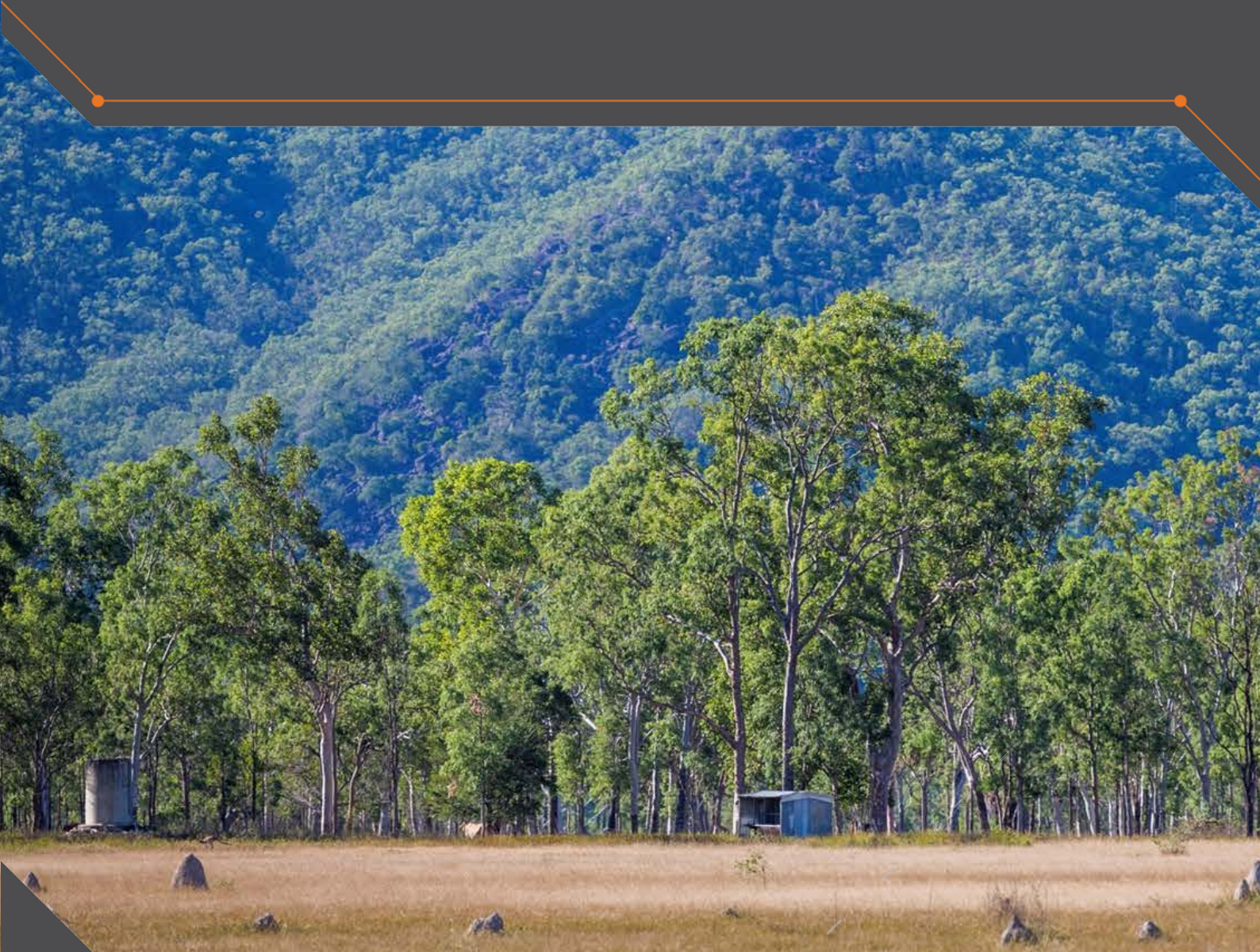


# Land use planning, Aboriginal and Torres Strait Islander cultural heritage and native title

An overview of their relationship in Queensland



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# Contents

1.0	Context.....	3
1.1	The Queensland planning system .....	3
1.2	Relevant legislation.....	3
2.0	Cultural heritage .....	4
2.1	What is cultural heritage? .....	4
2.2	What is 'duty of care'? .....	4
2.3	What does this mean when making or amending a local planning instrument? .....	4
2.4	What does this mean when carrying out development?.....	5
3.0	Native title .....	6
3.1	What is native title?.....	6
3.2	What is an Indigenous Land Use Agreement?.....	6
3.3	What does this mean when making or amending a local planning instrument? .....	6
3.4	What does this mean when carrying out development?.....	7
3.4.1	When exercising native title rights.....	7
3.4.2	When carrying out development that may impact on native title rights and interests .....	7



# 1.0 Context

This document discusses the relationship between the Queensland planning system, cultural heritage and native title.

## 1.1 The Queensland planning system

Land use planning provides an opportunity for community and industry stakeholders to work with government to develop a strategic direction, policies and priorities for appropriate land uses, infrastructure and investment decisions for areas as they change over time.

A local government planning scheme, called a 'local planning instrument' is the principal tool that regulates most land use and development in Queensland. However, a new or amended local planning instrument cannot stop an existing lawful use of premises from continuing, or further regulate the use, or require the use to be changed.

The approach of each local government in their planning scheme will vary and is informed by community values. For example, some communities may wish to protect certain areas from development, while other communities may wish to optimise economic and tourism benefits of certain areas or objects.

Information on how local government may advance Aboriginal and Torres Strait Islander knowledge culture and tradition when preparing or amending their planning schemes is explained in the [Advancing Aboriginal and Torres Strait Islander interest in land use planning – Guidance for local governments](#) document.

## 1.2 Relevant legislation

The following pieces of legislation contribute to recognising and advancing Aboriginal and Torres Strait Islander interests:

Legislation	Purpose
The <i>Planning Act 2016</i>	Ensuring local planning instruments and decisions on development applications advance the purpose of the <i>Planning Act 2016</i> , including <b>valuing, protecting and promoting</b> Aboriginal and Torres Strait Islander <b>knowledge, culture and tradition</b> .
The <i>Native Title Act 1993</i> (Cth)	To <b>recognise rights and interests</b> over lands or waters where Aboriginal and Torres Strait Islander groups have practiced and continue to practice, traditional laws and customs.
The <i>Aboriginal Cultural Heritage Act 2003</i> and the <i>Torres Strait Islander Cultural Heritage Act 2003</i>	Providing for the <b>recognition, protection and conservation</b> of Aboriginal and Torres Strait Islander <b>cultural heritage</b> in Queensland.

## 2.0 Cultural heritage

### 2.1 What is cultural heritage?

The *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* (the cultural heritage Acts) provide for the recognition, protection and conservation of Aboriginal and Torres Strait Islander cultural heritage in Queensland. Cultural heritage can be anything that is a significant Aboriginal or Torres Strait Islander area or object or evidence of archaeological or historical significance of Aboriginal or Torres Strait Islander occupation of an area in Queensland. The presence of cultural heritage may impact on land use and land use planning.

A cultural heritage database and cultural heritage register have been established under the cultural heritage Acts. These resources are managed by the Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP).

The **cultural heritage database** contains information about, but is not a complete record of, Aboriginal and Torres Strait Islander cultural heritage sites and places in Queensland. The purpose of the cultural heritage database is to:

- collate information about Aboriginal and Torres Strait Islander cultural heritage in a central and accessible location
- provide a research and planning tool to help Aboriginal and Torres Strait Islander parties, researchers and other persons assess the Aboriginal and Torres Strait Islander cultural heritage values of particular areas.

The cultural heritage database is not publicly available, however DATSIP makes this information available to:

- Aboriginal and Torres Strait Islander parties – if the information relates to the party's area of responsibility
- land users – if the information is necessary for them to satisfy their cultural heritage duty of care.

The **cultural heritage register** is publicly available and contains:

- information contained in cultural heritage studies
- information about whether particular areas have been the subject of cultural heritage management plans.

More information about Aboriginal and Torres Strait Islander cultural heritage and how to go about requesting access to the cultural heritage register and database is available on the DATSIP website

<https://www.datsip.qld.gov.au/people-communities/aboriginal-torres-strait-islander-cultural-heritage>.

### 2.2 What is 'duty of care'?

The cultural heritage Acts may apply to development regardless of the land tenure, and whether or not native title exists. The cultural heritage Acts require land users to exercise a duty of care to ensure their activity does not harm Aboriginal or Torres Strait Islander cultural heritage.

The information contained in the cultural heritage register may help an applicant in their consideration of the Aboriginal and Torres Strait Islander cultural heritage values of particular objects and areas when proposing to undertake development. However, merely accessing the cultural heritage database and cultural heritage register may not satisfy this duty of care.

More information about satisfying the cultural heritage duty of care is available on the DATSIP website

<https://www.datsip.qld.gov.au/people-communities/aboriginal-torres-strait-islander-cultural-heritage/cultural-heritage-duty-care>.

### 2.3 What does this mean when making or amending a local planning instrument?

The cultural heritage Acts do not set out any requirements for the preparation of local planning instruments such as planning schemes.

Advancing the purpose of the *Planning Act 2016* includes 'valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition'. The purpose of the *Planning Act 2016* includes delivering a system of land use planning and development assessment that facilitates the achievement of ecological sustainability. The

system to facilitate the achievement of ecological sustainability includes State planning policies setting out planning and development assessment policies about matters of State interest.

The State Planning Policy July 2017 (SPP) expresses the state's interests in land use planning and development that apply to plan making, and that should be given effect through each local government planning scheme. The SPP's cultural heritage state interest sets out that when a local government is making or amending their planning scheme matters of Aboriginal cultural heritage and Torres Strait Islander cultural heritage are to be appropriately conserved and considered to support the requirements of the cultural heritage Acts.

Information on how local planning instruments may do this is explained in the **Advancing Aboriginal and Torres Strait Islander interest in land use planning – Guidance for local governments** document.

## 2.4 What does this mean when carrying out development?

When carrying out development there are three considerations:

- development as defined in the *Planning Act 2016* is to be assessed against the provisions in the applicable local planning instrument
- where a planning scheme does not appropriately integrate an SPP state interest policy, development assessment is to have regard to the SPP; and
- this development may *also* need to satisfy the duty of care under the cultural heritage Acts.

## 3.0 Native title

### 3.1 What is native title?

Native title rights are an interest in land but are not of themselves a form of land tenure, such as freehold or a pastoral lease. By itself, native title does not confer ownership.

Native title or native title rights and interests is defined by the *Native Title Act 1993* (Cth) as *the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where the:*

- *rights and interests are possessed under traditional laws that are acknowledged, and the traditional customs that are observed, by the Aboriginal peoples or Torres Strait Islanders; and*
- *Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and*
- *rights and interests are recognised by the common law of Australia.*

It is the Federal Court who may make a determination of whether or not native title exists in relation to a particular area of land or waters. The existence or otherwise of native title is not dependent on there being a determination of native title made by the Federal Court. Rather, a determination of native title is the way that the existence or otherwise of native title is recognised under the *Native Title Act 1993*.

If native title rights and interests exist, they may influence land use and land use planning.

The content of native title rights may, over limited parts of Australia, include the right to possess and occupy an area to the exclusion of others. Over other areas, it may include non-exclusive native title rights, for example, the right to hunt, fish or gather food.

### 3.2 What is an Indigenous Land Use Agreement?

An Indigenous Land Use Agreement (ILUA) is one way that acts affecting native title, such as land dealings and development, can be validated under the *Native Title Act 1993*. An ILUA is a voluntary and confidential agreement about matters that affect native title and often does not deal with land use matters relevant to a planning scheme, so it will 'sit outside' the state's land use planning framework. It is made between a native title party or parties and the individuals or organisations with an interest in the area, such as farmers, mining companies, tourism operators, or government agencies, including local governments.

There are different types of ILUAs and an ILUA can be, but does not have to be, over areas where native title has been determined. The ILUA can address such matters as:

- access to an area
- compensation
- extinguishment of native title
- agreement to a future development that may affect native title in the agreement area
- co-existence of native title rights with rights of other people
- protection of significant sites and cultural heritage
- employment and economic opportunities for native title groups
- mining.

Further information about native title and ILUAs is available from the Department of Natural Resources and Mines [www.dnrm.qld.gov.au](http://www.dnrm.qld.gov.au) and the National Native Title Tribunal [www.nntt.gov.au](http://www.nntt.gov.au).

### 3.3 What does this mean when making or amending a local planning instrument?

A planning scheme is not a future act for the purposes of the *Native Title Act 1993*, meaning it cannot extinguish or confirm the existence of rights and interests; only a determination made by the Federal Court may do that.

As the content of ILUA's may be confidential, the [Advancing Aboriginal and Torres Strait Islander interest in land use planning – Guidance for local governments](#) document provides guidance on how to go about engaging with Aboriginal and Torres Strait Islander groups to determine how planning schemes may consider their interests in an appropriate manner.

If a local government can access information about the existence of native title rights and interests when making or amending their planning scheme it may consider how the planning scheme land use strategies can complement these rights and interests, and other rights and interests determined to exist by the Federal Court in the local government area. For example, an ILUA may exist over a certain area, if a local government has access to the content may infer the types of activities are envisaged and explore how the planning scheme intent can align with these.

The following resources may assist:

- the [Register of Native Title Claims](#)
- the [National Native Title Register](#) that contains approved native title determinations of whether native title exists in relation to the area
- the [Register of Indigenous Land Use Agreements](#).

## 3.4 What does this mean when carrying out development?

### 3.4.1 When exercising native title rights

The exercise of native title rights and interests are not exempt from the laws of the state or Commonwealth. The exercising of native title rights and interests, if assessable development under the *Planning Act 2016*, still requires a development approval under that Act and is to be assessed against the provisions in the applicable local planning instrument. For example, a person who may have native title rights to erect temporary structures on land, will also need to consider the requirements contained in the local government planning scheme before erecting that structure.

### 3.4.2 When carrying out development that may impact on native title rights and interests

An act that involves dealing in land in a way that extinguishes the native title rights and interests or that is wholly or partly inconsistent with the continued existence, enjoyment or exercise of those rights needs to comply with the procedures set out in the *Native Title Act 1993*. When carrying out development that involves future acts that affect native title, ensure these are valid in accordance the *Native Title Act 1993*. This may include being agreed to in an ILUA.

A grant of tenure over non-freehold land, where native title rights exist or may exist, would be an example of a land dealing that affects native title that would require validation under the *Native Title Act 1993*.









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