

19 September 2019

Dear Sir or Madam,

Discussion Paper on the Statutory Review of the Aboriginal Heritage Act 1975

Thank you for the opportunity to provide input to the review of *Aboriginal Heritage Act 1975*. Hydro Tasmania welcomes the government's commitment to a wide ranging review of the Act and the possible development of a more contemporary and progressive framework for the management of Aboriginal heritage.

Hydro Tasmania manages around 120,000 hectares of land and water resources, and operates a complex renewable energy system that includes 30 hydropower stations, 55 major dams and 45 major lakes. As part of these management responsibilities, Hydro Tasmania is continuing to develop its understanding of the range and location of Aboriginal heritage that occurs within its operating environments. This includes active engagement with the Tasmania Aboriginal Community in the protection and management of known Aboriginal heritage values, and projects to understanding our historic operational impacts.

Our response to a number of matters raised in the discussion paper is included as Attachment A to this letter.

We look forward to collaborating with you on the project and would be pleased to provide further detail on any of the matters raised in our submission.

Yours sincerely,

Jesse Clark
Chief Operations Officer

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

1a) How clear is the Act in what it is trying to achieve?

The absence of overarching objectives in the *Aboriginal Relics Act 1975* creates a significant level uncertainty in attempting to understand the desired outcomes for the management or protection of Aboriginal Heritage. The current Act describes a process but not any objective for protecting Aboriginal heritage. It focuses on registration and enforcement but is silent on important contemporary issues and opportunities for proactive management, such as education, interpretation and tourism, or encouraging conservation of heritage places and landscapes through proactive mechanisms.

1b) Could this be improved, and if so, how?

The Act should look to adopt a more contemporary model and move away from a compliance model into a more proactive space, acknowledging current international principles for managing heritage that enfranchise traditional owners/custodians and supports negotiated management arrangements, such as Cultural Heritage Management Plans and Land Management Agreements, for specific areas or activities. This should include the development, in consultation with Aboriginal people, of clear objectives to provide guidance in the application of the AHA.

What is Aboriginal heritage?

2a) How well does the Act define Aboriginal heritage?

2c) Does the definition of a 'relic', adequately capture all elements of Aboriginal heritage that should be protected and managed?

The current definition of Aboriginal heritage is very broad encompassing artefacts, paintings, carvings, engravings, arrangement of stones, middens, or other objects that are created, modified or of Aboriginal people or their descendants. In addition, it also includes, places of significance that could also be interpreted to comprise cultural landscapes such as vegetation patterns including midlands grasslands and eastern dry forests (accepted as the product of Aboriginal fire management).

2d) Should use of the term 'relic', and the way Aboriginal heritage is recognised and defined, be changed?

2b) Could this be improved, and how?

Consideration should be given to the development of contemporary definitions of Aboriginal heritage in line with community expectations and other jurisdictions, including the definition of landscape level Aboriginal heritage values.

Ownership of Aboriginal heritage

3a) How clearly does the Act describe ownership of Aboriginal heritage?

3b) Are provisions in the Act providing for ownership reasonable?

3c) Who should own Aboriginal heritage?

3d) Is the concept of 'ownership' the right way to think about who is responsible for Aboriginal heritage?

3e) Should the 'rules' in the Act apply to everyone in every situation?

3f) Should land tenure on which Aboriginal heritage exists make any difference to who owns/how the heritage is to be managed?

While the current framework for the ownership of Aboriginal heritage is generally clear, consideration should be given to a framework that promotes a greater level of ownership of Aboriginal relics, objects and protected places with the Aboriginal community and representative organisations such as the Aboriginal Heritage Council to bring it into line with other jurisdictions across Australia.

Making decisions about Aboriginal heritage

4a) Is the way the Act describes who makes decisions, and how decisions must be made, adequate and reasonable?

4b) How can decision making be improved?

4c) Who should make decisions under the Act?

The decision-making process under the current Act is out of step with contemporary principles for managing Indigenous heritage internationally and in other Australian jurisdictions, which variously advocate an independent Aboriginal Heritage Council or empowering traditional custodians to be the decision makers through management plan and/or land management agreement models. In Tasmania, owing to the history of colonial dislocation, an independent Aboriginal Heritage Council model may be the most practical means of delegating decision-making to the Aboriginal community, at least as a transitional measure.

Having an independent decision-making body necessitates that the decision-making process is transparent, inclusive and subject to reasonable statutory timeframes to be consistent with other legislation that provides for independent decision-making powers.

4d) Are there circumstances where different people, or parties, should make decisions about how to manage Aboriginal heritage? How should decisions be made?

An increasing number of Australian jurisdictions, such as Victoria, New South Wales and Queensland, have legislative models that minimises centralisation in favour of management plans and agreements between proponents/land users and affected Aboriginal parties. The tailoring management arrangements through negotiation and agreement with Aboriginal communities should be explored to align management arrangement closer to accepted best-practice models for Indigenous empowerment.

The Aboriginal Heritage Council

5a) How should members for the Aboriginal Heritage Council be chosen?

5b) Should the Act specify criteria for Council membership, and what criteria should apply?

5c) How clearly does the Act describe the role and function of the Aboriginal Heritage Council?

5d) Is the role of the Aboriginal Heritage Council adequate and appropriate?

5e) Could this be improved, and if so, how?

Hydro Tasmania supports the retention of the Aboriginal Heritage Council and would recommend that consideration be given to enhancing the roles and responsibilities of the Aboriginal Heritage Council to ensure greater inclusion of Aboriginal people in the management of Aboriginal heritage.

Offences and penalties

6b) How well does the Act describe and manage offences?

6b) Are the penalties adequate?

6c) Could the offences and penalties provisions in the Act be improved, and if so, how?

The definitions of offences in the current Act are out of step with other Australian jurisdictions, which increasingly invoke the concept of 'harm' rather than simply list actions that may not result in actual harm or loss of significance. Queensland's *Aboriginal Cultural Heritage Act 2003* defines harm as '*damage or injury to, or desecration or destruction of, the cultural heritage*', while the NSW draft *Aboriginal Cultural Heritage Bill 2018* defines harm as '*destroy or damage*', '*move the object or remains from the land with which [they] are connected*' '*lose the object or remains when assigned to the custody or care of a person or body*' or '*otherwise harm the Aboriginal cultural heritage significance*'. In both jurisdictions, the offence relates to actual harm rather than an arbitrary action, such as '*conceal*', '*interfere with*', or '*remove a relic from the place where it is found*' that exist under the AHA.

When can Aboriginal heritage be interfered with?

7a) Are the defence provisions in the Act adequate and reasonable?

7b) Could the defence provisions be improved, and if so, how?

The existing general defence provisions under the current Act could be enhanced by the inclusion of reasonable duty of care actions, such as making provision for pre-existing and/or low-impacts activities. This may comprise activities such as the concealing and exposure of Aboriginal relics via water level management (ie raising and lowering of water levels) within hydro-electric water storages. Consideration could also be given for defence provisions differentiate between primary and secondary context material generally, making it possible to deal with secondary context/introduced material through a notification rather than Permit process, or as part of a negotiated arrangement with the affected Aboriginal party.

Enforcement

8a) How well does the Act provide for enforcement of its provisions?

8b) Could this be improved, and if so, how?

The only significant omission from the Act is the absence of provisions relating to the Stop Work and Repair orders. The addition of these aspects would ensure that the Act contains enforcement provisions that are equal or greater than those that exist for historic heritage.

8c) Should the Act include stop-work provisions?

Stop work provisions are contained within several State Aboriginal heritage acts, including Victoria and NSW. The Tasmanian Act should contain similar provisions to summarily suspend actions that are likely to result in a contravention of the Act.

8d) Should the Act include provision for infringement notices and associated on-the-spot fines?

8e) Should offences in the Act be further scaled to distinguish between minor and non-minor offences?

Hydro Tasmania supports the Act containing provisions to enable summary heritage management, compliance and education outcomes, such as scalable offences with infringement notices for minor impacts.

Other ways to protect Aboriginal heritage

9a) How well does the Act protect and manage Tasmania's Aboriginal heritage?

9b) Could this be improved, and if so, how?

The Act should move away from a reactive permit-based system to a proactive system that utilises Management Plans and Land Management Agreements tailored to proposed developments or ongoing activities, and that allow for greater involvement of Aboriginal parties in decision making and implementation. Cultural Heritage Management Plans and Land Management Agreements are used in Victorian, NSW and Queensland heritage legislation and outline measures to avoid harm to Aboriginal cultural heritage.

The current Act is silent on other proactive means of improving outcomes for Aboriginal heritage, that are contained in other heritage legislation, such as the *Historical Cultural Heritage Act 1995*. This includes education and funding support for heritage conservation purposes. Such approaches to a proactive and supportive space has been demonstrated to improve heritage outcomes in other jurisdictions.

9c) Are 'protected sites' a useful mechanism for protecting Aboriginal heritage?

Hydro Tasmania supports the concept of protected sites for the management of significant Aboriginal heritage places and values, and in parallel supports the land returns of culturally significant places subject to consideration of its operational constraints.

