



Environmental
Defenders Office

**Submission responding to the update on the new
Aboriginal Cultural Heritage Protection Act (Tasmania)**

28 February 2024

About EDO

EDO is a community legal centre specialising in public interest environmental law. We help people who want to protect the environment through law. Our reputation is built on:

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.

Independent and accessible services. As a non-government and not-for-profit legal centre, our services are provided without fear or favour. Anyone can contact us to get free initial legal advice about an environmental problem, with many of our services targeted at rural and regional communities.

Environmental Defenders Office is a legal centre dedicated to protecting the environment.

www.edo.org.au

Submitted to:

Review of the Aboriginal Heritage Act 1975

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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. We also acknowledge that where possible, specificity is more respectful. In this submission, we have chosen to use the term “First Nations” to refer to Aboriginal and Torres Strait Islander peoples across Australia. When referring to Tasmanian Aboriginal / palawa / pakana people in this submission we have used the term “Tasmanian Aboriginal peoples”. We acknowledge that not all Aboriginal people may identify with these terms and that they may instead identify using other terms.

First Laws is used to describe the laws which exist within First Nations. It is not intended to diminish the importance or status of the customs, traditions, kinship and heritage of First Nations in Australia. The EDO respects all First Laws and values their inherent and immeasurable worth. EDO recognises that there are many different terms used throughout First Nations for what is understood in the Western world as ‘First Laws’.

Acknowledgement of Country

The EDO recognises and pays respect to the First Nations Peoples of the lands, seas and rivers of Australia. We pay our respects to the First Nations Elders past, present and emerging, and aspire to learn from traditional knowledges and customs that exist from and within First Laws so that together, we can protect our environment and First Nations’ cultural heritage through both First and Western laws. We recognise that First Nations’ Countries were never ceded and express our remorse for the injustices and inequities that have been and continue to be endured by the First Nations of Australia and the Torres Strait Islands since the beginning of colonisation.

EDO recognises self-determination as the right to freely determine one’s political status and freely pursue one’s economic, social and cultural development. EDO respects all First Nations’ right to be self-determined, which extends to recognising the many different First Nations within Australia and the Torres Strait Islands, as well as the multitude of languages, cultures, protocols and First Laws.

First Laws are the laws which existed prior to colonisation and continue to exist today within all First Nations. It refers to the learning and transmission of customs, traditions, kinship and heritage. First Laws are a way of living and interacting with Country that balances human needs and environmental needs to ensure that the environment and ecosystem which nurtures, supports, and sustains human life, is also nurtured, supported, and sustained. Country is sacred and spiritual, with culture, First Laws, spirituality, social obligations and kinship all stemming from relationships to and with the Land.

Executive Summary

Environmental Defenders Office (**EDO**) welcomes the opportunity to provide comments and feedback on the Minister's update on the progress of the new Aboriginal Cultural Heritage Protection Act (**the new Act**) which was released on 20 December 2023 (the **update**).

In making this submission, EDO acknowledges that it cannot and does not speak on behalf of Tasmanian Aboriginal 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 make several recommendations concerning the development of a new Act for Tasmania, EDO acknowledges that First Laws should be respected in the same way that Western laws are respected. In addition to protecting Aboriginal cultural heritage under Western law, an important way that First Laws 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.¹

The *Tasmanian Aboriginal Heritage Act 1975* (Tas) (the **Act**) has been criticised for being “woefully outdated” and “shamefully disrespectful” of Tasmanian Aboriginal people.² Tasmania is a laggard in its treatment of Aboriginal cultural heritage; with a 2021 review identifying that Tasmania has the worst Aboriginal cultural heritage laws in the country.³ It is beyond time that new laws be introduced to provide real and meaningful protection of Tasmanian Aboriginal cultural heritage.

While the update does not go into detail, there are several positive elements proposed for the new Act including:

¹ 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.

² The Mercury, 25 June 2016, “Relics Act shamefully disrespectful” by the Matthew Groom, Heritage Minister in the Hodgman State Government, accessed <http://www.kooriweb.org/foley/news/2000s/2016/hr25jun2016.pdf>

³ Tasmanian Government (2021) Review of the Aboriginal Heritage Act 1975 <<https://www.aboriginalheritage.tas.gov.au/Documents/Review%20of%20Aboriginal%20Heritage%20Act%201975%20Report.pdf>>.

- The provision of new definitions for Aboriginal cultural heritage;
- 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 between landowners and a Tasmanian Aboriginal representative body to be registered on the title to provide for the protection of Aboriginal cultural heritage.

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

The most important principle for the Act to incorporate is the principle of self-determination.⁴ 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”.⁵ These principles are not presently proposed to be reflected in either the objects or the substance of the new Act.

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

- 1. General observations**
- 2. The representation of Tasmanian Aboriginal people and interests**
- 3. Protection and Management of Aboriginal Cultural Heritage**
 - 3.1. Unknown/unsurveyed heritage sites**
 - 3.2. Refusal of activities with unacceptable impacts**
 - 3.3. Aboriginal Heritage Permits**
 - 3.4. Aboriginal Cultural Heritage Management Plans**
 - 3.5. Aboriginal Cultural Heritage Agreements**
 - 3.6. Compliance and Enforcement**

A summary of EDO’s recommendations concerning these sections can be found below.

⁴ 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>. (**Heritage Chairs of Australia and New Zealand (2020)**)

⁵ Ibid.

Summary of Recommendations

Recommendation 1: The Tasmanian Government follow through with its commitment to introduce measures to require early consideration of potential Aboriginal cultural heritage impacts in the highest (State and regional) level of strategic planning, and in all assessments of rezoning proposals under the *Land Use Planning and Approvals Act 1993* (Tas) (**LUPA Act**).

Recommendation 2: The new Act should integrate with the LUPA Act in the same way as the *Historic Cultural Heritage Act 1995* (Tas), and the *Environmental Management and Pollution Control Act 1994* (Tas).

Recommendation 3: The Resource Management and Planning System (**RMPS**) objectives should be amended to acknowledge Tasmanian Aboriginal people and the objectives of providing for the UNDRIP principles of self-determination and FPIC concerning all decisions relating to Aboriginal cultural heritage.

Recommendation 4: 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 the 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.

Recommendation 5: The new Act should provide for the Aboriginal Heritage Council (or appropriate Tasmanian Aboriginal representative body) to decide whether an Aboriginal cultural heritage survey is required prior to activities being undertaken on a site where no surveys have previously been carried out.

Recommendation 6: An appropriate Tasmanian Aboriginal representative body should be given the decision-making power to refuse to enter into an ACHMP where it finds that the impacts of a development or activity on Aboriginal cultural heritage will be significant and unacceptable to Tasmanian Aboriginal people.

Recommendation 7: The test in the new Act relating to whether an Aboriginal Heritage Permit or Aboriginal Cultural Heritage Management Plan is required should be co-designed by Tasmanian Aboriginal people.

Recommendation 8: The Tasmanian Aboriginal people should be given appeal rights and enforcement rights for decisions and activities impacting Aboriginal cultural heritage, including Aboriginal Cultural Heritage Permits and Aboriginal Cultural Heritage Management Plans.

Recommendation 9: The new Act should clarify who are the parties to an Aboriginal Cultural Heritage Management Plan and include the appropriate Tasmanian Aboriginal representative body as a party.

Recommendation 10: The new Act should ensure that the Aboriginal Cultural Heritage Management Plans are binding on successors in title and/or responsibility for an activity, and provide a process to allow the Tasmanian Aboriginal representative body to end the plan in circumstances that the body considers appropriate.

Recommendation 11: The new Act should ensure that there are clear penalties for non-compliance with Aboriginal Cultural Heritage Management Plans by proponents of activities, their representatives and contractors and a pathway for remediation or restitution for unlawful damage to Aboriginal cultural heritage as a result of the breach of the plan.

Recommendation 12: The new Act should clarify that, before any requirement for an ACHMP may be waived, the Aboriginal Heritage Council (or appropriate Tasmanian Aboriginal representative body) must determine whether an Aboriginal cultural heritage survey must be conducted and by whom.

Recommendation 13: The new Act should provide the Aboriginal Heritage Council (or appropriate Tasmanian Aboriginal representative body) with the power to determine when an exemption from the requirement for an Aboriginal cultural heritage permit or Aboriginal Cultural Heritage Management Plan is appropriate.

Recommendation 14: More clarity is required around the proposed exemptions from the requirements for an Aboriginal cultural heritage permit or Aboriginal Cultural Heritage Management Plan, particularly with respect to the definitions of “emergency works”, “pre-occurring”, and “like for like” activities.

Recommendation 15: The new Act should provide clarity on how Aboriginal Cultural Heritage Agreements will be “flexible and adaptable”, and clearly define the circumstances and process for whether and how Aboriginal Cultural Heritage Agreements can be amended.

Recommendation 16: The new Act should provide more clarity on how Audit Orders operate.

Recommendation 17: The Tasmanian Aboriginal representative body under the new Act should 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.

1. General observations

In response to broad support from the community, the Tasmanian Government previously committed to introducing measures to require early consideration of potential Aboriginal cultural heritage impacts in the highest (State and regional) level of strategic planning, and in all assessments of rezoning proposals under the *Land Use Planning and Approvals Act 1993* (Tas) (**LUPA Act**) to ensure major planning decisions take full account of Aboriginal cultural heritage issues.⁶

EDO has previously welcomed the Tasmanian Government’s commitment to shifting the focus from authorisations of disturbance or destruction of Aboriginal cultural heritage, towards early

⁶ Roger Jaensch (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>>.

consideration of Aboriginal cultural heritage in all relevant planning processes so that impacts on Aboriginal cultural heritage can be avoided wherever possible.⁷

Appropriate recognition and protection of Aboriginal cultural heritage requires a critical rethink of how 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.

However, the 2022 consultation paper outlining the Government’s approach to the new Act proposed to provide for a “light touch” integration between the new legislation and the planning system, with no meaningful mechanism for Tasmanian Aboriginal people to have a determining role in planning decisions that affect their cultural heritage.⁸ This approach appears to be adopted in the update of the new Act. The Tasmanian Government has also adopted ambiguous and weak language in the Aboriginal Cultural Heritage section of the draft Tasmanian Planning Policies (**TPPs**), meaning that if the TPPs proceed in their current form, there is little practical guidance, and more importantly, no statutory imperative, for Aboriginal cultural heritage to be actively considered and protected under the Tasmanian Planning Scheme or Regional Land Use Strategies.⁹ It is therefore unclear how the Tasmanian Government intends to achieve its commitment to the early consideration of Aboriginal cultural heritage impacts in the highest level of strategic planning and all major planning decisions.

EDO does not consider that the proposed “light touch” integration between the new Act and the Resource Management and Planning System (**RMPS**) suite of laws, 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.”¹⁰

⁷ Department of Natural Resources and Environment (2022) ‘Consultation Paper: A new Aboriginal Cultural Heritage Protection Act’ at p 18 <<https://nre.tas.gov.au/about-the-department/aboriginal-legislative-reform/aboriginal-heritage-act>>. See also EDO’s [submissions in response to that Consultation Paper](#).

⁸ Ibid.

⁹ Refer to EDO’s [Submission on the Draft Tasmanian Planning Policies](#).

¹⁰ Department of Primary Industries, Parks, Water and Environment (2021) *Review of the Aboriginal Heritage Act 1975: Review Report*, March 2021. Accessed at:

<https://nre.tas.gov.au/Documents/Review%20of%20Aboriginal%20Heritage%20Act%201975%20Report.pdf>

The *Pathway to Truth-Telling and Treaty Report* also reported (at p 85) 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 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. As a consequence, a search of the register is no guarantee that if a development goes ahead Aboriginal cultural heritage will not be damaged. See Professor Kate Warner, Professor Tim McCormack and Ms Fauve Kurnadi (2021) *Pathway to Truth-telling and Treaty, Report to Premier Peter Gutwein*. Accessed at:

[https://www.dpac.tas.gov.au/divisions/People Performance and Governance/publications](https://www.dpac.tas.gov.au/divisions/People%20Performance%20and%20Governance/publications)

The Government's foreshadowed approach to the new Act also does not provide for the early involvement of Tasmanian Aboriginal people in decisions that concern their cultural heritage in line with the UNDRIP principles of FPIC and self-determination. EDO, therefore, reiterates its view that a better approach would involve full integration of the new Act into the RMPS suite of legislation, with clear requirements for the early consideration of Aboriginal cultural heritage and Tasmanian Aboriginal peoples' involvement in all planning and development decisions under the LUPA Act.

Recommendation 1: The Tasmanian Government follow through with its commitment to introduce measures to require early consideration of potential Aboriginal cultural heritage impacts in the highest (State and regional) level of strategic planning, and in all assessments of rezoning proposals under the LUPA Act.

Recommendation 2: The new Act should integrate with the LUPA Act in the same way as the *Historic Cultural Heritage Act 1995* (Tas), and the *Environmental Management and Pollution Control Act 1994* (Tas).

Recommendation 3: The RMPS objectives should be amended to acknowledge Tasmanian Aboriginal people and the objectives of providing for the UNDRIP principles of self-determination and FPIC concerning all decisions relating to Aboriginal cultural heritage.

2. The representation of Tasmanian Aboriginal people and interests

The update provides a high-level outline of the role and responsibility of the Aboriginal Heritage Council in making decisions about the protection and management of Aboriginal cultural heritage.

EDO considers that the decision around who should represent Tasmanian Aboriginal people and interests is a matter for the Tasmanian Aboriginal community to determine. In so doing, we note the Best Practice Standard for the incorporation of principles of self-determination states that:¹¹

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.

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."¹²

It is unclear from the update how the Aboriginal Heritage Council will formally be constituted under the new Act, and what role the Tasmanian Aboriginal people have had in determining both the process and constitution of this body going forward. For this reason, in this submission, EDO refers to the Aboriginal Heritage Council or an appropriate Tasmanian Aboriginal representative body.

¹¹ Heritage Chairs of Australia and New Zealand (2020), page 35.

¹² Heritage Chairs of Australia and New Zealand (2020), pages 35-36.

Recommendation 4: 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 the 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.

3. Protection and Management of Aboriginal Cultural Heritage

3.1 Unknown/unsurveyed heritage sites

Figure 1 on page 5 of the update illustrates the main pathways for obtaining approvals under the new Act. Although there are pathways for known Aboriginal cultural heritage sites, it is unclear what safeguards will be put in place in the new Act to avoid or minimise harm on unknown/unsurveyed Aboriginal cultural heritage sites.

One way to address this is for the appropriate representative body to survey sites to determine whether there is any Aboriginal cultural heritage on the site before activities are allowed to commence. If Aboriginal cultural heritage is found then the appropriate negotiation and agreement process must commence concerning the heritage. Ultimately, it is for the appropriate Tasmanian Aboriginal representative body to decide whether the activity should be allowed based on the significance of impacts and the heritage to the Tasmanian Aboriginal people.

Recommendation 5: The new Act should provide for the Aboriginal Heritage Council (or appropriate Tasmanian Aboriginal representative body) to decide whether an Aboriginal cultural heritage survey is required prior to activities being undertaken on a site where no surveys have previously been carried out.

3.2 Refusal of activities with unacceptable impacts

According to Figure 1 on page 5 the only possible outcome of the pathway for an activity that has a high impact or high risk of damage on Aboriginal cultural heritage is the preparation of an Aboriginal Cultural Heritage Management Plan (**ACHMP**).

On page 6 of the update, it states:

The Council will have the primary role of guiding a proponent's development of an ACHMP and, subsequently approving the final ACHMP. In the event that the parties cannot agree on the terms of an ACHMP, the new Act will contain provisions to guide the proponent and the Council through an independently supported mediation process. Central to this process will be a requirement for each party to negotiate in good faith.

The Minister's role in considering ACHMPs will be limited to circumstances where the Council is unable or declines to make a decision on an application. The Minister will be obliged to consider an ACHMP in circumstances where the Council has determined that it does not want to consider the matter itself. The Minister may be asked to play the role of decision maker in situations where parties have first undergone mediation but failed to reach agreement. If the Minister is the decision maker, a statement of reasons will be required to support the decision.

There appears to be no option for the Aboriginal Heritage Council (or appropriate Tasmanian Aboriginal representative body) to decide to refuse to agree to an ACHMP if the activity is not appropriate given the significance of the heritage. It appears that the proposal is for the Minister to then play the deciding role where agreement on an ACHMP cannot be reached.

The proposal that the Aboriginal Heritage Council (or appropriate Tasmanian Aboriginal representative body) will not have the power in the new Act to refuse to enter into an ACHMP for a development or activity that will have significant and unacceptable impacts on Aboriginal cultural heritage, and for the Minister to have the deciding say, is inconsistent with the UNDRIP principle of FPIC and should be rectified.

Recommendation 6: An appropriate Tasmanian Aboriginal representative body should be given the decision-making power to refuse to enter into an ACHMP where it finds that the impacts of a development or activity on Aboriginal cultural heritage will be significant and unacceptable to Tasmanian Aboriginal people.

3.3 Aboriginal Cultural Heritage Permits

3.3.1 Absolute Protection

Page 4 of the update states that if harm to Aboriginal cultural heritage cannot be avoided, Aboriginal cultural heritage permits will be available when an activity is “not extensive” or has only a “minor impact” on Aboriginal cultural heritage values.

EDO is supportive of the focus of the Act being the avoidance of impacts on Aboriginal cultural heritage and of the regulation of impacts that cannot be avoided. However, we note that there will be some activities that may not be objectively extensive but may be located in such a way that the impact on Aboriginal cultural heritage is still significant. For this reason, rather than the new Act providing a test focussing on the scale of the proposed activity to determine whether an Aboriginal Heritage Permit or Aboriginal Cultural Heritage Management Plan is required, the test for whether an Aboriginal Heritage Permit or Aboriginal Cultural Heritage Management Plan is required should be developed in consultation with Tasmanian Aboriginal people.

Recommendation 7: The test in the new Act relating to whether an Aboriginal Heritage Permit or Aboriginal Cultural Heritage Management Plan is required should be co-designed by Tasmanian Aboriginal people.

3.3.2 Appeal rights

Page 4 of the update states there will be a new Act that will provide appeal rights “for the person who applied for the [Aboriginal cultural heritage] permit.” This suggests that there are only appeal rights for the proponent, not for the Tasmanian Aboriginal people.

Tasmanian Aboriginal people must have the right to enforce First Laws and Western laws to protect and seek redress for illegal damage to their cultural heritage. EDO therefore recommends

that merits appeal rights and enforcement rights for Tasmanian Aboriginal people must be enshrined in the new Act.

Recommendation 8: The Tasmanian Aboriginal people should be given appeal rights and enforcement rights for decisions and activities impacting Aboriginal cultural heritage, including Aboriginal Cultural Heritage Permits and Aboriginal Cultural Heritage Management Plans.

3.4 Aboriginal Cultural Heritage Management Plans (ACHMPs)

3.4.1 Parties to an ACHMPs

Page 6 of the update discusses ACHMPs, and although the Aboriginal Heritage Council is listed as being responsible for negotiating these plans with proponents, it is unclear who will ultimately be the parties to an ACHMP. This is especially important given the proposal (which is not supported by EDO) for the Minister to have a deciding role with these plans in certain circumstances, and the likelihood that plans will cover ongoing activities which may last many years, meaning successors in title/responsibility for an activity may need to be bound by the plan. Furthermore, given the extended timeframe that may be covered by such agreements, a clear process should be provided in the new Act for the Tasmanian Aboriginal representative body to end the plan in circumstances deemed appropriate by that body. For example, if the plan has been breached, or there has been a significant change in circumstances meaning that the plan is no longer appropriate (e.g. surveys reveal Aboriginal cultural heritage that is of greater significance to Tasmanian Aboriginal people or mitigation works have proven ineffective). Finally, the new Act should provide clear penalties for non-compliance with ACHMPs by proponents of activities, their representatives, and contractors, and a pathway for remediation and/or restitution for unlawful damage.

Recommendation 9: The new Act should clarify who are the parties to an Aboriginal Cultural Heritage Management Plan, and include the appropriate Tasmanian Aboriginal representative body as a party.

Recommendation 10: The new Act should ensure that the Aboriginal Cultural Heritage Management Plans are binding on successors in title and/or responsibility for an activity, and provide a process to allow the Tasmanian Aboriginal representative body to end the plan in circumstances that the body considers appropriate.

Recommendation 11: The new Act should ensure that there are clear penalties for non-compliance with Aboriginal Cultural Heritage Management Plans by proponents of activities, their representatives and contractors and a pathway for remediation or restitution for unlawful damage to Aboriginal cultural heritage as a result of the breach of the plan.

3.4.2 Aboriginal Cultural Heritage Surveys prior to waiver of ACHMPs

Page 6 of the update states:

... if a proponent of a development that has triggered the requirement for a preparation of an ACHMP can demonstrate that the activity does not pose a risk to ACH – for example a survey demonstrates that no ACH is present or the history of the site is such that any ACH that may have been present will have been destroyed (e.g. significant ground disturbance has occurred) – the Council will have the power to ‘waive’ the requirement for one to be prepared.

It is unclear who conducts the surveys for the presence of Aboriginal cultural heritage on the site before the Aboriginal Heritage Council (or appropriate Tasmanian Aboriginal representative body) waives the requirement for the preparation of an ACHMP. Given the significant interest a proponent may have in determining there is no Aboriginal cultural heritage present on a site, EDO considers that it is important that the Aboriginal Heritage Council (or appropriate Tasmanian Aboriginal representative body) are adequately resourced to determine how heritage surveys must be conducted and by whom, with the expense of the survey being borne by the proponent of the activity.

Recommendation 12: The new Act should clarify that, before any requirement for an ACHMP may be waived, the Aboriginal Heritage Council (or appropriate Tasmanian Aboriginal representative body) must determine whether an Aboriginal cultural heritage survey must be conducted and by whom.

3.4.3 Exemptions from needing an Aboriginal cultural heritage permit or ACHMP

Page 7 of the update explains the process relating to exemptions from the requirements for Aboriginal cultural heritage permits permit or ACHMPs. It states:

Exemptions from needing an ACH permit or ACHMP will apply in specific circumstances such as emergency works (as now), and where it can be demonstrated that an area has already been seriously disturbed and any pre-existing ACH, whether known about or not, would have lost its ACH value or been destroyed. Like for like activities, including infrastructure replacement and ongoing farming of land, will be allowed where the area and nature of disturbance does (sic) not exceed that which has occurred previously.

EDO disagrees with the apparent premise of this proposal which is that once disturbed, places with Aboriginal cultural heritage will no longer hold any Aboriginal cultural heritage significance. This is because this assumes all Aboriginal cultural heritage is of a tangible form and capable of being damaged or destroyed. EDO further considers that if prior destruction or disturbance of Aboriginal cultural heritage provides a basis for an exemption from the new Act, it may provide a perverse incentive for the wilful or negligent destruction of Aboriginal cultural heritage.

EDO therefore recommends that prior disturbance not be a circumstance that automatically enables exemption from the requirement for an Aboriginal cultural heritage permit or ACHMP, and that the power be given to the Aboriginal Heritage Council (or appropriate Tasmanian Aboriginal representative body) to determine the circumstances where an exemption from the requirement for an Aboriginal cultural heritage permit or ACHMP is appropriate.

EDO further seeks clarity on the following matters:

- What is the definition of “emergency works”? This should be defined in the Act clearly.
- What does “like for like” infrastructure replacement and “ongoing farming of land” mean, and how is the baseline level of Aboriginal cultural heritage disturbance determined and recorded?
- Do the proposed exemptions mean no new impacts on the already disturbed Aboriginal cultural heritage are allowed or that the new impacts are now allowed as all hitherto unlawful disturbance will be authorised under the new Act?

Recommendation 13: The new Act should provide the Aboriginal Heritage Council (or appropriate Tasmanian Aboriginal representative body) with the power to determine when an exemption from the requirement for an Aboriginal cultural heritage permit or Aboriginal Cultural Heritage Management Plan is appropriate.

Recommendation 14: More clarity is required around the proposed exemptions from the requirements for an Aboriginal cultural heritage permit or Aboriginal Cultural Heritage Management Plan, particularly with respect to the definitions of “emergency works”, “pre-occurring”, and “like for like” activities.

3.5 Aboriginal Cultural Heritage Agreements

3.5.1 The representation of Tasmanian Aboriginal people and interests

Page 7 of the update states that Aboriginal Cultural Heritage Agreements (**ACHAs**)

...will be voluntary agreements entered into between landowners, government and others and the Aboriginal community (represented by the Council). The Council will involve other Aboriginal people or groups where there are local or family connections to the ACH.

This suggests that the Tasmanian Aboriginal community will be represented by the Aboriginal Heritage Council in formalising arrangements relating to ACHAs.

EDO notes our previous comments concerning the determination of who should represent Tasmanian Aboriginal interests and we reiterate our earlier recommendations in this respect.

3.5.2 Flexibility and adaptability

Page 7 of the update also states “An ACHA will put in place a partnership that provides a flexible and adaptable approach that can address a range of matters, such as ongoing maintenance and management of ACH, access to sites and so on.” It is unclear for whom this approach will be flexible and adaptable – for the landowners, government, others, the Aboriginal community or all of the above? It is also uncertain whether or how ACHAs can be amended.

While EDO agrees that ACHA and plans should be able to be amended, particularly where new heritage is discovered or the significance of heritage is determined to be higher than originally understood, excessive flexibility may be to the detriment of Tasmanian Aboriginal people if agreements can be changed without their further agreement or without sufficient notice and time to consider the adjustments.

Recommendation 15: The new Act should provide clarity on how Aboriginal Cultural Heritage Agreements will be “flexible and adaptable”, and clearly define the circumstances and process for whether and how Aboriginal Cultural Heritage Agreements can be amended.

3.6 Compliance and Enforcement

3.6.1 Audit Orders

Page 7 of the update states one of the provisions to support compliance and the ongoing protection of Aboriginal cultural heritage includes Audit Orders. The update does not provide sufficient detail on the topic of Audit Orders and merely states “where there is a suspicion that relevant conditions of a Permit or ACHMP are not being complied with, or when the impact on ACH from an activity is greater than expected.”

EDO has questions about what is proposed. In particular, it is unclear:

- Who has the authority to issue an Audit Order?
- What is the process?
- How is a suspicion raised?
- Who can raise the suspicion (the public, Tasmanian people, legal organisations)?

Recommendation 16: The new Act should provide more clarity on how Audit Orders operate.

3.6.2 Rights of Tasmanian Aboriginal representative body and Tasmanian Aboriginal people with respect to compliance and enforcement

EDO recommends that the Tasmanian Aboriginal representative body (whether that is a strengthened AHC or another 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.

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 direct 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 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"¹³, civil enforcement opportunities should be provided under the new Act for Tasmanian Aboriginal people where regulators do not undertake enforcement action.

Recommendation 17: The Tasmanian Aboriginal representative body under the new Act should 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.

Thank you for the opportunity to make this submission.

Please do not hesitate to contact our office should you have further enquiries.

¹³ Heritage Chairs of Australia and New Zealand (2020), page 37.