



Environmental  
Defenders Office

**Submission on a new Aboriginal Cultural Heritage  
Protection Act (Tasmania)**

**6 May 2022**

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### Submitted to:

Review of the Aboriginal Heritage Act 1975  
NRE Tasmania  
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## **A Note on Language**

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

## **Acknowledgement of Country**

The EDO recognises First Nations peoples as the Custodians of the land, seas and rivers of Australia. We pay our respects to Aboriginal and Torres Strait Islander Elders past, present and emerging, and aspire to learn from traditional knowledge and customs so that, together, we can protect our environment and cultural heritage through law.

In providing these submissions, we pay our respects to First Nations across Australia and recognise that their Countries were never ceded and express our remorse for the deep suffering that has been endured by the First Nations of this country since colonisation.

## **Executive Summary**

EDO welcomes the opportunity to respond to the questions raised in the *Consultation Paper: A new Aboriginal Cultural Heritage Protection Act (Consultation Paper)*.

In making this submission, EDO acknowledges that it cannot and does 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 cultural heritage through the law. We have worked with First Nations clients who have interacted with cultural heritage laws in many different ways, from litigation, engaging in other State/Territory law reform processes, through to broader First Nations-led environmental governance of on Country projects. EDO lawyers have assisted First Nations clients around Australia, including in Tasmania, in their efforts to protect their cultural heritage from destruction. These submissions are based on this experience in working with laws designed to provide some level of protection to cultural heritage.

While in this submission, we discuss and makes a number of recommendations in relation to the development of a new Aboriginal Cultural Heritage Act (**new Act**) for Tasmania, EDO acknowledges that First Nations Lore should be respected in the same way that western laws are respected. First Nations Lore refers to the “learning and transmission of customs, traditions, kinship and heritage”. First Nations Lore “is a way of living and interacting with Country that balances human needs and environmental needs”.<sup>1</sup> For First Nations, Country is sacred and spiritual, with Culture, Law, Lore, spirituality, social obligations and kinship all stemming from relationships to and with the land.<sup>2</sup>

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<sup>1</sup> Environmental Defenders Office, ‘Flying-fox roost management reform for Queensland’ (Report, 13 October 2021) at p 8, accessible at <https://www.edo.org.au/wp-content/uploads/2022/01/Implementing-effective-independent-EPAs-in-Australia-Report.pdf>.

<sup>2</sup> Walanga Muru, ‘Aboriginal Cultural Protocols’ (Guide, Macquarie University, 2017) at p 10, accessible at: <https://policies.mq.edu.au/download.php?associated=1&id=327&version=1>

In addition to protecting Aboriginal cultural heritage under western law, an important way that Tasmanian Aboriginal Lore can be acknowledged and respected by the Tasmanian Government is through the development and application of Cultural Protocols developed through extensive consultation and co-design with Tasmanian Aboriginal people in accordance with the principles of free, prior and informed consent (**FPIC**), and self-determination. These Cultural Protocols can then form the basis for respectful and meaningful partnerships and relationships to be developed with Tasmanian Aboriginal communities and individuals.<sup>3</sup>

The Tasmanian *Aboriginal Heritage Act 1975* (**the Act**) has long been criticised for being “woefully outdated” and “shamefully disrespectful” of Tasmanian Aboriginal people. Tasmania is a laggard in its treatment of Aboriginal cultural heritage; with a 2018 review identifying that Tasmania and Western Australia have the worst Aboriginal cultural heritage laws in the country. Considering Western Australia has now created a new *Aboriginal Cultural Heritage Act 2021*, this leaves Tasmania in the unenviable position of having the most outdated Aboriginal cultural heritage laws in Australia.<sup>4</sup>

There are several positive elements proposed for the new Aboriginal Cultural Heritage Protection Act including:

- The inclusion of explicit purposes and objects;
- The introduction of a role for Tasmanian Aboriginal people in decision-making around the management of Aboriginal cultural heritage; and
- Provision for voluntary Aboriginal Cultural Heritage Management agreements to be registered on title between landowners and a Tasmanian Aboriginal representative body to provide for protection of Aboriginal cultural heritage.

However, EDO also has concerns about certain elements of the proposed Act as outlined in the Consultation Paper.

The most important principle for the Act to incorporate is the principle of self-determination.<sup>5</sup> Under the fundamental principles articulated in the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) including FPIC and self-determination, Tasmanian Aboriginal people “should be the ultimate arbiter of the management of the [cultural heritage] aspects any proposal that will affect that heritage”.<sup>6</sup> These principles are not presently proposed to be reflected in either the objects or the substance of the new Act.

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<sup>3</sup> See, for example, Torres Strait Regional Authority, ‘TSRA Cultural Protocols Guide’ February 2011 at p 5; Walanga Muru, ‘Aboriginal Cultural Protocols’ Guide, Macquarie University, 2017 at p 7.

<sup>4</sup> The *Aboriginal Cultural Heritage Act 2021* (WA) is by no means perfect. It is currently the subject of a complaint to the United Nations Committee on the Elimination of Racial Discrimination (the Committee). To read more about the complaint, visit the EDO website here: <https://www.edo.org.au/2021/09/10/un-scrutiny-for-wa-cultural-heritage-bill-after-first-nations-referral/>

<sup>5</sup> Heritage Chairs of Australia and New Zealand (2020) *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia*, Canberra, at Part 3, at p 35 accessed at: <https://www.awe.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>

<sup>6</sup> Ibid.

EDO also has concerns about the new Act in respect of:

- the objects do not presently recognise the living connection between Tasmanian Aboriginals with their ancestors and Country, or the relationship between the new Act and other Acts within the Resource Management and Planning System (**RMPS**);
- the proposed exclusion of intangible heritage from substantive operation of the new Act;
- the proposed role for the Minister in decision making;
- the proposed “light touch” integration between the new Act and the *Land Use Planning Approvals Act 1993* (**LUPA Act**);
- the lack of scope in penalties and enforcement options to provide access to justice and redress to affected Tasmanian Aboriginal communities.

EDO’s submission responds to the proposals detailed in each of the following sections of the Consultation Paper:

1. A new Act with explicit purposes and objectives
2. Definitions
3. Ownership
4. The representation of Aboriginal people and interests
5. Who makes decisions on Aboriginal cultural heritage
6. Alignment with the State’s planning and development system
7. Modern management mechanisms
8. Compliance and enforcement

A summary of EDO’s recommendations with respect to these sections of the Consultation Paper can be found below.

### **1. A new Act and objects**

**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 the proposed Aboriginal Cultural Heritage Protection Act and other resource management legislation that might be required to meet national standards.

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

**Recommendation 3:** The objects and principles of the new Act should recognise as a fundamental principle that Tasmanian Aboriginals will be the ultimate arbiter of the management of the cultural aspects any proposal that will affect that heritage.

**Recommendation 4:** The objects and purposes should include recognition that one of the Act’s essential roles is to support the living connection between Aboriginal people today, their ancestors and their lands.

**Recommendation 5:** The RMPS objectives should be amended (across the suite of RMPS legislation) to include objectives for the recognition and protection of Tasmanian Aboriginal cultural heritage and cultural wellbeing.

**Recommendation 6:** The objects and purposes of a new Act should reference the amended RMPS objectives.

**Recommendation 7:** 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 involvement in land, sea and resource management.

## **2. Definitions**

**Recommendation 8:** In the new Act, include an expansive definition of “Aboriginal cultural heritage” which includes intangible heritage such as Aboriginal beliefs, knowledge, traditions and recognise the living connection between Tasmanian Aboriginal culture today and ancestors.

**Recommendation 9:** In the new Act, include an expansive definition of “Aboriginal sites” which includes landscapes and seascapes.

**Recommendation 10:** The new Act, allow for appropriate protection of Aboriginal cultural landscapes and seascapes, including the possibility of imposing restrictions on existing lawful access and use.

**Recommendation 11:** Explore how the new Act can specifically recognise and provide for the management of intangible heritage consistent with the rights protected in UNDRIP and other relevant laws.

**Recommendation 12:** If the new Act does not provide for the management of intangible cultural heritage, provide resources to the Tasmanian Aboriginal community to assist it in making use of existing intellectual property laws.

## **3. Ownership**

**Recommendation 13:** The UNDRIP principle of FPIC be properly incorporated into all relevant aspects of the new Act.

**Recommendation 14:** In the new Act, provide for use of, access to and repatriation of cultural heritage as appropriate and determined by Tasmanian Aboriginal people.

**Recommendation 15:** In the new Act, make it explicit that owner of the land is not the owner of Aboriginal cultural heritage associated with that land, and any Aboriginal cultural heritage associated with the land must be managed in accordance with the general provisions in the Act.

## **4. The representation of Aboriginal people and interests**

**Recommendation 16:** The Tasmanian Aboriginal community should decide the appropriate representative organisation to assume a role with respect to decision making and management of Aboriginal cultural heritage under new Act. The design and governance of such an organisation must be led by the Tasmanian Aboriginal community and adequately resourced by the Tasmanian Government.

## **5. Who makes decisions on Aboriginal cultural heritage**

**Recommendation 17:** In the new Act, the Tasmanian Aboriginal representative body should be the ultimate arbiter with respect to the appropriate management of Aboriginal cultural heritage including in relation to any disputes about that management. Avenues of appeal or redress, should be limited to procedural or legal errors, and be to the Tasmanian Civil and Administrative Appeals Tribunal.

**Recommendation 18:** The representative body should be fully resourced to undertake and be responsible for dispute resolution, and then for determining disputes where agreement cannot be reached.

**Recommendation 19:** If, contrary to recommendation 17, the Minister retains a role with respect to arbitrating disputes concerning Aboriginal cultural heritage, the criteria for the Minister’s decisions should not allow for the weighing of economic benefits against the protection of Aboriginal cultural heritage, and instead require the Minister’s decision to be consistent with the objects and purposes of the Act.

#### **6. Alignment with the State’s planning and development system**

**Recommendation 20:** The Tasmanian Government consider alternatives to the “light touch” integration between the new Act and the LUPA Act.

**Recommendation 21:** The Tasmanian Government follow through with its commitment to introduce measures to require early consideration of potential Aboriginal heritage impacts in the highest (State and regional) level of strategic planning, and in all assessments of rezoning proposals under the LUPA Act.

**Recommendation 22:** The Tasmanian Government explore the feasibility of preparing spatial Aboriginal cultural heritage modelling – based on existing Aboriginal Heritage Tasmania records, Aboriginal cultural heritage surveys, historical records, and Tasmanian Aboriginal knowledge, stories and traditions – to inform planning and development decisions and the need for cultural heritage surveys and the preparation of Aboriginal cultural heritage management plans under the new Act.

#### **7. Modern management mechanisms**

**Recommendation 23:** In the new Act, provide for a process for the Tasmanian Aboriginal representative body to determine when a mandatory Aboriginal Cultural Heritage Management Plan is required.

**Recommendation 24:** In the new Act, provide appropriate avenues for Tasmanian Aboriginal people to appeal against the merits of decisions authorising the destruction of Aboriginal cultural heritage where those decisions are made by a person other than a representative of the Tasmanian Aboriginal community.

**Recommendation 25:** In the new Act, 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.

#### **8. Compliance and enforcement**

**Recommendation 26:** The Tasmanian Aboriginal representative body under the new Act be provided clear enforcement powers, together with resourcing to undertake compliance and enforcement, and civil enforcement opportunities should be provided for Tasmanian Aboriginal people in the event that the regulators do not undertake enforcement action.

**Recommendation 27:** In the new Act, provide greater scope for educative and/or restorative justice orders in sentencing offenders for offences under the Act.

**Recommendation 28:** Consideration should be given to how fines for particular offences under the new Act may be distributed to the Tasmanian Aboriginal communities that have been impacted by the offence.

**Recommendation 29:** In the new Act, provide options for redress and/or compensation to the Tasmanian Aboriginal community where cultural heritage is unlawfully damaged or destroyed.

## 1. A new Act with explicit purposes and objectives

### 1.1 A new Act

Given the seriously outdated nature of the *Aboriginal Heritage Act 1975* (Tas), EDO strongly supports the proposed introduction of a new Act to provide a process for the protection and management of Tasmanian Aboriginal cultural heritage. EDO considers that there is an urgent need to update our laws to provide Tasmanian Aboriginals with control over decisions affecting their cultural heritage, and better integration between cultural heritage laws with other laws in the RMPS.

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 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 UNDRIP.

Steps in this direction are being made with the publication of the *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander Heritage in Australia and Best Practice Standards for Indigenous Cultural Heritage Management and Legislation*<sup>7</sup> (**Dhawura Ngilan report**) and a commitment by the Ministerial Indigenous Heritage Roundtable on 21 September 2020 to reconvene at a later date to review progress towards the modernisation of Indigenous heritage protection laws.<sup>8</sup> EDO urges 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 creating a new Aboriginal Cultural Heritage Protection 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. Furthermore, ongoing improvement of Tasmania's cultural heritage laws should be built into the 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 the proposed Aboriginal Cultural Heritage Protection Act and other resource management legislation that might be required to meet national standards.

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

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<sup>7</sup> Heritage Chairs of Australia and New Zealand (2020) *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia*, Canberra, at Part 3, at p 35 accessed at:

<https://www.awe.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>

<sup>8</sup> Department of Agriculture, Water and the Environment (2020) *Ministerial Indigenous Heritage Roundtable, Communique - Modernisation of Indigenous Heritage Protection Regimes*, 21 September 2020. Accessed at:

<https://www.awe.gov.au/about/news/stay-informed/communiques/ministerial-Indigenous-heritage-roundtable-21-sept-2020>



## 1.2 Objects

The Consultation Paper refers to the 2013 Tasmanian Aboriginal Heritage Protection Bill 2013 (**2013 Bill**) and proposes that the following objects and principles be adopted in the new Act:

- It is acknowledged that Aboriginal people are the primary custodians and knowledge holders of Aboriginal heritage.

The objects of this Act are:

- to recognise, provide for and further the protection of Aboriginal heritage;
- to provide for the involvement of the Aboriginal community in the management and protection of Aboriginal heritage;
- to promote the management of Aboriginal heritage as an integral part of the State's Resource Management and Planning System;
- to establish workable and effective procedures for the Aboriginal heritage assessment, conduct and oversight of land activities and other activities with regard to Aboriginal heritage impacts;
- to provide appropriate sanctions and penalties to prevent harm to Aboriginal heritage;
- to promote public awareness and understanding of Aboriginal heritage.

EDO welcomes the proposal for the adoption of objects and principles in the new Act, as we have previously called for objects and purposes statements to be included in Tasmania's Aboriginal heritage legislation to make it clear what the legislation is trying to achieve.<sup>9</sup> Previously, EDO recommended objects and purposes statements to include the following:

- Provisions for the protection and management of Tasmanian Aboriginal cultural heritage.
- Recognition that Aboriginal people are the custodians of Aboriginal cultural heritage.
- Provisions for offences and sufficient penalties to prevent harm to and protect Tasmanian Aboriginal cultural heritage.
- The adoption of the rights of indigenous people with respect to their cultural heritage as set out in the UNDRIP, including Articles 11 and 12.

Articles 11 and 12 recognise the rights of indigenous peoples to practice and revitalise cultural practices and the right to "maintain, protect and have access in privacy to their religious and cultural sites".

Article 11.1 of UNDRIP states:

Indigenous peoples have the right to practice and revitalise their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

Article 12.1 of UNDRIP states:

Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

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<sup>9</sup> See for example, EDO submission to the Review of the Aboriginal Heritage Act 1975 dated 27 September 2019, accessed at <https://www.edo.org.au/publication/review-of-the-aboriginal-heritage-act-1975/>; and

EDO considers that the proposed principles and objects in the new Act can be improved to better reflect the rights of indigenous people with respect to the cultural heritage as set out in the UNDRIP.

While the proposed fundamental principle of the Act acknowledges that “Aboriginal people are the primary custodians and knowledge holders of Aboriginal heritage”, the objects do not reflect this custodianship and knowledge as giving Tasmanian Aboriginals the right of FPIC to any proposals that may impact on their cultural heritage, and therefore as having the right of self-determination. Rather, the objects provide “for the involvement of the Aboriginal community in the management and protection of Aboriginal heritage”.

EDO recommends that, consistent with the Dhawura Ngilan report Best Practice Standards for Indigenous Cultural Heritage Management Legislation (**Best Practice Standards**), the objects and principles of any new Act should recognise as a fundamental principle that Tasmanian Aboriginals will be the ultimate arbiters of the management of the cultural aspects any proposal that will affect that heritage.<sup>10</sup> Furthermore, consistent with Articles 11 and 12 of the UNDRIP, the purpose and objects of the new Act should recognise that one of the Act’s essential roles is to support the living connection between Aboriginal people today, their ancestors and their lands.<sup>11</sup>

**Recommendation 3:** The objects and principles of any new Act should recognise as a fundamental principle that Tasmanian Aboriginals will be the ultimate arbiter of the management of the cultural aspects any proposal that will affect that heritage.

**Recommendation 4:** The objects and purposes should include recognition that one of the Act’s essential roles is to support the living connection between Aboriginal people today, their ancestors and their lands.

We note that one of the proposed objects of the new Act is to “to promote the management of Aboriginal heritage as an integral part of the State’s [RMPS]”.<sup>12</sup> However, it is not clear from the Consultation Paper whether:

- (a) the RMPS objectives will be included as objectives in the new Act; and
- (b) the RMPS objectives will be appropriately amended to make it clear that the recognition and protection of Tasmanian Aboriginal cultural heritage and cultural wellbeing is a key object of the RMPS.

For a proper integration of any new Act into the RMPS, EDO considers that both these matters need be properly addressed.

**Recommendation 5:** The RMPS objectives should be amended (across the suite of RMPS legislation) to include objectives for the recognition and protection of Tasmanian Aboriginal cultural heritage and cultural wellbeing.

**Recommendation 6:** The objects and purposes of a new Act should reference the amended RMPS objectives.

<sup>10</sup> Heritage Chairs of Australia and New Zealand (2020) *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia*, Canberra, at Part 3, at p 35 accessed at:

<https://www.awe.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>

<sup>11</sup> Ibid at p 33.

<sup>12</sup> The RMPS Objectives are set out in Appendix 1 of this submission.

In previous submissions, EDO has highlighted that the other environmental and resource legislation and policies have significant implications for the recognition and expression of Tasmanian Aboriginal culture.<sup>13</sup>

For example, in the Tasmanian Government's Rural Water Use Strategy, one of the listed actions and goals is to "participate in national strategic policy initiatives on Aboriginal water interests and ensure that Tasmanian Aboriginal people have the opportunity to be engaged in these forums as well as in water planning in Tasmania."<sup>14</sup> It is not sufficient to simply aspire to Tasmanian Aboriginal 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 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 involvement in decision making that affects their cultural heritage as expressed through, or impacted by, water.

Another example relates to the *Living Marine Resources Management Act 1995*. Despite references in the Act's objectives to taking "account of the community's interests in living marine resources" and to enabling "people and communities to provide for their social, economic and cultural well-being" in the definition of sustainable development, the Act does little to further this objective by providing recognition of Aboriginal cultural heritage and fishing rights. While "Aborigines" engaging in "Aboriginal activities"<sup>15</sup> may be exempt from the need for certain fisheries licences and may be provided for in management plans, in the Act there is no:

- broad recognition of the continuing custodianship of Tasmanian Aboriginals of Sea Country nor their rights relating to the management and use of Sea Country;
- provision for Tasmanian Aboriginal involvement in decision-making on matters which may affect or impact on their cultural heritage in Sea Country;
- provision for quotas for the Tasmanian Aboriginal community in Total Allowable Catch for all culturally significant fisheries; or
- Tasmanian Aboriginal representation on advisory committees for fisheries.

Given one of the proposed objects of the new Act is to provide integration of the management of Aboriginal cultural heritage into the RMPS, consideration should be given amending other legislation to better recognise Aboriginal cultural heritage in resources, flora and fauna and landscapes, including:

- *Living Marine Resources Management Act 1995*
- *Mineral Resources Development Act 1995*
- *Nature Conservation Act 2002*
- *National Parks and Reserves Management Act 2002*

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<sup>13</sup> See for example, EDO's *Further submission on Statutory Review of the Aboriginal Heritage Act 1975* (Tas), accessible at <https://www.edo.org.au/publication/further-submission-on-statutory-review-of-the-aboriginal-heritage-act-1975-tas/>

<sup>14</sup> Department of Primary Industries, Parks, Water and Environment (2021) *Rural Water Use Strategy*, March 2021. <https://nre.tas.gov.au/Documents/Rural%20Water%20Use%20Strategy.pdf>

<sup>15</sup> These activities are defined under section 3 of the Act as (a) the non-commercial use of the sea and its resources by Indigenous Australians; and (b) the taking of prescribed fish by Aborigines for the manufacture, by Aborigines, of artefacts for sale; and (c) manufacturing of the kind referred to in paragraph (b).

- *Threatened Species Protection Act 1995*
- *Water Management Act 1999*

**Recommendation 7:** 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 involvement in land, sea and resource management.

## 2. Definitions

The Consultation Paper proposes that the new Act would have expanded and more appropriate definitions than the present legislation, including through the:

- removal of the term ‘relic’ in the definition of Aboriginal cultural heritage;
- provision for recognition and registration of intangible heritage (songs, language, stories, landscapes, customs etc);
- retention of the recognition that significance to the Aboriginal people of Tasmania is the defining characteristic of Aboriginal cultural heritage;
- retention of the exclusion of objects made, or likely to have been made, for sale; and
- potential specification of other categories of heritage (e.g. secret and sacred), on consideration of advice from Tasmania’s Aboriginal people.

EDO welcomes the proposal for updated definitions in a new Act, and for the removal of the term “relic” in the legislation.<sup>16</sup>

Consistent with the Best Practice Standards, EDO considers an expansive definition of Aboriginal cultural heritage that includes both tangible and intangible heritage, objects, defined sites, landscapes, knowledge, customs, beliefs and values is appropriate.<sup>17</sup> This is not consistent with what appears to be currently proposed.

The proposed definitions outlined in Consultation Paper are derived from the 2013 Bill. The proposed definition for ‘Aboriginal heritage’ is:

*Aboriginal heritage* means –

- (a) Aboriginal human remains; or
- (b) Aboriginal objects; or
- (c) Aboriginal sites; or
- (d) nominated Aboriginal heritage; [a technical inclusion – see discussion of intangible heritage below]

Despite the note in bracket next to “(d) nominated Aboriginal heritage” stating “a technical inclusion – see discussion of intangible heritage below” in the above definition, there is no further discussion in the Consultation Paper of what this category of heritage may include, nor any

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<sup>16</sup> Though we note that the proposed definition for “significance” included in the Consultation Paper still uses the term “relic”. We expect that this was a typographical error given the foregoing introduction in the Consultation Paper.

<sup>17</sup> Heritage Chairs of Australia and New Zealand (2020) *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia*, Canberra, at Part 3, at p 33 accessed at: <https://www.awe.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>

description of process for such nominations. We assume that this may allow for the inclusion of intangible heritage, and if so, such an inclusion is supported. However, in this respect, it would be much simpler to include in the definition reference to intangible heritage in the definition, for example, by formally referring to Aboriginal beliefs, knowledge, traditions more broadly.<sup>18</sup> We note that such an approach is consistent with the Best Practices Standards.<sup>19</sup>

The definition of “Aboriginal heritage” should also:

- recognise the living connection between Tasmanian Aboriginal culture today and ancestors;<sup>20</sup> and
- be amended to refer to “Aboriginal cultural heritage” so that there can be no confusion that the definition plays a role in determining the ancestry or familial heritage of Tasmanian Aboriginal people.

**Recommendation 8:** In the new Act, include an expansive definition of “Aboriginal cultural heritage” which includes intangible heritage such as Aboriginal beliefs, knowledge, traditions, and recognise the living connection between Tasmanian Aboriginal culture today and ancestors.

EDO further notes that the proposed definition for “Aboriginal site” is more constrained than similar definitions found in equivalent legislation in other jurisdictions such as under the *Aboriginal Heritage Act 2006* (Vic). The Victorian Act allows for “Aboriginal places” to be areas of land or water; natural features, formations or landscapes, archaeological features and anything immediately surrounding those places to the extent that they cannot be separated to the extent without destroying the heritage significance to Aboriginal people.

The importance of freshwater and Sea Country was a theme that was emphasised during the consultations for the *Pathway to Truth-Telling and Treaty* report. In this report, the coast, beaches and seas were recognised as being significant sites for food and cultural practices (such as shell-gathering for necklaces and collecting kelp for basket-making) which are important activities in the maintenance and revival of links to culture.<sup>21</sup> Given that much of the Tasmanian landscape has recognised Aboriginal cultural heritage value to the Tasmanian Aboriginal people,<sup>22</sup> EDO

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<sup>18</sup> It would appear from the Consultation Paper that reference to ‘Aboriginal traditions’ is proposed to be included in the definition of ‘Aboriginal heritage’ through a circuitous route involving references to the ‘significance’ of ‘Aboriginal objects’ and ‘Aboriginal sites’.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Warner, K. McCormack, T. & and Kurnadi, F. (2021) Pathway to Truth-Telling and Treaty Report to Premier Peter Gutwein, accessed at:

[https://www.dpac.tas.gov.au/\\_data/assets/pdf\\_file/0005/627242/Pathway\\_to\\_Truth-Telling\\_and\\_Treaty\\_251121.pdf](https://www.dpac.tas.gov.au/_data/assets/pdf_file/0005/627242/Pathway_to_Truth-Telling_and_Treaty_251121.pdf)

<sup>22</sup> For example, the Tasmanian Wilderness World Heritage Area is internationally recognised for its cultural heritage values, and it comprises approximately 20% of the Tasmanian mainland. Furthermore, 21,000 hectares is included in the National Heritage List as the Western Tasmania Aboriginal Cultural Landscape. There are likely to be other landscapes and seascapes significant to Tasmanian Aboriginal people that are yet to be formally recognised under existing laws: see for example Warner, K. McCormack, T. & and Kurnadi, F. (2021) Pathway to Truth-Telling and Treaty Report to Premier Peter Gutwein, from p 63 accessed at:

[https://www.dpac.tas.gov.au/\\_data/assets/pdf\\_file/0005/627242/Pathway\\_to\\_Truth-Telling\\_and\\_Treaty\\_251121.pdf](https://www.dpac.tas.gov.au/_data/assets/pdf_file/0005/627242/Pathway_to_Truth-Telling_and_Treaty_251121.pdf)

strongly recommends that the definition of “Aboriginal site” be expanded from what is presently proposed so that it can include landscapes and seascapes.

The Consultation Paper states:

Recognition and management of cultural landscapes could be approached in many ways and the Government will be listening closely to all views on this matter. It is, however, considered appropriate that existing lawful access and use of land would not be impacted by future recognition of any cultural landscape.

Considering the dearth of formal protection currently afforded to many Tasmanian Aboriginal sacred sites, EDO does not consider it is appropriate for the Tasmanian Government to be already ruling out any impact on existing access and use of land due to the recognition of cultural landscapes. EDO considers that the Tasmanian Government should be open to the fact that recognition of cultural landscapes may necessitate changes to existing land access and use.

**Recommendation 9:** In the new Act, include an expansive definition of “Aboriginal sites” which includes Aboriginal cultural landscapes and seascapes.

**Recommendation 10:** In the new Act, allow for appropriate protection of Aboriginal cultural landscapes and seascapes, including the possibility of imposing restrictions on existing lawful access and use.

While the Consultation Paper noted that the new Act would provide recognition of intangible heritage,<sup>23</sup> the paper proposes that the new Act would not specify management provisions for intangible heritage such as songs, language and stories to avoid duplication and interaction with Commonwealth intellectual property law.<sup>24</sup> However, EDO recommends that the Tasmanian Government explore how the new Act can specifically recognise and provide for the management of intangible heritage consistent with the rights protected in UNDRIP, in particular the right in Article 31 to “maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions”, and other relevant laws (such as Commonwealth intellectual property laws). In the event that the Tasmanian Government opts *not* to provide for the management of intangible cultural heritage under the new Act, EDO recommends that the Tasmanian Government provides resources to the Tasmanian Aboriginal community to assist it in making use of existing intellectual property laws, which are complex and difficult to navigate.

**Recommendation 11:** Explore how the new Act can specifically recognise and provide for the management of intangible heritage consistent with the rights protected in UNDRIP and other relevant laws.

**Recommendation 12:** If the new Act does not provide for the management of intangible cultural heritage, provide resources to the Tasmanian Aboriginal community to assist it in making use of existing intellectual property laws.

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<sup>23</sup> It is currently unclear from the Consultation Paper exactly *how* the new Act will recognise intangible Aboriginal cultural heritage given the list of definitions outlined in the paper.

<sup>24</sup> See Heritage Chairs of Australia and New Zealand (2020) *Dhawura Ngilan: A vision for Aboriginal and Torres Strait Islander heritage in Australia*, Canberra, at Part 3, at p 39 accessed at: <https://www.awe.gov.au/sites/default/files/documents/dhawura-ngilan-vision-atsi-heritage.pdf>

### 3. Ownership

The Consultation Paper states that new Act will:

- acknowledge that Tasmanian Aboriginal people are the custodians of their heritage;
- remove current provisions assigning ownership of Aboriginal cultural heritage on Crown land to the Crown, and not specifically provide for any other Crown ownership of Aboriginal cultural heritage;
- prohibit the sale of Aboriginal cultural heritage;
- provide for the registration of private collections of Aboriginal cultural heritage;
- clarify rights of private land holders in relation to undertaking certain activities; and
- provide for the representative Aboriginal body (see section 4) to make decisions about repatriation of Aboriginal cultural heritage.

EDO supports the recognition Aboriginal people as the custodians of their heritage and the omission from the new legislation provisions that assign ownership of Aboriginal cultural heritage to the Crown. As previously outlined in this submission, EDO considers that the natural concomitant of the recognition of Tasmanian Aboriginals as the custodians of their heritage is that they must be empowered to freely provide and/or withhold their consent in relation to any proposed policies, guidelines, or any proposals that may impact Aboriginal cultural heritage.

On this issue, the UN Human Rights Committee in its General Comment on Article 27 of UNDRIP (right to enjoy culture) said, especially in the case of Indigenous peoples, that the enjoyment of the right to one's own culture may require both positive legal measures of protection by a State party and measures to ensure the effective participation of members of minority communities in decisions which affect them. States are obligated to allow and encourage the participation of Indigenous peoples in the design and implementation of laws and policies that affect them, which would include cultural heritage laws and policies.<sup>25</sup>

Indigenous peoples have rights to effective participation in decision making processes relating to cultural heritage. This includes that concerned communities and individuals should be consulted and be able to actively participate in the process of identification, selection, classification, interpretation, preservation/safeguarding, stewardship and development of cultural heritage.<sup>26</sup> States are required to obtain Indigenous peoples' FPIC when the preservation of cultural resources, especially those associated with their way of life and cultural expression are at risk.<sup>27</sup> In these circumstances, FPIC requires affirmative consent (i.e. is a right to veto). The basis for this right to veto is derived from the right to culture and the prohibition on States destroying Indigenous culture that risks indigenous cultural survival. In other words, FPIC is not an aspiration or a process, but a right in itself which must be reflected in the design of heritage legislation.

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<sup>25</sup> Committee on Economic, Social and Cultural Rights, General Comment No.21, para.55(e)

<sup>26</sup> UNHRC, EMRIP, Study by the Expert Mechanism on the Rights of Indigenous Peoples on the Promotion and protection of the rights of indigenous peoples with respect to their cultural heritage, A/HRC/30/53, 19 August 2015, para.45.

<sup>27</sup> EDO NT, Submission to the Northern Territory Department of Environment and Natural Resources on draft Environment Protection Bill and draft Environment Protection Regulations (2018), Attachment B: Australia's obligations under International Law to Consult with, and to Ensure the Free, Prior and Informed Consent of, Indigenous Communities, [https://denr.nt.gov.au/\\_data/assets/pdf\\_file/0004/669739/21-submission.pdf](https://denr.nt.gov.au/_data/assets/pdf_file/0004/669739/21-submission.pdf) .



**Recommendation 13:** The UNDRIP principle of FPIC be properly incorporated into all relevant aspects of the new Act.

Consistent with Articles 11 and 12 of the UNDRIP, the Act should allow for use of, access to and repatriation of cultural heritage as appropriate and determined by Tasmanian Aboriginal people. EDO also recommends provisions in the new Act make it clear that, when it comes to private properties, the owner of the land is not the owner of Aboriginal cultural heritage associated with that land, and any Aboriginal cultural heritage associated with the land must be managed in accordance with the general provisions in the Act for protecting and managing Aboriginal cultural heritage.

**Recommendation 14:** In the new Act, provide for use of, access to and repatriation of cultural heritage as appropriate and determined by Tasmanian Aboriginal people.

**Recommendation 15:** In the new Act, make it explicit that owner of the land is not the owner of Aboriginal cultural heritage associated with that land, and any Aboriginal cultural heritage associated with the land must be managed in accordance with the general provisions in the Act.

#### **4. The representation of Aboriginal people and interests**

The Consultation Paper states that it is proposed the new Act will:

- establish and recognise a statutory Aboriginal representative body that would have decision making powers;
- set out processes for nomination and appointment of members of the representative body; and
- set out requirements for membership – skills, gender balance, regional representation.

EDO considers that decisions around who should represent Aboriginal people and interests is a matter for the Tasmanian Aboriginal community to decide. In so doing, we note the Best Practice Standard for the incorporation of principles of self-determination states that:

The identification of a legitimate ‘representative organisation’ capable of exercising an Indigenous community’s rights and responsibilities with respect to their [Cultural Heritage] is a fundamental component in any comprehensive [Cultural Heritage] legislation. It is for the Indigenous community to decide who represents them, consistent with FPIC.<sup>28</sup>

The Best Practice Standard also states that where a ‘representative organisation’ does not yet exist, legislation should include “mechanisms for the identification and appointment of an organisation that can genuinely be accepted as the ‘representative organisation’ of the affected Indigenous community to undertake this role.”<sup>29</sup>

**Recommendation 16:** The Tasmanian Aboriginal community should decide the appropriate representative organisation to assume a role with respect to decision-making and management of Aboriginal cultural heritage under new Act. The design and governance of such an organisation must be led by the Tasmanian Aboriginal community and adequately resourced by the Tasmanian Government.

<sup>28</sup> Heritage Chairs of Australia and New Zealand (2020), above n 1, page 35.

<sup>29</sup> Heritage Chairs of Australia and New Zealand (2020), above n 1, pages 35-36.



## 5. Who makes decisions on Aboriginal cultural heritage

The Consultation Paper states that the new Act will:

- establish principles of early and proactive consideration of Aboriginal cultural heritage with a primary focus on avoiding impacts;
- establish a system whereby a strengthened Aboriginal Heritage Council [**AHC**] would make decisions about authorisations for unavoidable interference or destruction in relation to management of Aboriginal cultural heritage in as many circumstances as practically possible (including by issuing permits);
- provide that complex matters are managed through Aboriginal Cultural Heritage Management Plans where the pathway to approval is agreement between the proponent and the strengthened AHC; and
- provide a pathway of last resort for the Minister to propose a resolution where a proponent and the strengthened AHC are unable to reach agreement on an Aboriginal Cultural Heritage Management Plan for a proposed activity, after exhausting good faith efforts to reach agreement.

EDO welcomes the shift from the current legislation where the Minister is the decision maker on all significant matters relating to the management and protection of Aboriginal heritage to one where Tasmanian Aboriginal people have a central role in deciding how Aboriginal cultural heritage is to be managed. However, EDO has concerns around the circumstances in which the Minister will be able to overrule the decisions of the Tasmanian Aboriginal representative body (whether that is the “strengthened AHC” or another body, as determined by the Tasmanian Aboriginal community).

The Consultation Paper indicates there may be circumstances when the project proponents and the strengthened AHC cannot reach agreement on an Aboriginal Cultural Heritage Management Plan and, in these instances, the Minister will be able to intervene and propose a resolution. In our view, this would be inconsistent with the Best Practice Standard for the incorporation of principles of self-determination which states that, in the context of Aboriginal cultural heritage, “the affected Indigenous Community itself should be the ultimate arbiter of the management of the [Cultural Heritage] aspects any proposal that will affect that heritage.”<sup>30</sup>

In line with this Best Practice Standard, EDO recommends Tasmanian Aboriginal people ultimately be the decision makers in the management and custodianship of their heritages, and that the circumstances in which the decisions of Tasmanian Aboriginal people can be overruled and who can overrule be carefully considered and limited.

EDO questions whether it is appropriate for the Minister to be the ultimate decision maker where there is a disagreement between a proponent and the Tasmanian Aboriginal representative body, or whether appeals processes, as foreshadowed in the Consultation Paper, provides sufficient recourse for dissatisfied proponents of developments or activities with an impact on Aboriginal Cultural Heritage. EDO considers that excluding the Minister from decision making and providing this role to the Tasmanian Aboriginal representative body would be more in line with the model contemplated in the Best Practices Standards. It is also more aligned with the model adopted in

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<sup>30</sup> Heritage Chairs of Australia and New Zealand (2020), above n 1, page 35.

Victoria, where the local Aboriginal party makes the decision and the proponent has a right of appeal to the Victorian Civil and Administrative Tribunal.

**Recommendation 17:** In the new Act, the Tasmanian Aboriginal representative body should be the ultimate arbiter with respect to the appropriate management of Aboriginal cultural heritage including in relation to any disputes about that management. Avenues of appeal or redress, should be limited to procedural or legal errors, and be to the Tasmanian Civil and Administrative Appeals Tribunal.

**Recommendation 18:** The representative body should be fully resourced to undertake and be responsible for dispute resolution, and then for determining disputes where agreement cannot be reached.

If, despite EDO's recommendations, the new Act retains a role for the Minister in arbitrating disputes between the Tasmanian Aboriginal representative body and proponents of projects that impact Aboriginal cultural heritage, EDO considers the criteria available to the Minister to use in making a decision outlined in the Consultation Paper (at page 18) should be significantly more constrained. The Consultation Paper notes that the new Act "requirements for certain matters to be considered [by the Minister] (such as social, economic and environmental aspects, which might include possible benefits or deficits in terms of public health, public infrastructure, transport and housing needs)".

It is difficult to provide detailed feedback on these criteria given their high-level nature, however, with respect to the proposed "benefits and deficits" criteria we note and repeat the objections we raised in EDO's *Submission on the draft Aboriginal Cultural Heritage Bill 2020 (WA)* (at page 28) with respect to the use of the "interests of the State" criterion in the Minister's decision.<sup>31</sup> Arguably, such criteria could result in the Minister performing a balancing act where the interests of Tasmanian Aboriginal people in protecting culture are weighed up against other economic or social benefits. EDO considers it would be inappropriate for the Minister to perform some kind of weighing exercise between a project's economic benefits and the protection of Aboriginal cultural heritage.

This is of concern because we have seen examples where Ministers have made decisions that put economic and other interests above the interest of protecting Aboriginal cultural heritage. For example, the *Pathway to Truth Telling and Treaty* report found that between July 2017 and June 2021 the AHC opposed a total of seven Aboriginal heritage permit applications. Of this number, the Minister accepted the Council's recommendation in just two cases and granted permits in the other five cases. Of the five cases that were granted permits, four were granted on the basis of social and/or economic benefit and one was granted based on public health concerns.<sup>32</sup> EDO has concerns that this balancing exercise may, and likely will, allow a Minister to make decisions that are not in the interests of Tasmanian Aboriginal people that have responsibilities to that cultural heritage, and would be contrary to the spirit of the new Act.

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<sup>31</sup> Environmental Defenders Office (2020) *Submission on the draft Aboriginal Cultural Heritage Bill 2020 (WA)*, 9 October 2020 accessed at: <https://www.edo.org.au/wp-content/uploads/2020/11/FINAL-EDO-Submission-draft-ACH-Bill.pdf>

<sup>32</sup> Warner, K. McCormack, T. & Kurnadi, F. (2021) above n 4.

Instead, EDO would support the inclusion of a criterion requiring that the Minister be satisfied that their decision is consistent with the objects and purposes of the Act. This criterion would help to ensure the objects and purposes of the Act remain central to any decisions the Minister makes.

**Recommendation 19:** If, contrary to recommendation 17, the Minister retains a role with respect to arbitrating disputes concerning Aboriginal cultural heritage, the criteria for the Minister’s decisions should not allow for the weighing of economic benefits against the protection of Aboriginal cultural heritage, and instead require the Minister’s decision to be consistent with the objects and purposes of the Act.

## 6. Alignment with the State’s planning and development system

The Consultation Paper states that the new Act will:

- require persons making decisions, or providing advice under the Act to take into account the objectives of the State’s Resource Management and Planning System (RMPS);
- establish statutory assessment and approval processes and timeframes which align, where practical, with other RMPS legislation – particularly *the Land Use Planning and Approvals Act 1993*;
- encourage, and where appropriate require, early consideration of Aboriginal cultural heritage in planning and development processes, with the intention of identifying, avoiding and proactively managing potential impacts; and
- retain provisions for statutory guidelines which may adopt standards, rules, codes and guidelines – particularly in the forestry and mining sectors.

EDO welcomes the Tasmanian Government’s commitment to shifting the focus from being about decisions concerning authorisations of disturbance or destruction of heritage, towards early consideration of Aboriginal cultural heritage in all relevant planning processes so that impacts on Aboriginal cultural heritage can be avoided wherever possible. Appropriate recognition and protection of Aboriginal cultural heritage requires a critical rethink of how the Aboriginal cultural heritage is recognised not just under Tasmania’s Aboriginal cultural heritage protection legislation but also under other Tasmanian laws. In particular, there is a need for all resource management and planning decisions to effectively integrate consideration and protection of cultural heritage.

EDO does not consider that the proposed “light touch” integration between the new Act and the RMPS suite of laws, and particularly the LUPA Act, will be sufficient to adequately protect Aboriginal cultural heritage. Simply requiring a proponent for a development or use proposal involving certain (presently unspecified) activities such as a threshold level of ground disturbance to first undertake a search of a statutory Aboriginal Cultural Heritage Register does not go far enough in protecting Aboriginal cultural heritage. This is because, as acknowledged in the *Review of the Aboriginal Heritage Act 1975*, there are significant variances in the quality of information contained in the existing non-statutory register and “its coverage of the State is highly uneven.”<sup>33</sup> The *Pathway to Truth-Telling and Treaty* report also reported some objections from Tasmanian Aboriginal people about the way cultural sites were recorded and included on the Heritage Register by Aboriginal Heritage Tasmania. Some Tasmanian Aboriginal people felt that having to

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<sup>33</sup> Department of Primary Industries, Parks, Water and Environment (2021) *Review of the Aboriginal Heritage Act 1975: Review Report*, March 2021.  
<https://nre.tas.gov.au/Documents/Review%20of%20Aboriginal%20Heritage%20Act%201975%20Report.pdf>

include sites on the Heritage Register was a “lose-lose situation” in that if the coordinates of significant sites are made public then there is a risk of people stealing or destroying them, but if the locations are not registered, this can happen anyway out of ignorance.<sup>34</sup> As a consequence, a search of the register is no guarantee that if a development goes ahead Aboriginal cultural heritage will not be damaged.

**Recommendation 20:** The Tasmanian Government consider alternatives to the “light touch” integration between the new Act and the LUPA Act and other resource legislation.

In its Tabling Report in response to the findings of the *Review into the Aboriginal Heritage Act 1975*, the Tasmanian Government committed to introducing measures to require early consideration of potential Aboriginal heritage impacts in the highest (State and regional) level of strategic planning, and in all assessments of rezoning proposals under the LUPA Act to ensure major planning decisions take full account of Aboriginal heritage issues.<sup>35</sup> The Consultation Paper indicates that this be done through the Tasmanian Planning Policies (TPPs).

While EDO is supportive of the TPPs specifically addressing the recognition, protection and management of Aboriginal cultural heritage, EDO considers that modelling of the likely spatial extent of cultural heritage in the State – based on existing Aboriginal Heritage Tasmania records, Aboriginal cultural heritage surveys, historical records, and Tasmanian Aboriginal knowledge, stories and traditions – would assist with the realisation of this commitment and inform such “high level” integration of Aboriginal cultural heritage into planning and development decisions.<sup>36</sup> In making this suggestion, it should be noted that EDO does not recommend that the precise location of Aboriginal cultural heritage be included in these spatial cultural heritage models (unless that is considered appropriate by the Tasmanian Aboriginal community), but that the models provide an indication of the *likelihood* of cultural heritage at a landscape scale (in the same way, for example, as biodiversity or hazard code layers provide an indication of the likelihood of encountering threatened species or landslide hazards). These models could then be incorporated into an Aboriginal cultural heritage layer for Local Provisions Schedules under the Tasmanian Planning Scheme. The new Act (and any appropriate amendments to the LUPA Act and other resource legislation) could then require certain proposed developments or uses in these modelled areas to compile appropriate expert surveys reports and, if necessary, the preparation of proposed Aboriginal cultural heritage management plans under the new Act.

**Recommendation 21:** The Tasmanian Government follow through with its commitment to introduce measures to require early consideration of potential Aboriginal heritage impacts in

<sup>34</sup> Warner, K. McCormack, T. & and Kurnadi, F. (2021), above n 2.

<sup>35</sup> Jaensch, Roger (2021) *Tabling Report: Government Commitment in Response to the Review Findings, Aboriginal Heritage Act 1975: Review under s.23*. <https://nre.tas.gov.au/Documents/Tabling%20Report%20-%20Review%20of%20the%20Aboriginal%20Heritage%20Act.pdf>

<sup>36</sup> See for example the “Aboriginal sites decision support tool” developed by the NSW Government - <https://www.environment.nsw.gov.au/research-and-publications/our-science-and-research/our-research/cultural-science/aboriginal-sites-decision-support-tool?fbclid=IwAR2ZuCQb9iMetWmCJ79IkIJ03m6nM2unFC-bz3JIOMmheVVz9JtAchHmtDU>. Some of this work appears to have commenced in Tasmania. For example, see Jones, PJ, Williamson, GJ, Bowman, DMJS, Lefroy, EC. Mapping Tasmania's cultural landscapes: Using habitat suitability modelling of archaeological sites as a landscape history tool. *J Biogeogr.* 2019; 46: 2570– 2582. <https://doi.org/10.1111/jbi.13684>

the highest (State and regional) level of strategic planning, and in all assessments of rezoning proposals under the LUPA Act.

**Recommendation 22:** The Tasmanian Government explore the feasibility of preparing spatial Aboriginal cultural heritage modelling – based on existing Aboriginal Heritage Tasmania records, Aboriginal cultural heritage surveys, historical records, and Tasmanian Aboriginal knowledge, stories and traditions – to inform planning and development decisions and the need for cultural heritage surveys and the preparation of Aboriginal cultural heritage management plans under the new Act.

## 7. Modern management mechanisms

The Consultation Paper states that the new Act will:

- provide for Aboriginal Cultural Heritage Management Plans (both voluntary and mandatory) for high risk/high-impact projects, as in other modern legislation, with the normal process being for finalisation by agreement between the proponent and the strengthened AHC, and (see section 5 above) going to the Minister only if agreement cannot be reached;
- provide for development projects of lesser scale or complexity to be subject to a streamlined assessment and approval process for permits, approved by the strengthened AHC, triggered by the known presence of Aboriginal cultural heritage;
- provide for a system of voluntary Aboriginal cultural heritage agreements to provide for flexible management and protection arrangements (e.g. especially useful for farmers and other owners of land containing Aboriginal cultural heritage values);
- establish a statutory Aboriginal Cultural Heritage Register to record and support management of Aboriginal cultural heritage records and statutory processes;
- introduce modernised provisions enabling the creation of Aboriginal Cultural Heritage Protected Areas for areas requiring the strongest protection, with appropriate management provisions;
- provide for a range of appeal processes, to ensure the Act is administered reasonably and fairly; and
- subject to advice from Tasmanian Aboriginal people, recognise additional categories of Aboriginal cultural heritage and include special management provisions.

The Consultation Paper proposes that any activity that is of a certain scale or degree of risk to heritage would require a mandatory Aboriginal Cultural Heritage Management Plan to be completed and approved prior to the activity commencing. Section 6 provides a little more detail on the trigger point stating that “Aboriginal Cultural Heritage Management Plans would be required where the potential risk to Aboriginal cultural heritage is known or likely to be significant.” It also states that they would be mandatory “if certain scale and activity type triggers were activated.” EDO has significant questions about what is proposed. In particular, it is unclear:

- What the scale and activity triggers are?
- What will constitute a “significant” risk to Aboriginal cultural heritage and/or who will be responsible for making the judgement call about the significance of a potential risk?

Consistent with the principles of FPIC and self-determination, EDO recommends that the Tasmanian Aboriginal representative body be responsible for determining the appropriate scale of

risk and the level of significance of a risk which warrants the mandatory preparation of an Aboriginal Cultural Heritage Management Plan.

**Recommendation 23:** In the new Act, provide for a process for the Tasmanian Aboriginal representative body to determine when a mandatory Aboriginal Cultural Heritage Management Plan is required.

As we have already outlined in this submission, EDO also believes that given the lack of a comprehensive survey of Aboriginal cultural heritage in Tasmania, it is not enough to rely on a trigger mechanism based on a potential risk to known Aboriginal cultural heritage. The inadequacies of Tasmania's existing surveys of Aboriginal cultural heritage are exemplified with the case of the Tasmanian Wilderness World Heritage Area (*TWWHA*). As the Tasmanian Government has acknowledged, in the case of the TWWHA, we are still at the stage of planning for a decade-long comprehensive cultural assessment of the property, which commenced in 2018.

Given the lack of a comprehensive cultural survey and the problems with a reliance on the Aboriginal Heritage Register described above, EDO considers the first step should be for the Tasmanian Government to commit to resourcing and undertaking a systematic assessment of cultural heritage across the State.

In terms of the appeals process described in the Consultation Paper, 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 heritage, particularly where those decisions are made by a person other than a representative of the affected First Nations community. In this respect, the new Act should be explicit about who has the right to appeal decisions relating to the management of Aboriginal cultural heritage. If contrary to recommendation 17 above, someone other than the Tasmanian Aboriginal representative body makes a decision authorising the destruction of Aboriginal cultural heritage, EDO recommends all Tasmanian Aboriginal people have standing to appeal against the merits of decisions. That is, appeals should not be limited to the formal parties to the permit or Aboriginal Cultural Heritage Management Plan.

In addition, the Act should 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 24:** In the new Act, provide appropriate avenues for Tasmanian Aboriginal people to appeal against the merits of decisions authorising the destruction of Aboriginal cultural heritage where those decisions are made by a person other than a representative of the Tasmanian Aboriginal community.

**Recommendation 25:** In the new Act, 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.

## 8. Compliance and enforcement

The Consultation Paper states that the new Act will:

- retain the current level of penalties for disturbing or damaging Aboriginal cultural heritage, as well as a range of proportionate penalties for administrative offences that do not directly harm heritage;
- include ‘stop work’ and ‘vacate site’ provisions with clearly defined criteria for when and how they may be used, and how long they may remain in force; and
- include provisions enabling the issue of infringement notices and remediation orders with clearly defined criteria for when and how they may be used, and what types of conditions they may contain.

EDO has previously noted that stop work orders, infringement notices, remediation orders are necessary elements of the powers required to ensure adequate protection of Aboriginal cultural heritage and welcomes the proposed inclusion these enforcement mechanisms into the new Act. The Consultation Paper does not make clear who has the authority to issue stop work orders, infringement notices or remediation orders, although consistent with *the Review of the Aboriginal Heritage Act 1975 Report*, it does note that an opportunity may be for Aboriginal Rangers with the Tasmanian Parks and Wildlife Service (**PWS**) to exercise these enforcement powers.

EDO recommends that, in addition to any expanded Aboriginal Ranger program with the PWS, the Tasmanian Aboriginal representative body under the new Act needs to have sufficient powers and resources to ensure that where an action that is impacting or is suspected of impacting Aboriginal cultural heritage can be stopped. Unfortunately, the Consultation Paper does not provide sufficient detail on the topic of compliance and merely states the powers of authorised officers are details that “will all be available for examination and comment when the draft exposure Bill is issued.”

While we recognise that the resourcing and capability development of the Tasmanian Aboriginal representative body (whether that is a strengthened AHC or another body) is not a directly legislative issue, that body will not be able to fulfil its envisioned statutory role if it is not adequately resourced and lacks the people with the necessary skills. EDO remains concerned about the lack of prosecutions under the existing Act and believes the Tasmanian Government must commit more resources to investigation and enforcement activities in order for the increased penalties to provide a meaningful deterrent.

Further, consistent with the Best Practice Standard that “affected Indigenous communities should be adequately empowered and resourced to undertake necessary compliance and enforcement functions,”<sup>37</sup> civil enforcement opportunities should be provided under the new Act for Tasmanian Aboriginal people where regulators do not undertake enforcement action.

**Recommendation 26:** The Tasmanian Aboriginal representative body under the new Act be provided clear enforcement powers, together with resourcing to undertake compliance and enforcement, and civil enforcement opportunities should be provided for Tasmanian Aboriginal people in the event that the regulators do not undertake enforcement action.

<sup>37</sup> Heritage Chairs of Australia and New Zealand (2020), above n 1, page 37.

In addition to financial penalties, the new Act should provide the power for Magistrates to make orders requiring offenders to:

- (a) prepare public notices in newspapers or other publications (including online forums) outlining the nature of the offence and detailing the penalties imposed;
- (b) attend any appropriate cultural education programs;
- (c) partake in restorative justice programs (with the consent of the representative Tasmanian Aboriginal body); and/or
- (d) make a contribution to a program to protect or restore Tasmanian Aboriginal cultural heritage (with the consent of the Tasmanian Aboriginal representative body).

**Recommendation 27:** In the new Act, provide greater scope for educative and/or restorative justice orders in sentencing offenders for offences under the Act.

Article 28 of the UNDRIP states:

Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

Consideration should therefore be given to how fines for particular offences may be distributed to the Tasmanian Aboriginal communities that have been impacted by those offences. The Act should also provide options for redress and/or compensation to the Tasmanian Aboriginal community where cultural heritage is unlawfully damaged or destroyed.

**Recommendation 28:** Consideration should be given to how fines for particular offences under the new Act may be distributed to the Tasmanian Aboriginal communities that have been impacted by the offence.

**Recommendation 29:** In the new Act, provide options for redress and/or compensation to the Tasmanian Aboriginal community where cultural heritage is unlawfully damaged or destroyed.



## Appendix 1 – RMPS Objectives

1. The objectives of the resource management and planning system of Tasmania are –
  - (a) to promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity; and
  - (b) to provide for the fair, orderly and sustainable use and development of air, land and water; and
  - (c) to encourage public involvement in resource management and planning; and
  - (d) to facilitate economic development in accordance with the objectives set out in paragraphs (a), (b) and (c); and
  - (e) to promote the sharing of responsibility for resource management and planning between the different spheres of Government, the community and industry in the State.

2. In item 1(a),

***sustainable development*** means managing the use, development and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety while –

- (a) sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations; and
- (b) safeguarding the life-supporting capacity of air, water, soil and ecosystems; and
- (c) avoiding, remedying or mitigating any adverse effects of activities on the environment.