



Environmental
Defenders Office

**Further submission on Statutory Review of the
*Aboriginal Heritage Act 1975 (Tas)***

4 December 2020

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Successful environmental outcomes using the law. With over 30 years' experience in environmental law, EDO has a proven track record in achieving positive environmental outcomes for the community.

Broad environmental expertise. EDO is the acknowledged expert when it comes to the law and how it applies to the environment. We help the community to solve environmental issues by providing legal and scientific advice, community legal education and proposals for better laws.

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A Note on Language

We acknowledge that there is a legacy of writing about First Nations people without seeking guidance about terminology. We also acknowledge that where possible, specificity is more respectful. When referring to Tasmanian Aboriginal people in this submission we have used the terms 'Tasmanian Aboriginal' / 'palawa'. More generally, we have chosen to use the term 'First Nations' to refer to Aboriginal and Torres Strait Islander peoples across Australia. We acknowledge that not all Aboriginal and Torres Strait Islander peoples may identify with these terms and that they may instead identify using other terms.

I. Introduction

- 1 On 27 September 2019, EDO Tasmania made a submission to the statutory review of the *Aboriginal Heritage Act 1975* (Tas) (**Review**). EDO appreciates the opportunity that has been afforded to it to make the following further submission to the Review.
- 2 This further submission does not seek to repeat the content of our previous relevant submissions,¹ rather, it is directed at addressing a number of important issues that have arisen since our previous submission. In making this submission, we acknowledge that we cannot and do not speak on behalf of First Nations peoples. We make the following comments as experts in planning and environmental law with experience in seeking to protect First Nations and Tasmanian Aboriginal / palawa cultural heritage through the law.

II. Cross-jurisdictional review of cultural heritage laws

- 3 On 24 May 2020, Rio Tinto destroyed 46,000-year-old rock shelters at Juukan Gorge, sites of enormous significance to the Traditional Owners, the Puutu Kunti Kurrama and Pinikura peoples of northern Western Australia. The destruction of the shelters for the purposes of an iron ore mine was shocking because it proceeded notwithstanding the protests of the Traditional Owners. Perhaps more alarmingly, the destruction had also occurred in accordance with Australian law. Unfortunately, that the law condoned this destruction of significant cultural heritage came as no surprise to the EDO.
- 4 While the destruction of the Juukan Gorge shelters was undoubtedly devastating to the Traditional Owners and the Australian and International communities more generally, there are many lessons that can and should be learnt from it so that the same grave errors are not repeated.
- 5 In the inquiries that have followed the Juukan Gorge incident, Western Australia's *Aboriginal Heritage Act 1972* has often been cited as the most outdated Aboriginal cultural heritage law in the country. However, Western Australia is currently proposing reform to that law, with consultation on the draft Aboriginal Cultural Heritage Bill 2020 (WA) taking place in October.² Once reforms to Western Australia's Act has passed, the mantle for the most outdated Aboriginal cultural heritage laws in the country will pass to Tasmania.
- 6 The Juukan Gorge incident has highlighted the need for urgent reforms to Australia's cultural heritage laws.³ In EDO's submission to the Australian Senate's *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia*

¹ EDO Tasmania's submission on the statutory review of the *Aboriginal Heritage Act 1975* (Tas) can be accessed here: <https://www.edo.org.au/publication/review-of-the-aboriginal-heritage-act-1975/>, its submission on the amendment of the *Aboriginal Relics Act 1975* (Tas) can be found here: <https://www.edo.org.au/wp-content/uploads/2019/12/170224-EDO-Submission-on-Aboriginal-Relics-Amendment-Bill-2016.pdf>, and its submission on the 2016 review of the *Aboriginal Relics Act 1975* (Tas) can be found here: <https://www.edo.org.au/wp-content/uploads/2019/12/160730-Review-of-Aboriginal-Relics-Act-1975-EDO-Tasmania-submission.pdf>

² EDO's submission on that Bill can be accessed here: <https://www.edo.org.au/wp-content/uploads/2020/11/FINAL-EDO-Submission-draft-ACH-Bill.pdf>

³ EDO also acknowledges that Juukan Gorge is one of many incidents involving the destruction or proposed destruction of Aboriginal cultural heritage without the free, prior and informed consent of First Nations' people. Tasmanian examples include the Jordan River levee crossing of the Brighton Bypass and the proposed opening of four-wheel drive tracks in the Western Tasmanian Aboriginal Cultural Landscape.

(attached)⁴ we called for there to a cross-jurisdictional review, of all cultural heritage legislation, led by First Nations peoples, and the development of national standards that are in line with international law, including the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*.

- 7 We urge the Tasmanian Government to support and facilitate this cross-jurisdictional review. In so doing, we do not suggest that the Tasmanian Government should pause its work towards the amendment of the “woefully outdated” *Aboriginal Heritage Act 1975* (Tas) (the **AH Act**), but rather, it should commit to the implementation of the national standards that result from the review where they differ from the content of the amended Act.
- 8 Furthermore, ongoing improvement of Tasmania’s cultural heritage laws should be built into the AH Act through a provision in the Act requiring independent statutory reviews of the operation of the Act every 5 years.

Recommendation 1: The Tasmanian Government should support a cross-jurisdictional review of all cultural heritage legislation and the development of national standards in line with international law. It should also commit to incorporating any amendments to AH Act and other resource management legislation that might be required to meet national standards.

Recommendation 2: A provision should be included in the amended AH Act requiring independent statutory reviews of the operation of the legislation at least every 5 years.

III. Need for broader reform to the concept of cultural heritage and greater integration with existing planning and resource management laws

- 9 In our original submission in response to the Review, we recommended that the term “relic” in the AH Act be replaced with a concept of “Aboriginal cultural heritage” which incorporated both tangible and intangible heritage. We also recommended that the declaration of “protected sites” pursuant to section 7 of the AH Act recognise both tangible and intangible heritage. In making those general comments, EDO wishes to make clear it recommends any amendments to the AH Act provide for the recognition and protection of culturally significant landscapes and seascapes.
- 10 Appropriate recognition and protection of Aboriginal cultural heritage requires a critical rethink of how the Aboriginal cultural heritage is recognised not just under the AH Act but also under other Tasmanian laws. In our original submission in response to the Review, we recommended that the Act be amended to integrate decision-making under that Act with development decision-making under the *Land Use Planning and Approvals Act 1993*. However, it is apparent that there is a need for all resource management and planning decisions to effectively integrate consideration and protection of cultural heritage.
- 11 For example, since our original submission to the Review, the Tasmanian Government has undertaken consultation on its draft Rural Water Use Strategy.⁵ One of the proposed ‘strategic activities’ under that draft Strategy is to “[e]nsure that the Tasmanian Aboriginal community have the opportunity to be actively engaged in water planning in Tasmania”. As highlighted in our submission on the position paper preceding the draft Rural Water Use

⁴ EDO’s submission to the Inquiry can also be accessed here: <https://www.edo.org.au/wp-content/uploads/2020/08/200814-EDO-Submission-Inquiry-into-Juukan-Gorge-destruction.pdf>

⁵ The draft Rural Water Use Strategy may be accessed here: <https://dpipwe.tas.gov.au/water/water-legislation-policies-and-strategies/rural-water-use-strategy>

Strategy,⁶ it is not sufficient to simply aspire to Tasmanian Aboriginal / palawa engagement in water management planning under the *Water Management Act 1999*. Rather, concrete steps need to be taken to give effect to the UNDRIP principle of free, prior and informed consent (**FPIC**) when it comes to the use of water and developments relating to its containment and distribution, and statutory mechanisms should be put in place to guarantee Tasmanian Aboriginal / palawa involvement in decision-making that affects their cultural heritage as expressed through, or impacted by, water.

- 12 Another example of the lack of recognition of the importance of the need to protect Aboriginal cultural heritage is the Government's draft Bush Mitigation Measures Bill. That draft Bill proposes to override the need for any AH Act permits or approvals for bushfire mitigation work impacting upon Aboriginal cultural heritage, providing a person has obtained the approval of a Bushfire Mitigation Plan (**BMPs**) by the Bushfire Mitigation Measures Panel. As it is currently proposed, no Tasmanian Aboriginal / palawa representative or people with expertise in the management of cultural heritage is required to sit on that Panel that approves the BMPs, and there are no criteria in the decision-making processes under the Bill that require consideration of impacts on cultural heritage or consultation with and the FPIC of affected Tasmanian Aboriginal / palawa people. Despite the extensive information now being available indicating how Tasmanian Aboriginal / palawa fire and landscape management has shaped the Tasmanian landscape, the draft Bush Mitigation Measures Bill also fails to recognise and enshrine Tasmanian Aboriginal / palawa fire and landscape management into the legal framework.
- 13 These are but two recent examples of laws and policies that fail to adequately recognise and protect Aboriginal cultural heritage and give effect to FPIC. These examples demonstrate that a review the AH Act alone is not sufficient to ensure that Aboriginal cultural heritage is properly recognised and protected under Tasmanian law, or that Tasmanian Aborigines / palawa are provided with appropriate opportunities to apply their knowledge to the management of Country.

Recommendation 3: The AH Act should be amended to make clear that Aboriginal cultural heritage can be (or be present on or in) land, an expanse of water or parts of the coastal seas of Tasmania.

Recommendation 4: Cultural heritage, environment, water, planning and other resource management laws must be reviewed such that they operate coherently to protect Aboriginal cultural heritage and facilitate Tasmanian Aboriginal / palawa involvement in land, sea and resource management.

IV. Need for appropriate appeal and civil enforcement mechanisms to address proposed destruction of Aboriginal cultural heritage

- 14 In our original submission in response to the Review, we noted that stop work orders, infringement notices, rehabilitation orders and third party civil enforcement are necessary to ensure adequate protection of Aboriginal cultural heritage.
- 15 The Juukan Gorge incident has highlighted the need to ensure that there are appropriate avenues to appeal against the merits of decisions authorising the destruction of cultural

⁶ EDO's submission on the Rural Water Use Strategy Position Paper can be accessed here: <https://www.edo.org.au/publication/submission-in-response-to-the-rural-water-use-strategy-position-paper/>

heritage, particularly where those decisions are made by a person other than a representative of the affected First Nations community.

- 16 The incident has also highlighted the need for:
- (a) the option to revoke any permits relating to cultural heritage where new information has come to light that was not considered when the original decision was made or there has been a substantial change in circumstances not foreseen at the time of the original decision;
 - (b) emergency stop work orders in cases where there is an imminent threat to cultural heritage; and
 - (c) options for redress and/or compensation to the Tasmanian Aboriginal / palawa community where cultural heritage is unlawfully damaged or destroyed.

Recommendation 5: The AH Act should provide appropriate avenues for Tasmanian Aboriginal / palawa people to appeal against the merits of decisions authorising the destruction of Aboriginal cultural heritage, particularly where those decisions are made by a person other than a representative of the Tasmanian Aboriginal / palawa community.

Recommendation 6: The AH Act should be amended to provide an opportunity for the review of any decisions authorising works relating to Aboriginal cultural heritage where new information comes to light that may have affected a decision to grant a permit or there has been a substantial change in circumstances not foreseen at the time of the original decision.

Recommendation 7: The AH Act should be amended to provide the Aboriginal Heritage Council (**AHC**) and/or the Minister (on the advice of the AHC) the power to issue emergency stop work orders where there is an imminent threat of damage to Aboriginal cultural heritage.

Recommendation 8: The AH Act should provide options for redress and/or compensation to the Tasmanian Aboriginal / palawa community where cultural heritage is unlawfully damaged or destroyed.

V. Conclusion

It has already been 3 years since interim amendments were made to the AH Act. Even with these amendments, the AH Act remains one of the most outdated cultural heritage laws in the country. EDO therefore urges the Government to respond to the feedback it has received through the Review process and immediately commence drafting a Bill to substantively update this legislation.

EDO is grateful for the opportunity to make these brief further submissions in relation to this important Review. Should the Review team have any questions in relation to this submission, or our previous submissions, please do not hesitate to contact us.