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24 February 2017

Policy Branch
Department of Primary Industries, Parks, Water and Environment
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By email: relicsact@dpipwe.tas.gov.au

Dear Madam / Sir,

Draft Aboriginal Relics Amendment Bill 2016

EDO Tasmania is a non-profit, community legal service specialising in environmental and planning law. We are committed to supporting the Tasmanian Aboriginal community to protect and manage cultural heritage, and welcome the opportunity to comment on the draft *Aboriginal Relics Amendment Bill 2016* (**the Bill**).

As outlined in our previous comments on the Issues paper, we generally support the proposed amendments as a priority interim measure, but urge the government to commence consultation immediately on a more comprehensive review of the regime for Aboriginal cultural heritage protection in Tasmania, ensuring that the Tasmanian Aboriginal community determines the scope of that review.

Our brief comments on the proposed amendments are set out below.

Recognition of cultural heritage

Any respectful, contemporary Aboriginal cultural heritage framework needs to recognise the significance not just of tangible objects and defined sites, but of landscapes, knowledge, custom, belief and values.

We commend the government for acknowledging that the current *Aboriginal Relics Act 1975* (***the Act***) is woefully outdated and disrespectful. We also acknowledge efforts to address the most obvious reflection of this, the name of the Act and the scope of the protection offered. We strongly support the change of name, but recommend that references throughout the Act to "relics" also be replaced with "Aboriginal cultural heritage".

We strongly endorse the removal of references to 1876, and the inclusion of "contemporary history" as a criterion for significance.

The proposed amendments to the definition of 'relics' in s.2 of the Act seek to broaden the concept by reference to Aboriginal tradition and significance to Tasmanian Aborigines. This is an improvement on the current definition, but remains tied to the requirement for tangible evidence of occupation ("bears signs of the activities…").

As part of the comprehensive review, we recommend that consideration be given to the approach adopted in the *Aboriginal Cultural Heritage Act 2003* (Qld). In particular, s.12 of that Act provides:

> **12 Identifying significant Aboriginal areas**
>
> (1) This section gives more information about identifying significant Aboriginal areas.
>
> (2) For an area to be a significant Aboriginal area, it is not necessary for the area to contain markings or other physical evidence indicating Aboriginal occupation or otherwise denoting the area's significance. [emphasis added]
>
> (3) For example, the area might be a ceremonial place, a birthing place, a burial place or the site of a massacre.

As an interim measure, clause 2(f) of the Bill could be amended as follows:

> 2. (f) by omitting from subsection (3)(b) "descendants; or" and substituting "descendants, or which is otherwise of significance to the Aboriginal people of Tasmania; or";

This amendment would allow objects, sites or places that show no physical signs of historical activities, but which contemporary Tasmanian Aborigines consider hold significance, to be protected.

Vesting of cultural heritage

Currently, the Act does not make any provision for relics to vest in the Aboriginal community - relics discovered on Crown land become the property of the Crown, relics found on private land remain the property of the landowner. Consideration must be given to this issue in the comprehensive review of the Act.

In the interim, the government should consider excluding Aboriginal remains from the provisions of s.11 and s.13 of the Act and providing for remains to vest in the Aboriginal community. The recent repatriation of remains from ANU demonstrates the significance of such remains to Tasmanian Aborigines. This change could be effected by inserting ", other than a relic referred to in subsection 2(3)(c) of this Act" after "relic" in the relevant sections.[1]

Aboriginal Heritage Council

We support the establishment of the Aboriginal Heritage Council, and its membership being limited to Aboriginal people. We defer to the Tasmanian Aboriginal community in relation to any other limitations or directions that should be included regarding membership of the Council.

As outlined in our comments on the Issues Paper, Aboriginal involvement must not be limited to advising the Minister – the Tasmanian Aboriginal community must ultimately play a decision-making role in the management and custodianship of their heritage. It is critical that the comprehensive review of the Act look at the establishment of an Aboriginal Heritage Council with decision making functions.

Better integration of Aboriginal cultural heritage legislation with planning legislation will also be essential to ensure that the Aboriginal Heritage Council has input into development decisions with the potential to impact on Aboriginal cultural heritage.

Offences and penalties

Penalties

We strongly support the introduction of higher maximum penalties for all offences to reflect the significance of damage to Aboriginal cultural heritage. As outlined in our earlier comments, the quantum of penalties alone is not a deterrent if there is limited risk of enforcement. We therefore urge the government to commit adequate resources to investigation and enforcement activities. [2]

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[1] This is consistent with the approach taken in the *Aboriginal Heritage Act 2006* (Vic), which distinguishes between human remains, objects and places. We acknowledge that the *Museums (Aboriginal Remains) Act 1984* also addresses vesting.

[2] For example, see Victoria's Aboriginal Cultural Heritage Fund

We support distinguishing minor procedural offences from more significant harm offences. However, we recommend that the offence of failing to report discovery of cultural heritage under s.10(3) of the Act attract a higher penalty than 100 / 50 penalty units. Failure to report has direct consequences for the ongoing management of cultural heritage, and there should be significant impetus to report evidence of Aboriginal cultural heritage upon discovery.

We do not support the distinction between small businesses and other bodies corporate in setting maximum penalties. No similar distinction exists in other legislation, including the legislation governing damage to non-Aboriginal heritage, the *Historic Cultural Heritage Act 1995*.

The size of the organisation responsible for damaging cultural heritage bears no relevance to the impact of the damage. The penalties set are maximum, rather than mandatory – it remains open for any sentencing judge / Magistrate to determine that lower penalties are appropriate, having regard to the size and circumstances of the guilty business entity. We recommend that the exclusion of small business entities from the higher penalty range be removed.

Ignorance defence

We strongly support the removal of the ignorance defence at s.21(3), and the introduction of tiered offence penalties to recognise that higher penalties should apply for intentional or reckless damage.

The government must provide support for an effective transition away from reliance on ignorance of the presence of Aboriginal cultural heritage. This will require developing resources and undertaking community engagement to assist landowners to be able to identify Aboriginal heritage, or key indicators for potential presence of Aboriginal heritage, and to take action to avoid and minimise impacts. These resources can be developed in conjunction with the Due Diligence Guidelines.

Due diligence defence

We generally support the introduction of a due diligence defence to promote proactive consideration of potential heritage impacts prior to any works taking place.

However, we recommend that subsection 20(2)(a)(ii) be amended to qualify the extent to which reliance on information provided by another persion will be reasonable. As presently drafted, reliance on information provided by <u>any</u> other person (other than an employee or director) will suffice. We suggest that clause 13(2) of the Bill be amended as follows:

> (2) Without limiting the ways in which a person may satisfy the requirements of subsection (1), a person satisfies those requirements if it is proved –
>
> (a) that his or her actions that would otherwise constitute the commission of the offence were due to –
>
> (i) an act or default of another person; or
>
> (ii) reliance on information supplied by another person, <u>in circumstances in which it was reasonable to rely on the information</u>; or

We support the requirement for the Due Diligence Guidelines to be approved by Parliament, but recommend that the Guidelines also be required to be endorsed by the Aboriginal Heritage Council.

Enforcement

We support the extension of the statutory period for commencing proceedings under the propopsed s.21A.

As outlined in our comments on the earlier Issues Paper, we recommend that the Bill be amended to include civil enforcement provisions, including third party enforcement through the Resource Management and Planning Appeal Tribunal. This would enable Tasmanian Aborigines to take action to prevent, stop or remedy damage to their cultural heritage where the government has failed to do so.

The civil enforcement provisions under s.48 of the *Environmental Management and Pollution Control Act 1994* provide a good model.

As part of the comprehensive review, additional enforcement options must also be made available to prevent damage through on-the-spot infringement notices and stop-work notices, suspended planning permits, cultural heritage management and rehabilitation orders.[3]

Review of the Act

We strongly support a comprehensive review of the Act with a view to introducing adequate, contemporary protection for Aboriginal cultural heritage, and support the timeframe for this review being set out in the legislation.

We acknowledge the time required for meaningful consultation, and consider the three year timeframe proposed by the new s.23 to be appropriate. However, the Minister should be required to report to Parliament within that time (rather than within 6 months of its expiry), with a view to introducing new legislation shortly afterwards.

Consultation regarding the terms of reference for the review should commence with the Tasmanian Aboriginal community immediately, and be managed through the Aboriginal Heritage Council. It is critical that the review is not limited to whether the Act meets its existing aims, but extends to whether it achieves more contemporary objectives in relation to protection of Aboriginal cultural heritage. The review should address, at a minimum:

- broadening the definition of Aboriginal cultural heritage
- meaningful involvement of the Tasmanian Aboriginal community, and a stronger decision-making role for the Aboriginal Heritage Council
- formalising the process / requirements for Aboriginal heritage assessments, including provisions for Aboriginal heritage management plans
- integration of Aboriginal heritage assessments with planning
- additional suite of monitoring and enforcement tools to protect Aboriginal heritage

Thank you for the opportunity to make these comments. Please do not hesitate to contact me if you would like to discuss any issues raised in this submission.

Kind regards,

EDO Tasmania

Jess Feehely
Principal Lawyer

[3] See, for example, *Aboriginal Heritage Act 2006* (Vic) Part 6; *Aboriginal Cultural Heritage Act 2003* (Qld) s.27; *Parks and Wildlife Act 1974* (NSW), s.193