural heritage.

Clause 24 of the Bill makes it an offence to harm Aboriginal cultural heritage if the person knows or ought reasonably to know it is Aboriginal cultural heritage. An offence is not committed if the person is acting under the Act or in accordance with a native title agreement, or other agreement, with the Aboriginal party or an approved cultural heritage management plan, or in compliance with the duty of care or duty of care guidelines, or in accordance with native title protection conditions; the person owns the cultural heritage or is acting with the owner's consent; or the act is necessary because of an emergency. The intent of this clause is to prevent harm to Aboriginal cultural heritage.

Clause 25 of the Bill makes it an offence to excavate, relocate or take away Aboriginal cultural heritage. An offence is not committed if the person is acting under the Act or in accordance with a native title agreement, or other agreement, with the Aboriginal party or an approved cultural heritage management plan, or in compliance with the duty of care or duty of care guidelines, or in accordance with native title protection conditions; or the person owns the cultural heritage or is acting with the owner's consent; or the act is necessary because of an emergency. The intent of this clause is to specifically target activities that affect Aboriginal cultural heritage.

Clause 26 of the Bill makes it an offence to possess an object that is Aboriginal cultural heritage if the person knows or ought reasonably to know it is Aboriginal cultural heritage. An offence is not committed if the person is acting under the Act or in accordance with a native title

agreement, or other agreement, with the Aboriginal party or an approved cultural heritage management plan, or in compliance with the duty of care or duty of care guidelines, or in accordance with native title protection conditions; or the person owns the cultural heritage or is acting with the owner's consent; or the act is necessary because of an emergency. The intent of this clause is to encourage Aboriginal cultural heritage to be appropriately dealt with.

Clause 27 of the Bill allows a court, where a person is convicted of an offence involving harming or possessing Aboriginal cultural heritage, to make orders about the cost of any repair or restoration of things that need to be repaired because of the offence. The intent of this clause is to allow a court to make provision for repairing damage to cultural heritage.

Clause 28 of the Bill allows the Minister to gazette guidelines about complying with the cultural heritage duty of care. The intent of this clause is to enable reasonable and practical guidelines to be drawn up, following appropriate consultation, to assist people meet their cultural heritage duty of care.

Clause 29 of the Bill makes it an offence in certain circumstances for a person to include secret or sacred information in a report or other document submitted to the chief executive or the Minister. The intent of this clause is to give a level of protection to secret and sacred information.

Clause 30 of the Bill requires a person who puts an approved cultural heritage management plan into effect to advise the chief executive about all Aboriginal cultural heritage revealed because of activity carried out under the plan. The intent of this clause is to enable Aboriginal cultural heritage to be identified for future planning purposes.

Clause 31 allows a person carrying out an activity, other than an activity under an approved cultural heritage management plan, to advise the chief executive about Aboriginal cultural heritage revealed because of the activity. The intent of this clause is to enable Aboriginal cultural heritage to be identified for future planning purposes.

Clause 32 allows the Minister to give a stop order for an activity in certain circumstances. The stop order continues in force for no more than 30 days. The Minister may give one further stop order for no more than 30 days. It is an offence to contravene a stop order given under this clause. The intent of this clause is to enable the Minister to take appropriate steps to protect cultural heritage from unlawful harm.

Clause 33 allows the Minister to acquire Aboriginal cultural heritage, erect structures and do other things for the purpose of preservation.

PART 4—ABORIGINAL PARTIES AND ABORIGINAL CULTURAL HERITAGE BODIES

Clause 34 defines the term "native title party" for an area as being the registered native title claimants, or a person who was a registered native title claimant for an area where their claim has failed and there is no other registered native title party for the area, or where the registered native title claimant has surrendered their native title or their native title has been compulsorily or otherwise extinguished; or the registered native title holder for an area, or a person who was a registered native title holder for an area where their native title has been surrendered, compulsorily acquired or otherwise extinguished. This clause takes advantage of the native title claims process established under the *Commonwealth Native Title Act 1993* and recognises that Aboriginal people who are the traditional owners of an area, are the appropriate people to be involved in the assessment and management of their cultural heritage whether or not their native title continues to exist. The intent of this clause is to provide certainty to all persons in the identification of the appropriate Aboriginal people to be involved in the assessment and management of cultural heritage.

Clause 35 defines the term "Aboriginal party" for an area as being the registered native title claimant or registered native title holder for the whole area of their claim regardless of the extent to which native title was found to exist in relation to the area unless someone else has been registered over an area where their native title has been determined not to exist. This clause also defines the term "Aboriginal party" where there is no registered native title party.

Clause 36 allows the Minister to register a corporation as an Aboriginal cultural heritage body for an area. The Minister must be satisfied that the corporation is an appropriate body, has the capacity to represent Aboriginal parties for the area and either that the native title parties agree to the application or where there are no native title parties that there is substantial agreement amongst the Aboriginal parties for the area that the corporation should be registered. The clause also allows the Minister to cancel the registration if the Minister is satisfied the corporation is no longer the appropriate body to identify Aboriginal parties for the area. Aboriginal parties for an area will continue to be notified under the legislation despite the cancellation.

Clause 37 gives the function of an Aboriginal cultural heritage body for an area as that of identifying Aboriginal parties for the area for the benefit of a person who needs to know under the Act. The Minister may give an

Aboriginal cultural heritage body financial or other help the body needs to carry out its function.

PART 5—COLLECTION AND MANAGEMENT OF ABORIGINAL CULTURAL HERITAGE INFORMATION

Clause 38 requires the chief executive to establish and keep an Aboriginal Cultural Heritage Database.

Clause 39 sets out the purpose of the database as a research and planning tool for Aboriginal parties, researchers and others in their consideration of the Aboriginal cultural heritage values of particular areas.

Clause 40 allows the chief executive to place information on the database to the extent the chief executive considers appropriate. Information may be added to the database without the necessity of undertaking a formal cultural heritage study.

Clause 41 allows the chief executive to remove information from the database where the chief executive is satisfied the information has been recorded in error.

Clause 42 prevents access to the database generally. The intent of this clause is that information may be provided from the database on an "as needs basis" only as set out in clauses 43 to 45 to ensure the sensitivity and integrity of the information is respected.

Clause 43 allows access to the database for Aboriginal parties.

Clause 44 allows access to the database for land users or their nominee.

Clause 45 allows access to the database for researchers.

Clause 46 requires the chief executive to establish and keep an Aboriginal Cultural Heritage Register.

Clause 47 sets out the purpose of the register as a research and planning tool for people in their consideration of the Aboriginal cultural heritage values of particular areas.

Clause 48 sets out what the chief executive or Minister must record in the register if registering a cultural heritage study conducted under part 6.

Clause 49 sets out what the chief executive must record in the register in relation to cultural heritage management plans under the Act.

Clause 50 allows the Minister to keep the register up to date.

Clause 51 allows access to the register generally.

PART 6—CULTURAL HERITAGE STUDIES

Clause 52 describes the layout of part 6.

Clause 53 allows any person to sponsor a cultural heritage study however Aboriginal parties are generally responsible for assessing the Aboriginal cultural heritage significance of areas and objects covered by a study.

Clause 54 allows the Minister to gazette guidelines to help people choose suitable study methodologies for undertaking a cultural heritage study.

Clause 55 provides that a reference to part of a cultural heritage study area may be taken as a reference to the whole of the cultural heritage study area.

Clause 56 requires the sponsor of a cultural heritage study to give a written notice to certain people, including owners and occupiers within the study area.

Clause 57 sets out what is required in the written notice required under clause 55.

Clause 58 sets out additional requirements for the written notice where the notice is given to a Aboriginal cultural heritage body.

Clause 59 sets out additional requirements for the written notice where the notice is given to a Aboriginal party.

Clause 60 sets out additional requirements for the written notice where the notice is given to a native title representative body.

Clause 61 sets out the procedure for giving a public notice where there is no Aboriginal cultural heritage body or Aboriginal party that is a registered native title claimant or registered native title body corporate.

Clause 62 details the obligation of the Aboriginal cultural heritage body in responding to a written notice and the responsibility of the sponsor in relation to any response.

Clause 63 details the obligation of the Aboriginal party in responding to a written notice and the responsibility of the sponsor in relation to any response.

Clause 64 details the obligation of the Aboriginal party in responding to a public notice and the responsibility of the sponsor in relation to any response.

Clause 65 provides that the sponsor of a study is not required to endorse an Aboriginal party who has not responded to the notice within the time required. The clause also allows the sponsor to endorse a party even though the sponsor is not required to.

Clause 66 sets out the role of the endorsed party for the cultural heritage study. This role may be performed by a nominee.

Clause 67 sets out the role of the sponsor for the cultural heritage study.

Clause 68 allows the sponsor to engage appropriate persons as cultural heritage assessors for the study.

Clause 69 sets out the role of the cultural heritage assessor in the cultural heritage study.

Clause 70 requires the sponsor and each endorsed party for a cultural heritage study to take reasonable steps to consult with each other about the study. The clause sets out subject areas that must be consulted about if one of the parties asks for the consultation. The clause also requires the sponsor to consult with the owner or occupier of land about obtaining access if the access is required for carrying out the study.

Clause 71 allows the chief executive to record the findings of the study in the register.

Clause 72 gives the chief executive guidance when deciding whether to record the findings of the study.

Clause 73 sets out what the chief executive must be satisfied about before recording a study in the register.

Clause 74 requires the chief executive to give a written notice of the decision to record or refusal to record the findings of the cultural heritage study in the register. The chief executive must give the reasons for refusing to record the findings together with the written notice of the decision.

Clause 75 sets out definitions for division 5.

Clause 76 allows a person to object to the Land and Resources Tribunal about the chief executive's decision to record or refusal to record the findings of the cultural heritage study.

Clause 77 sets out how the Land and Resources Tribunal must be constituted for the hearing. The clause states that all parties to the objection have the right to be heard at the hearing.

Clause 78 sets out what the Land and Resources Tribunal must recommend to the Minister after hearing an objection.

Clause 79 requires the Minister to have regard to the Land and Resources Tribunal's recommendation and the matters about which the chief executive was required to be satisfied under clause 72.

PART 7—CULTURAL HERITAGE MANAGEMENT PLANS

Clause 80 provides that division 2 sets out when a cultural heritage management plan is or may be required to be developed for a project.

Clause 81 describes the layout of part 7.

Clause 82 provides that anyone can initiate, or be the sponsor for, a cultural heritage management plan.

Clause 83 allows a person to develop and gain approval of a voluntary cultural heritage management plan. This is an important feature of the legislation intended to encourage industry to adopt best practice in circumstances where the legislation does not automatically require a mandatory cultural heritage management plan. The incentive for industry to do so is that any activity undertaken in accordance with a cultural heritage management plan approved under the legislation satisfies the duty of care under the legislation.

Clause 84 recognises that in some circumstances a cultural heritage management plan may contain no particular requirements for the management of Aboriginal cultural heritage.

Clause 85 allows the Minister to gazette guidelines to help people in choosing suitable methodologies for developing cultural heritage management plans.

Clause 86 makes it clear that the sections that compulsorily require cultural heritage management plans do not apply if a project is authorised under an existing agreement or a native title agreement. A native title agreement means an indigenous land use agreement; an agreement or determination under part 2, division 3 subdivision P of the *Commonwealth Native Title Act 1993* or an agreement under the Native Title Mining Provisions of the *Mineral Resources Act 1989*. This is designed to ensure that the cultural heritage issues for a project will not be required to be dealt with twice.

Clause 87 requires a cultural heritage management plan for a project where an Environmental Impact Statement is also required for the project. The intent in this clause is to catch the projects that are most likely to have an impact on Aboriginal cultural heritage. This reflects existing best practice.

Clause 88 allows the extension of the mandatory trigger for a cultural heritage management plan to cover projects that require an environmental assessment short of an EIS and that are prescribed under a regulation. A project can only be prescribed under the clause if the Minister is satisfied the project will have a significant impact on Aboriginal cultural heritage.

Clause 89 allows the chief executive to require the development of a cultural heritage management plan under the processes in the *Integrated Planning Act 1997*.

Clause 90 provides that a reference to part of a cultural heritage management plan may be taken as a reference to the whole of the cultural heritage management plan area.

Clause 91 requires the sponsor of a cultural heritage management plan to give a written notice to the interested parties set out in the clause.

Clause 92 sets out the requirements for the written notice.

Clause 93 sets out additional requirements if the notice is to be given to a Aboriginal cultural heritage body.

Clause 94 sets out additional requirements if the notice is to be given to an Aboriginal party.

Clause 95 sets out additional requirements if the notice is to be given to a representative body.

Clause 96 sets out the requirements where there is no Aboriginal cultural heritage body and no Aboriginal party that is a registered native title claimant or registered native title body corporate. In this case the sponsor must place a public notice in a newspaper. The intent of this clause is to ensure the appropriate Aboriginal people are identified for the cultural heritage management plan process.

Clause 97 sets out the requirements for the cultural heritage body to respond to a written notice from the sponsor of a cultural heritage management plan and the responsibility of the sponsor in relation to any response.

Clause 98 sets out the requirements for the Aboriginal party to respond to a written notice from the sponsor of a cultural heritage management plan and the responsibility of the sponsor in relation to any response.

Clause 99 sets out the requirements for the Aboriginal party to respond to a public notice from the sponsor of a cultural heritage management plan and the responsibility of the sponsor in relation to any response.

Clause 100 sets out the requirements for notifying an entity that becomes an Aboriginal party before the notice period ends and the responsibility of the sponsor in relation to any response.

Clause 101 provides that the sponsor is not required to endorse an Aboriginal party who has failed to respond within the notice period. This clause also allows the sponsor to endorse other Aboriginal parties even though the sponsor is not required to.

Clause 102 sets out the role of an endorsed party and allows the role to be performed by a nominee.

Clause 103 sets out the role of the sponsor for the cultural heritage management plan.

Clause 104 requires the sponsor to consult with each endorsed party about the development of the cultural heritage management plan. The clause gives guidance on subjects for consultation and methods of consulting.

Clause 105 requires the sponsor and each endorsed party to use every reasonable effort to reach agreement about the cultural heritage management plan. The clause also sets out matters the plan may contain.

Clause 106 allows a party to ask the Land and Resources Tribunal to provide mediation of a dispute between parties that is substantially delaying the plan.

Clause 107 allows a cultural heritage management plan to be submitted to the chief executive for approval by the sponsor where all the consultation parties are agreed. The chief executive must approve the cultural heritage management plan where all the parties have agreed.

Clause 108 sets out what the chief executive must be satisfied about before approving a cultural heritage management plan where no Aboriginal party has become endorsed for the plan by responding to the sponsor's written notice.

Clause 109 requires the chief executive to give written notice of the decision about the cultural heritage management plan where no Aboriginal party has become endorsed for the plan by responding to the sponsor's written notice.

Clause 110 sets out definitions for the division.

Clause 111 allows the sponsor to object to the Land and Resources Tribunal if no Aboriginal parties responded to the sponsors notice of intention to develop the cultural heritage management plan and the chief executive has refused to approve the cultural heritage management plan. The sponsor must object within 30 days after receiving notice from the chief executive.

Clause 112 allows the sponsor to refer a plan to the Land and Resources Tribunal where, following meditation, the mediator believes that resolution of the dispute is unlikely and has authorised the sponsor to refer the cultural heritage management plan to the Land and Resources Tribunal for consideration.

Clause 113 allows the sponsor to refer a plan to the Land and Resources Tribunal asking for approval where the consultation parties are not in agreement. The referral must happen within a reasonable time after the end of the consultation period for the plan.

Clause 114 sets out the administrative steps involved in an objection or referral.

Clause 115 requires the sponsor to file a document with the Land and Resources Tribunal setting out the nature and extent of the consultation and why the plan is sufficient in its proposed protection and management of Aboriginal cultural heritage. The Land and Resources Tribunal must give the other parties a copy and invite submissions from them.

Clause 116 gives the Land and Resources Tribunal the power to hold a hearing of an objection or referral. All parties to the objection or referral have the right to be heard.

Clause 117 requires the Land and Resources Tribunal to make a recommendation to the Minister about the cultural heritage management plan.

Clause 118 sets out what the Land and Resources Tribunal must be satisfied about in making a recommendation to the Minister, in particular about how the project is to managed to avoid or, to the extent to which damage cannot reasonably be avoided, minimise harm to Aboriginal cultural heritage.

Clause 119 requires the Land and Resources Tribunal to take all reasonable and practicable steps to make a recommendation to the Minister within 4 months or provide the Minister with written notice as to why a recommendation has not been made within that time together with an estimate of when one is likely to be made.

Clause 120 sets out the action the Minister may take upon receiving a recommendation from the Land and Resources Tribunal.

PART 8—INVESTIGATION AND ENFORCEMENT

Clause 121 allows the appointment of public service employees as authorised officers.

Clause 122 allows the setting of appointment conditions and powers of authorised officers.

Clause 123 requires each authorised officer to be issued an identity card.

Clause 124 requires the authorised officer to produce and display the identity card when exercising their powers.

Clause 125 sets out when an authorised officer ceases to hold office.

Clause 126 allows an authorised officer to resign from office.

Clause 127 requires a person who ceases to be an authorised officer to return the identity card.

Clause 128 gives an authorised officer power to enter places with consent or, where consent has not been given, with a warrant.

Clause 129 sets out the procedures to be followed where an authorised officer enters a place with consent.

Clause 130 allows the authorised officer to apply for a warrant from a magistrate.

Clause 131 sets out the ground for issuing a warrant and the requirements of the warrant.

Clause 132 makes provision for a special warrant where necessary due to urgent circumstances or other special circumstances.

Clause 133 sets out procedures to be followed in executing a warrant.

Clause 134 sets out the powers of an authorised officer upon entry under a warrant.

Clause 135 makes it an offence not to comply with a request under clause 134(3)(g).

Clause 136 makes it an offence not to comply with a request under clause 134(3)(h).

Clause 137 gives an authorised officer power to seize evidence from a public place.

Clause 138 gives an authorised officer power to seize an item that may be evidence from another place when acting with consent of the occupier or under a warrant.

Clause 139 gives an authorised officer the power to secure something seized.

Clause 140 makes it an offence to tamper with something seized by an authorised officer.

Clause 141 allows an authorised officer to require a person in control of a thing to take action in order to enable a thing to be seized, and provides an offence for failure to comply with the requirement.

Clause 142 provides for the issue of a receipt for anything seized by an authorised officer.

Clause 143 requires an authorised officer to return seized things which have not been forfeited within 6 months of seizure, or from the end of any proceeding for an offence or appeal from the proceeding, or when the thing is no longer required as evidence.

Clause 144 allows an owner to obtain access to a seized thing that has not been forfeited or returned.

Clause 145 allows an authorised officer to require a person to state their name and address in certain circumstances.

Clause 146 provides an offence for the failure by a person to provide an authorised officer with the person's name and address.

Clause 147 requires an authorised officer to notify an owner whose property has been damaged by the authorised officer in the exercise of the authorised officer's powers.

Clause 148 allows a person to claim compensation from the State for damage caused, or cost incurred, in the exercise or purported exercise of an authorised officer's powers and it outlines the manner and extent to which compensation may be sought.

Clause 149 makes it an offence to knowingly give false or misleading information to an authorised officer.

Clause 150 makes it an offence to knowingly give a false or misleading document to an authorised officer.

Clause 151 makes it an offence to obstruct an authorised officer in the exercise of a power.

PART 9—MISCELLANEOUS PROVISIONS

Clause 152 allows the Minister to delegate the Minister's powers to another Minister or an appropriately qualified public service officer. This clause also allows the chief executive to delegate the chief executive's powers to an appropriately qualified public service officer.

Clause 153 authorises a person who is already authorised to enter land to perform an activity under another Act to also enter the land to perform cultural heritage work. In any other circumstance, if no other authority exists under another Act to enter the land, the consent of the owner or occupier is required.

Clause 154 allows the Minister to establish advisory committees.

Clause 155 allows the Minister to acquire land by purchase or compulsory acquisition where the Minister is satisfied that it is necessary to manage, preserve or protect Aboriginal cultural heritage.

Clause 156 sets out the requirements for proceedings for an offence against the proposed Act which may be taken summarily or on indictment.

Clause 157 requires the Minister to review the proposed Act within 5 years of commencement. The intent in this clause is to ensure the proposed Act is examined in detail during its implementation.

Clause 158 allows the chief executive to approve forms for use under the Act.

Clause 159 allows the Governor in Council to make regulations under the proposed Act.

PART 10—REPEAL

Clause 160 repeals the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987*.

PART 11—TRANSITIONAL PROVISIONS

Clause 161 is a transitional clause confirming that the proposed Act is not generally intended to interfere with ownership of Aboriginal cultural heritage as it existed before the commencement of the proposed Act.

Clause 162 is a transitional clause requiring the chief executive to place information about Designated Landscape Areas, which have already been identified under the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987*, onto the new Aboriginal Cultural Heritage Register. The intent of this clause is to transition information about Designated Landscape areas to the new Aboriginal Cultural Heritage Register.

Clause 163 is a transitional clause that requires the State to place all information about Aboriginal cultural heritage accumulated by the State on the database.

Clause 164 is a transitional clause that allows a person to carry out activities in accordance with existing agreements. In these circumstances, a person will be taken to comply with their duty of care. The intent of this

clause is to ensure people can operate with confidence on the basis of existing agreements.

Clause 165 is a transitional clause that continues in force permits issued under section 28 of the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987*. The intent of this clause is to allow people operating under existing permits to continue to operate under those permits.

Clause 166 is a transitional clause that allows the holder of an authority obtained before the commencement of the proposed Act to apply to the Minister to have transitional measures approved to ensure the duty of care is met under the proposed Act. This is important to enable compliance under the proposed Act where Aboriginal cultural heritage has not previously been addressed.

Clause 167 is a transitional clause ensuring where cultural heritage arrangements were put in place in order to obtain an authority before the commencement of the proposed Act that a person acting in accordance with those arrangements does not commit an offence under the Act.

Clause 168 is a transitional clause to ensure that activities undertaken in accordance with arrangements put in place before the commencement of the proposed Act to address cultural heritage as part of an Environmental Impact Statement approval obtained after the commencement of the proposed Act do not offend against the Act.

169 is a transitional clause allowing a reference to the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* to be taken as a reference to the proposed Act. This is standard drafting practice when an Act is replaced with new legislation.

PART 12—AMENDMENT OF ACTS

Clause 170 provides that Schedule 1 makes consequential amendments to the Acts in Schedule 1.

SCHEDULE 1—AMENDMENT OF ACTS

Schedule 1 amends the following Acts:

COASTAL PROTECTION AND MANAGEMENT ACT 1995

Sections 61G, 61N, 61O, 61Y, 61ZB and 61ZJ of the *Coastal Protection and Management Act 1995* are amended to ensure that Aboriginal and Torres Strait Islander cultural heritage matters are dealt with under the *Aboriginal Cultural Heritage Act 2003* or the *Torres Strait Islander Cultural Heritage Act 2003* rather than being dealt with separately under the *Coastal Protection and Management Act 1995*.

FORESTRY ACT 1959

Section 5 of the *Forestry Act 1959* defines forest products as including Aboriginal remains and ownership of these remains is vested in the State. Under the *Aboriginal Cultural Heritage Act 2003* Aboriginal remains are owned by the Aboriginal people with a traditional or familial link to the remains and consequently the reference in the *Forestry Act 1959* to state ownership has been removed. Section 61A of the *Forestry Act 1959* is omitted because the reference to the *Cultural Record (Landscapes Queensland and Queensland Estates) Act 1987* is no longer relevant.

FREEDOM OF INFORMATION ACT 1992

The reference in Schedule 1 of the *Freedom of Information Act 1992* to the *Cultural Record (Landscapes Queensland and Queensland Estates) Act 1987* is updated to the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003*. The effect of this amendment is to continue the exemption under section 48 of the *Freedom of Information Act 1992* in relation to the disclosure of secret and sacred information.

LAND AND RESOURCES TRIBUNAL ACT 1999

References in section 53 of the *Land and Resources Tribunal Act 1999* to the *Cultural Record (Landscapes Queensland and Queensland Estates) Act 1987* are updated to reflect the provisions of the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003*. The effect of these amendments is to continue the exclusive jurisdiction of the Land and Resources Tribunal for injunctions in relation to cultural heritage.

NATURE CONSERVATION ACT 1992

Amendments are made to section 61 of the *Nature Conservation Act 1992* which vests ownership of cultural resources in the State to ensure that it is consistent with the ownership provisions of the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003*.

WHISTLEBLOWERS PROTECTION ACT 1994

The reference in Schedule 2 of the *Whistleblowers Protection Act 1994* to the *Cultural Record (Landscapes Queensland and Queensland Estates) Act 1987* is updated to reflect the provisions of the *Queensland Heritage Act 1992*, the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003*. The effect of this amendment is to continue the ability of a person to make a public interest disclosure in relation to certain offences involving cultural heritage where the commission of the offence is or would be a substantial and specific danger to the environment.

SCHEDULE 2—DICTIONARY

Schedule 2 contains the dictionary that defines words and phrases used in the Bill.