



**Australian Government**

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**Department of the Environment, Water, Heritage and the Arts**

# **Submission form**

**Possible reforms to the legislative arrangements  
for protecting traditional areas and objects**

The Australian Government is seeking feedback on proposals for more effective laws to protect Indigenous traditional areas and objects across Australia. The government has published a discussion paper that describes 15 proposals to achieve this aim by developing new legislation to replace the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. The discussion paper is available at:

[www.heritage.gov.au/indigenous/lawreform](http://www.heritage.gov.au/indigenous/lawreform)

The government is interested in hearing your views about the best way to reform the legislation. To encourage people to make submissions we're holding information sessions based on the government's network of Indigenous Coordination Centres across Australia. We will also meet with key representative groups such as native title representative bodies and land councils, state and territory governments, organisations involved in protecting Indigenous heritage and peak industry bodies.

## How can I have my say?

This form is designed to make it easy to respond to the proposals and questions in the discussion paper. There is additional space for comments on the back page.

To make a submission please complete this form and email it to [atsihpa@environment.gov.au](mailto:atsihpa@environment.gov.au), or post it to:

**Indigenous Heritage Law Reform  
Heritage Division  
Department of the Environment, Water, Heritage and the Arts  
GPO Box 787  
CANBERRA ACT 2601**

Alternatively you may wish to make your submission in a different format and send it to one of the addresses listed above.

**The deadline for submissions is Friday, 6 November 2009.**

## What should I put in my submission?

It is up to you what you put in your submission.

Your submission is more likely to have influence if you include brief recommendations about whether and how to improve the legislation, such as whether to use the proposals in the discussion paper. To assist you we have included questions with each proposal. However we encourage you to raise any issues that are important to you to ensure the information provided to government is as robust as possible.

You are welcome to add your own proposals for reforming the legislation if you wish.

## Who will be able to read my submission?

We will not regard your submission as confidential. In general we intend to publish all the submissions we receive on our website. That way everyone who has an interest in the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* will be able to see what other people think about reforming this legislation. However we reserve the right not to publish a submission or any part of a submission, at our discretion. For example we will not to publish any part of a submission that:

- promotes a product or a service
- contains defamatory or offensive language
- expresses sentiments that are likely to vilify sections of the community
- contains personal information that could be used to identify third parties.

Anyone who visits our website will be able to view your submission. This means that other people will be able to view your personal information, such as your name and address or any other information that could be used to identify you, if you include it in your submission. *If you prefer we can conceal your address when we post your submission on our website. Please let us know if you want us to do this by ticking the box on page 4 or by including a similar statement if you make your submission in a different format.*

We will use your submission to prepare advice for the Australian Government about options for reforming the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. As is normally the case with this type of advice, we will advise the government about the views of individuals or groups who have an interest in the legislation. This could mean that we provide some of your personal information, such as your name, to government ministers and other departments, for example the Minister for the Environment, Heritage and the Arts.

## What if I need help?

If you need more information about making a submission please contact: **1800 003 1644**

## Your details

Name: The Aboriginal Heritage Office, Northern Region (AHO)

Postal address: PO Box 12 North Sydney NSW 2059

Other contact details (optional): Mr David Watts, Aboriginal Heritage Manager  
02-9949 9882

Tick if applicable:

Please tick this box if you do not want your address and other contact details included when your submission is posted on the department's website.

Web site (if applicable): [www.aboriginalheritage.org](http://www.aboriginalheritage.org)

Are you making this submission on behalf of other people or an organisation?

yes - please specify  no

What is your interest in making a submission about this legislation? (optional)

The Aboriginal Heritage Office (AHO) and funding councils (Ku-ring-gai, Lane Cove, Manly, North Sydney, Pittwater, Ryde, Warringah, Willoughby and Armidale Dumaresq Councils) support the review of the legislation and the intention of providing clarity and consistency from federal to state levels of government. The suggested accreditation approach as a cornerstone of the legislation is welcomed under certain provisions, namely that: the legislation is not narrowly concerned with the rights and interests of traditional owners but is more inclusive and collaborative within the broader Aboriginal community; and that Intellectual Property rights and issues are clarified in the legislation.

The AHO works to protect and promote Indigenous heritage in accordance with the accreditation standards proposed. The co-operative relationship between 9 Local Government Areas (LGA)

that sponsor the AHO has been successful in protecting more heritage places, promoting Indigenous heritage, and minimising conflict. The AHO believes that the model currently working in the Northern Sydney Region at local government level can be used as a template for a national roll-out, particularly in urban areas, whereby the interests of Indigenous communities, landowners, consent authorities and the wider community can come together for mutual benefit.

## Your overall comments

The Australian Government is proposing to reform the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* to improve Indigenous heritage protection laws nationally. The Act could be substantially amended or replaced. Details are in the discussion paper.

★ **Question 1: Overall, what do you think are the main problems with the current situation, and what improvements are needed?**

- The AHO agrees that there is a need to improve the legislation regarding Aboriginal heritage protection, particularly to create a consistent framework that gives clarity, reduces bureaucracy and recognises Aboriginal rights.
- The main problem with the current legislation is it puts more emphasis on last minute assessments of heritage rather than encouraging better planning and up-front reviews prior to development. There is also no due diligence – there is no automatic protection for heritage items and a person cannot be fined if there weren't aware of a declaration.

In terms of the proposed changes, the AHO notes the following:

- The framework of the proposed legislation is contextualised within development, and therefore is conditional, whereas Aboriginal heritage should be protected for its own values.
- The only “one size fits all” policy that has ever been successful against Aboriginal people is genocide and dispossession. The reform proposals cannot possibly work across the full spectrum of historical experiences, particularly with tight definitions of who is considered ‘Aboriginal’ under the proposed definitions.
- The proposals do not measure progress, nor does the framework for accreditation require minimum standards of resourcing, capacity and responsibility from states, territories or federal departments.
- The terminology of the proposals, particularly the use and definition of “traditional Aboriginal”, is so narrowly defined and historically located, that the majority of Aboriginal people and heritage places may not be able to meet the criteria. There is an increasing body of research showing that Australia’s emphasis on the ‘traditional’ is a deeply flawed approach that disenfranchises most Indigenous people from being able to claim legally-defined ‘traditionality’, doesn’t recognise cultural change and undermines contemporary uses of land that are important in community economic and social development (eg refer Prof. Simon Young, *The Trouble with Tradition*, 2008).
- Individual rights are not recognised. This is the most serious flaw in the proposals, as Aboriginal societies are not homogenous. It is emphasising the group over the individual, which goes against other legislation.
- Aboriginal heritage can be built heritage, such as the Day of Mourning Building in Elizabeth St, Sydney, however the recognition of Aboriginal people contributing to our

national, urban character is not there. There are no “traditions” for urban heritage as defined by the proposed definition of ‘Aboriginal’ under the *Evidence Act 1995*. The vast majority of the **over 800 heritage places** currently protected by the Aboriginal Heritage Office have no legally recognised traditional owners who would be able to apply to protect them under federal legislation.

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## Proposal 1: Purposes of the legislation

The new legislation could set out its overall aims. This could be done using the points set out on page 11 of the discussion paper.

★ **Question 1.1: Do these points adequately express the purposes of the legislation?**

] yes

\* ] no - please explain why not

- The terminology does not go far enough. The use of terms “recognise” and “acknowledge” are not statements of force or explicit enough to show that Aboriginal people are the owners of knowledge, sites and places.
- There is no acknowledgement that Aboriginal heritage on its own can add to our nation’s character and history and can enrich people’s lives.
- A serious flaw in the proposal is not recognising Intellectual Property (IP) rights, and instead only limiting Aboriginal heritage to tangible items. IP can exist on its own as a vehicle for heritage protection, particularly given the definition of “traditional Aboriginal” that is proposed to be used. How can one define Aboriginal people as their knowledge and observances, but not see that IP is part of the heritage package?
- The use of the term “traditional Aboriginal” is very different from ‘Aboriginal traditions’. The narrow scope of ‘traditional’ greatly reduces the workability of the legislation. Aboriginal people across Australia are following traditions of caring for country and trying to maintain and rebuild culture, which is ‘continuity’ of a kind but not always recognised under Native Title legislation. To limit the legislation to ‘traditional areas’ may also disenfranchise the many Aboriginal people who are working to protect heritage but are not in their traditional lands or who are unsure of their traditional country due to past removals.
- There should be an acknowledgement that many important heritage places no longer have surviving stories and customs associated with them but they are still important to Indigenous survivors, whether from that area or not, and increasingly to the wider Australian community. To limit the scope of the legislation only to heritage associated with ‘traditional laws and customs’ is similar to the problems of Governments in the past creating policies for ‘full-bloods’ and others. Who becomes the arbiter of someone’s ‘traditional-ness’?
- The proposals that seek to bring greater up-front consultation and planning in Indigenous heritage is supported as from our experience, when developers and Indigenous people discuss issues early on, there is usually scope for heritage conservation and the development to go hand in hand.

## Proposal 2: Terminology – new definitions

New definitions could be put in the legislation. The definitions clarify the basis on which areas and objects can be protected under the legislation. The new definitions could use the concept of ‘traditional laws and customs’. This would match the *Evidence Act 1995*. The definitions would no longer need to rely on the concept of ‘particular significance’, which is vague. Possible definitions appear on page 14 of the discussion paper.

★ **Question 2.1: Overall, what do you think about this proposal?**

- There are serious flaws with using the *Evidence Act 1995* definition. There is considerable confusion over the definition of Torres Strait Islander, for example, where it is questioned whether an “inhabitant” of the Torres Strait leaves the island, are their “descendants” still considered Torres Strait Islander?
- The definition does not take into account intellectual property specifically, although it is implicit in using the terms “knowledge”. The definition of objects and areas does not take into account plants and animals, which are crucial to Aboriginal Law.
- The lack of individual rights within the definition is a flaw. Aboriginal society is not a democracy. Individuals own places, sites, objects, knowledge and rights. The lack of individual rights means that a “traditional owner” must rely on group consensus to define their own status. It does not take into account that one person may be the last speaker of a language or owner of knowledge.
- The use of the term “traditional Aboriginal” is very different from ‘Aboriginal traditions’. “Traditional Aboriginal” is a narrow definition that cannot be legally sustained, and constantly proven with failed Native Title claims, whereby continuity or narrow standards are applied as the test. How can someone who is a member of the Stolen Generation, or moved from Traditional Lands, be considered “Traditional Aboriginal” under the proposed reforms? Mabo is a perfect example where traditional practices of adoption were not recognised by the Court, therefore leaving Mr Mabo no option but to withdraw from the process.
- How can ‘contemporary’ practices, such as the Plane Dance from Doomadgee, be considered “traditional” under the proposed changes? Furthermore, places such as The Day of Mourning Building in Elizabeth St, Sydney, have been protected under heritage legislation (only after a prolonged fight against the NSW Heritage Office), but would not be considered to be “traditional Aboriginal” practices. Post-contact practices must have a place within the heritage reforms.
- Aboriginal people in urban areas may consider themselves as having Aboriginal traditions, but may not necessarily be “traditional custodians”. For the historic Aboriginal people, who make up the majority of the Aboriginal populations, choices about staying on country or continuing traditions were not options under the Mission Reserves, Stolen Generations and other government policies that removed people and rights to culture. The new proposals make standards of proof almost impossible for the historic populations. The overemphasis of ‘traditional’ has been challenged around the world and Australia is behind on this (refer Young, *The Trouble with Tradition*, 2008).
- There should be an acknowledgement that many important heritage places no longer have surviving stories and customs associated with them but they are still important to Indigenous survivors, whether from that area or not, and increasingly to the wider Australian community.
- The proposed Federal definition of “traditional Aboriginal” is not compatible with the existing NSW Land Rights legislation, whereby “traditional custodians” are not required to be members of a Land Council, nor are their opinions or knowledge needed for decisions to be made about development or other activities. Would the Federal legislation override Land Rights requirements for Indigenous corporations or other Aboriginal heritage bodies?
- It is recommended that the definition should remove the phrase “particular significance”, but keep in “Aboriginals in accordance with Aboriginal tradition”.

- ★ **Question 2.2: Would the proposed definitions leave out any areas and objects that are covered by the current legislation because they are ‘of particular significance to Aboriginals in accordance with Aboriginal tradition’?**

yes – please explain why                       no

The proposed definitions appear to give greater weight to ‘traditional laws and customs’ in determining a place’s significance than the existing legislation. If this were the case, there would be areas that would not meet the new definition because the local people may not be able to provide sufficient ‘proof’ of a continuity of customs for that place. It would also result in a greater number of future applications being rejected for the same reason.

Areas covered by the Aboriginal Heritage Office are largely without any legally recognised traditional owners, therefore all heritage items in these areas would not be subject to the legislation......

- Question 2.3: Would the proposed definitions apply to additional areas or objects that are not covered by the current legislation?**

yes - please explain why                       no

The new wording may make it easier for some groups who have been fortunate to have maintained more of their ‘traditional laws and customs’. This is to be applauded. It may, however, give people the impression that the legislation will further disenfranchise those who have lost more of their ‘traditional customs’......

### **Proposal 3: Accreditation**

Accreditation is a method for promoting national standards for Indigenous heritage protection laws in the states and territories. The new legislation could allow the Australian Government to accredit individual states and territories if their laws are effective. Accreditation would mean the Australian Government would not intervene in a decision of an accredited state or territory. This would give the states and territories an incentive to meet the standards and have effective legislation. Details of how this could work are set out on page 15 of the discussion paper.

Note that the content of possible national standards is covered separately under Proposal 4.

- ★ **Question 3.1: Overall, what do you think about this proposal?**

- The AHO believes this proposal can be beneficial to Aboriginal people, developers, proponents and other interested parties. Accreditation is the best way to promote co-operative relationships to protect Aboriginal heritage places, objects and intellectual property. Accreditation must be accompanied by strong regulations, staff training, ample funds and resources, capacity to build understanding and skills and Federal oversight.
- The accreditation would only work if the national standards are better or equal to existing state standards. Currently in NSW all Aboriginal sites or ‘objects’ are protected by legislation, regardless of land tenure and regardless of any ‘traditional knowledge’ or association with them. If the current proposed definitions were brought in as standard, much of the heritage of NSW would lose blanket protection as there would be difficulty finding legally recognised traditional owners who could apply to protect them.

★ **Question 3.2: Could the proposed method of accreditation be improved?**

yes - please explain why       no

The principles of accreditation must operate across the board. This means that if, for example, a standard requires appropriate consultation, then standards must apply to the person undertaking the consultation (such as demonstrating a genuine understanding of the issues), must apply to the ministerial staff (such as cross-cultural training, Aboriginal staff) and must apply to the Indigenous person or group who are being consulted with.

**Question 3.3: If the Australian Government Minister could provide advice for ministers of accredited state or territories to consider when making decisions, could this help make accreditation work effectively?**

yes       no - please explain why not

The Australian Government Minister must provide advice to ministers on decisions. This is part of the review, feedback and improvement processes, which operate under normal conditions. The Australian Government Minister must be responsible for the decisions that are made under accreditation. The Australian Government Minister must not be perceived by Aboriginal people as neglecting his or her role in over-arching decision making.

★ **Question 3.4: Do you think that periodic reviews would help make accreditation work effectively, especially if the Minister can add to the standards for accreditation?**

yes       no - please explain why not

Periodic reviews are necessary, particularly in the first instance of applying new legislation. There will be issues in how the accreditation is rolled out and Aboriginal people will need a point of contact to discuss how the legislation is affecting them or their community. There needs to be an open and ongoing process of dialogue to improve, and more importantly, to share in information and methods of implementing the new proposals.

## **Proposal 4: Standards**

The new legislation could specify standards for the states and territories to meet before they could be accredited. Possible standards are set out on pages 18–22 of the discussion paper. The proposed standards aim to identify the positive outcomes that good legislation can achieve, including strong protection for traditional areas and objects, a central role for traditional custodians in decision-making, and efficient, fair and transparent decision-making processes.

★ **Question 4.1: Would these standards, if adopted, help to improve the ways that Indigenous traditional areas or objects are protected in your state or territory?**

] yes

] no - please explain why not

The standards would help improve protection of Aboriginal heritage, *provided* that consultation and negotiation takes place with *all* Aboriginal people who have a legitimate interest in an area that may be affected by a proposed development and not just the traditional owners. The AHO is a case in point of how an effective, efficient and inclusive negotiation and review process may lead to outcomes that all parties, including the proponent, are satisfied with. This process is not restricted to Traditional Owners, but draws on all available viewpoints and expertise.

In the AHO example, internal assessments and reviews of particular activities are carried out based on LGA wide studies and policies. Trained staff reviewing the activities ensure that potential heritage issues are picked up without increasing the number of unnecessary and costly assessments and studies to landowners and developers.

It should be noted, however, that if the standards left out areas and objects that have no legally recognised traditional owners, this would leave out much of the heritage of many states.

Also, the exemption to the hearsay and opinion rules under the *Evidence Act 1995* could be in conflict with the need to protect secret/sacred material or knowledge or transparency in decisions. Clear and strong regulations about the use of hearsay and opinion rules in heritage protection must be made to ensure that Aboriginal people are fully aware of their rights.

Also, it is unclear whether Proposal 5, those “traditional custodians” who are legally entitled to apply for heritage protection, will form the basis for accreditation under Proposal 4. Identification of “traditional custodians” obviously forms part of the accredited process, however, it is not clear as to how this would operate. Proposal 5 is for unaccredited states and territories, yet it seems that the principles would have to be the same or similar for Proposal 4 to work. If the same procedures are to apply, then this proposal for identifying “traditional custodians” will have adverse effects on individuals and groups.

**Question 4.2: Do the standards need to be specified differently, or in more detail?**

\* ] yes - please suggest changes

] no

The standards need to make clear that all Indigenous heritage is important and any places or objects that are of significance to the Aboriginal community can be protected, not just those that are narrowly defined as ‘traditional’. In this case, there are models that can be used to help governments implement the legislation. For example, the Aboriginal Heritage Office (AHO) operates on principles similar to the proposed accredited standards. Indeed, the AHO could be likened to an accredited body operating at the LGA level. When the AHO standards are applied, there are no adverse affects to wider legislation, nor are the operating costs excessive. The AHO has created savings in expenditure and ongoing maintenance costs within the co-operative relationship between the 9 LGA’s of the partnership (8 from the northern Sydney region and Armidale Dumaresq Council in northern NSW). Please see Appendix 1 for more information on the AHO method.

## Proposal 5: Traditional custodians

The new legislation could recognise that many traditional custodians have achieved legal entitlements to their heritage, for example native title rights. Other people should not be able to apply to protect that heritage. Details of how this could work are set out on page 23 of the discussion paper.

★ **Question 5.1: Overall, what do you think about this proposal?**

The AHO is supportive of the proposed changes however there are a number of concerns about how it may work in practice:

1. there is a difference between “who can speak for country” and “who may advocate Aboriginal interests” – the broader Aboriginal community who may have a stake should not be excluded.
2. relying on existing legal processes like native title is costly and arduous:
3. there are the difficulties of Aboriginal people in documenting or “proving” traditional ownership:
  - The use of existing legal processes makes good sense, however, there are many hurdles to gain this level of accreditation. There are many individuals and groups in Australia who have wide community support to act as traditional custodians, but who cannot meet the onerous criteria of these processes. This proposal is fraught with problems. For example, Tasmania has an ‘Eligibility’ register, where only those ‘eligible Aboriginals’ can be part of government processes. At the last census in 2006, there were 20,000 people registered as Tasmanian Aboriginal, however, the Office of Aboriginal Affairs only recognises 5,000 of those people as being ‘eligible Aboriginals’. In one recent case, a person who applied for Aboriginal housing was denied as ‘Aboriginal’, even though their immediate kin is on the list.
  - Will legally recognised status be inherited? Who has the power to determine who is legally recognised? What types of standards and tests will apply as to who becomes legally recognised?
  - Proposal 5 appears to be about minimising vexatious protection applications from individuals. However, there is nothing stopping individuals from forming their own heritage body under corporation law to apply for protection.
  - The proposed reforms would be better aimed at protecting the individual rights over the group, which would reduce the likelihood of a rapid increase in heritage groups being formed. This would give the states and territories, whom become accredited, the right to direct heritage works through the appropriate bodies.

★ **Question 5.2: Does it make sense to rely on existing legal processes like native title processes to identify traditional custodians?**

[ ] yes

[ ] no - please explain why not

- In cases where the wider community may recognise an individual or group as having custodial rights, but where they cannot meet Commonwealth or state criteria, it would seem appropriate to have some flexibility to allow the Minister and Department the option of receiving wider submissions. After all, the loss of cultural knowledge and

continuity is not something Indigenous people have chosen but is a result of non-Indigenous policies.

- There needs to be an open process of self-identification. An open web page where interested bodies or individuals can register themselves as Aboriginal, providing means of identification that does not rely on group consensus, is one way in which transparency and fairness can apply.
- However, this does not detract from other processes of identifying Aboriginal people for the purposes of the Act, such as Native Title legislation and the Land Rights Act. Although, the Land Rights legislation in NSW does not require a “traditional custodian” to be a member of the Local Aboriginal Land Council, nor does it require “traditional custodians” to be consulted in decision making processes. On the whole, this process does not seem to have adverse affects on heritage protection. Therefore, to make only “traditional custodians” the legally entitled consultative group would create hardship for those communities and individuals who operate under different principles.

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★ **Question 5.3: Is it fair to allow only recognised traditional custodians, using their representative bodies and processes, to apply to protect traditional areas and objects, if there are recognised traditional custodians?**

yes

\* no - please explain why not

- Given the many limitations on being able to qualify as a traditional custodian, there is much scope for those who are not considered ‘eligible Aboriginal’ people to still have a right to be consulted. However, there needs to be mechanisms to reduce the likelihood of vexatious applicants.
- The application process could provide a section asking why that person or group has applied for protection over the rights of the recognised native title applicants. The checks of natural justice, fairness and transparency should remove those applications where individuals or bodies are making vexatious applications on the balance of evidence.
- There are an increasing number of Indigenous heritage professionals and others who may be working ‘out of country’ but who can contribute their experience to an issue and to have a policy that would automatically discount their input would be a shortcoming.

**Question 5.4: Should Indigenous persons who are not native title parties be able to apply for Commonwealth heritage protection over areas where native title rights and interests have already been recognised?**

yes - please explain why       no

There should be flexibility in the legislations as there may be occasions where native title holders have not had access to all relevant information on an issue. Additional information should be allowable, but steps put in place to avoid vexatious applications.

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- ★ **Question 5.5: Are prescribed bodies corporate the appropriate organisations to apply for Commonwealth heritage protection over areas where native title rights or interests have been recognised?**

yes

no - please explain why not

N/A

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## **Proposal 6: Indigenous land use agreements (ILUAs)**

The new legislation could support native title holders by not overriding a registered ILUA. Details of how this could work are set out on page 25 of the discussion paper.

- ★ **Question 6.1: Overall, what do you think about this proposal?**

ILUAs should, where possible, be respected provided that they are founded on the best possible information for an area. Flexibility should be maintained to allow applications where good information suggests significant heritage may be impacted that was not considered in the ILUA. Indigenous people have a history of being let down by non-Indigenous governments, institutions, companies and individuals. Giving Indigenous people every available safeguard and safety net from those who would, for whatever reason, change an agreement is not unreasonable given the circumstances.

**Question 6.2: Is it fair to stop applications to protect traditional areas and objects from an activity if the activity is allowed under a registered ILUA?**

yes

no - please explain why not

N/A

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- ★ **Question 6.3: If not, is some other reform needed to prevent applications from impacting on ILUAs?**

\* yes - please suggest reform

no

N/A

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- ★ **Question 6.4: Would this proposal complicate ILUA negotiations by encouraging people who are not native title parties to become involved in negotiations?**

yes - please explain impacts

\* no

N/A

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**Question 6.5: (a) Would ILUA negotiations be more difficult if native title parties could not ask the Minister to protect traditional areas and objects from activities permitted under an ILUA?**

yes - please explain why       no

Indigenous people have a history of being let down by non-Indigenous governments, institutions, companies and individuals. Giving Indigenous people every available safeguard and safety net from those who would, for whatever reason, change an agreement is not unreasonable given the circumstances.

★ **(b) Or would the ILUA be a stronger agreement as a result?**

yes       no - please explain why not

N/A

## **Proposal 7: Discovered remains**

To reduce duplication of state and territory laws, the requirement to report all discoveries of Indigenous personal remains to the Australian Government could be removed, except for discoveries on land that is managed by the Australian Government. Details are set out on page 26 of the discussion paper.

★ **Question 7.1: Overall, what do you think about this proposal?**

Provided that state and territory laws adequately address the issue, this is supported.

**Question 7.2: Do the states and territories have adequate processes for reporting discovered human remains that are suspected to be those of Indigenous people, and to ensure that discovered Indigenous personal remains are treated in a culturally sensitive manner?**

yes       no - please explain why not

The handling of Indigenous remains in NSW has improved significantly since the 1980s and appears to operate effectively, with Police called in first, followed by the local Aboriginal community with Department of Environment and Climate Change officers. The Aboriginal Heritage Office (AHO) is often called in for issues in its partner Councils due to its experience in this area and having Aboriginal heritage staff at local government has assisted in people coming forward about finding remains. There are still many anecdotal cases where the finding of suspected Indigenous remains has been kept quiet and the site destroyed. More effort needs to be made to give confidence to developers and landowners that human remains need to be

respected and finding them isn't an automatic costly delay to a project. DECC used to have an emergency remains fund and this should be improved to assist in these cases.

The AHO can't comment on other states.

- ★ **Question 7.3: If not, how could Commonwealth legislation be used to encourage improvements without always overlapping state and territory responsibilities?**

A set of guidelines, best practice standards, could be developed at Commonwealth level to ensure states and territories are meeting their responsibilities.

## Proposal 8: Secret sacred objects and remains

The new legislation could address key Indigenous concerns about some traditional objects by making it an offence to display these objects in public. Probably this would require new definitions such as 'secret sacred object' and 'Indigenous personal remains'. Details are set out on page 27 of the discussion paper, including examples of situations where it might be necessary to prohibit or allow display.

- ★ **Question 8.1: Overall, what do you think about this proposal?**

This is long overdue. The new legislation should require those individuals and institutions that have failed common courtesy to remove sensitive items from display to do so.

**Question 8.2: Are there other situations where it might be necessary to prohibit or allow display?**

yes - please describe       no

The AHO has contacted NSW authorities a number of times about the illegal selling of Indigenous heritage items through the internet, such as on eBay. This will continue to come up until the community is aware of the laws and there is enforcement by government agencies.

- ★ **Question 8.3: How would prohibiting the public display of these objects affect your business?**

The AHO has a small cultural centre and keeping place, with items donated by staff and on-loan from museums and so on. These items are all checked and no item that is considered inappropriate is displayed. The proposed changes would not negatively affect the way the AHO operates. Indeed, the AHO exhibit includes a section on the unethical removal of human remains throughout Australia's history by explorers, settlers and scientists to illustrate how many museum

items have been obtained. There are so many topics that can be easily promoted without the need for sensitive materials. It would be good to provide some guidance to institutions that hold huge collections of Indigenous heritage but are reluctant to share this with its rightful owners.

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- ★ **Question 8.4: Would the proposed definitions exclude any objects that might need to be protected from public display because they have a special meaning in Indigenous traditions?**

yes - please explain why       no

Where 'traditional laws and customs' have not survived in a particular area, but where the significance of an item can be inferred from elsewhere, the definitions should make it clear that these items should still be treated carefully. For example, an item may be not known to have any particular significance by a local community, but in another Indigenous community be seen as secret and not for display. If the item becomes a source of offence to visitors, there should be scope in the legislation to require people to house an item in a more sensitive way.

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## Proposal 9: Applications

In states and territories that are not accredited Indigenous Australians could apply to the Australian Government to protect traditional areas and objects from activities that are not already dealt with in a registered ILUA. The new legislation could set out what information to include in applications and say when applications could not be accepted. Details are on pages 30 of the discussion paper.

★ **Question 9.1: Overall, what do you think about this proposal?**

An application form that clearly outlined what was required would certainly assist the process. Allowances should be made for those people who may have difficulty filling in the application and it should not be dismissed out of hand without some assistance being given in those circumstances......

★ **Question 9.2: Does the legislation need to specify the content of applications?**

yes                       no - please explain why not

This could be included as a standard in the accreditation process and/or be outlined in any accompanying regulations or policies.....

★ **Question 9.3: What other information might need to be included in an application?**

- Assistance needs to be provided to Aboriginal people to apply for protection. Hardship should not be used as a standard, as most Aboriginal people and communities live under conditions of hardship.
- If the states and territories become accredited, then the Federal government must make minimum standards for resourcing the offices' that will manage heritage applications. If funding is sufficient, then 'legally recognised traditional custodians' should not need to apply for assistance.

**Question 9.4: Are there other reasons why the government might not be able to accept an application?**

yes - please describe                       no

N/A.....

## Proposal 10: Conferences

The new legislation could set out the procedures for responding to applications. The procedures could include specifying which people the government would need to contact, because their legal rights might be affected. Following this contact the government could hold conferences to try to resolve problems. Details are on pages 33 of the discussion paper, including details of the process for setting up and running the conferences.

★ **Question 10.1: Overall, what do you think about this proposal?**

The AHO supports the idea of out of court mediated consultation and welcomes the inclusion of any other Indigenous party – other than the applicant – who has a right or an interest in the area/object.....  
.....

## Proposal 11: Sensitive information

To address Indigenous concerns about traditional knowledge, the Australian Government could have a power to direct the people involved in an application to protect culturally sensitive information. This would also apply to commercially sensitive information. Details are on page 36 of the discussion paper.

★ **Question 11.1: Would this new power provide adequate protection for sensitive information?**

## Proposal 12: Interim protection

There could be more clarity around the rules for providing protection on a short-term basis in an emergency. For example there could be more clarity around the reasons for providing and revoking this form of protection, the timing, and who would need to be informed. Details are on pages 37 of the discussion paper.

★ **Question 12.1: Overall, what do you think about this proposal?**

★

★ **Question 12.2: Considering proposal 9, is 48 hours sufficient time to lodge an application for protection?**

yes

no - please explain why not

48 hours is not sufficient time to lodge an application for protection. This should be extended to 96 hours given that the increased level of information required (including mapping) as well as the difficulties Aboriginal people often face in terms of completing often complex paperwork.....  
.....

## Proposal 13: Longer-term protection

The rules for providing and revoking longer term protection could be clarified to strengthen the basis for the Australian Government Minister's final decision. For example there could be more clarity around the reasons for providing and revoking this form of protection, including the factual basis of the decision. Details are on pages 41 of the discussion paper.

★ *Question 13.1: Overall, what do you think about this proposal?*

***Question 13.3: Is the proposed method for preparing the statement of facts a fairway to assess the facts about the situation***

] yes

] no - please explain why not

This method is fair, if a point is included in the “statement of facts” which establishes the likely effect of making a Protection Order in these terms on the cultural, social, economic and environmental welfare of the **wider** Aboriginal communities.....

## Proposal 14: Penalties and enforcement

The discussion paper includes a range of suggestions for how to ensure that the new legislations enforced adequately. Details are on pages 46 of the discussion paper.

★ ***Question 14.1: Are there other, better ways to promote compliance and enforce protection?***

\* ] yes - please describe

] no

- There needs to be an element of compensation for any destruction or impact on sites. The nature of Aboriginal heritage means that, for example, rock art cannot be reproduced or replaced once destroyed. Penalties must apply to those who destroy heritage, however compensation needs to be made to those people who have lost their heritage.
- Education and Training of the wider community, as well as specific industry groups would go a long way in promoting compliance. People protect what is valuable and people value what they understand. The AHO's approach is to provide the wider community with information on the Indigenous heritage of their local area so that they can make an informed decision on its importance. The results have been almost exclusively positive.

## Proposal 15: Reviews

The effectiveness of the legislation, especially the accreditation scheme, could be reviewed at regular intervals to ensure it is achieving its aims. Details are on page 49 of the discussion paper.

★ **Question 15.1: What would be the best intervals for reviewing the legislation?**

- Monitoring and feedback mechanisms must be part of any regulations and reforms. Monitoring is crucial within the first three years, and on a six month to yearly basis, to ensure that the ‘teething problems’ are addressed.
- There must be accessible ways for Aboriginal people to contribute to the processes of review beyond the standard practices of submissions at any time. Fixed legislation cannot overcome the fluid nature of culture, responses to heritage and the changes wrought by other Federal legislation, such as the Intervention. Therefore, Aboriginal people must have points of contact and ways in which to respond to changes.

★ **Question 15.2: What would be the best way to review the effectiveness of accreditation?**

- There must be ministerial accountability, such as State of the Environment reports, or a specific body set up to deal with issues as they arise.
- Aboriginal communities or individuals must be able to have instant ways to address a problem or alert the relevant body. An open web page where people can make comments is a good way for people to undertake comment within their own timeframes.

★ **Question 15.3: What specific aspects of accreditation would need to be reviewed?**

- The abilities and skills of those who are implementing the processes at the local level, including ministerial staff and Aboriginal communities;
- the effectiveness of the agreements as to the standards proposed; the ability of the minister to communicate with Aboriginal people and bodies;
- the feedback mechanisms for Aboriginal people to comment on the legislation; the ability for the Federal Government minister to revoke or call in powers;
- the means by which Aboriginal or Torres Strait Islander people are identified as the “traditional custodians”
- use of the hearsay exemption in making determinations



## APPENDIX 1

### THE ABORIGINAL HERITAGE OFFICE CASE STUDY

This case study is presented to the Department as a working program that is successful, goal orientated, outcome focussed and built around the commitment of 9 Local Government Areas (LGA) in cooperation with the Local Aboriginal Land Council and Aboriginal community. The Aboriginal Heritage Office program should be considered as an example of how heritage management can succeed. If Aboriginal heritage can be protected, with minimal conflict in the most populous region of Australia and applying to the most expensive real estate, then the AHO standards can be applied in other regions.

### HISTORY

As with many successful programs, it is people, rather than process, that spark the need for action. In this case, in 1996 the Aboriginal community within the region of the Metropolitan Local Aboriginal Land Council (MLALC) could only offer restricted and localised services to the Councils in its area for interpretive walks of heritage sites, due in part to resourcing issues. The culture tours were informal, but crucial to understanding how heritage can value add to the wider community, why it needed to be protected and how Aboriginal people can work with others to promote the knowledge of those sites and places. In particular, two pro-active Councillors from North Sydney and Willoughby decided to implement heritage programs within their respective regions, requesting the then Aboriginal Sites Officer from MLALC, David Watts, to assist them. A Site Management report and education program for North Sydney Council was carried out under an initial 9 month contract in 1998.

The success of that short-term project led the North Sydney Council to consider further works, whereby Mr Watts was asked to design a position that partnered four LGA's to share costs and adopt the same site management and education/training principles. North Sydney, Willoughby, Lane Cove and Warringah committed to this framework in 2000.

The challenges in establishing an effective Aboriginal Heritage Office at the local government level are high. At that time there was no one employed at the local government level in Australia dealing specifically with Aboriginal heritage issues. Even now there are few, if any, directly employed for this purpose. Councils are not familiar with Aboriginal heritage issues, furthermore, there was no template for this new position and the position was to be shared by four different councils, each desiring to maximise the input of their new employee into their own particular projects and tasks. Despite some early teething problems and the many challenges facing this new position, a large number of projects and more regular activities were successfully completed. The position is now a benchmark for others to follow, including state governments.

### PROGRESS

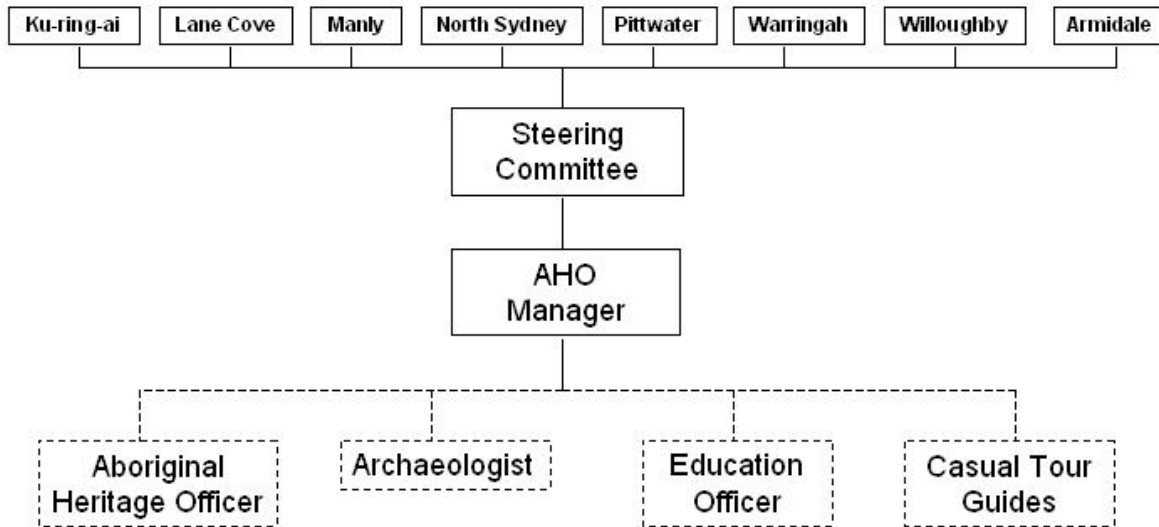
The success of the Office is reflected in its expansion. Manly Council employed their own Aboriginal Heritage Officer on a part-time basis but realised they could get greater service delivery from joining the AHO, which they did in 2005. In 2006 Ku-ring-gai Council signed up, Pittwater joined in 2007 and Armidale Dumaresq Council came onboard in August 2008. Ryde Council will join in March 2010. Other Councils in the northern Sydney region and beyond have

also expressed an interest in joining the program or getting assistance to try and establish their own program.

There are now a total of 9 LGA's who have signed an MoU with the AHO. The services that are offered, together with the organisational structure, allow the AHO to work within any region of NSW. Therefore, seemingly disparate LGA's, i.e. Manly and Armidale-Dumaresq Councils, can share the same Site Management planning systems, access equal resources, seek easy consultative services with the Aboriginal community and minimise disruption to planning, infrastructure and other projects.

## ORGANISATIONAL STRUCTURE

Part of the success of the AHO is the organisational structure, whereby the Aboriginal Heritage Office is made up of the Aboriginal Heritage Manager (AHM), Mr David Watts, and other staff, according to need and resources. The Manager reports to a Steering Committee made up of representatives of each Council. The general administration, such as salaries, accounts and so on, has been overseen by North Sydney Council, who volunteered this service. The benefits of one Council overseeing all administration allows the staff to work under the same conditions, whilst located within different LGAs.



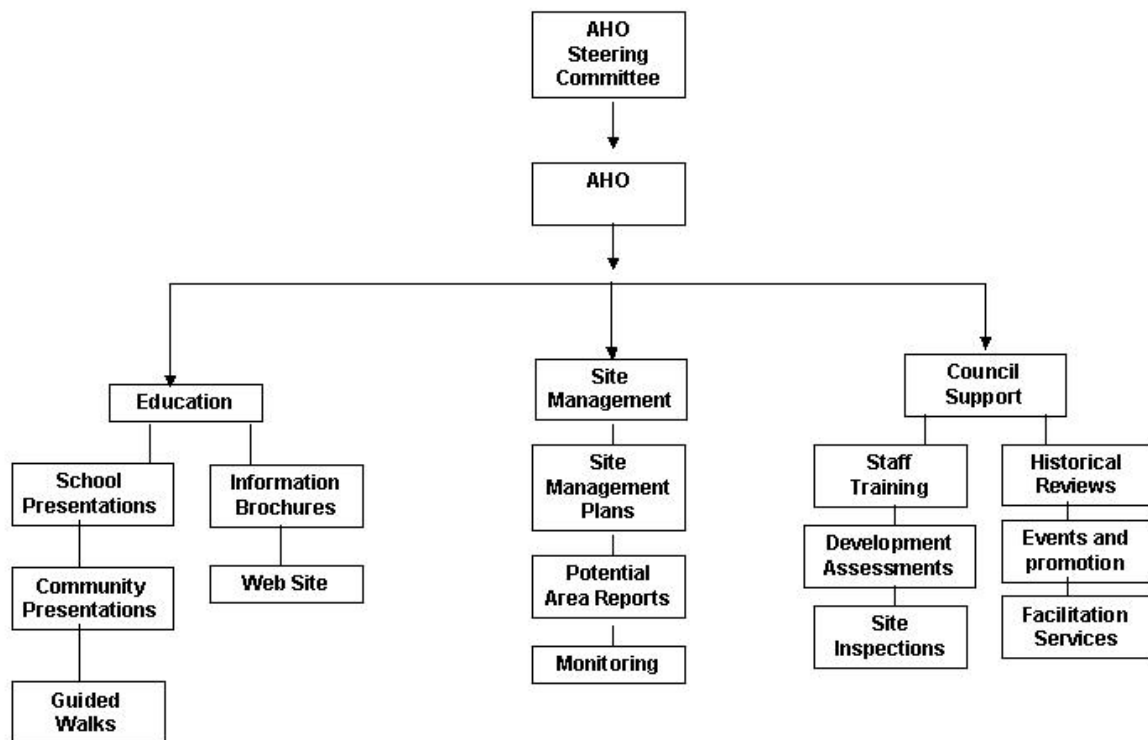
## FUNDING

Each Council provides an annual agreed amount, which has largely remained static but increasing in line with CPI, and a Memorandum of Understanding is signed as a commitment every 5 years. The AHO has also sought additional funding from state and federal government agencies to augment the budget and further the outreach activities possible. In particular, the Heritage Branch of the NSW Department of Planning (formerly the NSW Heritage Office) has supported many funding bids over the years, and the federal Department of Environment, Water, Heritage and the Arts (DEWHA) has also awarded several grants.

These additional funds allow the AHO to contract additional staff and consultants to carry out projects that help in the broader mission of the office. While these funds have allowed for successful outcomes, getting funds this way can take time and there is no guarantee that the bid will be successful. Even with a successful bid, there are often significant delays before funds are actually cleared and available and this can have repercussions on the payment and availability of staff and consultants.

## AHO PROGRAMS

Over the years the AHO has become a leader in Aboriginal heritage management and protection through a diverse range of innovative programs, projects and activities. The primary purpose of the AHO is to protect irreplaceable Aboriginal heritage sites. This is done through building Aboriginal heritage management frameworks at the local government level that cover site management, education and community liaison.



Another key role is to give Aboriginal and non-Aboriginal people within these LGAs an avenue to discuss issues or concerns they may have. The AHO liaises and works closely with the Aboriginal custodians of the land on all Aboriginal heritage issues.

Education and training are crucial components of site protection, and the AHO has established training programs for LGA staff and the public and a Schools Program to help children appreciate the unique culture of Aboriginal people. Providing material for educating the public, such as brochures, is also an on-going activity and has resulted in the Education Centre and Keeping Place being established. The AHO now has a large office space that caters to the public.

In association with the LGAs, talks, walks and activities are undertaken to enhance appreciation of Aboriginal culture in the wider community.

## ABORIGINAL HERITAGE MANAGEMENT

One of the most important tasks of the AHO has been reviewing the Aboriginal heritage planning function of each LGA and setting up new and improved systems. The legislative responsibility for the protection of Aboriginal heritage in NSW remains with the Department of Environment and Climate Change<sup>1</sup> (DECC), however, as a land manager and approval body, local Councils have responsibilities to protect Aboriginal heritage. As environmental planning legislation requires local governments to consider Aboriginal heritage as part of the environmental impact assessment process, it is important that there are clear policies and procedures in place, supported by staff who are trained in how to implement them. As Aboriginal heritage has generally been poorly understood in NSW, this task requires regular reinforcement. The main focus has been in updating information about the known Aboriginal heritage resources, planning for potential Aboriginal sites, and training staff and the local community.

The table below provides a comparative look at the way New South Wales local governments deal with Aboriginal heritage management compared to how Aboriginal heritage management and planning is undertaken by the AHO. The summary, whilst only a generalisation, still illustrates a danger that other LGAs suffer, that is, a cyclical knowledge gap. If a Council does actually initiate any Aboriginal heritage study there is a risk of this cyclical pattern, whereas the AHO's process is more efficient and provides on-going support and refinement of data.

	<b>Regular NSW Council Process</b>	<b>AHO Process (Best Practice)</b>
1	Council instigates Aboriginal Heritage Study	Council joins AHO partnership
2	Council seeks additional funds (e.g. from Heritage Branch, Department of Planning).	AHO commences Aboriginal Heritage Study, Potential Areas Study, Staff Training, Community Education Activities.
3	Council selects consultants for study.	
4	Study is completed	Studies are completed.
5	Site information is updated and put on GIS. Sites not found, inaccessible or in private property are not updated or partly updated.	Site information is updated and put on GIS. Sites not found, inaccessible or in private property are updated according to best available information. Monitoring is scheduled for future attempts to update and refine data.
6	Recommendations made by consultants are investigated by Council staff. Limited support is available from original consultant due to high consultancy fees. Council plans to instigate recommendations are hampered by lack	Recommendations made by AHO are investigated by Council staff. AHO provides ongoing support and training to Council staff. Support includes: <ul style="list-style-type: none"> <li>• Regular data updates.</li> <li>• Targeted training to outdoor and planning staff.</li> </ul>

<sup>1</sup> The NSW DECC was formally the Department of Environment and Conservation and prior to 2003 was the National Parks and Wildlife Service.

	of in-house expertise.	<ul style="list-style-type: none"> <li>• Basic and advanced training.</li> <li>• Day to day advice on all Aboriginal heritage issues and avenues of approach on Indigenous issues.</li> </ul>
7	Aboriginal Heritage Study becomes largely forgotten or is considered too complex to implement.	Aboriginal Heritage Study and other reports are 'living' documents that are updated, improved and fully supported.
8	Council seeks clear direction on how to address its Aboriginal heritage responsibilities – considers a new Aboriginal heritage study and repeats cycle.	Council responsibilities for Aboriginal heritage are strengthened with ongoing support, training, liaison and community education activities.

## COUNCIL SUPPORT

As the Aboriginal Heritage Manager (AHM) position and the AHO are based in-house as an arm of the LGA, all activities are aimed at assisting and benefiting the LGA and the local community. AHO staff work to provide each partner LGA with the resources, skills and tools to best manage Aboriginal heritage in that area. Initially the AHM attended many committees and sub-committees in order to provide this support directly. It was soon found that the sheer number of individual committees was taking up most of his time and he was unable to devote enough time to completing the Site Management Plans and other key strategic documents. The emphasis therefore shifted to providing more training and support to increase general awareness of Aboriginal heritage issues so that LGA staff would automatically include them in their day to day work. This has been very successful.

## STAFF TRAINING

Training of staff forms an important component of the AHO's role in promoting awareness of Aboriginal heritage and its protection. LGA employees are often working in close proximity to Aboriginal sites in the course of their duties and in some cases will find previously unrecorded sites. Staff training covers a range of topics including identifying and understanding Aboriginal sites, culture, politics and legislation. Staff involved in bush regeneration or weed removal must be trained in site identification and cultural awareness. Planning and assessment staff need more technically orientated training, that is, to understand the concept and use of the AHO's Aboriginal heritage GIS site layers and Potential Area mapping when working on planning and development issues. Training involves periods of coursework and fieldwork that are varying in length depending on specific requirements.

## REFERRAL PROCESS

LGAs have to rely on their own in-house expertise and information to be able to assess whether Aboriginal heritage issues may come up for a particular development or LGA activity. Given the generally low level of awareness of Aboriginal heritage, this has meant that very few activities attract this kind of review. For partner LGAs, the AHO provides regular training for planners and outdoor staff in order for these staff to have a better understanding of where Aboriginal sites are likely to be, and therefore implement appropriate actions to ensure any site or potential area is not

impacted. The AHO encourages LGAs to develop an internal vetting process so that trained staff can identify DAs or LGA works that are more likely to have an Aboriginal heritage issue and these can be scrutinised more closely and perhaps referred to the AHO for specific advice. Developments that are very unlikely to have an impact are not referred to the AHO. Any issue where an Aboriginal site would be impacted by a development or activity is referred to the NSW DECC for the appropriate permit and approvals.

## **FUTURE**

The success of the initial program has expanded beyond the expectations of those two original Councillors and the Aboriginal community. Indeed, the AHO does not actively search for partner LGAs as the reputation and good works of the AHO attracts LGAs who wish to improve and streamline their own services.

This program is now cemented within the Councils' standard procedures and has gone beyond being a pilot program or exercise. It is seen as a crucial part of the daily services and activities that deliver the community value for money without fuss or extravagance.

The collaborative nature of the project, together with a streamlined process of clear pathways, has allowed Aboriginal heritage to be protected in ways that reduce conflict, normalise heritage procedures in LGA systems and give the wider community a context for the importance of Aboriginal heritage. The processes associated with the AHO are not 'bolt on' policies, but are now part of the mainstream referral system.

The AHO will expand further as more LGAs sign up to the program. The AHO invites the Department to investigate its success in the most urbanised area in Australia. Interestingly, much of the area that the AHO works in has no group or individual who could satisfy the current definitions of following 'traditional customs', yet there are many Indigenous people working to protect the surviving heritage. The proposed changes to the heritage legislation should be able to incorporate the significant heritage of an area and those working to protect it. This is part of the 'tradition' of Indigenous people who are seeking to maintain a link between pre-colonial times, current survivors and future generations.