



Aboriginal Heritage Act Review

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Re: Submission to Aboriginal Heritage Act Review

The Board of Directors of *Melytina Tiakana Warrana* Aboriginal Corporation (MTWAC), a member organisation of the Tasmanian Regional Aboriginal Communities Alliance (TRACA), welcomes the opportunity to respond to the review of the *Aboriginal Heritage Act 1975*. MTWAC provides the following submission in relation to the Aboriginal Heritage Act review.

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

The Act is the definitive legislative framework that is supposed to provide for the management and protection of Aboriginal heritage. The Act is old and antiquated in both its language and construction, despite some timely amendments being made to the Act in 2017. The Hodgman Liberal Government should be congratulated on making these amendments, which include the legislative requirement for a review of the Act. However, in spite of the best intentions of the Act to manage and protect Aboriginal heritage, MTWAC notes that there remains problematic dimensions to its form and application.

This problematic dimension is highlighted by the proposed Arm End development of a links style golf course at South Arm. In that case a permit application was granted which will effectively conceal and destroy highly significant Aboriginal heritage despite two separate Aboriginal Heritage Councils opposing the permit applications.

MTWAC recommends that new Aboriginal heritage legislation is required. Tasmania Aboriginal heritage is amongst the oldest in the world and possesses uncommon richness and diversity for such a small area. Given the significance of Tasmanian Aboriginal history and heritage MTWAC argues that a unique and timely opportunity now exists for Tasmania to develop legislation that meets or exceeds best practice criteria for the management and protection of the island's Aboriginal heritage.

2. What is Aboriginal Heritage?

One important source of MTWAC concern is the virtual limitation of 'Aboriginal Heritage' in the Act to material culture, and in particular 'relics'. The Act in its *Interpretation* defines 'relics' as "(b) any object, site, or place that bears signs of the activities of any such original inhabitants or their descendants, which is of significance to the Aboriginal peoples of Tasmania...". While, in one sense, it could be argued that this definition is too broad—that its reach extends to encompass all natural and manufactured artefacts in Tasmania that are recognised as having Aboriginal heritage value—in another sense its grasp is too narrow. The Act does not recognise immaterial culture that embodies significant Aboriginal heritage values. Indeed, there are neither adequate nor effective parameters for what 'heritage', 'Aboriginal heritage' or 'Aboriginal heritage values' might be or signify.

MTWAC strongly recommends that further consultation and analysis be conducted (most appropriately via the advent and participation of a Tasmanian Aboriginal Heritage Council) in order that these terms are defined and a clearer understanding of what may rightfully come under the protection and management of the Act be established.

Ownership of Aboriginal heritage?

The idea and understanding of 'ownership' of Aboriginal heritage is of concern for MTWAC. The *Constitution Act 1934* recognises Tasmanian Aboriginal peoples as the traditional and original owners of Tasmanian lands and waters. Tasmanian Aboriginal peoples never ceded their rights to the 'ownership' of their heritage and 'relics' and continue as the authentic Intellectual Property Rights holders of these precious and sacred objects and sites, as well as the cultural stories and traditions that go with them.

MTWAC acknowledges and recognises that Aboriginal peoples are 'owners' of Aboriginal heritage, however, is concerned about how notions of 'ownership' and 'custodianship' may be interpreted, and the effect that these understandings may have on Tasmanian Aboriginal peoples' rights and interests in Aboriginal heritage. Any meaning or interpretation of these terms should not diminish the responsibility that private land owners or the Crown has in managing and protecting Aboriginal heritage, or providing Tasmanian Aboriginal peoples with access to the same.

MTWAC is also concerned that under the Act that there are provisions for the Crown to pay private landowners compensation for Aboriginal heritage which it can compulsory acquire. Tasmanian Aboriginal peoples are the 'owners' of Tasmanian Aboriginal heritage. Private landowners and the Crown should not view that they are the 'owners' of Aboriginal heritage present in private land. MTWAC requests that these issues be clarified.

MTWAC also notes their concerns regarding the repatriation of Aboriginal artefacts and human remains from mainland and overseas institutions. To date, these relics have been surrendered in most cases to the Tasmanian Aboriginal Corporation (TAC). As a result some have been disposed of by cremation without any consultation or engagement with other Tasmanian Aboriginal organisations. The Coroners Act is unclear on the return of Aboriginal

human remains to the Aboriginal community. There needs to be a clearer and transparent process instead of the existing one, whereby, the Attorney General makes the decision. MTWAC recommends that this arrangement be revisited and that a truly representative Tasmanian Aboriginal Heritage Council have future oversight over such matters.

3. Making decisions about what happens to Aboriginal Heritage.

As discussed in previous sections of this submission MTWAC argues that all Tasmanian Aboriginal organisations should be involved and have a say in the consultation and decision-making process on Aboriginal heritage issues. This pertains particularly to issues arising in their own local areas. While regional organisations may see fit to seek expert advice and consultation from other relevant peoples and authorities, it is logical that local Aboriginal peoples and organisations be consulted first and have decision-making powers concerning local matters.

MTWAC supports the Aboriginal Heritage Council (AHC) being a statutory decision-making body, provided that it is representative of regional community organisations and has a membership that incorporates a variety of knowledge, views, and experience necessary for it to undertake its function effectively - there is no benefit with having a Council comprised solely of Aboriginal Heritage Officers.

4. The Aboriginal Heritage Council - what it is and what it does.

MTWAC believes that the AHC should be setup as an independent statutory decision-making body under the Act that is adequately resourced and funded to undertake and perform its role effectively in the management and protection of Aboriginal heritage.

Currently the AHC is provided with limited part-time administrative support - there are no paid policy officers who can do the necessary research or prepare detailed submissions for the AHC. In the two years that the current AHC has been operating, this lack of support and resourcing is highlighted by the lack of a visible web presence that provides any detail - a vital platform necessary to provide information back to Aboriginal communities on its policies and actions under the Act.

MTWAC supports the formation of a statutory AHC that is composed of Tasmanian Aboriginal peoples, is representative of regional community groups and organisations, gender balance, and has a diverse range of knowledge and skillsets, which are necessary for it to function effectively. The appointment process should be independent and MTWAC supports the current process with members appointed by the Governor on the Minister's recommendation. MTWAC does not consider a general election type process like that for the Aboriginal Land Council of Tasmania (ALCT) can achieve the outcome of a suitable AHC.

The role and function of AHC under the Act provides a fair degree of autonomy to conduct its business, however, the powers of the AHC should not be limited to providing advice and

recommendations solely under the Act. The AHC should have broader powers that can allow it extend across other relevant acts such as *Land Use Planning and Approvals Act 1993* (LUPPA) on topics and issues that it sees as being important.

5. Offences under the Act and penalties for doing the wrong thing.

MTWAC welcomed the increase in maximum penalty under the 2017 amendments to the Act to same level as those under the Tasmanian Heritage Act. However, as there have been no prosecutions to date, it is uncertain in how penalties will be applied or their effectiveness.

Despite the increase in maximum penalty, MTWAC does not believe that the penalties are adequate:

- Small or minor offences can simply be ignored due to resourcing and time issues required to go through the judicial process to prosecute a case.
- There is the potential for a guilty person under the Act to incur a fine that can be 'racked up' avoiding full payment. This serves a little deterrence.
- Big business managing large capital development projects could use economic rationalism as the basis of decisions on whether or not to declare an unanticipated discovery site of Aboriginal heritage i.e. the cost of work stoppages versus a fine under the Act.

To help mitigate some of these issues , MTWAC would consider the introduction of additional compliance measures such as on-the-spot fines. The definition of what constitutes a minor and major offence would require wide consultation with regional Aboriginal community groups and organisations. MTWAC would not support practical measures like this if it allowed for more serious types of offences to be downgraded because it was simpler, easier, and cheaper process for compliance, as this devalues our heritage.

MTWAC supports the ability to include custodial sentences and the removal of licenses and permits. These types of measures would send a clear message to CEOs and board members that they can be held personally accountable for decisions they make.

MTWAC supports in principal the Act applying differently to Aboriginal peoples in certain circumstances. As the island's first peoples and traditional owners and custodians, Tasmanian Aboriginal peoples, MTWAC argues that they ought have the right to continue practicing culture and the cultural obligations to Caring for Country. This can result in the need to connect and engage with Aboriginal heritage sites. In this case MTWAC recommends that a set of Cultural Protocols be developed by the Tasmanian AHC, along with the provision for penalties if these protocols are breached.

6. When can Aboriginal heritage be interfered with?

MTWAC acknowledges that at times there are circumstances in which Aboriginal heritage will necessarily be impacted e.g. replacement of a power pole on a living area to maintain essential infrastructure, or creating a footpath adjacent to a busy road near a school over an isolated artefact scatter site for improved public safety. However, MTWAC does not support the destruction or making Aboriginal heritage sites vulnerable through actions or developments where alternative options are not fully investigated first - financial cost, or *'this is the preferred and best site for tourist experiences'* should not be a basis for the destruction or compromise of Aboriginal heritage. MTWAC believes that maintaining Aboriginal heritage values and protecting Aboriginal heritage artefacts—both natural and manufactured—will greatly contribute to the wider Tasmanian community, both economically and culturally well into the future.

MTWAC understands and accepts the importance of having defence provisions and Guidelines under the Act for bona fide cases. MTWAC recommends that the interpretation and meaning of some of these provisions are more clearly defined and the Guidelines expanded upon so that these provisions are improved and less ambiguous in their interpretation. Improved education on Aboriginal heritage awareness is seen as a key component of this process.

7. Enforcement of the legislation.

As outlined in section 6 and 7 above, MTWAC holds that enforcement of the legislation could be improved. Improved education on the importance of Aboriginal heritage is seen as being a key component and the range of enforcements options needs to be increased.

The issuing of on-the-spot fines for minor cases would help with compliance for those situations that would otherwise not be followed up through the current judicial process. It is essential that there is a proper consultation process with Aboriginal organisations to determine the scaling of offences and what would constitute a minor offence and on-the-spot fines. MTWAC does not support the watering or trivialisation of breaches under the Act. MTWAC strongly supports the inclusion of stop-work provisions and the inclusion of jail sentencing provisions. Stop-work provisions are an important tool that can be used to prevent further damage to Aboriginal heritage sites. The introduction of jail sentencing would provide a strong deterrent for the worst offences under the Act.

8. Other ways the legislation protects Aboriginal heritage.

MTWAC acknowledges that whilst the use of Regulations under the Act are not as strong as legislation, they do provide a number advantages by addressing issues that are not easy to address in the legislation, and are easier to amend in response to issues that arise under

the Act. MTWAC is supportive of using Regulations, providing that they allow for better management and protection of Aboriginal heritage.

9. Other matters covered by the legislation.

The experience of MTWAC supports the argument that the role and function local government plays can be improved under the Act. Local governments may have perceived, or real, conflicts of interest with the protection of Aboriginal heritage, its role and function. The competing interests of stakeholders—services and spaces for ratepayers, stimulating local economies, rates & taxes, etc.—are difficult to manage. It would be naive to ignore the possibility that in some councils the decision makers (Mayor and Councillors) might have vested interests that conflict with protecting Aboriginal heritage.

Since closure of the Tasmanian Aboriginal Land & Sea Council, there is no organisation that has responsibility for the training and endorsement of Aboriginal Heritage Officers (AHO's). Given the importance and functions of AHOs under the Act, MTWAC recommends that the Act make provision for the accreditation/registration of Aboriginal Heritage Officers/ Advisors inline with other professionals operating under their Acts. Any proposal should include consultation with regional Aboriginal organisations and currently endorsed AHOs.

Please accept all ideas, arguments and recommendations offered above as the sincere and considered position of MTWAC executive and members. We would welcome any opportunity to discuss this further.

Signed

Nick Cameron

Chairperson

29 September, 2019