

ASK FIRST: A GUIDE TO RESPECTING INDIGENOUS HERITAGE PLACES AND VALUES

ISSUES AND GAPS ANALYSIS

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A report prepared for the Department of Sustainability, Environment, Water,
Population and Communities: Canberra. June 2012

The opinions in this report are the views of the authors and do not reflect the views of the University of
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EXECUTIVE SUMMARY

The Department of Sustainability, Environment, Water, Population and Communities has asked for an analysis of any gaps and issues in *Ask First: a guide to respecting Indigenous heritage places and values*.

Ask First was first published in 2002 as a 'how to' guide to consulting Aboriginal and Torres Strait Islander people about their heritage and its conservation. Since 2002, a number of Australian jurisdictions are looking at, or have included, statutory consultation processes in their Aboriginal and Torres Strait Islander heritage protection laws. These approaches were compared with the processes described in Ask First to identify any gaps and issues.

Overall, the analysis showed that Ask First is a remarkably robust approach to consulting Aboriginal and Torres Strait Islander people about their heritage. There were no elements in the approaches to consultation adopted by the different jurisdictions that were not present in Ask First. Rather, Ask First had some elements that were not found in the approaches to consultation found elsewhere in Australia.

The review compares the contents of each section of Ask First with statutory approaches used elsewhere in Australia. Where there are discrepancies, it recommends that the views of stakeholders should be sought. The main areas that are likely to be contentious are as follows:

- The purpose of Aboriginal and Torres Strait Islander heritage conservation in Ask First because it focuses on the intangible elements that create attachment and not just the physical elements of a place. This is not seen as an important purpose of heritage conservation in some jurisdictions and may be seen as a difficulty by miners and industry.
- The precautionary principle in Ask First states that uncertainty about heritage values at the place should not be used as justification for proceeding with an activity. This may be seen as a difficulty by miners, developers and by some jurisdictions. It recognises that it may take some time for people to disclose why a place is important. It recognises the issues raised by the Hindmarsh Island bridge case where the development went ahead, but the final judgement in the Federal Court recognised that the place was significant in accordance with Aboriginal tradition.
- The inclusion of other Aboriginal and Torres Strait Islander people with interests in a place may be seen as undermining the rights of traditional owners. Ask First does suggest, however, that the interests of other Aboriginal and Torres Strait Islander stakeholders should be clearly identified and that their involvement in making decisions should be confined to these identified interests.
- Ask First recommends that independent mediation should be provided when there are disagreements amongst Aboriginal and Torres Strait Islander people about their heritage. This approach may be seen as interfering with statutory process for arbitrating native title disputes and some miners and developers may see it as a restriction on their right to negotiate.
- The suggestion that the consultation process should be used to build skills in Aboriginal and Torres Strait Islander communities may be controversial among some miners and developers who see provision of opportunities for employment that serves their industry as the primary way of assisting communities.

A short issues paper, a letter seeking stakeholder comment to the issues paper and a list of key stakeholders is included in Annex A.

CONTENTS	PAGE
EXECUTIVE SUMMARY	1
CONTENTS	2
1. INTRODUCTION AND SCOPE OF STUDY	3
2. METHODS AND DATA	3
3. DEFINITIONS, PURPOSE AND PRINCIPLES	4
3.1 <i>Definitions</i>	4
Recommendation (3.1.1)	4
3.2 <i>Purpose</i>	5
Recommendation (3.2.1)	5
3.3 <i>Principles</i>	6
Recommendation (3.3.1)	6
Recommendation (3.3.2)	6
3.4 <i>Engagement</i>	6
4. CONSULTING ABORIGINAL PEOPLE AND TORRES STRAIT ISLANDERS ABOUT THEIR HERITAGE PLACES	7
4.1 <i>Who should be Consulted</i>	7
Recommendation (4.1.1)	7
4.2 <i>Describing the Activity and Agreeing a Process</i>	7
Recommendation (4.2.1)	8
4.3 <i>Dealing with Disputes</i>	8
Recommendation (4.2.1)	8
5. IDENTIFYING INDIGENOUS HERITAGE PLACES AND VALUES	8
Recommendation (5. 1)	9
6. MANAGING INDIGENOUS HERITAGE PLACES	9
Recommendation (6. 1)	9
Recommendation (6. 2)	9
Recommendation (6. 2)	9
7. EXAMPLES OF INDIGENOUS HERITAGE MANAGEMENT PRACTICES	9
Recommendation (7. 1)	9
8. CONCLUSIONS	9
REFERENCES	11
ANNEX A - LETTER AND QUESTIONS FOR STAKEHOLDERS	13
ANNEX B - STAKEHOLDER SELECTION AND STAKEHOLDER LIST	17

1. INTRODUCTION AND SCOPE OF STUDY

In 2002, the Australian Heritage Commission published *Ask First: a guide to respecting Indigenous heritage places and values* (Ask First). It was produced to help miners, developers, archaeologists, anthropologists and heritage professionals to consult Aboriginal and Torres Strait Islander people when their activities might affect Indigenous heritage places. It was also an attempt to address the claim commonly made by Aboriginal and Torres Strait Islander people that they had not been properly consulted about projects that could impact on their heritage.

Beginning in the mid 1980s, the Australian Heritage Commission pioneered approaches to consulting Aboriginal and Torres Strait Islander people about the identification and management of their heritage places (Jonas 1991). Ask First built on this experience and on the consultation policy developed by the Australian Heritage Commission (1997). It was the first attempt to develop a simple 'how to' guide to consultation with Aboriginal and Torres Strait Islander people.

There is an increasing recognition that the identification and management of Indigenous heritage places poses particular challenges and that the Commonwealth can play a leadership role in the development of a culturally appropriate approach to management of these places. The most recent State of the Environment Report suggested that widespread adoption of the approach to Indigenous heritage management set out in Ask First would be a major step forward (Hatton *et al.* 2011: 736, 791).

The Australian Government Department of Sustainability, Environment, Water, Population and Communities is currently considering revising Ask First. This report analyses Ask First to identify any gaps (and issues) in the current document and identifies questions to ask stakeholders. The responses to these questions should help to guide any revision of the processes set out in Ask First. A draft letter, the questions and a list of key stakeholders is at Appendix A.

2. METHODS AND DATA

Initially, Ask First is examined to see whether there are any internal inconsistencies or any obvious gaps in the document. A comparison of the steps in Ask First with the steps in the recently developed statutory consultation processes in the two Queensland Indigenous heritage protection Acts, *Aboriginal Heritage Act 2003* and *Torres Strait Islander Heritage Act 2003*, and the Victorian *Aboriginal Heritage Act 2006* is used to identify gaps and issues. Relevant material produced as part of the current reviews of the Queensland and the Victorian Aboriginal and Torres Strait Islander heritage legislation (Aboriginal Affairs Victoria 2011, 2012a, 2012b; Department of Natural Resources and Water 2008; Department of Environment and Resource Management, 2009) is also compared with the Indigenous heritage consultation process in Ask First.

The public documents relating to the reviews of Aboriginal heritage protection laws in South Australia (Aboriginal Affairs and Reconciliation Division 2008; Rougham n.d.) and New South Wales (Office of Environment and Heritage 2011, 2012a, 2012b; Schneirer 2010) are also considered. The discussion paper on changes to the Western Australian *Aboriginal Heritage Act 1972* released by the Department of Indigenous Affairs (2012) was examined. However, the changes proposed in these documents do not include detailed information on who should be consulted about Indigenous heritage.

The 2007 *United Nations Declaration on the Rights of Indigenous Peoples* was not explicitly considered in the analysis of gaps and issues. However, the process in Ask First ensures

Aboriginal and Torres Strait Islander people are provided with information to allow them to make informed decisions about management of their heritage.

We begin by looking at the purpose, definitions and principles in Ask First before considering the three steps described in Ask First to consult Aboriginal and Torres Strait Islander people about their heritage.

3. DEFINITIONS, PURPOSE AND PRINCIPLES

3.1 *Definitions*

The definitions in Ask First (page 4) can be divided into three groups: what is Aboriginal and Torres Strait Islander heritage; who are the Indigenous people with rights or interests in a place; and the precautionary approach.

The definition of Indigenous heritage in Ask First covers both tangible and intangible cultural heritage. It recognises that heritage links Indigenous people to their ancestors and to country. The last sentence in the definition could be simplified to state 'Indigenous cultural heritage is the relationship people have with country (sea and land), kin, ways of living, objects and beliefs and this is expressed through knowledge, law, language and symbols which arise from Indigenous spirituality'.

The definition of Indigenous heritage places also identifies sources of heritage value. Many of these are 'social' or intangible, which is broadly consistent with the recognition of customary law, tradition and Aboriginal and Torres Strait Islander people's rights to use and enjoy areas under Native Title. Ask First recognises that heritage places may also be important in Aboriginal and Torres Strait Islander history. There is an implicit distinction between country and Indigenous heritage places with the latter being described as being of more than general importance which is consistent with s.39 of the Commonwealth *Native Title Act 1993*.

Cultural heritage management planning in Victoria emphasises physical remains and this appears to be a narrower view of Aboriginal and Torres Strait Islander heritage than the one adopted in Ask First. Some of the submissions on the Victorian Act suggested an expansion of the definition of Aboriginal heritage to include intangible heritage (Aboriginal Affairs Victoria 2012a: 41, 43).

The definition of Indigenous heritage values in Ask First repeats information in the previous definitions of Indigenous heritage and Indigenous heritage places and may be redundant. The definition could be amended to read 'Indigenous heritage values include spirituality, law, knowledge, practices, traditional resources, history or other beliefs and attachments'.

Recommendation (3.1.1) Obtain stakeholder views on the definitions of Aboriginal and Torres Strait Islander heritage, Aboriginal and Torres Strait Islander heritage place and Aboriginal and Torres Strait Islander heritage value in Ask First.

Scientific value and aesthetic values are not discussed in Ask First because the former is a 'western' rather than an Indigenous value. Some of what might be described as aesthetic values in indigenous communities are probably better understood as social values.

Defining Aboriginal and Torres Strait Islander people with rights or interests in a place can be complex. Ask first identifies two categories of Aboriginal and Torres Strait Islander people with rights or interests in an area: traditional owners and other Aboriginal and Torres Strait Islander people with interests.

The definition of traditional owner recognises those Aboriginal and Torres Strait Islander people who have rights in and the responsibility to care for their country or clan estate. This is identical to the definition of an Aboriginal Party in the Queensland *Aboriginal Heritage Act 2003* (s.35). Similarly, in Victoria a body representing registered native title holders or a traditional owner group that has entered into a settlement and recognition agreement must be appointed as the only Registered Aboriginal Party for an area should they apply (*Aboriginal Heritage Act 2006*, s.151).

The definition in Ask First of other Indigenous people with rights or interests in a place recognises that Aboriginal people may have voluntarily or involuntarily moved away from their country to settle on missions and reserves or in cities. While they are not traditional owners, they may have a strong interest and knowledge about particular places. The interests of Aboriginal and Torres Strait Islander people in a place should be clearly identified and not assumed. This could be made clear in the definition.

3.2 *Purpose*

The purpose of Aboriginal and Torres Strait Islander heritage conservation in Ask First (page 5) is unusual because it does not simply focus on the place and its values. Rather, it states that the primary purpose is to sustain the relationship between Aboriginal and Torres Strait Islander people and their heritage places. This definition attempts to encapsulate the obligation that traditional owners have to care for their country, and that sustaining this relationship is fundamental to the conservation of Aboriginal and Torres Strait Islander heritage. The Queensland *Aboriginal Heritage Act 2003* has a similar description of the purpose of Aboriginal heritage conservation. It states (s.5d) that the activities involved in recognition, protection and conservation of Aboriginal cultural heritage are important because they allow Aboriginal people to reaffirm their obligations to 'law and country'. The Victorian *Aboriginal Heritage Act 2006* does not have an explicit recognition of Aboriginal obligations to care for their country. The duty of care guidelines in Victoria focus on physical, often archaeological, heritage rather than the practices and beliefs that make this heritage important to Aboriginal and Torres Strait Islander people.

The emphasis on the 'intangible' may be seen as problematic by developers and miners particularly when there is no evidence for 'sacred' sites. There may also be concerns about the purpose of heritage conservation where Aboriginal people were forcibly removed from their country. There are instances, however, where heritage places are important for re-establishing connections to country and for maintaining Aboriginal identity (Burke 2011; Office of Environment and Heritage 2012b: 5).

Recommendation (3.2.1) Obtain stakeholder views on whether the purpose of Aboriginal and Torres Strait Islander heritage conservation is confined to the protection of places and physical heritage or should its primary purpose be maintaining the relationship that Aboriginal people have with places.

3.3 *Principles*

Ask First (page 6) identifies a number of principles that should be incorporated in any process used by miners, developers, archaeologists, anthropologists and heritage professionals when consulting Aboriginal and Torres Strait Islander peoples about their heritage places. These can be summarised as follows:

1. that Aboriginal and Torres Strait Islander people are the primary source of information about their heritage places and therefore must be consulted if these places and their values are to be adequately identified and appropriately managed and conserved for future generations;

2. Aboriginal and Torres Strait Islander people must have an active role in managing their heritage if they are to fulfil their obligations to 'care for country'; and,
3. there may be cultural restrictions on the sharing of information about some places and breaches of these restrictions may adversely affect the heritage values of some places.

Both the Queensland *Aboriginal Heritage Act 2003* (s.5b) and the Victorian *Aboriginal Heritage Act 2006* (s.3b) recognise that Aboriginal people are the primary guardians, keepers and knowledge holders of their cultural heritage. Both the Queensland (s.6) and the Victorian (s.3c) legislation specify roles for Aboriginal and Torres Strait Islander people in the protection and management of their heritage with the former linking this role to the responsibility to care for country (s.5d). Similar principles are included in Indigenous heritage law reform discussion papers prepared by South Australia (Aboriginal Affairs and Reconciliation Division 2008: 8) and New South Wales (Office of Environment and Heritage 2012a: 3-4).

Queensland recognises the existence of secret and sacred objects and secret information. Under s.29 of the *Aboriginal Heritage Act 2003* there are penalties if secret information is included in a report provided to the Department or the Minister without the agreement of the Aboriginal knowledge holders. Victoria recognises secret and sacred objects but its legislation does not provide any protection for culturally restricted information. The need to protect such information is not considered either in the discussion papers released by South Australia (Aboriginal Affairs and Reconciliation Division 2008) or in the paper released by New South Wales (Office of Environment and Heritage 2012a).

Recommendation (3.3.1) Obtain stakeholder views on the need to formally recognise the existence of, and need to protect, culturally restricted information.

Ask First includes a precautionary principle which states that a lack of certainty about a place's Aboriginal and Torres Strait Islander heritage values should not be used to justify activities that may impact on the place. This principle recognises that it may take some time for Aboriginal and Torres Strait Islander people to disclose why some places are important and that non-disclosure of this information should not be taken as a sign that a place has limited heritage value. Recent decisions by the Native Title Tribunal in relation to mining applications in Western Australia at Lake Disappointment (National Native Tribunal 2009: 2-16) and Wilgie Mia (Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji, [2011] NNTTA 172 (21 September 2011)) suggest that this principle is needed.

Recommendation (3.3.2) Obtain stakeholder views on the value of including a precautionary principle as an aspect of Aboriginal and Torres Strait Islander heritage conservation and management.

The remaining principles recognise that all parties with interests, which could include non-Indigenous stakeholders, should be consulted about possible impacts on Indigenous heritage and that developers and others that might impact on this heritage must abide by all relevant laws. This includes customary law as well as Commonwealth and State/Territory laws. The requirement to abide by relevant laws is a reminder that developers should not pick and choose which legal processes they will abide by and which they will ignore.

3.4 *Engagement*

Engaging Aboriginal and Torres Strait Islander people during consultation can be difficult. Ask First suggests that negotiating the level of involvement of Aboriginal and Torres Strait Islander people is important as there may be competing priorities that have to be met by Indigenous people.

4. CONSULTING ABORIGINAL PEOPLE AND TORRES STRAIT ISLANDERS ABOUT THEIR HERITAGE PLACES

4.1 *Who should be Consulted*

The initial consultation stage in Ask First identifies who should be consulted and the matters that should be discussed during initial meetings.

The first step in consultation is the identification of Aboriginal people with rights or interests in the area where a proposed activity may impact on Indigenous heritage places. Ask First gives primacy to Aboriginal and Torres Strait Islander traditional owners who are authorised to speak for a place. It also recognises that different people may have different levels of knowledge about a place. Men and women may want to be consulted separately.

While traditional owners should always be consulted, Ask First recognises the importance of including Aboriginal and Torres Strait Islander people with interests in a place in the process. There are differing views amongst Aboriginal and Torres Strait Islander people about the need to consult people with interests in a place, with some accepting that people who have lived at a place for a long time should be consulted and others saying that only people with the right to speak for country should be consulted (Aboriginal Affairs Victoria 2012a; Roughan n.d). One way to approach this issue is to require that the interests of other Aboriginal and Torres Strait Islander stakeholders must be clearly identified and that they should only be consulted on these matters if traditional owners want them included in broader discussions. For example, Aboriginal families moved to the Lake Tyres mission from elsewhere in Victoria should be consulted about any activities that may impact on the mission.

Recommendation (4.1.1) Obtain stakeholder views on consultation with other Aboriginal and Torres Strait Islander people with interests in a place about those matters in which they have an interest (e.g. Aboriginal families moved to a mission on someone else's country should be consulted about any activities that may impact on the mission).

4.2 *Describing the Activity and Agreeing a Process*

The next step is to meet the relevant Aboriginal and Torres Strait Islander people to describe the project or activity. The descriptions of the actions at this step emphasise the importance of providing Aboriginal and Torres Strait Islander people with clear factual information so they can make an informed decision. This should include a description of the potential benefits and costs of the proposed activity.

The approach in this step should be uncontroversial. It is recognised, however, that disputes among traditional owners and between traditional owners and other Aboriginal people may occur during this and subsequent stages of the consultation process.

Ask First suggests that offering assistance with mediation may be appropriate. The Native Title legislation includes opportunities for mediation but dispute resolution has not always been considered in Aboriginal and Torres Strait Islander heritage laws. The Queensland *Aboriginal Heritage Act 2003* includes provisions for mediation when management plans are disputed and the Land Court will probably maintain this role (Department of Natural Resources and Water 2008: 6). Some of the submissions on the Victorian *Aboriginal Heritage Act 2006* raised the issue of mechanisms to resolve disputes, particularly between Aboriginal and Torres Strait Islander people and heritage advisors (Aboriginal Affairs Victoria 2012a: 46). The issue of dispute resolution is discussed below.

The final steps in the first stage of consultation are to agree on the process for addressing Indigenous heritage matters and deciding who will undertake the work. Many of the matters are administrative, and include level and timing of further consultation, copyright issues, content of reports, obtaining comments from traditional owners and obtaining consent to disseminate information. This step may provide some opportunities to help build skills in traditional owner groups through involvement in developing terms of reference for, and selection of, consultants. It could include training in organising and keeping records of future meetings. Ask First recognises the need to formalise any agreed protocols and agreements reached with the relevant Aboriginal and Torres Strait Islander people. Initial consultation may provide an opportunity to identify how skills in the community can be increased during the identification and management of Aboriginal and Torres Strait Islander heritage issues.

Recommendation (4.2.1) Obtain stakeholder views on whether they support the idea of identifying opportunities to build skills in the Aboriginal community during the consultation process.

Ask First suggests that the initial consultation with Aboriginal and Torres Strait Islander people should be separate from consultation with other stakeholders. It recognises that combined meetings with any other stakeholders with rights or interests in a place should occur after the initial meetings with both groups. These meetings can provide a forum where Aboriginal and Torres Strait Islander people can explain issues to other stakeholders. They also provide an opportunity to agree on dispute resolution measures. Ask First already provides some hints for dealing with disputes.

4.3 *Dealing with Disputes*

Ask First suggests that Aboriginal and Torres Strait Islander people are the appropriate people to resolve internal disputes, but that this might be assisted by the appointment of an independent mediator agreeable to Indigenous stakeholders. Some may see this as unnecessary as native title legislation includes provisions for mediation and arbitration.

Most developers and miners work to their timeline and so Aboriginal and Torres Strait Islander people may not have time to resolve internal disputes. It is unclear whether the suggestions in Ask First that unrealistic timeframes should not be imposed and that independent mediation may help Aboriginal and Torres Strait Islander people resolve disputes are useful suggestions. It is also possible that some miners and developers would see a conflict between their right to negotiate with Aboriginal and Torres Strait Islander people and the provision of such services.

Recommendation (4.3.1) Obtain stakeholder views on whether mediation might be useful where there are disputes between traditional owners or within Aboriginal and Torres Strait Islander communities.

5. IDENTIFYING INDIGENOUS HERITAGE PLACES AND VALUES

The steps used to identify Aboriginal and Torres Strait Islander heritage places and values include background research and consulting Aboriginal and Torres Strait Islander people about their heritage places. All previous surveys and research to identify Aboriginal and Torres Strait Islander heritage and resources should be gathered, but this in itself is not sufficient to make decisions about how heritage should be managed. Aboriginal and Torres Strait Islander people should participate in any surveys (country mapping and planning). They should provide information about why particular places are valued by traditional owners and other Aboriginal and Torres Strait Islander people with interests in a place. While not emphasised in Ask First, this role is different to that of a field assistant in archaeological

or historical work. This is one reason why Ask First suggests that names of people who hold particular knowledge about a place should be recorded.

Recommendation (5. 1) Obtain stakeholder views on whether gathering information about the value of places for Aboriginal and Torres Strait Islander people is an appropriate role for Indigenous people surveying places for heritage.

6. MANAGING INDIGENOUS HERITAGE PLACES

Ask First recognises that management of Aboriginal and Torres Strait Islander heritage places may include the need to maintain customary law and the relationship with country as well as physical remains and traditional resources. While not mentioned, maintaining Aboriginal and Torres Strait Islander heritage values at a place may include the need to conduct ceremonies or other cultural practices. Because ceremony may be part of Aboriginal and Torres Strait Islander heritage management, it is important to establish the information that can be shared with other interested parties.

Recommendation (6. 1) Ceremony and burning (cleaning) country should be explicitly mentioned as special management requirements.

Ask First suggests that management of an Aboriginal and Torres Strait Islander heritage place needs to be discussed with all stakeholders, and it provides a list of issues that may need to be considered. This type of joint meeting will also help to ensure that everyone is aware of any special requirements that are necessary to conserve Aboriginal and Torres Strait Islander heritage values.

Recommendation (6. 2) Obtain stakeholder views on whether there are any management issues that are not included in the list in the hints box.

While the need to review and possibly revise management arrangements is recognised, it does not mention the frequency of such reviews. It could be suggested that the frequency of reviews should be agreed by all parties.

Recommendation (6. 3) Obtain stakeholder views on whether all stakeholders should agree on the frequency of reviews of management arrangements.

7. EXAMPLES OF INDIGENOUS HERITAGE MANAGEMENT PRACTICES

Ask First divides Aboriginal and Torres Strait Islander heritage management practices into four categories: maintenance, restoration, removal and interpretation. The examples used under each category include some practices that are shared with general cultural heritage practices as well as practices that are unique to Aboriginal and Torres Strait Islander people (e.g. repatriation of cultural material, undertaking ceremonies). It would be useful to know if there are additional practices that should be mentioned under any of these categories.

Recommendation (7. 1) Obtain stakeholder views on whether there are additional Aboriginal and Torres Strait Islander heritage management practices that should be included in Ask First.

8. CONCLUSIONS

The approach adopted in Ask First towards the conservation and management of Aboriginal and Torres Strait Islander heritage places has been mirrored to some degree by subsequent Aboriginal heritage legislation in Queensland and Victoria. However, comparison shows that the scope of Aboriginal and Torres Strait Islander heritage and the approach to consultation in Ask First appear to be more comprehensive than those in the Queensland *Aboriginal*

Heritage Act 2003 and the *Victorian Aboriginal Heritage Act 2006*. Consequently, there were no obvious gaps in the process set out in Ask First.

There are a couple of places where it is recommended that text in Ask First should be deleted or clarified (Recommendations 3.1.2 and 6.1). The comparisons identified a number of issues with the definitions and processes in Ask First, however, and it is recommended that the views of stakeholders on these issues should be sought. A letter and a short issues paper (Appendix A) have been prepared to help stakeholders provide input into revising Ask First.

REFERENCES

- Aboriginal Affairs and Reconciliation Division, 2008. *Review of the Aboriginal Heritage Act 1988: scoping paper*. Adelaide: Department of the Premier and Cabinet. Downloaded on 28 May 2012 from <http://www.aboriginalaffairs.sa.gov.au/resources/AHA%20Scoping%20Paper%20pdf%20version.pdf>
- Aboriginal Affairs Victoria, 2011. *Discussion paper: review of the Aboriginal Heritage Act 2006*. Melbourne: Department of Planning and Community Development.
- Aboriginal Affairs Victoria, 2012a. *Summary of submissions and consultation: review of the Aboriginal Heritage Act 2006*. Melbourne: Department of Planning and Community Development.
- Aboriginal Affairs Victoria, 2012b. *Issues and options paper: review of the Aboriginal Heritage Act 2006*. Melbourne: Department of Planning and Community Development.
- Australian Heritage Commission, 1997. *Policy in relation to Aboriginal and Torres Strait Islander peoples in the National Estate*. Canberra: Australian Heritage Commission.
- Australian Heritage Commission, 2002. *Ask First: a guide to respecting Indigenous heritage places and values*. Canberra: Australian Heritage Commission.
- Burke A., 2011. Inclusion of a place in the National Heritage List: the Jordan River Levee site. *Commonwealth Government Gazette* S349.
- Department of Environment and Resource Management, 2009. *Indigenous Cultural Heritage Acts Review: key issues and draft recommendations*. Brisbane: Department of Environment and Resource Management.
- Department of Indigenous Affairs, 2012. Discussion paper: seven proposals to regulate and amend the *Aboriginal Heritage Act 1972* for improved clarity, compliance, effectiveness, efficiency and certainty. Downloaded on 28 May 2012 from <http://www.dia.wa.gov.au/PageFiles/1836/Discussion%20paper%20APRIL%202012v1.pdf>
- Department of Natural Resources and Water, 2008. *Indigenous Cultural Heritage Acts Review: review paper*. Brisbane: Department of Natural Resources and Water.
- Department of Primary Industries, Parks, Water and Environment n.d. Review of Aboriginal Heritage Legislation. Downloaded on 28 May 2012 from <http://www.dpiw.tas.gov.au/inter.nsf/WebPages/LBUN-8G4VUM?OpenDocument>
- Hatton T., S. Cork, P. Harper, R. Joy, P. Kanowski, R. Mackay, N. McKenzie, T. Ward and B. Weinecke, 2011. *State of the Environment 2011: Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities*. Canberra: Department of Sustainability, Environment, Water, Population and Communities.
- Jonas W. J., 1991. *Consultation with Aboriginal people about Aboriginal heritage*. Canberra: Australian Government Publishing Service.

- National Native Title Tribunal, 2009. Future act determination - mining lease must not be granted: WDLAC (Jamukurnu–Yapalikunu)/Western Australia/Holocene [2009] NNTTA 49 (Deputy President Sumner , 27 May 2009). *Native Title Hot Spots* 30: 2-16.
- Office of Environment and Heritage, 2011. *Aboriginal heritage in New South Wales: comparing the New South Wales Aboriginal heritage system and other Australian systems*. Sydney: Office of Environment and Heritage.
- Office of Environment and Heritage, 2012a. *Aboriginal heritage in New South Wales: public consultation on issues for reform*. Sydney: Office of Environment and Heritage.
- Office of Environment and Heritage, 2012b. *Aboriginal heritage in New South Wales: Aboriginal culture and heritage reform Phase 1 consultations - Summary of feedback*. Sydney: Office of Environment and Heritage.
- Price, Waterhouse and Cooper, 2012. *Socioeconomic impacts of the Aboriginal Heritage Act 2006*. Melbourne: Department of Planning and Community Development.
- Rougham S., n.d. 'It's Not Just about Sacred Sites': a qualitative analysis of the community consultation process of the 2009 review of the Aboriginal Heritage Act 1988. Downloaded on 28 May 2012 from <http://www.aboriginalaffairs.sa.gov.au/resources/AHA%20Review%20Consultation%20Report.pdf>.
- Schneirer E., 2010. *Caring for Culture: perspectives on the effectiveness of Aboriginal cultural heritage legislation in Victoria, Queensland and South Australia*. Parramatta: New South Wales Aboriginal Land Council.
- United Nations, 2007. Declaration on the Rights of Indigenous Peoples. New York: United Nations. Downloaded on 28 May 2012 from http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

ANNEX A - STAKEHOLDER LETTER AND ISSUES PAPER

Dear

I am writing to seek your advice about a revision of Ask First. Ask First is a 'best practice' guide to consulting Aboriginal and Torres Strait Islander people about their heritage. It was published in 2002 by the Australian Heritage Commission and is currently available as a PDF on the Australian Heritage Council's website.

Since Ask First was published, a number of jurisdictions have amended their Indigenous heritage laws to create a definite role for Aboriginal and Torres Strait Islander people in the identification and management of their heritage. The Australian Heritage Council is keen to take into account people's experience when consulting Aboriginal people and Torres Strait Islanders on heritage matters when revising Ask First, particularly in jurisdictions where consultation is now part of a statutory process.

The Australian Heritage Council has developed an issues paper to help all stakeholders provide comment on the scope and usefulness of Ask First. The issues paper and a copy of Ask First are enclosed for your consideration.

I would appreciate receiving any comments you may have on Ask First by [date]. If you have any questions do not hesitate to contact [name and contact details for project officer]. Thank you in advance for your input on revising Ask First.

Yours sincerely

[Signature Block]

ISSUES TO CONSIDER WHEN COMMENTING ON ASK FIRST

Definitions, purpose and principles - Pages 5 and 6

The definition of Indigenous heritage in Ask First covers both tangible and intangible cultural heritage and recognises that heritage links Indigenous people to their ancestors and to country. The definition of Indigenous heritage place identifies sources of heritage value. Sources such as customary law, tradition and Aboriginal and Torres Strait Islander people's rights to use and enjoy areas are 'social' or intangible. Scientific value and aesthetic values are not discussed in Ask First because the former is a 'western' rather than an Indigenous value and some aesthetic values in indigenous communities are probably better understood as social values.

Question 1. Do you think the definitions of Aboriginal and Torres Strait Islander heritage, Aboriginal and Torres Strait Islander heritage places and Aboriginal and Torres Strait Islander heritage value in Ask First are appropriate and comprehensive?

Ask First recognises traditional owners as people with rights to speak for country and that these rights may relate to status and position in a clan group. It also recognises that there may be other Aboriginal and Torres Strait Islander people who have particular interests in a heritage place.

Question 2. Are there likely to be knowledge holders about heritage places within a clan estate who are not traditional owners but who should be consulted about particular heritage places? Does the definition of other Aboriginal and Torres Strait Islander people with interest in a place cover this type of person?

The purpose of Aboriginal and Torres Strait Islander heritage conservation is described as sustaining the relationship between Aboriginal and Torres Strait Islander people and their heritage places. It encapsulates the obligation that traditional owners have to care for their country, which is fundamental to the conservation of Aboriginal and Torres Strait Islander heritage. This is different from other approaches to heritage conservation which often focus on the conservation of objects and areas.

Question 3. Should the purpose of Aboriginal and Torres Strait Islander heritage conservation just focus on protection of physical places or should it be expanded to include maintaining the relationship that Aboriginal people have with their heritage places?

Most of the principles in Ask First on the role Aboriginal and Torres Strait Islander people should play in the identification and management of their heritage are generally accepted: for example, that Aboriginal and Torres Strait Islander people are the primary source of information about their heritage and its value. The need to recognise and protect culturally restricted information is not always recognised as a principle.

Question 4. Is there a need to formally recognise the need to respect cultural restrictions on who should have access to particular information?

Ask First includes a precautionary principle which states that uncertainty about Indigenous heritage values at a place should not be used to justify activities that might damage or desecrate the place. The adoption of a precautionary principle is not common in processes to protect and manage Aboriginal and Torres Strait Islander heritage places.

Question 4. Do you think that application of the precautionary principle in Ask First could make a valuable contribution to the management of Aboriginal and Torres Strait Islander heritage places?

Consultation - Pages 8 to 11

Traditional owners should always be consulted about heritage places on their country as they are the people with rights or interests in their clan estate. Ask First identifies another category of Aboriginal and Torres Strait Islander people who should also be consulted about particular heritage places. These are people who through their individual or family history have a long association with, and knowledge of, a heritage place.

Question 5. Should Aboriginal and Torres Strait Islander people with interests in a place, but who are not traditional owners, be consulted about heritage in which they have an interest?

Aboriginal and Torres Strait Islander people should be provided with clear and objective descriptions of the potential benefits and downsides of any proposed activity that may impact on their heritage, so they can make informed decisions about its management. It is at this stage that the process for addressing heritage issues should be agreed to by all parties. There may be opportunities in the process of addressing heritage issues to help build the skills base of the Aboriginal and Torres Strait Islander community. Example could include skills in developing terms of reference for consultants and organising and keeping records of meetings.

Question 6. Do you support the idea of identifying opportunities to build skills in the Aboriginal community during the consultation process?

Ask First recognises that disputes may occur among Aboriginal and Torres Strait Islander people as well as between Aboriginal and Torres Strait Islander people and other stakeholders. Ask First suggests that Aboriginal and Torres Strait Islander people are the appropriate people to resolve internal disputes but that this might be assisted by the appointment of an independent mediator agreeable to Indigenous stakeholders. This approach might extend the timeframes for consultation.

Question 6. Do you think that independent mediation might be useful where there are disputes between traditional owners or within Aboriginal and Torres Strait Islander communities?

Identifying places and values - Pages 12-13

Aboriginal and Torres Strait Islander people normally participate in archaeological and anthropological surveys. Their role should be to provide information about why particular places are valued by traditional owners and other Aboriginal and Torres Strait Islander people with interests in a place. While Aboriginal and Torres Strait Islander people may be interested in archaeological interpretations of their heritage they should not be seen as archaeological or historical field assistants.

Question 7. Do you think the suggested role for Aboriginal and Torres Strait Islander people in heritage surveys is appropriate?

Managing heritage places - Pages 14-15

Ask First recognises that management of Aboriginal and Torres Strait Islander heritage places may include the need to maintain customary law and the relationship with country as well as physical remains and traditional resources. While not mentioned, maintaining Aboriginal and Torres Strait Islander heritage values at a place may include the need to conduct ceremonies

or other cultural practices. Because ceremony may be part of Aboriginal and Torres Strait Islander heritage management, it is important to establish the information that can be shared with other interested parties.

Question 8. Should ceremony and burning (cleaning) country be explicitly mentioned as special management requirements?

Question 9. Are there any management issues that are not included in the list in the hints box?

Ask First suggests that any management arrangements should be periodically reviewed and when necessary, the management arrangements should be revised.

Question 10. Is there a need to review management arrangements and how frequently should this be done?

Management practices - Pages 16-17

Ask First provides examples of different types of Aboriginal and Torres Strait Islander heritage management practices.

Question 11. Are there any additional Aboriginal and Torres Strait Islander heritage management practices that should be included in Ask First?

ANNEX B - IDENTIFYING KEY STAKEHOLDERS

Original Requests for copies of Ask First

When Ask First was published in 2002, the Australian Heritage Commission recorded requests for the publication and the number of copies asked for. These records were analysed to identify the government and economic sectors where there was demand for the publication (Table 1).

Sector	Requests	Copies
Indigenous Organisations	20	806
Australian Government	20	351
State Government	101	2567
Local Government	75	530
Mining	7	79
Developers	2	37
Agriculture	2	2
Tourism	3	22
Consultants	16	55
Law	5	19
Natural Environment	24	325
Built Environment	1	1
Arts	2	2
Museums	4	6
Libraries	15	101
Education	34	338
Personal	79	407
Parliamentarians	4	136
TOTAL	414	5787

The greatest demand for the publication came from state government agencies and from local government. Obtaining the views of state and local government on the issues identified with Ask First is important given their role in heritage protection. While it is possible to seek the views of individual agencies and councils, it is probably more efficient to seek the views from state local government associations and from state government agencies that have a role in Indigenous heritage regulation.

There was some demand in University departments and environmental organisations like catchment management authorities. There was also demand from consulting companies that undertake environmental and heritage assessments. Again, it is probably more efficient to seek the views of the peak bodies that represent cultural heritage consultants rather than the views of individual companies.

There was some demand from Aboriginal and Torres Strait Islander organisations based in New South Wales, Queensland, Victoria and South Australia. Many of the organisations seeking copies of Ask First were local Land Councils, although requests were received from larger organisations in Queensland, Victoria and South Australia.

There was limited demand from businesses that impact on land: miners, farmers and property developers. While there were seven requests from mining companies, three of these were from different parts of Rio Tinto and one each from Mount Isa Mines, Anglo Gold, Western Metals and Arsaco Exploration. Given the major impacts of mining companies, it is probably

more efficient to seek the views of peak representative bodies such as AMEC and APPEA rather than individual companies. However, given the number of requests, it is probably worth seeking Rio Tinto's views on the revision of Ask First.

Using this logic a key stakeholder list is attached as an excel spread sheet.