FOREST INDUSTRIES ASSOCIATION OF TASMANIA

SUBMISSION ON

THE

ABORIGINAL HERITAGE ACT REVIEW

SEPTEMBER 2019

Submission on Aboriginal Heritage Act Review 2019

FIAT

FIAT is Tasmania's peak forest industry representative body and given that forestry is a resource use industry, we have a keen interest in the Aboriginal Heritage Act 1975 ("AHA").

We welcome the opportunity to provide our views in respect to the review of the Act and wish continue to participate in the consultative processes.

OVERVIEW

FIAT respect the need to protect Tasmania's extensive indigenous heritage and have actively supported the Tasmanian Government's recent amendments to significantly increase the penalties that can be applied to damage of that heritage to a level equal to that applying to European heritage.

We do, however continue to advocate for a pragmatic approach that incorporates protections for individuals and corporations that have exercised due care and precaution but have inadvertently caused some disturbance/damage.

We will provide comment on the numbered issues raised within the Discussion Document noting that we may not comment on each of the ten discussion points raised.

1. What is the AHA trying to achieve

FIAT are content that the Act is reasonably clear in respect to its aspirations. We believe there are some improvements that can be considered that will improve the way in which the Act balances its primary objective of protecting Aboriginal heritage and the rights/needs of industry and the general public.

In particular, FIAT believe that the identification of reasonable time frames within which designated actions are to be performed will provide certainty and confidence to industry to avoid any stifling of investment. This could be aligned with s.58 of the Historic Cultural Heritage Act.

This issue will be pursued further later; however, it is raised here to demonstrate the requirement for the Act to provide a balance between the protection of Aboriginal heritage and the socio-economic necessities of operating our economy within Tasmania and the, legitimate rights and aspirations of private landowners.

Any endeavor to rewrite objectives for the AHA must clearly contemplate these at times competing priorities and recognize the need for balance.

2. WHAT IS ABORIGINAL HERITAGE

"Intangible Heritage"

FIAT have considerable concern over the potential inclusion within the coverage of the AHA of "intangible heritage" as described in the discussion paper.

The discussion paper identifies that in legislation in Victoria intangible heritage is included and caters for "ceremony, stories, traditional skills and practices, language and dance".

Our concerns do not go to these issues but to the potential to include as discussed "spiritual essence of a place or broader landscape where Aboriginal people once lived, hunted and practiced culture". Our concern is that this concept is too abstract to be capable of definition and could lead to significant areas of the state being protected due to a claim that it constitutes intangible heritage.

It is conceivable that an area like the "Tarkine" could be so defined which could severely constrict forestry and mining activities in that entire area.

Equally it would be impossible to clearly foresee which areas carry intangible heritage i.e. it is not something that can be seen or touched which will significantly increase the sovereign risk for industry.

It is vital, to obtain and retain community support for the protection of important Aboriginal heritage, that a clear, easy to understand description of that heritage that can be readily foreseen by the community exists – we do not believe this will be the case should intangible heritage be included within the scope of the Act.

It is also difficult to understand how the Act could operate in such a manner as to protect intangible Aboriginal heritage such as "ceremonies, stories, traditional skills and practices, language and dance". What would the protection entail, who could the Act restrict and in what way?

In our view the extension of the Act to incorporate the notion of intangible heritage would create considerable confusion, angst and would elevate sovereign risk for industry in an unacceptable manner and in a way where compliance would be next to impossible.

3. OWNERSHIP OF ABORGINAL HERITAGE

We note the observation that the current Act is silent on the ownership of Aboriginal heritage on other than Crown lands.

This is an area of considerable complexity and must be approached with extreme caution.

FIAT contend that it is difficult to provide a rule set that can be applied readily to all potential situations e.g. ownership of paintings in a cave on private land could be considered for ownership by the Aboriginal community, however scattered implements such as flints spread broadly across a large expanse of pasture or on forested land would be much for difficult as there are potentially competing aspirations between the Aboriginal community and the landowner.

This is an area that should be the subject of detailed consultation between stakeholders as it is an issue that has the potential to stifle the productive use of privately-owned land thereby giving rise to issues of compensation. Whilst it might be a laudable aspiration to create a tenure blind approach, the reality is that such an approach will be mired in complexity and potentially in acrimonious positioning.

As a general concept FIAT propose that "the right to farm" approach needs to be applied to land purchased in good faith for productive pursuits, but we would concede that this should not preclude **reasonable steps** to protect Aboriginal heritage.

4. MAKING DECISIONS ABOUT WHAT HAPPENS TO ABORIGAL HERITAGE

In broad terms FIAT believe that decisions about the management, disturbance, and acquisition etc. of Aboriginal heritage must remain the province of the Minister and/or the Director of National Parks and Wildlife.

We further say that the decision-making process by either the Minister or the Director must be mandatorily subject to their undertaking consultation with affected stakeholders which would include the Aboriginal Heritage Council.

The requirement for decision makers to undertake meaningful and genuine consultation should be as broad as possible to capture the different interests that can be affected by any decision.

FIAT propose that the Act be amended to ensure that all decisions other than urgent decisions are subject to meaningful consultation.

We recognise and respect the aspirations of the Aboriginal community generally and the Aboriginal Heritage Council more specifically to be the decision makers in respect to issues associated with their heritage, unfortunately, such a simplistic proposition would be likely to advantage one side of a contested situation to the exclusion of another.

Pragmatism demands that we acknowledge that there are a number of competing positions that can and will arise and that these situations will require mature and considered input from all stakeholders not just one. Should the AHT be ceded decision-making powers it will be considered as providing extreme advantage to one side of the debate to the exclusion of others.

The creation of appellate bodies and reviews does not assuage this concern as the decision-making body of first instance will always be in a highly advantaged position.

The current situation with the addition of much broader, compulsory consultation provisions perhaps coupled with some specific judicial or quasi-judicial appellate rights would be our preferred option. It can be readily seen from the discussion paper how conflict can be expected where it is noted that the Aboriginal people consider themselves to be rights holders and custodians of their heritage and aspire to be responsible for managing that heritage – whilst at the same time acknowledging that private land owners will rightly assert that they wish to make decisions in respect to the use and management of their land.

To provide decision making rights to one side of such a clash in aspirations will lead to a significant lack of confidence in the decision-making process and will ultimately lead to considerable, avoidable angst.

6. OFFENCES UNDER THE ACT AND PENALTIES FOR DOING THE WRONG THING

FIAT regard the amendments to the Act in 2017 to be entirely appropriate and provide a sensible balance between penalties for those "doing the wrong thing" and those disturbing relics through inadvertence. We further view the approach of annexing detailed procedures that recognise the needs and peculiarities of different sectors to be highly pragmatic and an entirely responsible and suitable approach.

We note that the discussion paper states that Aboriginal community members believe equivalent value has not been placed on damaging or disturbing Aboriginal heritage as has been attached to European heritage.

In respect to the approach ensconced within the Act we believe this criticism is now unwarranted as the penalties now prescribed are "among the highest of any other Aboriginal heritage legislation in the country" and "in line with similar offences for damaging European heritage". This constitutes the Tasmanian communities expression of the relative value of each as expressed through our elected representatives.

We note that no penalties have been imposed under the new provision in the Act and therefore it is not possible to determine what approach the Courts might adopt and whether or not they will in fact apply higher penalties or not.

FIAT believe any remaining gap between the communities' approach to Aboriginal heritage and European heritage should be redressed through community education rather than through tinkering with penalties that have yet to be tested.

Clearly there are circumstances that will arise whereby the "rules" in the Act will require a different application than in other circumstances and this could for example include the example provided in the discussion paper. It would also apply to the different approach to deliberate verses unintentional damage to Aboriginal heritage.

It would not be appropriate to provide for blanket exemptions from the application of the Act, but it may be possible for permits to be issued by the Director to permit disturbance of relics by members of the Aboriginal community in prescribed circumstances such as the example mentioned in the discussion paper.

7. WHEN CAN ABORIGINAL HERITAGE BE INTERFERED WITH?

It is FIAT's view that the defence provisions established in the 2017 amendments are suitable and contemporary in nature. It is vital that such pragmatic provisions apply to ensure a sensible approach to protecting heritage without acting as a disincentive to investment.

The guidelines provide a realistic approach that provides a balance between protecting Aboriginal heritage whilst not stifling economic opportunities. A more stringent approach would Act to increase red tape, frustration and deter investment.

It is always appropriate to periodically review provisions such as these but an overriding criteria of such a review must be to retain the central tenet of the original intent behind the defence whilst assessing if improvement can be made.

A good example would be to ensure reasonable timeframes are prescribed within which applications or requests for survey will be responded to, or to prescribe that a private landowner is not responsible to fund the cost of investigating heritage through archeological exploration.

These type of improvements ensure a better operation of the Act and further pursues the original intent behind the provisions in securing a balance between the protection of Aboriginal heritage and the legitimate aspirations of private landowners to undertake economic pursuits on their property.

8. ENFORCEMENT OF THE LEGISLATION

The concept of the issuance of "stop work notices" is another proposal that raises considerable concern.

On the one hand we can readily understand the need to be able to stop work where actual Aboriginal heritage is in immediate danger of irreparable damage. On its own however without very carefully constructed checks and balances it would not be something FIAT could support.

A cease work notice is a very blunt and potentially damaging tool and we do not believe it should be agreed to without very careful consideration. It is also potentially capable of manipulation.

For example, how long should a cease work order apply, should there be very tightly constrained timeframes, should there be avenues to appeal, who would be responsible in the event of a notice for damages and/or compensation, who will meet the costs associated with the investigation generally or particularly where a claim is found to be unsubstantiated or vexatious?

The provision for forestry operations in the standards and procedures already contain finely tuned and balanced checks and any unilateral amendments to those procedural agreements will unbalance the entire document.

Allowing the use of the cease work notices could cause very significant damage to commercial operations and might particularly lead to a disinclination to invest and/or to develop property.

Equally FIAT would not support the advent of infringement notices as they carry the presumption that the authorised officer can act as complainant, judge, prosecutor and executioner which is fundamentally unfair, unjust and flawed.

Complaints can and should be taken through the legal processes which carries with it a level of assurance that a fair and just process will be followed, and that highly trained and experienced jurists will deal with the issues.

10. OTHER CONSIDERATIONS

The discussion paper identifies a range of other matters that might be considered in a review of the Act: -

- Broader societal education on Aboriginal heritage;
- Lack of understanding by persons planning activities that might impact on Aboriginal heritage;
- Appeals against decisions;
- Need for clarity and certainty in the operation of the Act;
- Statutory processes and timeframes to deal with enquiries over permit requirements and decisions making timeframes;
- Integration with RMPS and/or LUPAA

FIAT strongly support the position that there should be a significantly enhanced focus on educative processes that will, over time, lead to an increased understanding of Aboriginal heritage its importance and the need for it to be protected through appropriate and largely agreed procedures.

This approach in our view is far superior to a heavy-handed regulatory regime that will exacerbate problems in the relationship between the Aboriginal community and the rest of the Tasmanian population. FIAT believe genuine reconciliation will best be prosecuted by a more detailed understanding of heritage issues and a genuine mutuality between the Aboriginal and non-Aboriginal stakeholders.

Other issues identified in this section of the discussion paper have been raised within this submission under other headings, so we do not repeat those comments here.

CONCLUSION

FIAT continues to support the reasonable protections provided for Aboriginal heritage but we caution that that support could wane if moves are now made to introduce provisions that significantly impede private landowners or managers from undertaking economic activities on their land. We repeat that extreme care is needed to carefully analyze any amendments to ensure a reasonable and fair balance exists between different stakeholders with differing but reasonable aspirations.

We are prepared to continue to participate in the ongoing consultations processes in respect to this review.