



Aboriginal Cultural Heritage Reforms Phase 3 Consultation

Report on written submissions

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1. Introduction

This report presents an overview of the feedback received through written submissions from phase 3 of public consultation on the Aboriginal cultural heritage (ACH) reforms.

Other information on the results of the phase 3 consultation process is available via:

- a fact sheet which provides an overall summary of the feedback received (www.environment.nsw.gov.au/resources/cultureheritage/aboriginal-cultural-heritage-reforms-factsheet-160717.pdf)
- an overview of the feedback received through an online questionnaire (www.environment.nsw.gov.au/resources/cultureheritage/aboriginal-cultural-heritage-reforms-questionnaire-results-160700.pdf)
- an overview of the feedback received in public workshops (www.environment.nsw.gov.au/resources/cultureheritage/aboriginal-cultural-heritage-reforms-workshops-report-160702.pdf).

1.1 Submissions process and format

Respondents were invited to provide written submissions via the NSW Government's *Have Your Say* website, via mail, email, voicemail or fax between September 2013 and March 2014.

People were asked to respond to the proposed ACH model as outlined in the document *Reforming the Aboriginal Cultural Heritage System in NSW: A NSW Government model in response to the ACH Reform Working Party's recommendations and public consultation*. The document was structured around themes and respondents were asked for feedback on these. The themes included:

- stand-alone legislation, preamble and definition
- Aboriginal committees and who makes decisions
- tools for conservation
- links with planning
- negotiating project agreements
- dispute resolution processes
- penalties and offences
- appeals and reviews.

Some responses addressed the document as a whole and some addressed themes and questions separately. Not all submissions responded to all themes.

1.2 Respondent demographics

Written feedback was received from 147 individuals or groups representing a broad range of interests in Aboriginal cultural heritage in New South Wales.

Submissions ranged in size from one sentence to documents of up to 50 pages with attachments. To assist with analysis, the submissions were grouped according to similar interests or discipline. The groups identified, including the number of submissions within each group, were:

- Aboriginal organisations (11)
- Aboriginal individuals (24)
- general public (8)
- government – state (8)

- government – local (19)
- heritage consultants (22)
- industry (11)
- national parks boards of management (4)
- legal bodies (5)
- statutory bodies (3)
- Local Aboriginal Land Councils (25)
- specialist groups or associations (7).

1.3 Response analysis

The written feedback received was analysed and organised under the abovementioned themes.

Qualitative and, where possible, quantitative analysis of the written submissions was undertaken to inform this summary report. The report summarises the comments received and provides a selection of representative quotes.

A copy of [all written submissions](#) received is available, excluding those where respondents specifically requested their responses not be made public. The quotes in this report appear exactly as provided in written responses and have not been edited.

2. Stand-alone legislation, preamble and definition

The NSW Government proposed the creation of a new stand-alone Aboriginal Cultural Heritage Act to replace and improve provisions currently in the *National Parks and Wildlife Act 1974*. The new Act would include an improved preamble and definition of ACH.

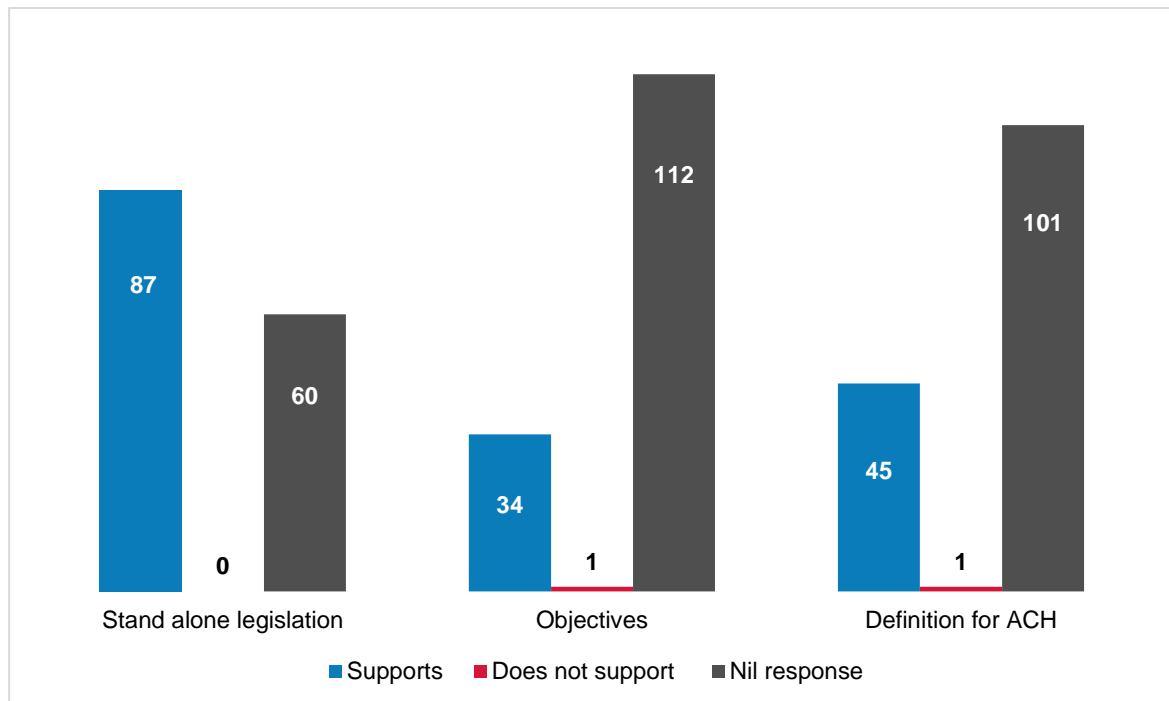


Figure 1: Stand-alone ACH legislation, objectives and definition (number of responses)

2.1 Stand-alone legislation

There was clear support for the proposal to create a new stand-alone Aboriginal Cultural Heritage Act (Figure 1). Of the 147 submissions, 87 (59%) commented on the proposal, while 60 submissions did not provide either a comment or a clear preference. No submissions stated opposition to the proposal. Submissions did suggest better alignment and integration with other Acts and processes such as the Commonwealth *Native Title Act 1983* to ensure better protection.

In your own words

'It is applauded that the State are finally seeking to develop standalone Cultural Heritage legislation as Reform of Aboriginal heritage legislation in New South Wales (NSW) is well overdue' (Aboriginal organisation)

'[We] support the development of stand-alone legislation to manage and protect Aboriginal cultural heritage across NSW' (Industry)

'It is important that the focus of any new legislation is actually on the maintenance and protection of [Aboriginal cultural heritage]' (Aboriginal organisation)

2.2 Objectives and definition

Most submissions supported the proposed preamble and objectives in principle and agreed with improving the recognition of Aboriginal people, their values, their culture and spiritual connection to the land.

Respondents discussed individual words and their meanings for different individuals or groups. There were calls for a stronger emphasis on protection, respect, ownership and culture, and for traditional owners and Elders to be referred to in the wording of the preamble. A few submissions suggested that the preamble should include reference to Aboriginal lore and the right to self-determination, autonomy, ownership, intellectual property rights and community control.

There was support from all stakeholders for a broader definition of ACH in the new Act. Most submissions, while supportive of having a broader definition of ACH, did not think that the definition proposed adequately described the breadth of Aboriginal cultural heritage.

Many respondents stated there was a need for the definition to identify both tangible and intangible aspects of ACH, including cultural belief systems, references to spirituality and cultural protocols. Some wanted explicit recognition of historic heritage values and scientific values along with ACH values, while others viewed the term 'Aboriginal cultural heritage values' as all-encompassing.

While all stakeholder groups supported the intent to extend the definition for the purpose of affording greater protection to ACH values, submissions noted that the definition needed to be clear and applicable on a daily basis, in order to fulfil its intent.

In your own words

'I agree with the preamble and definition, but think it needs stronger wording about protection and conservation - that should be the aim of the Act' (Anonymous)

'I am of the view the proposed definition of Aboriginal Cultural Heritage does not fully meet the aims to illustrate the need to protect both tangible and intangible ACH values' (Aboriginal individual)

'Ensure clarity in the definition of Aboriginal cultural heritage, especially the intangible aspects of ACH, and include an evaluation of cultural value or significance that is culturally appropriate and can be applied consistently and fairly across the State' (Industry)

'The objectives of the new Act must] respectfully reflect both traditional and contemporary views and understanding of the value of Aboriginal cultural heritage' (Aboriginal organisation).

3. Aboriginal committees

Identifying Aboriginal cultural knowledge holders early in the development process was a key element of the NSW Government's proposed model. Two mechanisms for increasing Aboriginal involvement outlined in the government's proposed model were:

- Local ACH committees
- a statewide representative body, the Aboriginal Cultural Heritage Advisory Committee (ACHAC).

For clarity, this chapter covers local ACH committees and the ACHAC separately.

Responses were detailed and complex, with particular consideration given to the committees' composition, boundaries, functions and accountability. These issues are discussed individually in the following sections.

3.1 Local ACH committees

The majority of submissions demonstrated clear support for the increased involvement of Aboriginal people in ACH matters. Submissions showed strong support for local ACH committee membership to include Aboriginal owners under section 170 of the *Aboriginal Land Rights Act 1983* and native title holders under Part 15 Division 2 of the *Native Title Act 1993* (Cwlth) (Figure 2). There was less consensus about criteria to identify who has cultural authority to speak for Country and about the criteria for commonly used terms such as 'Elders', 'traditional owners', 'Uncle', 'Aunty', and 'traditional custodian'.

Submissions from Local Aboriginal Land Councils (LALCs), the NSW Aboriginal Land Council (NSWALC) and the Office of the Registrar, Aboriginal Land Rights Act (ORALRA) wrote of their 'extreme disappointment' that the model did not 'recognise' the important role of the LALCs as 'democratic and accountable community organisations, significant land holders, and advocates for Aboriginal cultural heritage matters' under the Aboriginal Land Rights Act.

The Aboriginal Cultural Heritage Advisory Committee (ACHAC) and the Wonnarua Nation Aboriginal Corporation both expressed views that the Aboriginal Land Rights Act does not require LALC members to have cultural association with the local area, therefore it would be culturally inappropriate to automatically include LALC members in the proposed local ACH committees.

Aboriginal people and Aboriginal organisations did not widely support the government's proposal that committee members be nominated from local community groups and appointed by the Minister as this was seen as inconsistent with local decision-making.

Of the 10 written responses that commented on committee membership terms, all suggested that a three-year term would be more appropriate than the proposed five-year term.

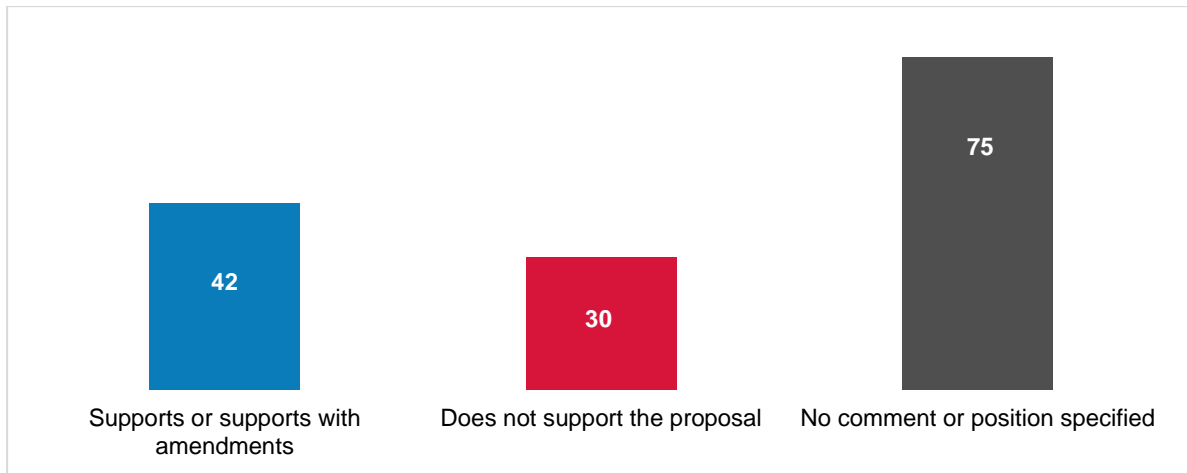


Figure 2: Support for the proposed composition of local ACH committees (number of responses)

In your own words

‘...strongly believe that the process of recognising and respecting cultural association and connection, and resolving ‘who speaks for Country’, is important to assist in the respect for Aboriginal cultural heritage, improving and maintaining relationships, and resolving many issues related to Aboriginal cultural heritage management in NSW – for not only Aboriginal people, but also for all levels of governments and the private and industry sectors’ (Statutory body)

‘By giving Aboriginal people the autonomy to make the right decisions and to engage in active discussions with proper responsibilities and processes, the committees help further to protect and preserve our cultural heritage, and will strengthen our children's connections and strengthen their identity and cultural practices’ (Anonymous, Aboriginal person)

‘We support the formation of local groups made up of Aboriginal people to deal with cultural heritage. It must be accountable to the Aboriginal community it serves, able to draw knowledge and opinion from that community at any time, and be adequately resourced. If used correctly and resourced properly, the LALC network is the gateway into the Aboriginal community. In saying this, we do not suggest they are the “one stop shop” in terms of culture and heritage but they are a practical place at which to start to engage with the Aboriginal Community in NSW; to ignore this network is simply foolish’ (Statutory body)

‘...believe that establishing local ACH committees by Ministerial appointment, with the community being only able to make nominations is fundamentally inappropriate, is divisive, and will remove any legitimacy from the process. It does not provide a scheme whereby those appointed are accountable to the Aboriginal community, as the community does not determine their appointment or removal’ (LALC)

3.1.1 Local ACH committee boundaries

The proposed model considered different boundary options. The majority of submissions called for traditional or cultural boundaries, noting concerns that any of the four proposed boundary options could result in people speaking ‘off Country’. Of the provided options, there was a stronger preference for local LALC (smaller area) boundaries over regional NSWALC zone (larger area) boundaries. There was a low level of support for either the local government or land service boundaries (Figure 3).

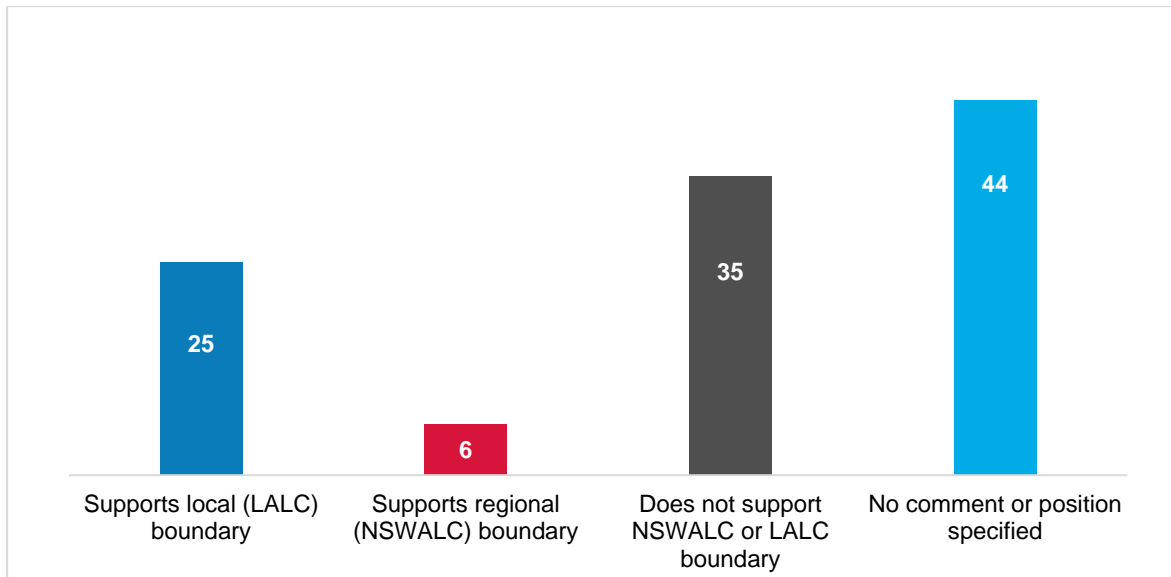


Figure 3: Support for proposed boundaries (number of responses)

In your own words

‘The majority of our members object to all four (4) boundaries as proposed and strongly recommend that any future boundaries are developed based on traditional customs and lore’s and customs’ (Statutory body)

‘It would be an insult to Aboriginal Communities to consider utilizing the Local Aboriginal Boundaries when Traditional Descendants/Owners have successful Registered Native Title Claims within the area/region’ (Aboriginal individual)

‘While one committee per local government area may be useful for a consistent and efficient approach for proponents, in a larger local government area covering several LALC areas, there may be different issues/areas of concern. The membership and chairing of committees must be appropriate for timely decision-making and avoiding conflicts of interest’ (Local government)

‘The New South Wale Aboriginal Land Council or the Local Aboriginal Land Councils do not speak on behalf of the Djiringanj or Ngarigo peoples’ (Aboriginal individual)

‘None of the four sets of boundaries proposed in the reform proposal will be right in the long term. Of course people who are recognized Native Title holders should be eligible for membership of local ACH committees where these identifiers exist; but that is hardly relevant for many parts of New South Wales. Most importantly it seems very unclear how the people on the local ACH committees should relate to and be accountable to the traditional custodians of the various places in their jurisdiction if those people are not themselves members of the ACH Committee. This is not at all clear, yet it is absolutely critical’ (Individual)

3.1.2 Functions and accountabilities of local ACH committees

There was more feedback on the proposed local committees and the proposed roles and responsibilities of the local decision-makers than on any other aspect of the model. Out of the 147 written submissions received, 123 commented on the proposed committees.

There was strong support from all groups for a system that enables Aboriginal people with cultural authority to make decisions on local Aboriginal cultural heritage matters. However, there was little consensus on how appropriate people should be identified for membership of the committees.

Many submissions, including the Local Aboriginal Land Councils’ form letters and the NSWALC submission, recommended the committees be given the right to ‘veto’ any proposed development if the potential impacts to cultural heritage values are deemed too high by the

local Aboriginal community. Additionally, they proposed that committees should have a right to take legal action to enforce a breach of the new legislation under the new system.

Industry and government proponents strongly supported the proposed 'single entry point' role of local committees, however they raised concerns about the practicality of this idea in light of the proposed size of the local committees.

Local Aboriginal Land Councils, NSWALC and some local councils raised concerns that responsibilities that currently sit with LALCs would be transferred to the local committees. These submissions sought further details on the potential impact of the new system on the LALCs.

There was strong support for a system in which the local ACH committees would operate with clear and effective governance arrangements, with most submissions requesting that the committees have well-defined terms of reference under the new legislation.

Governance training and development of a code of conduct for committee members was strongly supported. It was suggested that governance training include how to respond to and resolve conflicts of interest that arise for committee members.

There was also strong support for the local committee membership criteria to avoid over-representation by a single familial group in any one local area. This issue was raised equally by Aboriginal and non-Aboriginal stakeholders including industry groups and government proponents.

Aboriginal people and Aboriginal organisations advised that having fewer committees (i.e. committees determined by regional boundaries) would likely force the local ACH committee members to speak 'off Country'. Submissions also cautioned that regional boundaries could produce too large a workload for the proposed 10 person committee and that this may cause tension and delays in decision-making.

Other issues raised included access to technical information and expertise, and funding of committees.

In your own words

'Placing decisions with the Local Committee is a great step forward but it will need governance arrangements that clearly ensure good outcomes and decisions are made - and anyone doing the wrong thing can be removed - and prosecuted if corrupt behaviour occurs. Separating employment from decisions will remove most of the issues we face now' (Anonymous, Aboriginal individual)

'The proposed functions and composition of the Local Aboriginal Culture and Heritage Committees as currently proposed are of concern. A Ministerially appointed committee limited to 10 members, particularly if the Committee is responsible for a regional rather than local area, is unlikely to be considered representative, legitimate and accountable. Further detail is needed regarding how the proposed committees will be established and resourced, and how any decision-making roles will be guided and discharged. The continuation of a large role for government is also of concern' (LALC)

'Some local ACH committees may benefit from having access to technical advice and support from specialists (e.g. archaeology, legal, GIS, land use planning, and so on) to assist in ACH mapping, preparation of plans of management or assessment of project agreements' (Local government)

'Although [we] do not necessarily oppose a 'user pays' system, having land users directly fund the 'regulator' [i.e. local committee] in its performance of statutory functions raises some problems. Where inadequate funding will be provided from public funds, [we] consider government should play a role in determining and allocating any amounts obtained from land-users on a fair and transparent basis' (Industry)

3.2 Aboriginal Cultural Heritage Advisory Committee

Few respondents commented specifically on the structure of the statewide body, with seven supporting the retention of ACHAC, and 10 supporting a Council or Commission (Figure 4).

Approximately 60 responses commented on the function of the statewide body, suggesting it should be able to make decisions, not just provide advice. Individuals and organisations, including NSWALC, ANTaR, NTSCorp, the Environmental Defenders Office and the Law Society of NSW, would prefer the new Act create an independent Aboriginal Cultural Heritage Commission with specific administrative and support roles for the local decision-making bodies. These individuals and organisations stated an ‘independent statutory body, with a clear governance and accountability framework’ should be established for making decisions on matters of Aboriginal cultural heritage.

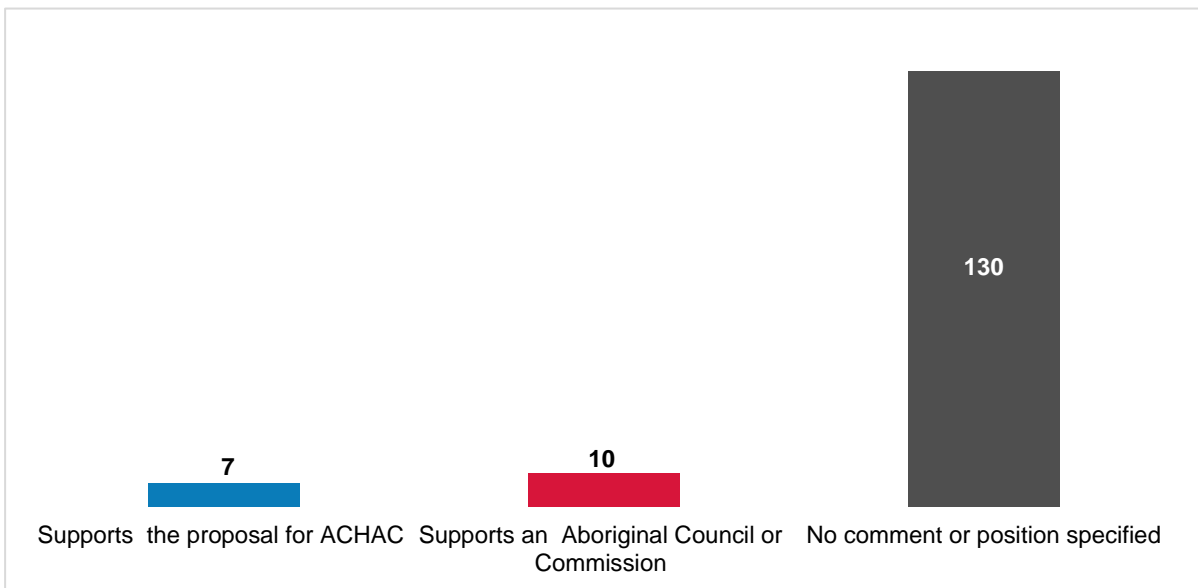


Figure 4: Support for the Aboriginal Cultural Heritage Advisory Council (ACHAC) or a Commission (number of responses)

In your own words

‘[An] independent Aboriginal Heritage Commission... appointed by the Aboriginal communities of NSW... must have responsibility for overseeing the protection and management of Aboriginal cultural heritage in NSW’ (Anonymous)

‘We recommend that a process to identify, make transparent and remove any conflicts of interest is developed [in the governance frameworks for the Aboriginal Cultural Heritage Advisory Committee]’ (Heritage consultant)

‘[We have] concerns with the use of the term ‘Advisory Committee’ in the Aboriginal Cultural Heritage Advisory Committee (ACHAC). ‘Advisory Committee’ suggests advice can be sought and potentially ignored. [We] strongly endorses that under any new administrative arrangements the ACHAC should be known as the Aboriginal Heritage Council (AHC) and it should have a similar authority and role as the Heritage Council of NSW under the Heritage Act 1977’ (Statutory body)

4. Tools for conservation

The NSW Government’s proposed model included a range of tools to improve conservation and protection outcomes, such as maps, plans of management, a State of Aboriginal Cultural Heritage Report, and an ACH Register.

The majority of submissions acknowledged the need for improved ACH conservation and protection outcomes, and were supportive of the intent of mapping. However, there were mixed views regarding how useful these tools would actually be in achieving better conservation and protection outcomes (Figure 5).

Each tool is discussed in more detail below.



Figure 5: Support for the proposed conservation tools (number of responses)

4.1 Aboriginal Cultural Heritage Register

There was general support for the proposed ACH Register as an electronic repository of all known and identified Aboriginal cultural heritage information. Submissions raised concerns, however, about the need to protect and manage sensitive information, accessing data, and avoiding the data integrity issues present within the Aboriginal Heritage Information Management System (AHIMS) database.

Many of the parties that commented on the proposed ACH Register requested the NSW Government work with local Aboriginal communities to develop culturally appropriate access protocols. Some others requested the registered information remain with the local traditional custodians.

In your own words

‘...but how will sensitive information be managed? It will be difficult to find the balance between having enough information out there and withholding sensitive information’
(Anonymous)

‘[We are]concerned that the creation of a register of cultural heritage requires the disclosure of Indigenous Cultural and Intellectual Property which might be sacred or vulnerable to misuse by those with access to the register. We are also concerned generally about the treatment and disclosure of the information relating to the cultural heritage throughout the registration, negotiations and approvals process. [We] ask that the Department consider the treatment of this information throughout the registration, negotiation and approvals processes and look at ways to better protect the confidentiality of culturally sacred or secret information. One option is to require that where the register identifies a site which represents a sacred

story line, for example, that the register simply indicates that the site is protected in relation to sacred knowledge relating to that site. The register need not disclose the sacred knowledge itself. Any parties then wishing to negotiate the use of that site would need to sign a confidentiality agreement in respect of the information disclosed in the negotiations in order to protect the sacred knowledge associated with that site' (Legal body)

4.2 State of Aboriginal Cultural Heritage Report

The proposed State of Aboriginal Cultural Heritage Report was well received by all the individuals and organisations that provided comment on this proposal. There were a few calls for annual reporting, especially in the first three years following the commencement of the new system.

Submissions included suggestions as to the content of the report, including that the report:

- contain practical outcomes and measure satisfaction with the system
- include project costs in order to inform trends and potential implications of the new Act
- reflect the intent of the new legislation to conserve and manage Aboriginal cultural heritage, and report the outcomes of cultural heritage decisions made between local Aboriginal communities and proponents.

In your own words

'The State of Aboriginal Cultural Heritage Report is a worthy proposal and would be a valuable monitoring tool. It would need good resource backing and the information collated needs to be measured against the quality of the local report base and the outcomes relevant to a local area (rather than based on a different area)' (Local government)

'I recommend that the following points be adopted:

- annual reporting to ensure that the information is updated and accurate
- transparent monitoring of cultural impacts' (Aboriginal individual)

'The focus of reporting must underpin the intent of the legislation – namely, the protection and maintenance of Aboriginal cultural heritage. Consequently, conservation outcomes must be seen as a high priority. The report should include a list of names of all members of each established local committee and their period of appointment. The report should include a summary of all outcomes arising from the decisions made under the new legislation, including:

- applications made to local committees by developers regarding proposed developments
- outcomes of the decisions made by local committees in relation to applications by developers
- a list of outcomes resulting in the protection and maintenance of Aboriginal cultural heritage' (Aboriginal organisation)

'The development of a monitoring mechanism such as a State of Aboriginal Cultural Heritage Report is supported as a means of providing for accountability through the new ACH system. This report should detail practical outcomes and measure Aboriginal community and development community satisfaction with the system, and not just focus on numbers and timeframes of approvals and project agreements' (Local government)

5. Creating ACH maps and plans

The NSW Government proposed to create upfront ACH maps and plans of management to help projects plan to avoid impacts and conserve strategic landscapes and areas containing high ACH values.

5.1 Creating the ACH maps

Several submissions recognised the value of maps and plans in improving conservation and protection outcomes (Figure 6). However, some queried the operation and feasibility of the proposed system for the ACH maps. The four main concerns raised included:

- the process for collecting and managing the data for the maps (i.e. protocols for who, how and what was to be collected, accessed and how culturally sensitive data would be protected)
- avoiding the current data integrity issues in AHIMS (i.e. accuracy, integrity, inconsistent level of detail)
- the level of resourcing required to create the maps across New South Wales (i.e. consistency in approach, capacity building requirements for committee members, funding sources and the time allocated to achieve the creation of the maps)
- the need for rigor in the mapping process (templates, guidelines, protocols).

Stakeholder groups expressed the importance of setting clear protocols and governance arrangements for managing and accessing culturally sensitive data in the maps. Concerns were raised about the feasibility of mapping ACH values for areas that had not been accessed for extended periods of time, or where knowledge holders were reluctant to share their knowledge.

Concerns remain that any unreliable information in AHIMS will be transferred to the new maps and plans and would continue to hinder conservation and project planning efforts. For this reason, submissions sought an audit of existing AHIMS data and current data collection and management processes to be undertaken before new maps start to be created.

An issue consistently raised by all stakeholder groups was the level of resourcing that would be needed to establish the maps. Submissions provided examples of resources for smaller scale mapping activities undertaken elsewhere and the lessons learnt. Some submissions warned of the extensive fieldwork, capacity building and IT training required for such extensive processes. Many councils noted that the timeframe required for mapping the ACH values within their areas could be measured in years, not months, and that the funding required was higher than anticipated.

The fourth issue raised was a consistent message about the importance of having standardised guidelines, procedures and templates to guide local decision-makers in order to ensure consistency across the state, but also to ensure the mapping data is used and accessed appropriately.

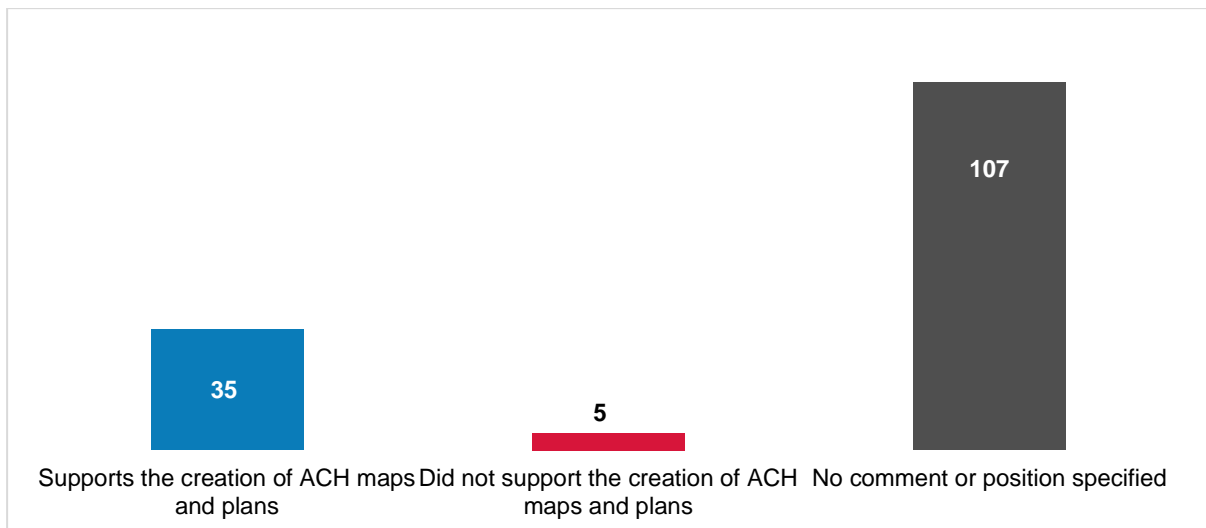


Figure 6: Support for the creation of ACH maps and plans of management (number of responses)

In your own words

'I like the idea ... this means that our people must talk together and share their information to protect what's important in the maps... but how will sensitive information be managed? It will be difficult to find the balance having enough information out there and withholding sensitive information' (Anonymous, Aboriginal individual)

'...reiterates the importance of having quality data, including complete and accurate information to prepare and maintain the ACH maps. ... It is suggested that existing Aboriginal Heritage Information Management System (AHIMS) data be audited and updated, and that an extensive Aboriginal heritage survey be undertaken, including extensive consultation with Aboriginal communities, to ensure the full spectrum of Aboriginal heritage sites and places are incorporated' (Local government)

'Our group has worked on research projects and all over the Cumberland plain for over 50 years and have an extensive knowledge of cultural, oral, social and landscapes, the mapping of this area is an insurmountable amount of work' (Aboriginal organisation)

'Consistency in the approach by Aboriginal groups across the state to the identification and mapping of Aboriginal cultural heritage significance and the structure of the Plans of Management will be critical to the understanding of how mapping has been developed and how it is being used across the state. Consistency will also be a critical factor in providing resourcing and skills development to enable Aboriginal communities to develop the required Maps and Plans of Management with the leadership and resourcing they will require within the required timeframes' (Local government).

5.2 Plans of management

There was support for having upfront plans to improve decision-making and conservation outcomes, with clear requirements set out within an ACH plan. Concerns were raised about the feasibility of preparing the plans as well as their potential effectiveness in achieving improved outcomes. Submissions cited the need for:

- sufficient funding and training to create the plans
- in-depth foresight required to plan for any scenario
- clear processes and templates to support the creation and application of the plans
- a right to appeal decisions where a plan is ignored in planning decisions.

Many respondents, particularly industry and law groups, queried whether it was feasible for the plans to 'be prepared in advance so that they satisfactorily deal with all contingencies that may arise in the assessment process', or whether the plans 'can adequately anticipate all cultural heritage and set out a comprehensive code as to how it will be managed'. Aboriginal people, the Aboriginal Land Councils and other Aboriginal organisations have similar concerns. Most of these groups acknowledge there is merit in some upfront mapping and strategic planning for the protection of cultural heritage, but question whether it is possible in practice to sufficiently identify and assess all objects and places of cultural heritage significance potentially affected by any development in a locality.

The Environmental Defenders Office and the Law Society wrote of their concerns about appeal rights where an ACH map and plan is overlooked, or if the developer breaches the Aboriginal cultural heritage plan and destroys cultural heritage values. They argue that the legislation should provide the local Aboriginal community and traditional custodians with the legal right to appeal, and improved opportunities to protect their culture and heritage.

Some respondents called for the government to test the feasibility of applying the ACH maps, plans and consultation process prior to drafting any legislation to provide evidence-based data.

In your own words

'There needs to be a right of appeal for local committees when Plans of Management agreed by local committees are rejected by the Minister for Planning' (Aboriginal organisation)

'The government's Heritage Model remains vague in relation to appeals, which does not assist any party or community member to make detailed comment on an issue which is central to the effective operation of the Government's Heritage Model. On its face the appeal rights appear too narrow. We note that appeals limited to "process" do not allow for appeals in relation to the substance at issue in cultural heritage decisions. Appeals relating to the conformity of Agreements with Plans of Management do not provide protection for cultural heritage, particularly if the Plan of Management is silent or ambiguous on a particular issue' (Legal body)

'The model is based on the assumption that all cultural heritage can be either identified, or planned for, up front in the management plans. While there is merit in some mapping and general plans of management to accommodate some cultural heritage, it is unreasonable to expect that management plans can properly deal with all potential cultural heritage' (LALC)

'The government must commit adequate time and resources to ensure appropriate frameworks and systems are in place to manage/ transition the proposed changes. Aboriginal communities must be provided with the appropriate resources and tools they need to properly engage and participate in these heritage (and planning) processes' (Statutory body)

6. Negotiating project agreements

The NSW Government proposed replacing heritage impact permits with new project agreements that would be negotiated between the proponents and the local ACH committees. It was proposed that project agreements would be required for certain activities in areas that are mapped as having incomplete or high ACH values.

6.1 Project agreements

Submissions from most stakeholder groups conveyed their dissatisfaction with the current system for Aboriginal Heritage Impact Permits (AHIPs), and were supportive of the project agreement concept.

Submissions identified a number of factors that would be critical to the success of the proposed project agreements. These include:

- having a system that identifies the right people at the commencement of negotiations
- allowing negotiations to occur with the right people, early in the planning process
- ensuring there is clarity regarding consultation timeframes and requirements
- ensuring negotiation processes provide fair and equitable platforms for both parties
- providing flexibility for both parties, while requiring absolute transparency and accountability.

Numerous submissions were critical of the proposal to have a predetermined outcome (proceed with caution) when the negotiation of a project agreement failed. These submissions noted the process was likely to lead to negotiations not being conducted in good faith or being unfair and inequitable for Aboriginal people.

Some submissions noted that negotiating project agreements could provide significant social and economic benefits for Aboriginal communities, but suggested an ACH trust fund be created and managed by the committees and ACHAC to support the Aboriginal communities.

In your own words

‘Council is generally supportive of the idea of Project Agreements, in that these will provide for the potential to develop localised solutions to project based problems in a direct discussion between the proponent (or developer) and the local Aboriginal community. In particular, the local Aboriginal community in the Illawarra, and particularly the Local Aboriginal Land Council, have long advocated for a stronger link between ACH management and ACH impacts, and Aboriginal employment opportunities and other social / cultural outcomes. Based on our review of the proposed model it appears that Project Agreements may provide the potential for negotiating these more creative outcomes in relation to Aboriginal Heritage’ (Local government).

‘Replacement of the AHIP process with Project Agreements negotiated between proponents and the local ACH committees is supported. Minimum standards in template form should be developed to provide guidance to both the proponents and the committees. In addition, the Act or the Regulations will need to clearly outline the transition process for converting existing AHIPs into Project Agreements’ (Industry).

‘If agreement cannot be reached then Aboriginal cultural heritage should not be interfered with in the absence of a permit issued by an Independent Aboriginal Heritage Commission in accordance with clearly identified criteria; with the proposed legislation providing for an appeal mechanism to the Land and Environment Court’ (Legal body)

‘If no project agreement is reached... this gives the proponent considerable power in the negotiation process, since they have absolute surety that they can proceed with the project regardless of the outcomes of the negotiation ...this imbalance of negotiating power seriously impacts the ability of Traditional Owners to leverage the right to negotiate to get positive benefits for their communities’ (Aboriginal organisation)

6.2 Local people negotiating with proponents

The majority of respondents supported local Aboriginal people negotiating agreements with the relevant proponents, but with the qualifier that ‘local Aboriginal people’ means those with cultural knowledge and authority to ‘speak for Country’ (rather than Aboriginal people with a local address). There were also suggestions that negotiations should involve all affected stakeholders.

Some respondents raised concerns that the process of negotiating with a committee would be at odds with cultural protocols, particularly where a committee covers a large geographic area.

Concerns were raised regarding the need to increase capacity across New South Wales for Aboriginal communities who will not have the same resource or budget-driven organisational support as the parties they are negotiating with. The Office of the Registrar expressed support for implementing such processes only where adequate resourcing was provided for the Aboriginal communities.

In your own words

'The establishment and representation of the local committee does not guarantee the full representation of views in the community. There will always be the possibility of areas of culture and heritage for some traditional owners that may not be known or ignored by members of the committee.... there could be a knowledge gap on the committee. Consequently, it would be prudent of the committees to consult with their information records, and with the community as well' (Legal body)

'Bodies affected by the project agreement should also be invited to be involved in the negotiations' (Local government)

6.3 Negotiating project agreements earlier in the planning process

There was strong support from all stakeholder groups for the integration of ACH processes with state, regional and local planning processes, including ePlanning. This was viewed as critical to ensure ACH is considered earlier in the planning process. Submissions noted that considering ACH earlier in the planning process may improve conservation outcomes by providing greater opportunity to be aware of ACH values and to actively plan to avoid impact to those ACH values.

There was strong feedback calling for the law to apply to all projects in New South Wales, including those major projects approved by the Department of Planning and Environment, or alternatively to require major projects to follow the 'best practice' standards set in the new Act.

In your own words

'[We] strongly believe that developing Project Agreements at the earliest stages of the planning process, rather than after a development approval is issued, is the most effective way to consider and manage Aboriginal cultural heritage values. However, if government does not support this recommendation, [we] recommend that the approving authority is required to include a standard clause as a Condition of Consent as below:

Consultation with the relevant Aboriginal Traditional Owner Committee and development of an Aboriginal Cultural Heritage Project Agreement must be gained to manage the high and/or incomplete ACH values mapped to Lot xx DP xx prior to commencing any ground disturbance works' (Aboriginal organisation)

'In Council's experience, the dis-connectivity between the present ACH systems in New South Wales and local government (and with local planning decisions and systems) has been a major failing and must be addressed to achieve better conservation outcomes. The new system will need to be clearly related to the new NSW Planning Systems and provide for integrated management of Aboriginal heritage as part of the planning framework' (Local government)

6.4 Mandatory timeframes for negotiating

Most stakeholder groups considered the proposed timeframes for the development of project agreements were too short and that more time for discussion, consultation and research should be included. Recommendations were made for timeframes to be linked to the scale of the project in order to be realistic, and include clearer 'stop-the-clock' provisions than proposed. Aboriginal and some other stakeholder groups wrote of the need for *Sorry* business and other important events such as NAIDOC week to be formally recognised and respected by pausing the mandatory timeframes.

In your own words

‘...these timeframes do not reflect the everyday commercial reality. They are unworkable and onerous for Aboriginal people for reasons including the unavoidable difficulties that often occur in convening committees....it is manifestly unreasonable to assume that a ‘non-response’ equates to agreement’ (Legal body)

‘The timeframes are inflexible in that they are the same regardless of whether there is a minor project or a substantive open cut mine which covers a large area. The timeframe is the same regardless of how significant the affected Aboriginal cultural heritage is’ (LALC).

‘Given the short timeframes the Aboriginal community will have to respond to a proponent, taken with the ability of proponents to proceed with caution as well as the Aboriginal community’s inability to refuse a project, it is difficult to see how the project agreements process is fair, equitable and genuine. New laws must provide rights for Aboriginal people to refuse an activity or development. There must be processes to refuse a project based on unacceptable impacts to Aboriginal heritage values. This is consistent with Articles 8 and 11 of the United Nations Declaration on the Rights of Indigenous Peoples outlining Aboriginal people’s rights to practice and revitalise culture, and rights to redress where cultural heritage is harmed without free, prior and informed consent’ (LALC).

‘All timeframes in the Project Agreement process must be stipulated, including the timeframe to ‘undertake assessments (archaeological, anthropological, community etc) and reporting’ as well as registration by the Heritage Division. Timeframes for negotiating of Project Agreements must be realistic but finite, especially for large projects’ (Industry).

7. Dispute resolution processes

The NSW Government’s proposed model included new dispute resolution processes to assist the relevant parties (local cultural knowledge holders and proponents) to negotiate positive ACH outcomes.

7.1 Dispute resolution

Consistent with concerns summarised in section 6.1 regarding the proposal to ‘proceed with caution’, some submissions argued that the absence of a fair negotiating power base for the local ACH committees could also lead to predetermined biases in the proposed dispute resolution processes. Many stakeholder groups also raised concerns that the timeframes proposed for resolving disputes were inadequate.

There was a shared view in many submissions that dispute resolution processes should be available at various stages in the project agreement process, rather than at one point of the process, notwithstanding that this may extend timeframes.

There was no clear preference for any of the four proposed dispute resolution processes, with submissions noting that each had merit for different people or situations. Feedback on dispute resolution processes suggested that there should be a continuum from mediation through to arbitration if matters remained unresolved.

In your own words

‘The new legislation must set out clear and transparent rules for dispute resolution, including a code of conduct for each committee’ (Legal body)

‘...it must be acknowledged that there may be differing views within a LACHC [local ACH committee], compared to a developer who has a unified position. It may be difficult for a LACHC to reach consensus as to the terms of a proposed agreement, particularly where the destruction of ACH is proposed as part of an agreement. It is suggested that were consensus

of LACHC members cannot be reached a safety-net position of non-destruction of ACH is adopted' (Aboriginal organisation)

'The proposal to allow proponents to 'proceed with caution' is not supported. Where agreements cannot be reached between a proponent and local ACH committee an independent Aboriginal heritage commission should have roles here to decide whether or not the project can proceed and any conditions' (LALC)

'Recourse to dispute resolution or the Land and Environment Court should be available in the event a Project Agreement is not finalised within the specified time period....It is important that any dispute resolution is undertaken in a timely, fair and culturally appropriate manner' (Industry)

'[We] believe that it is critical that an independent person makes a determination that is binding on the parties when a dispute occurs. The independent person would be guided by the Aboriginal Cultural Heritage Act as well as information contained within the mandatory Aboriginal Cultural Heritage Maps and Plans of Management when making the decision. Arbitration may be appropriate in certain circumstances as the Aboriginal Traditional Owners Committee and proponent may seek greater confidentiality than that of an open court, especially in relation to culturally and commercially sensitive information' (Aboriginal organisation)

8. Penalties, offences and appeals

The government's proposals included retaining, but updating, the existing penalties and offences, and gave respondents the opportunity to consider appeals.

8.1 Penalties and offences

Some stakeholder groups questioned the retention of the existing provisions, and raised concerns regarding enforcement history and low penalties. Industry groups supported retaining certain provisions, but also noted the need for reviews of the legislation to consider effectiveness and alignment with other NSW legislation.

Aboriginal organisations and LALCs felt the existing penalties were too low to be an effective deterrent. Some stakeholders commented that the problem was lack of enforcement rather than the penalties themselves, and suggested introducing a requirement to prosecute as the necessary incentive to protect ACH values.

Stakeholder feedback for retaining some of the existing due diligence provisions was divided. Aboriginal stakeholders were very critical of the process, expressing concern that ACH was being destroyed under the due diligence process, whereas industry groups expressed their general support for the process.

Aboriginal people and organisations expressed the importance of retaining exemptions for Aboriginal people carrying out traditional cultural activities.

In your own words

'Since existing penalties under the NPWS Act have been so rarely imposed and when they have been are so inadequate, one needs to ask what reason we will have to expect better enforcement and more appropriate penalty impositions under the new Act? We urge that these penalties and their enforcement regimes be not simply imported from the old NPWS Act but that serious consideration be given to elaborating them so that they can be more rigorously applied under the new Act to be a real deterrent to reduce inadvertent damage as well as malicious destruction' (Specialist group).

'Although the laws were amended in 2010, with government promoting the notion that increased fines and penalties would act as a deterrence to the destruction of Aboriginal heritage, in practice this has not occurred. There has only been one prosecution since the increased penalties came into force.'

'[We] welcome the recommendations in the ACH Model for consistency in the new legislation with existing offences, penalties and defences. These offences and penalties were significantly increased in 2010 and are consistent with other NSW legislation. We also support regular review of the offences and penalties in line with government policy' (Industry)

8.2 Appeal processes

Feedback generally indicated that the provision of clear guidelines and standards would reduce the likelihood of appeals, however criticisms of the appeal proposals in the government's model were raised in submissions from legal bodies, Aboriginal organisations and other stakeholder groups. These groups advocated for more opportunities to appeal and review decisions, or changes to the proposed model to provide more scope for Aboriginal people to take action where a breach has occurred.

In your own words

'The new legislation must provide legal rights to enable local committees and traditional owners to adequately protect their culture and heritage. Such a right is an essential safeguard, for example where: a development commences after failed negotiations; if the committee does not adequately address all of the culture and heritage issues for the development; or if the developer breaches the agreement or plan of management and destroys culture and heritage. The Discussion Paper does not adequately address the need for the traditional owners to have the right to either appeal the decision made for culture and heritage, nor are there any provisions for how traditional owners can enforce their rights to culture and heritage. We cannot support the reforms proposed in the Discussion Paper without adequate consideration of appeal rights for traditional owners and custodians... The new legislation should provide the right for traditional owners to bring legal action to enforce a breach of the new Act....Ensure the new legislation provides for a range of remedies and enforcement orders to be available for offences involving harm to Aboriginal culture and heritage' (Legal body)

'The government model states that appeals may be made to the Land and Environment Court for judicial review, and indicates that merit appeals will not be allowed. This is a major concern. Proper appeal processes must be incorporated into a new legislative regime that allow for merit appeals and for Aboriginal peoples to take action where harm to Aboriginal heritage has occurred or is under threat, including stop work and interim protection orders' (LALC)

'[We] submit that the Government's Heritage Model remains vague in relation to appeals, which does not assist any party or community member to make detailed comment on an issue which is central to the effective operation of the Government's Heritage Model. On its face the appeal rights appear to narrow' (Legal body).

'[We] believe that the public exhibition process of Aboriginal Cultural Heritage Maps and Plans of Management and the review process by the Heritage Division will ensure that Project Agreements are consistent with all relevant mandatory requirements and minimum standards. Therefore, members of the public should have the right to appeal Project Agreements only on the basis that the process leading to the Project Agreement contravened legal principles (i.e. judicial review)' (Aboriginal organisation)

'The Wonnarua people believe that there needs to be a mechanism by which a decision maker should be able to assess a development and determine that the cultural heritage not be destroyed or to put in place conditions which minimise the harm to cultural heritage.If necessary there should be a limited appeal right for developers to the Court if it considers that the LAHC is unreasonable' (Aboriginal organisation)