

19 September 2019



Dear Sir,

**RE: Review of the Aboriginal Heritage Act 1975**

The Tasmanian Minerals, Manufacturing and Energy Council (TMEC) represents the state's minerals, manufacturing and energy industries and provides leadership, effective issues management and cooperative action on behalf of its members. Our mission is to promote the development of sustainable exploration, mining, industrial processing and manufacturing sectors which add value to the Tasmanian people and communities.

TMEC thanks the Minister for the opportunity to consider and provide comment on all matters relevant to our sector in the review of the Aboriginal Heritage Act. This opportunity has afforded key industry participants with an opportunity to ensure that the amendments are drafted with a commitment to the on-going management and protection of Tasmania's aboriginal heritage while ensuring the legislation operates efficiently for the benefit of the wider community, including industry. Industry is able to efficiently contribute to the community when legislation provides certainty.

The Discussion Paper (DPIPWE May 2019) has been used by TMEC in preparation of this submission and the issues raised are responding to the Discussion Paper prompts that are relevant to TMEC members.

**1. What is the Aboriginal Heritage Act 1975 trying to achieve?**

TMEC are satisfied the Act makes clear its intent. From TMEC's perspective, we see an opportunity to remove a degree of uncertainty for both land users and for the protection of Aboriginal heritage.

Under s9 and s14 of the Act the Minister has authority to make orders for the protection of sites and relics, and to issue permits including for disturbance or relocation of a relic. The Act is silent on the time frame in which an order or permit can be made. The absence of time frames in the event an investigation is required can create uncertainty and therefore investment risk which is contrary to Tasmania being an attractive investment destination.

## **2. What is Aboriginal heritage?**

The Discussion Paper raises the concept of introducing Intangible Heritage and refers to the Victorian legislation, s79B of the Aboriginal Heritage Act 2006 (Victoria), specifies items of intangible heritage and specifically excludes places. TMEC supports the extension of heritage to include these cultural skills and practices.

Without explanation, the Discussion Paper asserts that in Tasmania the word intangible has tended to include places and landscapes where aboriginal people once lived. If this extremely broad concept of intangible heritage is adopted, it raises the potential that large swathes of land could be declared protected sites, and effectively be excised from use by the wider community, including from industry. Regarding new projects, given the “intangible” nature of the consideration, it will be nigh on impossible to anticipate this in advance of an investment proposal. Indeed, existing operations could also be threatened.

TMEC strongly disagrees with a definition of Intangible Heritage of a place which does not have tangible evidence of significance.

## **3. Ownership of Aboriginal Heritage**

TMEC reserves the right to identify issues at a later stage should the need arise.

## **4. Making decisions about what happens to Aboriginal Heritage**

TMEC supports the current status that The Minister/Director should retain the primary authority to make the decisions under the Act. The suggestion to devolve decision-making to the AHC provides a significant shift in balance in the decision-making process, raising issues of potential conflicts of interest, ACH governance structures, and accountability for decisions.

Consultation is a key to good governance. It is likely that cases of heritage protection will arise that will impact various stakeholders including both the AHC and project proponents. TMEC supports decision-making that is transparent and balanced. We suggest that an improvement would be that the Minister/Director not only takes advice from the AHC but also from the proponent of a project, but that ultimate decision-making responsibility should continue to rest with the Minister/Director.

## **5. The Aboriginal Heritage Council – what it is and what it does**

The Discussion Paper includes questions on the make-up of the AHC and notes that the Act does not specify membership criteria except being an Aboriginal person. It further notes that government policy requires both gender and regional balance where possible. TMEC notes the current make-up of the AHC may not be entirely regionally balanced and would recommend the review considering mechanisms to ensure there is regional balance, rather than “where possible”. TMEC believes the AHC should be widely inclusive so that it enjoys the confidence and support of the wider Tasmanian community for the protection of this heritage.

## **6. Offences under the Act and penalties for doing the wrong thing**

The Discussion Paper states that there is a concern among Aboriginal people that broader society has not yet placed Aboriginal heritage on equal value with European heritage. Since the penalties under the Act are now in line with penalties for European heritage offences, TMEC supports the view expressed in the Discussion Paper that the current penalties are appropriate, and that the perceived imbalance value can be improved through education and awareness.

## **7. When can Aboriginal heritage be interfered with?**

The Discussion Paper expands on the issuing of permits, and how it occurs under the *Aboriginal Heritage Standards and Procedures*. This document states that consultation and timely recommendations will occur in practice “*The AHC plays a key role in the consultation process with Tasmanian Aboriginal people. The previous Council engaged with proponents as early as possible to ensure that appropriate consultation occurred, and to facilitate efficient and timely recommendations if a permit decision was required. This practice will continue under the new statutory Council.*”

While this approach shows positive intent, there is a lack of specificity with respect to the ministerial decision-making. Further for such a key issue, which is fundamental in providing investment certainty, timeframes are best specified in legislation – acts or regulations, rather than statements of intent in non-statutory rules such as guidelines.

### **Defences and Guidelines**

Compliance with guidelines established under s21A of the Act is a defence to a prosecution under s21. *The Guidelines (issue by the Minister for Environment, Parks and Heritage under s21A of the Act), The Aboriginal Standards and Procedures, and the Exploration Code of Practice* are relevant or partially relevant for many TMEC members. However, in the opinion of TMEC, all of these guidelines are vague on due diligence defences in some situations, for example in the case of accidental disturbance of unexpected items of heritage.

Most extractive and mineral processing operations by TMEC members are regulated as level 2 activities by the EPA through the planning authority (local government). Aboriginal heritage surveys are undertaken in the approval process and the planning permit provides conditions with respect to the protection of the heritage items where required. TMEC believes that compliance with the Aboriginal Heritage condition of a planning permit should become a due diligence defence.

Similarly, in undertaking exploration, the proponent is required to have an approved Works Program under the MRD Act. It is already a requirement of that act to seek specialist advice if there is any uncertainty with respect to the implications of the Aboriginal Heritage Act, and MRT will impose Works Program approval conditions on the proposed exploration if required. Compliance with any Aboriginal Heritage conditions of an approved Works Program should become a due diligence defence.

The Tasmanian government has a policy to reduce unnecessary red tape. *The Tasmanian Red Tape Audit Report 2018–19* mentions that consultation with the mining industry identified measures to reduce regulatory duplication. The two suggestions mentioned above would reduce regulatory duplication in line with the government’s stated goals.

## **8. Enforcement of the legislation**

The Discussion Paper raises the idea of including stop-work provisions in the legislation. TMEC is not negative on this idea itself particularly where there is the possibility of serious and imminent damage to items of heritage. However, this type of legislative mechanism would need checks and balances to ensure it is used for its real purpose, including time frames on the length of stop-work orders, who is permitted to issue these orders, appeal rights, and compensation for improperly imposed stop-work orders.

## **9. Other ways the legislation protects Aboriginal heritage**

The Discussion Paper raises whether or not the provision for making Regulations is useful. Because there are currently no Regulations under this Act, TMEC is unable to comment at this stage. If regulations are proposed, including in this Review, stakeholders should be consulted about the content of any proposed Regulations.

#### **10. Other matters covered by the legislation**

TMEC reserves the right to identify issues at a later stage should the need arise.

#### **Conclusion**

TMEC supports the intent to ensure there is adequate protections in place for Aboriginal Heritage and there is a complementary pragmatic approach to resolving how Aboriginal Heritage is protected and the provision remains for developers and land users to have some certainty in timeframes and procedural matters.

We look forward to ongoing participation in the review of this important Act.

**Ray Mostogl**  
**Chief Executive Officer**