Review of the *Aboriginal Heritage Act 1975*

Review Report

March 2021

Department of
Primary Industries, Parks, Water and Environment

Tasmanian Government

A Report prepared for the Minister for Aboriginal Affairs

Department of Primary Industries, Parks, Water and Environment

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Executive Summary

We acknowledge and pay respect to the Tasmanian Aboriginal people as the traditional and original owners and continuing custodians of the land on which we live and work, and we acknowledge Elders – past, present and emerging.

This review has confirmed, as indicated in past reviews over many years, that dissatisfaction with Tasmania's *Aboriginal Heritage Act 1975* (the Act) remains high among both Tasmanian Aboriginal people and most stakeholders.

Many of those that provided input into the review process, and particularly Aboriginal people, hold significant concerns with the limitations of the protection measures afforded by the Act. As elsewhere in Australia the desire of Aboriginal people for better protection of their heritage, and for a stronger role in delivering this protection, is a critical driver of reform. We are also observing a similar shift in the expectations of Australians more generally. This is reflected in current national developments.

Protection of Aboriginal heritage also has practical implications, particularly in relation to proposals to carry out developments. Those implications can result in delays to approval, negative sentiment, additional cost and a need to modify proposals or seek approval to interfere with or destroy Aboriginal heritage. These implications are often compounded when issues arise too late for proper planning and management. This has resulted in land owners, managers of land and developers raising concerns over a lack of certainty of process, with many calling for alignment with the State's Resource Management and Planning System (RMPS).

However, despite the many limitations and inefficiencies inherent in the Act, at its core the Act clearly establishes that it is an offence to interfere with, damage or destroy Aboriginal heritage without prior approval. As a result, the majority of established industries and developers that take on large-scale developments appropriately investigate Aboriginal heritage, and the management and protection of Aboriginal heritage is given careful consideration. The end result is that relatively few permits to interfere / damage / destroy are granted by the Minister each year.

The review received many suggestions for improvement. Among the prominent suggestions were: increased education and awareness; the need for cooperative and proactive management of Aboriginal heritage based on early consideration in planning and development approval processes; and widespread support for cooperative and consultative approaches that closely involve Tasmania's Aboriginal people. This review has heard a number of other suggestions for reform, outlined in detail later in this report. These are around issues such as the need to define Aboriginal heritage more appropriately (abandonment of the term 'relic' is universally supported) and a need for open and transparent processes – along with occasional points of support, such as for the current level of penalties.

Over the past 20 years, all other States and Territories have either introduced completely new laws (or at least, have substantively amended their laws) or are currently in the process of doing so. There is also a strong momentum at a national level to aim for more consistent legislation, and recognition of common standards. In reviewing and renewing our own Act, we are therefore part of a national process. We can draw on precedents from other jurisdictions, and perhaps from national standards. This makes it an auspicious time to be undertaking this review.

Findings of the review

The following key findings of the review are based on analysis of input received through the consultation process, including comparison with legislation in other jurisdictions. The focus is on the presentation of widely agreed views on the Act, supplemented and informed by analysis. Findings are grouped together under headings reflecting key themes that have emerged through the review process.

Age and general adequacy of the Act

FINDING #1. While the 2017 amendments addressed a number of the most problematic elements of the Act, it remains amongst the most outdated in Australia. In the view of the vast majority of contributors to this review, the shortcomings of the Act are considerable and cannot be meaningfully addressed through further amendment of the current Act. There is a near consensus on the need for new, modern and contemporary Tasmanian legislation.

FINDING #2. The language, structure and functions of the Act are outdated and do not support management and protection of Aboriginal heritage in Tasmania in a manner that is consistent with contemporary practices and standards for managing Indigenous heritage, nationally and internationally.

Purpose and objective of the Act

FINDING #3. The Act lacks clarity on its overall intended purpose and objective. In other jurisdictions statements of purpose, objectives or principles provide additional guidance in understanding and interpreting the legislation.

Definition of Aboriginal heritage

FINDING #4. The definition of Aboriginal heritage in the Act is limited in scope and does not align with contemporary definitions. As a consequence, not all heritage that is of significance to the Aboriginal people of Tasmania, and to broader society, is currently recognised and afforded appropriate management and protection.

FINDING #5. New categories of any expanded definition might include contemporary Aboriginal heritage, Aboriginal areas and Aboriginal landscapes and seascapes. Legislated processes and prescribed criteria would provide a robust and transparent framework for identifying and registering these Aboriginal heritage values.

Early consideration of Aboriginal heritage

FINDING #6. Statutory and policy mechanisms to promote early consideration of Aboriginal heritage in land use planning and approvals processes are absent across Tasmania's Resource Management and Planning System (RMPS). There is broad support for the inclusion of mechanisms that result in early consideration of Aboriginal heritage, to improve protection outcomes and to promote public awareness of Aboriginal heritage.

FINDING #7. Education, awareness and appreciation for what Aboriginal heritage is and why it is so valuable are key long-term components in realising improved outcomes in the management and protection of that heritage.

Certainty of statutory process

FINDING #8. The Act almost completely lacks clarity and certainty of process, as well as flexibility and proportionality. This reduces the confidence of investors and developers and other users of land in Tasmania. It also contributes to a more general lack of confidence in the ability of the legislation to adequately and consistently protect and manage Tasmania's Aboriginal heritage.

FINDING #9. As elsewhere in Australia, it is recognised that all parties involved in the legislated process – including those charged with fulfilling administrative functions, Tasmanian Aboriginal people, proponents and consultants – need to be appropriately informed and resourced to play their part in ensuring efficient process, effective regulation and appropriate protection.

Aboriginal Heritage Council role and representation

FINDING #10. There is broad acceptance that a representative body, such as the Aboriginal Heritage Council, can play an important role in managing and protecting Aboriginal heritage in Tasmania. There is significant support for expanding the current statutory role of the Council.

FINDING #11. Additional prescriptions in the Act around selection of members of the Aboriginal Heritage Council would improve confidence in the Council and be widely welcomed.

Decision making process

FINDING #12. The Act contains little guidance on the process for decision making, and has no requirement for transparency or justification for decisions that are made. Changes in this respect would significantly improve confidence and trust in the decision making process.

FINDING #13. The limited role of Aboriginal people in decision making, and the widespread perception of an ongoing failure to sufficiently value and protect sites of significance to Aboriginal people, underlie their deep dissatisfaction with the current system.

Management tools

FINDING #14. The Act does not provide any of the contemporary tools that are available in modern Aboriginal heritage legislation for managing and protecting Aboriginal heritage. The central process – the permit to interfere (etc) with Aboriginal heritage – is inflexible and unable to consider scale, and the Minister holds the sole responsibility for making decisions. There is nothing to encourage proactive and cooperative agreement among parties, including Aboriginal people, on how Aboriginal heritage should be protected and managed.

Compliance and enforcement

FINDING #15. Enforcement provisions for appropriate punishment and strong deterrence remain essential and are universally supported. It is also considered that a focus on education, as well as streamlined and effective processes, would be the best long-term foundation for effective and broad-based compliance.

FINDING #16. Providing opportunities for Aboriginal people to be involved in compliance and enforcement activities would be welcomed, offers opportunities to individual Aboriginal people, and would help to ensure that the Act is effective and fully supported by Aboriginal people generally.

Ownership of heritage

FINDING #17. Review and renewal of Tasmania's Aboriginal heritage protection and management legislation provides an opportunity to formally recognise Aboriginal people as the original people of Tasmania and the living custodians of Tasmania's Aboriginal cultural heritage.

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Chapter 1: Introduction

1.1 This statutory review

The *Aboriginal Heritage Act 1975* (the Act) is a stand-alone piece of Tasmanian legislation which defines what Aboriginal heritage is and sets out how that heritage must be managed.

The substance of the Act was amended in 2017 for the first time since it was created in 1975. The amendments served to address some of the most outdated and problematic parts of the Act and were seen as a positive step. However, aside from the amended provisions, the Act as a whole remains largely outdated and unused and continues to reflect the thinking and language of close to half a century ago.

The requirement for a statutory review of the Act was one of the more important amendments made in 2017 (s.23 of the Act). It was acknowledged at the time that the 2017 amendments were only intended to replace the worst features of the Act and that, in due course, more comprehensive and contemporary legislation should be introduced.

The Department of Primary Industries, Parks, Water and Environment has undertaken this review on behalf of the Minister for Aboriginal Affairs. This report presents the findings of the review to the Minister. The requirement for a statutory review further specifies that the Minister is to table a report detailing the outcome of the review in both Houses of Parliament. That report (the Tabling Report) will be informed by these findings and will be the Government's response to the findings of this review.

The public phase of the review began in late May 2019, with the release of a Discussion Paper and a call for public submissions. This generated 39 submissions that provided a broad range of comments and suggestions. The Minister released a report on 6 December 2019 that detailed the consultation feedback received.

The COVID-19 pandemic affected the timetable for Stage 2 of the consultation, a targeted follow-up process originally scheduled for March to June 2020. By mid-February 2020, it was obvious that the Aboriginal community organisations and key stakeholders would not be able to engage as initially planned, and public servants were unable to travel as needed.

Subsequently, in the final quarter of 2020 the review team contacted the organisations and individuals that had been engaged, or made submissions, in the initial consultation process in 2019 to provide a further opportunity for their input into the review. The intent was to capture any new thinking or information, so that views recorded remained current. Most of those contacted were happy simply to reconfirm previous feedback, but some additional points were made.

The review has considered and analysed all feedback received. The review also includes a comparison with how Aboriginal heritage is managed in other Australian jurisdictions. While all views and opinions have been taken into account in preparing this report, not all are specifically mentioned and discussed. Instead, this report presents the key matters and themes that have emerged. As noted, all written contributions to the review, together with the Consultation Feedback Report summarising feedback from the public consultation phase, are available on the Department's website[1].

[1] The Consultation Feedback Report and the 39 submissions are available at **https://dpipwe.tas.gov.au/about-the-department/aboriginal-heritage-act/consultation-feedback-report**

The Consultation Feedback Report and the original detailed submissions remain an essential reference for the consultation results. Input from the later consultation provided further valuable information and confirmation of views. The 11 key themes that were identified in the Consultation Feedback Report also remain an important guide for the review (see Appendix 1). A summary by category of contributor is presented at Appendix 2. The analysis has been fully informed by all feedback as well as by the knowledge held in the Department and comparisons with other jurisdictions. Where relevant, this review identifies the views of Aboriginal people or non-Aboriginal stakeholders.

This review is formally of the Act as a whole, but it makes little or no detailed comment on specifics of the Act. This reflects the key point that although the Act is short, much of it is unused and redundant: specific critique of those provisions would add limited value. The active elements are almost entirely those either amended or inserted as part of the 2017 amendment process. As indicated in the first finding in Chapter 3 below, it is considered reasonable to operate on the assumption that any new legislation will be very different in form and content.

While much has been heard from contributors to the review by way of suggestions about what is missing from or is wrong with the current legislation, and therefore what might be considered in preparing new legislation, the scope of the current review has not extended to policy recommendations or to preparation of new legislation.

The main intent of this Review Report is to set out the key findings gathered from the public consultation process, and to provide some high-level analysis of those issues, including by reference to legislation in other jurisdictions. This will be presented to the Government for consideration of how it will address the issues that have been identified. The Government will then formulate a response that will constitute the 'report on the outcome of the review' specified in s.23(2) of the Act and table that in Parliament ('the Tabling Report').

1.2 Origins and history of the Act

The *Aboriginal Heritage Act 1975* was introduced as the *Aboriginal Relics Act 1975* and has remained in many respects unchanged in the subsequent 45 years. Although Tasmania was the last State to introduce specific legislation to protect Aboriginal heritage, even at the time of its introduction it was somewhat old-fashioned[2].

Its focus was clearly to protect archaeological 'relics' dated before 1876, the date of the death of Trukanini. The late 1960s and 1970s were a time of vigorous (and contentious) activity in Tasmanian Aboriginal archaeology, and there was a genuine upsurge of interest in Aboriginal history. Growing concerns for environmental protection were complemented by an increasing concern for the fate of cultural 'relics'[3]. Archaeologists and historians provided momentum for legislation that was largely aimed at preventing or regulating amateur and black-market collection as well as preserving sites from the impact of tourism.

As the last legislation of its time, it drew on models elsewhere, including the New South Wales model with an advisory council comprising experts from various related fields. However, there was little consultation with Tasmanian Aboriginal people, or with stakeholders such as local government and commercial developers. The focus was very much on academic networks and on what could be learnt from archaeology.

[2] A recent PhD thesis by Jamin Moon, who has worked for many years in the Victorian Aboriginal heritage system, includes (Chapter 5, pp.54-116) a useful history of the legislation in all Australian jurisdictions up to almost the present: *Aboriginal Cultural Heritage Law, the Thirdspace and Decolonisation in Australia, Canada and Aotearoa / New Zealand*, Latrobe, 2019.

[3] For the source of this early background, see Laurajane Smith, 'A history of Aboriginal heritage legislation in south-eastern Australia', *Australian Archaeology*, 50, 2000.

The Act was seen by its creators as a progressive breakthrough, but its provisions were brief and relatively modest in practice. There was provision for 'protected sites', to be managed by the Director of National Parks and Wildlife. One place on the 5-person Aboriginal Relics Advisory Council was reserved for a person of Aboriginal descent – Tasmania was only the second jurisdiction to include such a provision – but in other respects the power lay wholly with the Minister and the Director. In theory, all pre-1876 physical heritage was protected but there is no indication that the implications of this protection was thought through, in terms of how it might impact on development activities. The offences were extremely hard to establish or prove, and the penalties minimal.

Nonetheless, the Act did represent the beginning of a legislated acknowledgment of Aboriginal heritage in the State, and a key provision in practice was the obligation to report findings of 'relics'. Over time this led to the gradual accumulation of an evidence base, which became known as the 'Tasmanian Aboriginal Sites Index' (more recently the 'Aboriginal Heritage Register'). Despite the inadequacies of the Act, administrative procedures were developed to create a system that could lead to the avoidance or mitigation of harm, facilitating the protection of much Aboriginal heritage. There was in addition the beginnings of a formalised process of bringing Tasmanian Aboriginal people into the management system, through the recognition of 'Aboriginal heritage officers' and a role for the Tasmanian Aboriginal Land [later 'and Sea'] Council. Such advances owed little to the Act itself, however.

By the late 1990s there was a broad agreement that the Act had been overtaken by legislation in every other jurisdiction. A formal review in 1997-98 generated almost uniformly critical comment, from all sides. By then, the Act had no credible defenders, but the lack of agreement about how to replace it was to prevent reform for the next 20 years. The State undertook two major review processes, in 2003-2010, and 2011-13. Each included comprehensive public consultation processes that confirmed the range and extent of the criticisms of the Act.

The second review resulted in the *Aboriginal Heritage Protection Bill 2013*, a comprehensive and complex attempt to incorporate the lessons of the newer legislation interstate, in particular the Victorian *Aboriginal Heritage Act 2006*. It was still in Parliament, and facing a select committee in the Legislative Council, when the Government changed in early 2014. Reflecting on the recent history of efforts to reform Aboriginal heritage laws in the State, the new Government decided that it would be best to amend the *Aboriginal Relics Act 1975* to remove its worst and most offensive features, and to provide for this statutory review. Among the 2017 amendments, the name was changed to *Aboriginal Heritage Act 1975*, although the term 'relics' continues to be used throughout the Act.

Chapter 2: The Act in a National Context

2.1 Purpose and structure of the Act

The Department of Primary Industries, Parks, Water and Environment is responsible to the Minister for Aboriginal Affairs in relation to the administration of the Act. The Department includes the specialist unit Aboriginal Heritage Tasmania (AHT), which undertakes the general implementation of the Act and supports the Aboriginal Heritage Council (AHC).

Before comparing the Act with other legislation, it is useful to briefly outline its current structure and content, highlighting those provisions that are of significance. The original *Aboriginal Relics Act 1975* had 25 sections, mostly quite short. Although the 2017 amendments changed a good deal of the content, and added about a quarter to the Act's length, the structure and general scale remained. There are six parts:

Part I – Preliminary

- 2 sections, including the crucial s.2, 'Interpretation' – the definitions of key terms. This was significantly amended in 2017 to import the concept of 'significance to the Aboriginal people of Tasmania', and supporting definitions of 'Aboriginal tradition' and 'significance'. The two references to 1876 were also deleted.

Part II – The Aboriginal Heritage Council (the only Part renamed in 2017 – formerly 'The Aboriginal Relics Advisory Council')

- 3 brief sections, significantly amended in 2017 to amend or replace the 4 former sections. The main provisions stipulate the composition of the new AHC (not more than 10 members, all Aboriginal people) and a broad advisory role, specifically including to advise in relation to any 'object, site or place alleged to be a relic'; this became necessary once the 1876 date was deleted and modern items became potentially protected under the Act.

Part III – Declaration and Management, &c., of Protected Sites

- 3 sections intended to provide for sites of special significance. However, only five were ever proclaimed, the last over 30 years ago (three remain current), and this Part's provisions have proved difficult to interpret and use.
- In 2017 the one amendment (s.9(2A) & (2B)) was to include very high maximum penalties (up to $1.72 million) for harm knowingly inflicted, or $344,000 if the offence was reckless or negligent. The maximum penalty is 1,000 times higher than the former penalties and is now in line with those applying in the *Historic Cultural Heritage Act 1995*, which covers non-Aboriginal heritage.

Part IV – General Provisions Relating to Relics, Including Their Vesting in the Crown

- 5 sections, much of which is barely or never used (including those relating to Crown ownership), but including two important provisions:
  - s.10(3), unchanged in 2017, which requires a person, 'as soon as practicable after finding a relic', to 'inform the Director or an authorized officer of the find'. This underlies the official record of Aboriginal heritage in the State, now consisting of well over 13,000 items.
  - s.14(1), which has for decades been in practice the only operative provision in the Act – requiring a permit 'granted by the Minister on the recommendation of the Director' to 'destroy, damage, deface, conceal or otherwise interfere with a relic', or to deal with a relic in various other ways (sell, remove etc). In 2017 the penalty provisions were radically upgraded to the same levels as in s.9(2A) & (2B).

Part V – Provisions Relating to Administration and Enforcement

- Now 9 sections, ranging from much that has rarely if ever been used, to several of the more significant amendments of 2017, aimed largely at making enforcement more practicable. Key amendments include:
  - in recognition of the massively increased penalties, providing for defences. As well as that of carrying out emergency work (s.20), the Act now includes a form of 'due diligence' defence based on compliance with Guidelines issued by the Minister and approved by Parliament (s.21A).
  - s.21B, extending the time in which a prosecution must be commenced from the former 6 months (by default, under other legislation) to 2 years from the offence or from when it first comes to the attention of an authorised officer.

Part VI – Miscellaneous

- 4 sections totalling barely a page. The longest deals with Regulations, but there have been no current Regulations for at least 20 years. The significant provisions, as amended in 2017, are for:
  - This statutory review of the Act, due within three years.
  - A tidying up and clarification of the references to two other Acts that deal with Aboriginal human remains.

2.2 Comparison with other Aboriginal heritage legislation

A characteristic of Aboriginal heritage law in Australia is that each jurisdiction has its own legislation that was introduced at different times. (This includes some Commonwealth law that is now under review and plays a generally minor role in the practical protection and management of Aboriginal heritage.) There are many differences of detail between the State Acts as well as important variations in terms of basic principles and approach. The history and organisation of the Tasmanian Aboriginal people is unique and the effective absence of native title (in the sense recognised in statute law) is also a major point of difference with the mainland's models around 'who speaks for Country'. Further, each State has its own planning and development control regime. It has therefore never been possible for Tasmania simply to align with an established model.

Before looking at comparisons in more detail, it is worth noting the contrast in length between the Tasmanian Act and all post-2000 legislation, including legislation in development. This provides a crude but instructive illustration, and the contrast between the *Aboriginal Heritage Act 1975* and modern legislation elsewhere is quite stark (see table at Appendix 3). Modern examples of legislation are at least three times as long as the Tasmanian Act, and the widely cited Victorian Act is about 10 times as long. This is despite the fact that much of the Tasmanian legislation is barely, if ever, used. The comparison indicates very clearly that modern legislation includes a great deal that is absent from the Tasmanian Act.

The complexity of the issues that arise when seeking to legislate for heritage as ancient and widespread as Australian Aboriginal heritage is confirmed by the historical fact that reviews in all jurisdictions have often ended without achieving new legislation, or the reform process has been very long and drawn out. A brief summary of where the Commonwealth, States and Territories are at this point is included in the table at Appendix 3.

Despite the uncoordinated reform process between States, there are clearly some trends that emerged over time and a tendency for each new Act to provide useful precedents for those that follow, as each tries to pick out the best from all the others. The tendency for broadly similar changes over time is likely to be accentuated by the wide dissemination of the Best Practice Standards (see section 2.4 below), which take precedents from modern legislation, in particular that of Victoria. Some of those who provided feedback in the Stage 2 consultation argued that the Best

Practice Standards should now provide criteria for acceptable new legislation.

A recent academic study[4] considered that the 2017 amendments had brought key elements of the *Aboriginal Heritage Act 1975* substantially closer to other legislation, and that it was no longer the extreme outlier that it was for many years previously. But it remains clear that Tasmania requires very significant reform before it has legislation comparable with contemporary legislation in other jurisdictions.

As part of this Review, a comparison of the main features of legislation across Australian jurisdictions has been updated, and the full table is at Appendix 4. Some of the key features from this table are summarised in the table below:

[4] Jamin Moon, *Aboriginal Cultural Heritage Law*, pp.105-7 [full reference at footnote 2].

SUMMARY OF PROVISIONS IN ABORIGINAL HERITAGE (AH) LEGISLATION IN OTHER JURISDICTIONS

(reflects current legislation or complete draft legislation only and does not include provisions proposed in legislation in preparation in NSW and Queensland)

Topic	VIC	NSW	QLD	SA	ACT	NT	WA [new Bill]
What is protected?	Blanket protection – modern definitions. Unique system of registering intangible heritage.	Blanket protection of objects; important places declared.	Blanket protection of areas and objects.	Protection of Aboriginal sites and objects.	Blanket protection of places and objects.	Blanket protection of archaeological places and objects, plus sacred sites under Sacred Sites Act.	Blanket protection for places & objects; may protect cultural landscapes.
Who owns AH? including 'secret & sacred' (S&S)	Human remains and S&S – Aboriginal people as far as practicable. Rest undefined.	Movable – Crown, but with power to transfer to Aboriginal owner; rest – landowner.	Human remains and S&S – Aboriginal people; rest, State by default.	Largely undefined, no general ownership by Aboriginal people.	The ACT if on Territory land; registered AH to the landowner.	Registered AH to landowner, unless on Aboriginal land – to Aboriginal people.	Human remains and S&S to relevant Aboriginal people; for rest, they're primary custodians.
Who makes decisions on proposals that may harm AH?	Mainly Registered Aboriginal Parties (RAPs); Sec of Dept only if no RAP or no decision by RAP.	Director-General issues Aboriginal heritage impact permits (AHIPs). Minister declares Aboriginal places.	Focus on management plans agreed between proponents and 'Aboriginal parties'; if agreed, no State role; if no agreement, to Land Court then to Minister.	Mainly Minister, but now aiming for agreement process with Recognised Aboriginal Representative Bodies (RARBs), though Minister still approves agreements.	Independent ACT Heritage Council (not just for AH) approves management plans & advises on DAs.	Minister on major works, Heritage Council for minor permits. Aboriginal Areas Protection Authority (AAPA) controls sacred sites.	ACH Council decides on minor permits; mgt plans for rest – agreed if possible, Minister decides if no agreement.
How do Aboriginal people participate in decision making?	RAPs (local / regional), approved by all-Aboriginal AH Council.	Aboriginal Cultural Heritage Advisory Committee – advisory; Land Councils locally. Requirement to consult before applying for AHIP.	Mainly through 'Aboriginal parties', generally identified through native title processes. (No State AH Council.)	State Aboriginal Heritage Committee (SAHC), advisory to Minister; RARBs (appointment decided by SAHC). General recognition of TOs.	Represented on Heritage Council; consultative role for Representative Aboriginal Organisations.	Represented on Heritage Council; AAPA is all-Aboriginal.	New local ACH services (LACHSs) to have key role in agreed mgt plans etc. Mandatory consultation part of due diligence.
What register system is used?	Full scope, legislated; Sec of Dept responsible.	Limited scope, legislated; Chief Exec to 'establish and keep'.	Legislated, 2 levels with differing content & access. Chief Exec to 'establish and keep'.	Legislated, Minister to keep Register.	Legislated, Heritage Council to keep Register.	Legislated, Heritage Council to keep Register – but not to include secret Aboriginal information.	Legislated, ACH Council to 'establish and maintain' ACH directory.
Development assessment process & whether integrated with land use planning & approvals system (LUPAS)?	Wide range of instruments, depending on nature of potential impact. Fully integrated with LUPAS.	Director-General may issue AHIP where harm cannot be avoided. Not integrated with LUPAS.	Management Plan is compulsory where EIS required. Otherwise not integrated within LUPAS.	Range of instruments, not integrated with LUPAS.	Wide range of instruments, depending on nature of potential impact. Fully integrated with LUPAS.	'Works approval' required if impact AH; not integrated with LUPAS.	Due diligence & 4-tiered system depending on impacts. Not integrated with LUPAS.
What are the maximum penalties? (B=business, P=personal. Penalty units into $$. # = imprisonment option.)	$1.652 M (B) & $297,396 (P)	$1.1 M (B) & $550,000 (P)	One outlier at $2.269 M (B & P); others $1.335 M (B) & $133,450 (P)	$50,000 (B) & $10,000# (P)	$810,000 (B) & $160,000 (P)	$63,200# (B & P) in Heritage Act & $316,000 (B) & $63,200# (P) for SSAct	$10 M (B) & $1 M# (P)

While it is acknowledged that each jurisdiction will have legislation that reflects its own unique history and circumstances - including contextual constraints such as the nature of its planning and approvals systems, its mechanisms of reservation for conservation purposes, native title circumstances and the impacts of early European settlement - the differences between the Tasmanian legislation and that in other jurisdictions are striking. Yet despite the inevitable differences between jurisdictions, clear trends are emerging in both policy and legislation which includes many of the practical implementation mechanisms – around compliance and enforcement, or potential tools like management plans and agreements – that are now reasonably standard in all the more modern legislation. Many of these are picked up in the new Best Practice Standards.

2.3 A note on the practical administration of the Act in Tasmania

While the Tasmanian Act is very different from modern legislation in other parts of Australia, it is important to acknowledge that the reality of how Aboriginal heritage is protected and managed in Tasmania is more similar to other jurisdictions than a simple comparison with their legislation would suggest. In Tasmania, the lack of statutory mechanisms has forced development of administrative practices, policies and procedures. These have gone some way to improve certainty and deliver outcomes that are comparable to those realised through the statutory mechanisms in place in many other jurisdictions.

The basis for the current system is the core feature of the Act – which clearly establishes that it is an *offence to interfere with, damage or destroy Aboriginal heritage without prior approval.* Many developers, and in particular larger scale developers, are aware of their obligations regarding Aboriginal heritage and undertake appropriate assessments.

The 2017 amendments included the development of statutory Guidelines that lay out a basic scheme for people to undertake 'due diligence' in relation to Aboriginal heritage. The intent is to equip anyone engaging in activities that potentially impact on Aboriginal heritage with some basic precautions to avoid harm. The ability to claim ignorance as a defence was removed at the same time.

The cumulative work of many Aboriginal people, industry proponents, consultants or archaeologists, heritage organisations, and Aboriginal Heritage Tasmania staff has created a substantial body of up-to-date information and advice. Good practice elsewhere, nationally and internationally, informs much of what is done. This allows good-faith developers and land managers to undertake appropriate surveys etc, and to manage heritage that may incur impact, in a logical and thorough fashion. (The resources available can be found on the AHT website, **https://www.aboriginalheritage.tas.gov.au/** .)

The Aboriginal Heritage Register (previously called 'Tasmanian Aboriginal Sites Index'), has grown over the years to hold a record of more than 13,000 sites and objects. The register also contains thousands of reports from assessments of Aboriginal heritage that are used to inform advice. Its origins and history, including the limitations of information technology in earlier decades, mean that there are significant variances in the quality of its information and its coverage of the State is highly uneven. This register does, however, provide a fundamental tool for protection and management, and has great potential to be improved.

For instance, there are now simple tools to allow public interrogation of whether there is known and registered Aboriginal heritage at a particular site. The 'Dial before you dig' and 'Aboriginal Heritage Property Search' tools cater to large numbers of basic enquiries. The number of searches has grown from 37,023 for 2018 to 46,628 for 2020. Consistently about 8 per cent of these searches trigger the possibility of requiring further consideration.

At each more complex step the numbers reduce, because it becomes clear either that there is no identified Aboriginal heritage likely to be interfered with, or that it can be avoided. In 2020 there were 857 desktop reviews, 249 full register searches, 57 full assessments and 31 permit applications (including for archaeological studies).

In summary, compared with the number of initial enquiries on Aboriginal heritage, few permits to interfere / damage / destroy are considered by the Aboriginal Heritage Council and Minister each year. In the majority of cases, particularly if Aboriginal heritage is addressed early, in line with the official advice and along with other considerations like environmental impacts, harm can be avoided. Even if it is concluded that harm cannot be avoided and a permit is required, harm can usually be mitigated through permit conditions.

It is not in any way contended that the system is ideal, which is largely because it has had to be built up in the absence of clear processes and responsibilities in the Act. Some of the problems created by this absence are impossible to overcome by administrative action only, particularly due to the lack of any flexibility in the ministerial permit process. However, it would be inaccurate to conclude from considering the Act alone that the way Aboriginal heritage is managed in Tasmania is completely different from what happens in other jurisdictions.

2.4 Relevant developments in Aboriginal heritage policy nationally

There is an influential factor present at this time that has never been so important previously. This is the momentum towards review and improvement of Aboriginal heritage legislation nationally. In many ways this makes the timing of the review very fortunate, although it could also complicate the timelines because over the next two years there may well be some relevant national and inter-jurisdictional processes to work through. This will certainly be the case if national standards are to be developed and implemented.

On 21 September 2020, when the Ministers responsible for both Aboriginal heritage and Indigenous Affairs from every jurisdiction in Australia held a roundtable to discuss Indigenous cultural heritage legislation, three issues were considered:

- the statutory 10-yearly review of the Commonwealth's *Environment Protection and Biodiversity Conservation Act 1999* (EPBCA), where the interim report had been strongly critical of the Commonwealth's legislation to protect Aboriginal heritage, including the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) which is intended to provide a backstop for Aboriginal heritage under imminent threat;
- the development by the Heritage Chairs and Officials of Australia and New Zealand of *Dhawura Ngilan: A Vision for Aboriginal and Torres Strait Islander heritage in Australia*, incorporating also Best Practice Standards[5] – which draw heavily on the example of the Victorian legislation; and
- the intense discussion and consequent momentum for change created by the blasting of long-inhabited and highly significant rock shelters at the Juukan Gorge in the Pilbara, in May 2020. A Joint Standing Committee Inquiry has produced an interim report and has indicated that in 2021 the Committee will be approaching jurisdictions to examine their Aboriginal heritage legislation (beyond Western Australia and the Commonwealth, which were investigated in the interim report)[6].

Following the roundtable Ministers agreed that their respective governments would further consider the *Dhawura Ngilan* and Best Practice Standards; welcomed the Commonwealth's intention to address Indigenous heritage protection reform opportunities (including for ATSIHP) as part of its response to the EPBCA review; and agreed also to reconvene later to review progress towards the modernisation of their laws. The final Report of the EPBCA Review was released on 28 January 2021, including formal Recommendations. Recommendation 7 reads: 'The

[5] Available from **https://www.environment.gov.au/heritage/publications/dhawura-ngilan-vision-atsi-heritage** .

[6] See **https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Northern_Australia/CavesatJuukanGorge** .

Commonwealth Government should immediately initiate a comprehensive review of national-level cultural heritage protections, drawing on best practice frameworks for cultural heritage laws.'[7]

The coincidence of this timing has created a higher level of interest, and of momentum for reform, than has arguably been seen for at least a quarter of a century.

In summary, the national context suggests that there is increasing interest in harmonising Aboriginal heritage legislation with reference to agreed national standards. Until the Commonwealth announces its own intentions, however, and Ministers have reconvened to discuss the issues further, the possible mechanisms remain unclear.

[7] The relevant Chapter 2 is significantly updated, and among other things contains many references to *Dhawura Ngilan* and the Best Practice Standards, especially at pp.68-69: **https://epbcactreview.environment.gov.au/resources/final-report** .

Chapter 3: Findings

Introduction, and structure of the chapter

The sections under this chapter group together issues that have been identified through this review. Issues, concerns and suggestions that have been identified in relation to the *Aboriginal Heritage Act 1975* are discussed and, where relevant, a clear finding is presented. The findings represent as far as possible an objective and high-level account of the weaknesses or strengths of the Act, drawn from consultation feedback and the analysis of information from and about other Australian jurisdictions. It will in due course be the responsibility of the Government to indicate how it intends to respond to the findings of this review.

The scope of the Review has been open, enabling consideration of all issues raised. The Discussion Paper that launched the consultation process set out its questions under 10 headings, which then provided the structure for the Consultation Feedback Report. A slightly different and more relevant way of grouping issues has emerged from the feedback received and additional analysis. The issues are discussed below under the following headings:

1. Age and general adequacy of the Act
2. Purpose and objectives of the Act
3. Definition of Aboriginal heritage
4. Early consideration of Aboriginal heritage
5. Certainty of statutory processes
6. Aboriginal Heritage Council role and representation
7. Decision making processes
8. Management tools
9. Compliance and enforcement
10. Ownership of heritage

3.1. Age and general adequacy of the Act

Issues and observations

The review has confirmed, as indicated in past reviews over many years, that dissatisfaction with Tasmania's *Aboriginal Heritage Act 1975* (the Act) remains high among both Tasmanian Aboriginal people and non-Aboriginal stakeholders.

The broad themes of discontent with the Act remain largely the same as in reviews dating back to the 1990s, although mitigated to some extent by the effect of the 2017 amendments. Critically, the Aboriginal community continues to be fundamentally unsatisfied with the Act, with at best grudging support for a few elements. Reasons for this attitude include: the lingering implication that the people and culture of the community are extinct and represented only by relics; the apparent inability of government to enforce the Act and punish offenders; and the Act's advisory-only role for Aboriginal people. Stakeholders such as, farmers, foresters, miners and the construction / land development industry also remain critical of the lack of legislated process and of procedural clarity generally, which effectively concentrates all attention on the single 'permit' process under s.14 of the Act. Many contributors, including those from local government, also called for alignment with the State's Resource Management and Planning System (RMPS).

There is consensus that Aboriginal heritage has value to all Tasmanians. The oldest heritage is at least 40,000 years old. The pre-1830s heritage in particular is irreplaceable – 'Once it's gone, it's gone', as a member of the Aboriginal Heritage Council put it.

The consistent message from Aboriginal people has been that the value of their heritage is fundamental in terms of identity, spirit, culture, and connection to Country. The review has heard of the distress of Tasmanian Aboriginal people around the destruction of their heritage, while waiting so long for effective legislation to protect it. Despite disagreements on other issues among Tasmanian Aboriginal people, they are united in the concern about the preservation of their cultural heritage. Increasingly, this concern is also reflected in calls for greater consistency across jurisdictions in Australia, along with a greater consideration of international standards and trends.

The outline of the Act and comparison with legislation in other jurisdictions in Chapter 2 demonstrate that the Tasmanian legislation compares poorly with modern legislation on the topic.

Remedies for the majority of issues that the review has heard about would necessarily need to be underpinned by modern, contemporary and effective legislation backed with appropriate resourcing. There is general agreement that Tasmania should be aiming for best practice management of its Aboriginal heritage.

Over the past 20 years, all other States and Territories have introduced completely new laws or at the least have substantively amended their laws, or they are currently in the process of doing so. The current momentum for reform, discussed in section 2.4 above, means that in reviewing and renewing our own Act, we are part of a national process. Among other things, this means Tasmania can also draw on precedents from other jurisdictions or from potential national standards.

The Government concluded in 2017 that there was no realistic scope for further amendment of the Act. The amendments of that year already stretched the fabric of the Act. Critically, it was impossible in 2017 to remove the term 'relic' from the body of the Act without redrafting it. The understanding that the 2017 changes had reached the limits of what might reasonably occur via amendment was an important consideration in establishing the need for this statutory review. There was no significant argument in the consultation for merely further amending the Act.

On that ground, it is evident that any effort to address substantive shortcomings in the *Aboriginal Heritage Act 1975* will require creating a legislative regime that is up-to-date and comprehensive. At the same time, any elements of the current Act that remain useful or positive should of course be retained.

There was strong comment that the development process for any future legislation should involve early and substantial engagement with Aboriginal people, cultural heritage practitioners, users and developers of resources in Tasmania and the wider community.

FINDING #1. While the 2017 amendments addressed a number of the most problematic elements of the Act, it remains amongst the most outdated in Australia. In the view of the vast majority of contributors to this review, the shortcomings of the Act are considerable and cannot be meaningfully addressed through further amendment of the current Act. There is near consensus on the need for new, modern and contemporary Tasmanian legislation.

FINDING #2. The language, structure and functions of the Act are outdated and do not support management and protection of Aboriginal heritage in Tasmania in a manner that is consistent with contemporary practices and standards for managing Indigenous heritage, nationally and internationally.

3.2. Purpose and objectives of the Act

Current provisions

The nearest reference to a purpose in the Act is the 'long title': 'An Act to make provision for the preservation of aboriginal relics'. The Act does not contain any objectives or principles to support how the purpose is achieved.

Issues and observations

The majority of those that provided input relating to this matter consistently stated the Act is out of date and lacks clarity on its overall intended purpose and objectives. It has been suggested that inclusion of a clear Purpose and Objective statement will make clear the intentions of the provisions within the Act and provide guidance on its scope. Recent legislation in other jurisdictions includes objectives.

It has been suggested that Tasmanian legislation should reference the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This was supported by the Australian Government in 2009 and is widely recognised by the world's Indigenous peoples as articulating the foundation principles and minimum standards for the survival, dignity, security and wellbeing of Indigenous peoples worldwide. The Best Practice Standards attached to *Dhawura Ngilan* highlight consistency with UNDRIP and other international law as the preferred foundation principle for Australian legislation.

FINDING #3. The Act lacks clarity on its overall intended purpose and objective. In other jurisdictions statements of purpose, objectives or principles provide additional guidance in understanding and interpreting the legislation.

3.3. Defining Aboriginal heritage

Current provisions

The Act does not provide a definition for 'Aboriginal Heritage'; it does however provide a definition for 'relic', which remains its main operative term:

(3) For the purposes of this Act, but subject to the following provisions of this section, a relic is –

(a) any artefact, painting, carving, engraving, arrangement of stones, midden, or other object, made or created by any of the original inhabitants of Australia or the descendants of any such inhabitants, which is of significance to the Aboriginal people of Tasmania; or

(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 people of Tasmania; or

(c) the remains of the body of such an original inhabitant or of a descendant of such an inhabitant that are not interred in–

(i) any land that is or has been held, set aside, reserved, or used for the purposes of a burial-ground or cemetery pursuant to any Act, deed, or other instrument; or

(ii) a marked grave in any other land.

Excluded from the definition of relic are those objects that are made, or likely to have been made, for the purposes of sale.

The 2017 amendments changed the title of the Act from the Aboriginal Relics Act to the Aboriginal Heritage Act and expanded the definition of 'relic' to include the phrase 'which is of significance to the Aboriginal people of Tasmania'.

significance, of a relic, means significance in accordance with –

(a) the archaeological or scientific history of Aboriginal people; or

(b) the anthropological history of Aboriginal people; or

(c) the contemporary history of Aboriginal people; or

(d) Aboriginal tradition.

The amendments also defined 'Aboriginal tradition', using terms that have been standard in legislation nationally since the 1970s[8].

A consequence of the 2017 amendments that rightly removed the cut-off date of 1876 (the date of the death of Trukanini) for a relic to be afforded protection under the Act was a lack of guidance and mechanisms on the determination of which post-1876 heritage should be afforded protection. This was partially addressed by providing (in s.3(2)(ab)) that in cases of uncertainty the Aboriginal Heritage Council (AHC) would provide advice, effectively making it the arbiter of what heritage came under the Act.

[8] The Aboriginal Land Council of Tasmania, however, would delete the reference in this definition to traditions etc of 'a particular community or group of Aboriginal people', leaving only 'of Aboriginal people generally'.

Issues and observations

There is near consensus on a need to modernise the way that Aboriginal heritage is defined in the Act. Many contributors to the review hold strong views that the language used in the Act to refer to Aboriginal heritage does not reflect or accurately represent Aboriginal meanings and values and must be addressed.

The amendment of the title of the Act in 2017 from the Aboriginal Relics Act to the Aboriginal Heritage Act acknowledges the inappropriateness of the use of the word 'relic' in defining Aboriginal heritage, as it comes with connotations that Aboriginal heritage is confined to artefacts from a time, and a people, long past.

There was broad recognition that the definition of Aboriginal heritage, and what is covered, should be expanded beyond the archaeological.

The Aboriginal Heritage Council captured broadly held views of the Aboriginal community in suggesting a contemporary definition should 'encapsulate tangible and intangible heritage values and allow for the connection with the cultural story of our [Aboriginal] people and for cultural landscapes [including seascapes] such as button grass plains, and natural features such as mountains, trees, waterways (inland and coastal) etc as well as recognising areas that have social values and are associated with oral stories, traditions, ceremony, and trade relations'.

A recent definition in the New South Wales draft *Aboriginal Cultural Heritage Bill 2018* reads: 'Aboriginal cultural heritage is the living traditional and historical practices, representations, expressions, beliefs, knowledge and skills (together with the associated environment, landscapes, places, objects, ancestral remains and materials) that Aboriginal people recognise as part of their cultural heritage and identity.' The new WA draft Bill offers a narrower definition, while the national Best Practice Standards recommend use of the broader Victorian model. But all such definitions are broadly consistent with the vast majority of representations received on the matter of better defining Aboriginal heritage.

It was agreed that ultimately the determination of whether and why any element of heritage is 'significant' is for Aboriginal people to decide. This is distinct from the often technical exercise, particularly with archaeological heritage, of identifying and categorising the specific characteristics of such heritage, an exercise that may form an important part of an assessment process.

There was no opposition to retaining a clear prescription of what is not considered to be Aboriginal heritage. In the current Act this is confined to objects that have been made for sale. It has been proposed that this should not preclude all such items, if they are of significance to the Aboriginal community, from being nominated for listing as Aboriginal heritage. The determination of this significance may be through a registration process based on a set of prescribed criteria.

Recognition of Aboriginal landscapes and areas (currently provided for in the Act only through Aboriginal Protected Sites) was widely agreed to be important; however, there was significant concern among land management and land use stakeholders that there would need to be a clearly defined process guiding how such recognition could be achieved. It was suggested that this may be through a nomination process, with consideration of validity against agreed criteria. This is how the Victorian Act deals with intangible heritage.

The aspect of intangible heritage that is broadly covered by the term 'intellectual property' (IP) – stories, images, music, dance etc – is complex. Currently only the Victorian Act (in Part 5A, inserted in 2016) provides for such heritage. Provisions in that Act are essentially about protection of IP from commercial exploitation by third parties. Some Aboriginal organisations hold a strong view that prescriptions around management of Aboriginal intellectual property must extend to who may hold such information and how such information may be reproduced, shared and viewed. IP law is in general a Commonwealth responsibility and the issues have been under review at that level for some years. In the past, the Tasmanian position has been that the Commonwealth remains the appropriate jurisdiction to be responsible for this type of Aboriginal heritage. The Best Practice Standards conclude that 'it is

desirable that measures in this respect are supported by Commonwealth legislation' and indicate support 'for the development of national legislation in regard to the recognition and protection' of intangible heritage[9].

The 2017 amendments that removed the 1876 cut-off date for the creation of Aboriginal heritage recognised that Aboriginal culture is a vibrant and living culture. Any new definition of Aboriginal heritage will need to provide clarity around which objects (and if included, traditions, practices etc) that are created by Aboriginal people now, and in future, warrant protection and management under the Act. For instance, in relation to historic heritage something is not necessarily automatically protected when it is first created; but with the passage of time, or through special circumstance, that built heritage may become significant to the people of Tasmania and worthy of protection and management under historic heritage legislation. It has been proposed that a listing process for nominating, considering and accepting proposals for newly recognised Aboriginal heritage values could be administered by a representative Aboriginal body such as the Aboriginal Heritage Council.

FINDING #4. The definition of Aboriginal heritage in the Act is limited in scope and does not align with contemporary definitions. As a consequence, not all heritage that is of significance to the Aboriginal people of Tasmania, and to broader society, is currently recognised and afforded appropriate management and protection.

FINDING #5. New categories of any expanded definition might include contemporary Aboriginal heritage, Aboriginal areas and Aboriginal landscapes and seascapes. Legislated processes and prescribed criteria would provide a robust and transparent framework for identifying and registering these Aboriginal heritage values.

3.4. Early consideration of Aboriginal heritage

Current provisions

Provisions in the Act apply to persons interfering with Aboriginal heritage, including while undertaking works on land. The provisions simply prohibit interference, damage or destruction without a permit being in place. There is no formal linkage to the State's Resource Management and Planning System (RMPS). Key legislation in the RMPS, such as the *Land Use Planning and Approvals Act 1993* (LUPAA) (and any planning scheme in force under that) and the *Environmental Management and Pollution Control Act 1994* (EMPCA), do not carry provisions requiring consideration of impacts to Aboriginal heritage.

Issues and observations

The result of the Act's stand-alone status is that it is possible to overlook Aboriginal heritage in planning for projects and developments. This can be the effect of innocent ignorance because there is no trigger in broader planning processes to bring the matter to attention. The post-2017 statutory Guidelines are helpful if used, but there remains nothing to ensure that a person knows about them.

[9] Best Practice Standards, at **https://www.environment.gov.au/system/files/resources/8582db94-6daa-4097-b77e-079a797ef67d/files/dhawura-ngilan-vision-atsi-heritage.pdf** , p.33.

It has been asserted that the balance is in favour of economic considerations when Aboriginal heritage emerges as a competing consideration at the end of a project approval process. At that point in a development process considerable investment of time and money will have been made. Considerations that are part of the development application process (such as environmental and historic cultural heritage) may have also been taken into account in the design and many, if not all, opportunities to work around Aboriginal heritage may have been lost. Often one of the only options remaining is to apply for a permit to interfere with or destroy the heritage.

Late consideration of Aboriginal heritage does not promote positive outcomes for Aboriginal heritage protection and creates a perception of lower value. The review has heard that negative outcomes, such as loss of time, loss of money, frustration and even deliberate and unreported removal or interference with the Aboriginal heritage, occur as a result of late consideration. The core problem remains that Aboriginal heritage is not an element of the normal planning and approvals process.

The review has heard varying views on how early consideration of Aboriginal heritage may be achieved. However there is strong, consistent agreement that early consideration of Aboriginal heritage in land use planning processes is vital to maximise both protection for Aboriginal heritage and opportunities for proponents to plan how best to work around Aboriginal heritage issues. The practical options for doing this are not, however, straightforward (though section 3.8 discusses some potential tools for proactive management).

It is agreed, and unarguable, that broad awareness and understanding of the significance and value of Tasmania's Aboriginal heritage will play an important part in achieving better outcomes. The lack of awareness about the prevalence of Aboriginal heritage in Tasmania, and about the Act and its requirements, still results in many proponents unintentionally breaking the law.

In addition, consideration can be given to ways that Aboriginal heritage is taken into account during, for instance, rezoning processes or possibly in the creation of subdivisions. Potential options will require careful consideration of the technical and legal issues in the operation of LUPAA and the planning scheme.

It has also been argued by some councils, heritage practitioners and land management industries that there is potential to make better use of spatial information on where known Aboriginal heritage occurs (currently based on information in the non-statutory Aboriginal Heritage Register administered by Aboriginal Heritage Tasmania). Different options have been presented. At one end of the spectrum, full visibility of the information on the Register is suggested; while others suggest that just being aware of where Aboriginal heritage surveys had been conducted previously, and having access to relevant survey results and recommendations, would help them understand potential costs associated with any proposal they may be considering.

Councils do a thorough job of educating the public on the requirements to obtain a planning permit. In some cases they note on their websites the legislation that a proponent may need to be aware of in submitting a development application, in order to be successful. Councils, however, have no statutory role in considering potential impacts on Aboriginal heritage when they assess development applications. Councils cannot therefore require proponents to have considered impacts to Aboriginal Heritage or to have sought approval under the *Aboriginal Heritage Act 1975*. As a direct consequence, it is not uncommon for the first consideration of Aboriginal heritage to be either when a person gets a 'positive' hit through Dial Before You Dig while checking for buried cables etc, or it comes to their attention when they unintentionally dig up or otherwise encounter Aboriginal heritage, and potentially destroy it, once they commence work at a site.

Some respondents have called for a 'full integration' model, meaning that Aboriginal heritage legislation would be closely and statutorily tied to LUPAA processes. This is how historic heritage is considered and managed. An option is a 'lighter touch' integration model where the planning system carries provisions which include Aboriginal heritage among the matters that must be considered.

The current scheme requires consideration of environmental matters such as noise, water and threatened species,

but the listed environmental matters do not extend to Aboriginal heritage. Some have noted that if Councils had an obligation to take potential impacts on Aboriginal heritage into account when considering land use applications, applicants would be advised up-front that they would need to provide evidence of consideration of the potential for impacts on Aboriginal heritage in their land use applications. General awareness of the requirements under the Aboriginal Heritage Act would also increase.

The Victorian system for managing Aboriginal heritage, widely seen as the model for integration with the planning and approvals system, involves a set of criteria and exceptions that are complex and partly account for the length of that legislation. Any system of 'triggers' involves drawing lines at certain points (such as the size of a block, or the type of development, that requires assessment). Some relevant experts have indicated that if Councils had a direct role this system would be necessarily complicated. The review also heard that it would not be considered appropriate for non-Aboriginal people to be judging whether potential impacts were acceptable or not.

FINDING #6. Statutory and policy mechanisms to promote early consideration of Aboriginal heritage in land use planning and approvals processes are absent across Tasmania's Resource Management and Planning System (RMPS). There is broad support for the inclusion of mechanisms that result in early consideration of Aboriginal heritage, to improve protection outcomes and to promote public awareness of Aboriginal heritage.

FINDING #7. Education, awareness and appreciation for what Aboriginal heritage is and why it is so valuable are key long-term components in realising improved outcomes in the management and protection of that heritage.

3.5. Certainty of statutory process

Current provisions

The Act provides that the Aboriginal Heritage Council (AHC) 'when it is appropriate and practicable to do so, is to consult with the Aboriginal people of Tasmania'. The Act does not, however, require the Council to seek professional expert opinion for the purposes of providing advice to the Minister (except in relation to an object, site or place 'alleged to be a relic'). Nor does the Act detail elements that should be considered or evidenced in the decision-making process. It does not provide for appeal processes or stipulate timeframes for the provision of advice or issuance of permits.

Issues and observations

There is broad concern that the Act does not provide clear guidance on how provisions in the Act that are associated with the assessment and approval of permit applications should be implemented.

Respondents involved in use and development of land, such as large developers, foresters and miners, universally indicated that proper protection and management of Aboriginal heritage is part of their core processes as they go about their businesses. However, they are concerned that there is little in the way of specified processes and timeframes in the legislation to allow them to meet expectations and manage their business planning processes effectively, to meet statutory requirements. A part of the concern with the current process is its 'one size fits all' approach. It has been suggested by some (in line with models in some other jurisdictions) that the legislation should consider the scale of a proposed activity, and the risk it poses to Aboriginal heritage.

Almost all those who responded to the review wanted to see clear articulation of required processes, including key steps and specified timeframes, for a range of administrative functions including:

- Process and timeframes for applying for permits, having them assessed and receiving notification of a decision – many suggested there would be merit in aligning key steps and timeframes with similar assessment and approval processes run under EMPCA and LUPAA;
- Process and timeframes for appropriate consultation with Aboriginal people, including how to identify who must be consulted with and how to go about that consultation – all parties contributing to this review acknowledged the importance of consultation with Aboriginal people in determining how their heritage can best be managed;
- Process for appealing decisions, including clear definition around who can appeal and under what circumstances; and
- Process and criteria for how newly discovered or recognised Aboriginal heritage values can be considered and then formally registered – these could include modern / new items created by Aboriginal people and features nominated for special management and protection such as Aboriginal areas and Aboriginal landscapes.

A key concern for both Aboriginal people and some non-Aboriginal stakeholders is that each of the entities involved in the management of Aboriginal heritage issues around any given project (eg proponent, consultant, Aboriginal community, Aboriginal Heritage Tasmania, Aboriginal Heritage Council etc) should have appropriate capacity and resources at hand to deliver their specific function in the planning and approvals process. For some parties, the resourcing of an activity is well understood (eg it is usual and accepted that a proponent would routinely pay for planning expenses; a consultant would expect that they would be paid to provide advice; a government employee would expect to be paid to assess permit applications). However, for other parties the resourcing is quite unclear – and particularly for Aboriginal parties: eg how should an Aboriginal community be resourced to participate in consultation and provide advice? There are differences of opinion around matters such as how much resource is reasonable and where that resource should come from. Smooth planning requires that all common regulatory functions (including assessment and approvals, monitoring, compliance investigation and enforcement) are adequately funded to meet timelines and other expectations; and also that Aboriginal community organisations that might play a role in the legislated processes are able to do so. This last issue has been raised often in relation to the Juukan Gorge inquiry. In Victoria the Government has put considerable efforts into building the capacity of their key Aboriginal players, the 'registered Aboriginal parties'.

FINDING #8. The Act almost completely lacks clarity and certainty of process, as well as flexibility and proportionality. This reduces the confidence of investors and developers and other users of land in Tasmania. It also contributes to a more general lack of confidence in the ability of the legislation to adequately and consistently protect and manage Tasmania's Aboriginal heritage.

FINDING #9. As elsewhere in Australia, it is recognised that all parties involved in the legislated process – including those charged with fulfilling administrative functions, Tasmanian Aboriginal people, proponents and consultants – need to be appropriately informed and resourced to play their part in ensuring efficient process, effective regulation and appropriate protection.

3.6. Aboriginal Heritage Council role and representation

Current Provisions

The Act was amended in 2017 to include provision for a statutory Aboriginal Heritage Council (AHC). The role of the Council is to make recommendations and provide advice to the Minister and the Director in relation to the administration of the Act. For the purpose of making recommendations 'in relation to any object, site or place alleged to be a relic', the Council is to seek information or professional or expert advice from any person or body the Council believes on reasonable grounds to have expertise in relation to the matters concerned. In performing its functions the Council is to consult with the Aboriginal people of Tasmania, where it is appropriate and practicable to do so.

The Act provides for the Council to consist of up to 10 members, all of whom must be Aboriginal persons.

In practice, the AHC primarily provides advice by making written recommendations to the Minister on permit applications regarding the interference with any relic under the Act. The Minister grants or refuses permits allowing for interference with the identified Aboriginal Heritage. The Act does not oblige the Minister to seek advice from the Council or to act in accordance with the advice received from the Council in making decisions – whereas it does require that the Minister have the advice of the Director of National Parks and Wildlife on all permits.

Issues and Observations

There is general agreement that a central Aboriginal body representative of the community, such as the AHC, would be a suitable and relevant body to provide advice and make recommendations in relation to the management and protection of Aboriginal heritage in Tasmania. The ALCT, however, proposes that it should assume all functions and responsibilities assigned by the legislation to an Aboriginal representative body. There is significant diversity of view around how input from an Aboriginal representative body should be regarded. Aboriginal people, however, feel very strongly that they should be making the decisions about the fate of their heritage, particularly where the issue involves the risk of harm to that heritage. Conversely, some stakeholders such as land management industries were of the view that current arrangements whereby the Minister takes advice and makes decisions in relation to issuance of permits were appropriate and should remain. (This is discussed further in section 3.7.)

There were a number of suggestions for the AHC to be statutorily obliged to seek specialist advice in particular circumstances and to consult with the Aboriginal people of Tasmania.

A number of Aboriginal and several non-Aboriginal organisations, such as the Environment Defenders Office and ICOMOS Australia, believe that the AHC should be an independent statutory body similar to the Tasmanian Heritage Council (THC), which makes decisions in relation to the management of heritage under the *Historic Cultural Heritage Act 1995*. (This is also discussed in detail in section 3.7.)

There has been strong interest in an expansion of the functions of the AHC. This may include, as often applies in interstate Aboriginal heritage councils:

- Considering and making decisions in relation to applications to list Aboriginal heritage that is not self-evidently suitable for listing, including modern heritage, Aboriginal areas and Aboriginal landscapes;
- Playing a central role in repatriating or restoring removed heritage to the most appropriate Aboriginal custodians;
- Approving or otherwise playing an integral role in the development and negotiation of Aboriginal heritage management plans; and
- Determining appropriate parameters for Aboriginal people to interfere with Aboriginal heritage while practising culture.

There has been strong support across the board for the Act to provide more transparent and clearer member selection and appointment processes, with additional criteria for consideration prior to the appointment of members to the AHC around:

- Tasmanian Aboriginal membership;
- Gender and regional balance; and
- Required skill sets.

However, there is a divergence of views about how the AHC should relate to Aboriginal community organisations, particularly those that are regionally based. Some of these argue that, in relation to heritage in their own areas, they, rather than the AHC, should represent Aboriginal interests. This goes to some difficult and sensitive issues among Tasmanian Aboriginal people. It is notable that current thinking in other jurisdictions is tending strongly towards accepting 'native title parties' as appropriately representing those who 'speak for Country' in relation to Aboriginal heritage. In the absence of native title in Tasmania, in the sense recognised in Australian statutory law, this relatively straightforward option is not open.

FINDING #10. There is broad acceptance that a representative body, such as the Aboriginal Heritage Council, can play an important role in managing and protecting Aboriginal heritage in Tasmania. There is significant support for expanding the current statutory role of the Council.

FINDING #11. Additional prescriptions in the Act around selection of members of the Aboriginal Heritage Council would improve confidence in the Council and be widely welcomed.

3.7. Decision making processes

Current provisions

The Minister is the decision maker on all significant matters relating to the management and protection of Aboriginal heritage (the minor exception is the Director of National Parks and Wildlife's role in managing protected sites). The Minister must take advice from the Director of National Parks and Wildlife in relation to issuing permits and the declaration of protected sites. The Minister may seek advice from the AHC, but is not statutorily required to do so[10]; and the AHC may give him advice on its own initiative. The Minister is not required to take into account the advice received, or to act in accordance with advice received. The Minister's decision cannot be appealed.

[10] There are minor and in practice irrelevant exceptions in sections 8 and 13.

Issues and observations

There are mixed views on who should make decisions about how Aboriginal heritage should be managed and if it can be interfered with or destroyed. There is, however, broad consensus that Aboriginal people should have a much greater and more influential role in decision making processes.

Aboriginal people feel strongly that decisions about what happens to Aboriginal heritage should be made by Aboriginal people. Similar views are expressed by some non-Aboriginal stakeholders, and are integral to the Best Practice Standards in *Dhawura Ngilan*. Those with this view generally asserted that the AHC should be the decision making body, with the exception of the ALCT which, as noted, proposes that it should assume all relevant statutory roles under the legislation.

There is general recognition that decision making should achieve a balance of considerations, including broader social, economic and environmental issues. However, there is also significant concern that Aboriginal heritage is vulnerable and is not valued highly enough when weighed against social and economic considerations. Aboriginal people argue that they see their heritage gradually being destroyed to build roads and houses and other infrastructure, as well as now recognising its vulnerability to climate change induced threats such as sea level rise and fire. Aboriginal people in Tasmania, as elsewhere, strongly assert that the presence and integrity of their heritage is essential to their cultural and spiritual wellbeing, and that the continuing destruction of their heritage has an overwhelming impact on their wellbeing individually and as a community.

A number of Aboriginal and some non-Aboriginal organisations believe that the AHC should be an independent statutory body similar to the Tasmanian Heritage Council (THC), which makes decisions in relation to the management of heritage under the *Historic Cultural Heritage Act 1995*. There is concern that the different approaches to administration of the respective Councils speak to a disparity in the way that the respective heritages are regarded and valued. This argument is partly countered by the fact that penalties for interfering with Aboriginal heritage were brought to a par with those for historic heritage when the Act was amended in 2017. The value of a direct comparison is further clouded by the fact that THC membership is also required to include specified areas of expertise and to represent a variety of business and interest groups (see s.6(1) – interests represented include local government, agriculture, churches, mining, tourism, and building development). These prescriptions have been engineered to ensure that a broad and balanced consideration of social, economic and environmental factors is embedded in any decisions made by that body.

The concern of some stakeholders is that if such expertise and interests are not represented on the AHC, these broader considerations would not be properly accounted for in the making of decisions. The AHC, on the other hand, argues that only Aboriginal people should make decisions on the fate of Aboriginal heritage and that the Aboriginal community, and therefore the AHC, has the skills and knowledge to assess the environmental, social and economic considerations relating to a proposed development, and points out that they already take these things into account when advising the Minister on current matters.

As noted in the previous section, an important variant on the view that the AHC should be the decision maker is the assertion that regional and local Aboriginal groups should also be separately consulted to ensure their views and knowledge are heard and understood. Some submissions argue that such groups should have the final say on heritage in their areas.

Views differ widely on the issue of the appropriate final decision maker. While a strong preference has been expressed by some for the AHC to make decisions, others have strongly supported the continuation of responsibility lying with the Minister. But if the Minister does retain a decision making role, it is generally agreed that there should be increased transparency about how advice from the AHC is to be considered by the Minister in that decision making process. There is broad support for provisions such as requiring:

- the Minister to seek advice from the AHC when making decisions involving interference or destruction of Aboriginal heritage;
- the Minister to have regard to the advice received from the AHC;
- the Minister to provide a public statement of reasons if their decision is contrary to advice from the AHC; and
- the AHC to consider any consultation it, or any other party, has undertaken that has informed its advice to the Minister.

FINDING #12. The Act contains little guidance on the process for decision making, and has no requirement for transparency or justification for decisions that are made. Changes in this respect would significantly improve confidence and trust in the decision making process.

FINDING #13. The limited role of Aboriginal people in decision making, and the widespread perception of an ongoing failure to sufficiently value and protect sites of significance to Aboriginal people, underlie their deep dissatisfaction with the current system.

3.8. Management tools

Current provisions

Effectively the only mechanism in the Act for regulating activities that can harm or interfere with heritage is the 'permit granted by the Minister on the recommendation of the Director' under s.14.

The Act provides for the declaration of protected sites by Order of the Minister. This power is restricted to state owned lands and in practice has rarely been used (five times between 1976 and 1990). The Director of National Parks and Wildlife is charged with responsibility for managing protected sites. The Minister and Director are not required to consult with Aboriginal people in relation to the declaration and management of protected sites, except when the Director seeks to remove human remains from a site for their protection, in which case he must have regard to recommendations from the Aboriginal Heritage Council in relation to any scientific or other investigations of those remains. Protected sites are provided for under Part 3 of the Act.

The Act provides for the Governor to make regulations. The regulations can make provisions with respect to managing protected sites. No regulations have been in force for at least 20 years.

The Act does not make provision for a statutory register of Aboriginal heritage.

Issues and observations

A fundamental issue, which emerges most clearly from comparisons with other legislation, is the inflexibility of the Act's provisions and inability to provide processes proportionate to the issue concerned. This is reflected in the consultation, which revealed consensus that the Act does not provide adequate mechanisms for the effective management and protection of Aboriginal heritage. (Issues relating to compliance and enforcement are covered in

the next section.) The Act has clear offences relating to interference with or destruction of Aboriginal heritage, but has nothing in the way of mechanisms that encourage or recognise proactive management or reactive intervention at any stage before the risk of damage is realised. In other words, the Act effectively does not come into play except when threats to Aboriginal heritage are imminent or actually realised – which is, of course, often too late.

It has been suggested that legislative mechanisms for managing Aboriginal heritage should be expanded significantly. Analysis of modern legislation elsewhere indicates that a broad range of mechanisms are in use, such as:

- A statutory Aboriginal heritage register;
- A modernised system of protected sites;
- Listed Aboriginal landscapes;
- Appeal provisions;
- Aboriginal heritage management plans for high-impact activities, and permits for low-impact ones; and
- Other voluntary management agreements.

All these could play a role in encouraging and / or enabling Aboriginal heritage to be considered and managed well before a damage risk is realised. These mechanisms are all in use (in slightly varying forms) in other Australian jurisdictions.

In particular, Aboriginal Heritage Management Plans – which are recognised as formal statutory management tools – have been implemented with great success in other Australian jurisdictions such as Victoria, Queensland and South Australia. Management plans allow cooperative and collaborative agreement to be reached between a land manager or development proponent, and Aboriginal people. Once in place, management plans provide a legal framework within which land can be managed, used and developed. The role of the Minister in these management plan systems varies, but the key in all of them is that any actions undertaken in accordance with an agreed management plan are recognised under the legislation as lawful.

In the jurisdictions where they are used, management plans appear to be the preferred model for proactively managing heritage issues for larger-scale projects and high-impact activities. In these jurisdictions there is also provision for various sorts of voluntary agreement, which may be more suitable (for instance) for specifying appropriate longer-term management of areas of land by public land managers, foresters and farmers.

Provisions for establishment of protected areas and listed landscapes similarly provide opportunities for proactive and cooperative early consideration of Aboriginal heritage, including establishment of prescriptions to manage and protect associated Aboriginal heritage values. The ALCT indicated strong support for an expanded use of protected site provisions.

Feedback received through the consultation process highlighted the strong view on the part of Aboriginal respondents that it is important to recognise and protect areas that include known or newly discovered natural resource sites, such as for ochre and stone tool materials. The AHC considers this recognition important to allow for the continuation of traditional practices.

A statutory Aboriginal Heritage Register that holds all records of known Aboriginal heritage (potentially including the registration of approved modern heritage, protected areas, resource sites and recognised Aboriginal landscapes, as discussed in section 3.3) would form an important tool for underpinning the integrity of any Aboriginal heritage legislation in Tasmania. Such registers are standard in other jurisdictions, though with differing characteristics. It has been recognised that a large amount of information is already held in a non-statutory register managed by Aboriginal Heritage Tasmania and that this information is of varying quality and integrity. It has been suggested that sufficient resources be allocated to ensure that information held on a statutory register is as accurate and reliable as possible, in order to maximise the value of that information in contributing to effective and efficient protection and management of Tasmania's Aboriginal heritage.

FINDING #14. The Act does not provide any of the contemporary tools that are available in modern Aboriginal heritage legislation for managing and protecting Aboriginal heritage. The central process – the permit to interfere (etc) with Aboriginal heritage – is inflexible and unable to consider scale, and the Minister holds sole responsibility for making decisions. There is nothing to encourage proactive and cooperative agreement among parties, including Aboriginal people, on how Aboriginal heritage should be protected and managed.

3.9. Compliance and enforcement

Current provisions

The Act stipulates that the Minister must issue guidelines which specify actions to be undertaken by a person to establish a defence. Evidence of having undertaken these actions is recognised as a defence in the event that Aboriginal heritage is inadvertently interfered with or destroyed by that person. In effect, compliance with the guidelines demonstrates that they have exercised 'due diligence' (the term is not used in the Act, though it is used once in the guidelines).

The Act provides for the appointment of wardens, honorary wardens and authorised officers who have limited powers including:

- Requiring a person's name and address; and
- Requiring a person to leave a protected site.

In addition to the above, an authorised officer may also:

- Seize an object held in contravention of the Act;
- Enter and search a premises (etc), under warrant; and
- Require reasonable assistance from a person apparently in charge of a premises (etc) subject to a search warrant.

Issues and observations

The 2017 amendments to increase penalties, remove the ignorance defence, extend the time available to commence a prosecution, and oblige the Minister to issue guidelines for managing Aboriginal heritage (and adopt relevant codes etc), were welcomed by respondents.

Prosecution forms a necessary part of compliance and should underpin the deterrence intended under the legislation. However, many comments were made to the effect that the most effective way to maximise compliance is to ensure that potential offenders are aware of the significance of Aboriginal heritage values, and are provided with proactive assistance in achieving acceptable management and protection outcomes.

In line with precedents from modern interstate legislation, it has been suggested that it would be helpful to provide tools such as:

- Stop work provisions;
- Infringement notices (often referred to as 'on the spot fines');
- Restoration / remediation orders; and
- Aboriginal rangers.

Provision for stop-work orders is recommended to ensure that regulators have a robust legal option to require people undertaking activities that are illegally damaging, or risk damaging Aboriginal heritage, to immediately stop those activities. Interstate examples include provision for very short-term orders (24 or 48 hours) as well as longer ones that require an appealable process to impose. The current Act has no such provision and a person could choose to continue with their activity. Although they are later able to be held accountable in a court of law, the damage will already have been done. The fear expressed by some is that people may choose to incur the penalty in order to 'get the job done'.

The importance of having legally robust mechanisms in legislation to support emergency intervention was recently highlighted by the failure of the Western Australian legal system to prevent the destruction of the 46,000-year-old Aboriginal rock shelters at Juukan Gorge in the Pilbara. It also highlighted the weaknesses in the last-resort protection supposedly provided by the Commonwealth's *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

Provisions for infringement notices are widely available in relation to minor offences under other legislation. They would be considered appropriate for minor and administrative offences, rather than (for instance) for cases of harm to Aboriginal heritage. (They are not strictly 'on the spot fines', because they need not be accepted: they function only as a simple guilty plea, which saves time and effort, and usually carries a small fine.) An ability to require people who have caused damage to Aboriginal heritage to undertake restoration and rehabilitation works has also been proposed. The review also heard strong advice from land use and development sectors that great care must be given to ensuring such mechanisms are accompanied by appropriate checks and balances to ensure that they are applied reasonably and appropriately.

Many Aboriginal people remain concerned that there is not sufficient resource or appetite to adequately detect or to successfully prosecute alleged offences. Although the Department regularly conducts compliance investigations under the Act – approximately 18 in the last financial year – bringing an investigation to prosecution can take several years. There has been no prosecution since the amendments of 2017 resulting in the imposition of penalties, although a number of cases remain open and are being actively pursued. Similarly, prior to 2017 there were very few concluded prosecutions through the courts. The lack of visible prosecutions under the Act is frequently cited as evidence of a failing to pursue investigations and prosecutions, resulting in a poor message to potential offenders.

It was suggested that Aboriginal people should play a lead role in compliance and enforcement activities. A role for them as Aboriginal rangers, or some such, was suggested in several comments. There is potential for both skill development and employment opportunities in this area.

It was widely agreed that it was appropriate for a person to have a defence for inadvertently interfering with Aboriginal heritage in circumstances where that person had taken all reasonable steps to understand and manage the risk of doing so. The adoption of guidelines was supported by many, but it was also argued that the current statutory guidelines need to be critically reviewed to ensure that their provisions and their application remained relevant and adequate.

There was also broad concern that the current system lacks clarity and appropriate legislative and policy settings around some elements of what constitutes an offence. Examples of areas of uncertainty and concern include: Aboriginal people practising culture; farmers going about normal farming activities; utility providers maintaining or replacing existing in-ground infrastructure; and the undertaking of emergency response actions.

FINDING #15. Enforcement provisions for appropriate punishment and strong deterrence remain essential and are universally supported. It is also considered that a focus on education, as well as streamlined and effective processes, would be the best long-term foundation for effective and broad-based compliance.

FINDING #16. Providing opportunities for Aboriginal people to be involved in compliance and enforcement activities would be welcomed, offers opportunities to individual Aboriginal people, and would help to ensure that the Act is effective and fully supported by Aboriginal people generally.

3.10. Ownership of Aboriginal heritage

Current provisions

The Act requires a person who owned a relic at the commencement of the Act (ie in 1976) to advise the Director or an authorized officer of that fact within six months.

The Act provides that relics on Crown land are the property of the Crown.

The Act has provisions allowing the Minister to acquire or accept a relic on behalf of the Crown.

Where a relic is determined to be the property of the Crown, the Director may allow scientific or other investigation of the relic but must have regard to any recommendations of the AHC in doing so.

The Act does not recognise any other form or circumstance of ownership, including custodianship.

Issues and observations

The review has heard from many Aboriginal people that the concept of 'ownership' is not consistent with how they perceive their relationship with their heritage. There is general concern that the Act does not recognise Aboriginal people as the rightful holders and custodians of Aboriginal heritage.

Further, provisions in the Act assigning ownership of Aboriginal heritage on public lands to the Crown are seen as highly inappropriate by Aboriginal people. The review has also heard that where Aboriginal heritage lies on or under land that is privately owned, the owner of that property should also not be considered the owner of that heritage in any way – although it is noted that there are difficulties of legal definition around physical heritage on private property.

The ALCT, however, proposes a strong framework of ownership, which would fundamentally underpin the protection of heritage as 'property of the Aboriginal people', with the ownership expressed through ALCT.

The concept of 'ownership' in the more modern legislation of other jurisdictions is treated cautiously, and not uniformly. If specified, it tends to be applied only to the category of 'secret and sacred' heritage. In *Dhawura Ngilan* and the Best Practice Standards there is little mention of ownership. Instead, the opening Vision statement begins, 'Aboriginal and Torres Strait Islander people are the custodians of their heritage.' Where ownership is mentioned, it is in the context of 'community ownership'. The preference for custodianship, rather than ownership, is consistent with the views of several Aboriginal submissions.

The clearest statements in comparable pieces of interstate legislation tend to be though provisions in the overarching objectives / purposes / principles. For example Queensland was followed by Victoria in recognising Aboriginal people as 'the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage'. The Western Australian 2020 draft Bill, in s.8 'Objects of Act', recognises 'that Aboriginal people have custodianship over Aboriginal cultural heritage'.

A sensitive issue related to ownership or custodianship is the need for provisions around the repatriation or return of removed heritage - particularly from university or museum collections, in Australia and overseas. While provisions

vary around the country (and *Dhawura Ngilan* calls for a coordinated approach) they all share the assumption that in a fundamental sense removed heritage 'belongs' to Aboriginal people, and that they should be able to decide its treatment.

As noted in section 3.3, an issue of ownership that has emerged relatively recently, and one that comes into play when considering intangible heritage, is that of intellectual property (IP). It has been strongly argued by some Aboriginal groups that they feel they should have absolute ownership of, and therefore control, IP associated with their heritage. However, at this stage the argument for Commonwealth responsibility in the regulation of IP still appears well supported.

FINDING #17. Review and renewal of Tasmania's Aboriginal heritage protection and management legislation provides an opportunity to formally recognise Aboriginal people as the original people of Tasmania and the living custodians of Tasmania's Aboriginal cultural heritage.

Appendices

Appendix 1 – Key themes emerging from Stage 1 consultation and presented in the Consultation Feedback Report

- The Act needs to contain clear statements of its objective and purpose.
- The Act needs to be brought up to a contemporary standard, consistent with modern Aboriginal heritage legislation and legislative processes in other Australian jurisdictions.
- The Act and related processes for managing Aboriginal heritage need to connect better with broader planning and approvals processes in Tasmania.
- The definition of Aboriginal heritage in the Act needs to be amended and expanded to encompass contemporary views of Aboriginal heritage.
- The Act needs to be clear on who the owners and custodians of Aboriginal heritage are, and what this means for managing Aboriginal heritage across Tasmania's various land tenures.
- Tasmanian Aboriginal culture is a living culture and Tasmanian Aboriginal people need to be able to practise their culture without fear of breaching the Act.
- Aboriginal people should have a greater role and influence in making decisions about how Aboriginal heritage is managed in Tasmania.
- Aboriginal people could, and should, play a more prominent role in education, compliance and enforcement activities, and should be supported to do so.
- The 2017 amendments that increased penalties to bring them into line with those for interfering with or damaging European heritage are a positive step forward in recognising the significance of Aboriginal heritage.
- Education can play a significant role in encouraging voluntary behaviours that are compliant with the Act and that lead to improved outcomes for the protection of Aboriginal heritage.
- Additional enforcement tools such as stop work notices and on-the-spot fines would assist to deliver improved outcomes for the protection of Aboriginal heritage.

Appendix 2: Brief summary of key points made by various groups of those consulted in the review.

All Stage 1 submissions are available[11]; the following lists only those issues with substantial support in the category, or that are otherwise noted in this report.

Aboriginal community organisations and Aboriginal Heritage Council

- Need an updated definition of Aboriginal heritage (AH), without 'relic', and including intangible heritage.
- Clarify owner(ship) provisions and preferably replace term with 'custodian(ship)'.
- Decisions on dealings with AH to be made by Aboriginal people, either AHC only or in combination with local groups. All participants to be properly resourced.
- Need for stronger enforcement provisions, preferably with key role for Aboriginal people – to include stop work notices and other protective measures.
- Exceptions to be made for interference by Aboriginal people with AH while practising culture.
- Clarify and improve provisions around Aboriginal human remains.
- Importance of better and wider education about the value and significance of Aboriginal heritage.
- The Aboriginal Land Council of Tasmania[12] proposes a distinctive approach in which the functions of the (abolished) AHC would all be exercised by ALCT; with extended use of protected site provisions; and a central focus on Aboriginal ownership of heritage (through ALCT) as the basis for control of its protection.

Local Government or planning expertise

- Key message is need for better alignment of AH legislation / practice with the *Land Use Planning and Approvals Act 1993* (LUPAA) and other elements of the Resource Management and Planning System. Generally not specific, but some support for full integration on Victorian model.
- Suggestions often included wish for mapping of known / expected AH to be available, as an essential practical tool.
- Very important to have better processes / procedures, timeframes / deadlines etc, and appeals where appropriate.
- Some support for greater role for local Aboriginal community organisations.

[11] Listed and linked at **https://dpipwe.tas.gov.au/about-the-department/aboriginal-heritage-act/consultation-feedback-report**.

[12] ALCT first engaged with the review when drafting of this report had been almost finalised.

Organisations representing, or companies from, specific industries / sectors

- Strong support for greater certainty through defined processes / procedures, timeframes / deadlines etc, and appeals where appropriate.
- Need to recognise practical realities of industry, especially resource industries, and the processes they already have in place to meet their wish to protect AH.
- Concern about potential vagueness and uncertain extent of intangible heritage.
- Some strongly supported continued decision making role of Minister, and requirement for broad consultation (not only with Aboriginal parties) in decision making.
- Support effective public information / education, and want to ensure compliance mechanisms have reasonable checks and balances.

Providers and managers of linear infrastructure (electricity supply and telecommunications)

- Should clarify and update principles / objectives, as well as definitions.
- Need for contemporary mechanisms such as management plans and agreements. Also need code(s) (etc), like those for mining and forestry, for linear infrastructure providers.
- Support enhanced compliance and enforcement, provided they are balanced by greater clarity on duty of care / due diligence, and emergency activities defence.

Organisations and individuals with heritage expertise

- Provided numerous and detailed comments and suggestions, reflecting varied practical experience; strongly urge that new legislation be developed through an iterative consultative process with Tasmanian Aboriginal people and stakeholders, including heritage practitioners.
- Key consideration in all decisions to be AH protection, with decisions lying with Tasmanian Aboriginal people (via AHC or like Victoria), and proper resourcing for Aboriginal parties. Stress relevance of the UN Declaration on the Rights of Indigenous Peoples.
- Generally support integration with RMPS. Favour strong compliance measures with similar offences to RMPS, not just 'harm' offences (eg undertaking development without AH authorisation such as management plan).
- Support inclusion of intangible heritage. Clarify ownership / custodianship, on assumption that it lies with Tasmanian Aboriginal people.

Agencies / regulators

- Importance of better processes / timeframes etc, including care around any new enforcement mechanisms and the role of the Register.
- Need to ensure clarity on provisions for landscape or place, avoiding inclusion of unbounded / undefined places.
- Greater decision making for Aboriginal people needs to be supported by appropriate resourcing, and by modernised processes, timeframes etc.
- Supportive of mining and forestry codes / guidelines.

Others

- The 4 individuals submitting on their own behalf provided varied ideas from wide range of perspectives, which are difficult to summarise usefully. Distinctive points included arguments for an expertise-based AHC, not necessarily all-Aboriginal, and the need for high academic qualifications for those providing advice on AH.
- Reconciliation Tasmania put in a substantial submission, largely consistent with the Aboriginal organisations above. Distinctive points included that ownership of AH on Crown land should be transferred to Aboriginal people or groups, along the lines of the Victorian legislation; and that any funds from fines etc should go to a distinct Heritage Fund.
- Members of the National Parks and Wildlife Advisory Council put forward a range of ideas, including that ownership is not an Aboriginal concept; and that AH is best managed by Tasmanian Aboriginal people, but they can work towards joint / co-management with other stakeholders and land managers.

Appendix 3: Other Australian jurisdictions and their Aboriginal heritage legislation – selected points

Jurisdiction	Current legislation[13]	Are there reviews or reforms under way? Position as at February 2021	Selected recent legislation – size of legislation
Common-wealth	*Environment Protection and Biodiversity Conservation Act 1999* *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*	**Yes.** A major review of the EPBC Act has been undertaken, which has drawn attention to weaknesses in the Federal legislation (see section 2.4 above). The Government is considering the report and will be working further with other jurisdictions as required.	
Tasmania	*Aboriginal Heritage Act 1975*	**Yes** (see section 1.1 above).	As amended in 2017: 25 sections, 18 pages (plus Guidelines)
New South Wales	*National Parks & Wildlife Act 1974*, especially Parts 6 & 6A	**Yes.** A multi-staged reform process has been under way since 2011. In September 2017, the NSW Government released a proposal paper which outlined the aims and key proposals of the new legal framework. This was followed by the release of the draft Aboriginal Cultural Heritage Bill in February 2018. The Minister has indicated that new legislation is a priority for 2021.	Consultation draft, *Aboriginal Cultural Heritage Bill 2018*: 154 sections, 68 pages (plus Regulations and guidelines to come)
Victoria	*Aboriginal Heritage Act 2006*	**No.** The 2006 Act was reviewed and underwent some amendment in 2016. (The State's Aboriginal Heritage Council is undertaking an informal 'review' to gauge the views of the Aboriginal community.)	As amended in 2016: 198 sections, 208 pages (plus 94 pages of Regulations)
Queensland	*Aboriginal Cultural Heritage Act 2003*	**Yes.** Review ongoing, following formation of the new Government in November 2020. A Discussion Paper in mid-2019 generated 70 submissions from a wide range of Aboriginal community organisations and stakeholders.	172 sections, 56 pages (plus 16 page *Duty of Care Guidelines*)
South Australia	*Aboriginal Heritage Act 1988*	**No.** After many years of review processes, changes to the Aboriginal Heritage Act (SA) were proclaimed on 17 October 2017. They established the new institution of Recognised Aboriginal Representative Bodies.	
Western Australia	*Aboriginal Heritage Act 1972*	**Yes.** After several earlier reviews up to 2014, a comprehensive 3-phase review process began in early 2018. In early September 2020 a draft Bill was issued and generated 158 published responses; these, together with results of community consultations, are now being considered. Further changes may be made. (Government in caretaker mode as of 3/2/21.)	Consultation draft, *Aboriginal Cultural Heritage Bill 2020*: 299 sections, 185 pages (plus Regulations and guidelines to come)
Australian Capital Territory	Included in broader *Heritage Act 2004*	**No.**The 2004 Act was amended in 2014 following a statutory review process.	
Northern Territory	Included in broader *Heritage Act 2011*, and the *Aboriginal Sacred Sites Act 2006*	**No.**	

[13] These are the key pieces of legislation only. Note that there is generally other legislation that is relevant – see eg p.2 of the NSW comparison paper, at **https://www.environment.nsw.gov.au/-/media/OEH/Corporate-Site/Documents/Aboriginal-cultural-heritage/comparing-nsw-aboriginal-heritage-system-with-other-australian-systems-120402.pdf** .

Appendix 4: Other Australian jurisdictions – summary of the provisions of their Aboriginal heritage legislation

SUMMARY OF ARRANGEMENTS FOR THE PROTECTION OF ABORIGINAL HERITAGE IN OTHER JURISDICTIONS

The table below summarises key features of the legislation in other States and Territories, which are the relevant comparisons in relation to Tasmanian legislation. The text has been checked and amended by the relevant Agencies.

It should also be noted that the Commonwealth has some powers in this area, and they have been highlighted recently in the context of the 10-year statutory review of the *Environment Protection and Biodiversity Conservation Act 1999* and the Juukan Gorge episode, both of which prompted questions around the scope and effectiveness of last-resort protection for Aboriginal heritage under Commonwealth law. (The Joint Select Committee Inquiry into Juukan Gorge is yet to follow up with all jurisdictions, which it has said will occur early in 2021.) The *Dhawura Ngilan* and Best Practice Standards, published in September 2020 by the Indigenous Chairs of the Heritage Chairs and Officials of Australia and New Zealand, also need to be taken into account (see section 2.4 above). However, as at mid-February 2021, there remains some uncertainty about the processes and outcomes around these matters.

Topic	VIC	NSW	QLD	SA	ACT	NT	WA
What legislation primarily governs Aboriginal heritage issues?	*Aboriginal Heritage Act 2006*	*National Parks & Wildlife Act 1974*	*Aboriginal Cultural Heritage Act 2003* *Torres Strait Islander Cultural Heritage Act 2003* (the Acts)	*Aboriginal Heritage Act 1988*	*Heritage Act 2004*	*Heritage Act 2011* and the *Aboriginal Sacred Sites Act 2006*	*Aboriginal Heritage Act 1972* [+ draft *Aboriginal Cultural Heritage Bill 2020*]
Who owns Aboriginal heritage?	Underlying principle that as far as practicable: - Aboriginal Ancestral Remains and 'secret or sacred objects' should be owned by and returned to **Traditional Owners** of the area from which they originate; and - registered Aboriginal intangible heritage should be owned by **Traditional Owners** of the area, region or culture from where it originates. New section 21A clarifies that, from 1 August 2016, **secret and sacred objects are no longer able to be lawfully owned** by individuals or State entities other than in accordance with Aboriginal tradition. Makes no explicit reference with regard to ownership of Aboriginal heritage items that do not fall into the above categories.	S83 of the Act sets out that certain Aboriginal objects are the property of the Crown. Under s85 Aboriginal objects can be transferred to Aboriginal Owners (as per the Aboriginal Land Rights Act) or to an appropriate person or organisation. 'Immovable' items such as rock art, scarred trees and grinding groves are the property of the **land owner.**	Aboriginal and Torres Strait Islander human remains, and 'secret and sacred' objects in state collections, are owned by **Aboriginal people and Torres Strait Islanders** with traditional or familial links. Otherwise the **State** owns Aboriginal and Torres Strait Islander cultural heritage, excluding any Aboriginal and Torres Strait Islander cultural heritage passing into the ownership of an Aboriginal and Torres Strait Islander party under the Acts, Aboriginal and Torres Strait Islander cultural heritage owned by a person whose ownership is confirmed under a provision of the Acts, or Aboriginal and Torres Strait Islander cultural heritage owned by a person to whom ownership is lawfully transferred.	No specific recognition of Aboriginal people as owners of Aboriginal heritage, including ancestral remains or sacred objects. Where land or an Aboriginal object has been acquired or has come into the possession of the **Minister for Aboriginal Affairs and Reconciliation (Minister)**, the land or object may, if the Minister determines, be placed in the custody of an Aboriginal person or organisation.	An Aboriginal object is owned by the Territory if the object is located on territory land and another person or entity does not hold a legal interest in the object, or the Minister has not made a declaration stating that the Territory surrenders its legal interest in the object; or the object is purchased by the Territory; or the object is given to the Territory. Items listed on the register of heritage places & heritage objects are the property of the **land owner**.	Items listed on the NT Heritage Register are the property of the **land owner**. Aboriginal sacred sites and other sites on Aboriginal owned land are owned by **Aboriginal people**.	Allows Aboriginal heritage to be 'owned' by any person. The Minister may retain any object classified by the Aboriginal Cultural Material Committee as Aboriginal cultural material, by agreement or acquisition (requires payment). **PROPOSED IN NEW BILL** In principle, relevant Aboriginal people recognised as 'primary custodians' of ACH; and for remains & secret & sacred, ownership also – general reference to 'where practicable' throughout.

Topic	VIC	NSW	QLD	SA	ACT	NT	WA
Who makes decisions?	**Registered Aboriginal Parties (RAPs)** issue cultural heritage permits; approve management plans; enter into Cultural Heritage Agreements; enter into Aboriginal Cultural Heritage Land Management Agreements with public land managers; and enter into Aboriginal intangible heritage agreements. The **Secretary, Department of Premier and Cabinet**, issues cultural heritage permits where there is no relevant RAP; determines applications for the certification of preliminary Aboriginal heritage tests (ie to confirm whether a management plan is or is not required); approves management plans where there is no RAP or the RAP does not elect to assess the plan within the set timeframe; and is the decision maker about whether to register Aboriginal intangible heritage or not.	The **Special Minister of State** is responsible for declaration of Aboriginal Places. The **Director-General, Department of Premier and Cabinet**, is responsible for protection of Aboriginal heritage and issuing permits. Issuing Aboriginal Heritage Impact Permits is a delegated authority.	**Aboriginal and Torres Strait Islander parties** are responsible for determining the significance of cultural heritage areas and objects. **Aboriginal and Torres Strait Islander parties** may enter into cultural heritage agreements with land users (or 'another agreement' – refer to section 23(3)(a)(iii)) to establish agreed management strategies for the protection of cultural heritage. The State is not party to these agreements and they are not approved by the Chief Executive. There is no access to the Land Court of Queensland when negotiating cultural heritage agreements (refer to CHMP process below). **Aboriginal and Torres Strait Islander parties** ('endorsed party') may enter into cultural heritage management plans with land users about how a project is to be managed to avoid harm to Aboriginal and Torres Strait Islander cultural heritage and to the extent that harm cannot reasonably	Only the **Minister** may determine whether an object is an Aboriginal object, or whether an area of land is (or contains) an Aboriginal site. **Traditional Owners** decide the significance of any Aboriginal heritage according to Aboriginal tradition. The **Minister** issues authorisations for archaeological excavation; damage, disturbance or interference to Aboriginal heritage; or for the sale (and/or removal from the State) of an Aboriginal object. A new agreement making scheme enables land use proponents to negotiate directly with **Recognised Aboriginal Representative Bodies (RARBs)**, and enter a **Local Heritage Agreement**. The Act makes procedural provision in relation to local heritage agreements, including a requirement that they be approved by the **Minister**. The agreement making process is not mandatory.	The **ACT Heritage Council** is an independent body and the key advisory body on cultural heritage issues. The Council makes decisions on places and objects to be registered and must comply with any direction by the **Minister**. The Council is also empowered to give a heritage direction to the owner, occupier or custodian of an Aboriginal place or object to do or not to do something to conserve the place or object.	The **Minister** is the primary decision-maker responsible for approving major works applications and for declaring a place or object to be a heritage place or object. The **Heritage Council** makes decisions on applications for minor works The **Aboriginal Areas Protection Authority**, which administers the *Aboriginal Sacred Sites Act 2006*, has decision making powers, registers and records sacred sites, and issues authority certificates for development. The **Minister** has the power to override decisions of the Authority.	The **Minister** is responsible for issuing consents to certain uses of land. The **Aboriginal Cultural Material Committee** evaluates the significance of Aboriginal sites and advises the Minister on consents – no stipulation of Aboriginal representation on Committee. The Minister is not bound by the Committee's advice. The **Registrar of Aboriginal sites** gives certain approvals under the *Aboriginal Heritage Regulations 1974*. **PROPOSED IN NEW BILL** For major developments strong focus on agreements between proponent and **local ACH service (LACHS)**, and resulting **Aboriginal cultural heritage management plan (ACHMP)** submitted to State **ACH Council (ACHC)**. But if agreement not reached, in last resort decision goes to **Minister**.

Topic	VIC	NSW	QLD	SA	ACT	NT	WA
Who makes decisions? (continued)	The **Victorian Aboriginal Heritage Council** appoints RAPs; issues permits where the applicant is a RAP or the Secretary; and approves management plans where the Secretary is the sponsor and there is no RAP or the RAP does not elect to assess the plan within the set timeframe.		be avoided, to minimise harm to Aboriginal and Torres Strait Islander cultural heritage. When agreement cannot be reached, the proposed plan can be referred to the Land Court of Queensland. Following consideration of the matter, the Court will make a recommendation to the Minister. The **Minister** then makes the final decision whether to approve, amend or reject the plan. The Minister has regard to the Land Court's recommendation, but isn't bound by it. The **Chief Executive** may approve a management plan where there is no endorsed party for the area. The **Chief Executive** must approve the plan if there is at least 1 endorsed party for the plan, and all consultation parties for the plan agree that the Chief Executive may approve the plan. **Aboriginal heritage bodies** for an area are corporations which can be registered by the **Minister**.	Where there is no RARB, or a RARB does not wish to discuss a proposal, a proponent may still apply directly to the **Minister** to seek authorisation to impact heritage. The **Minister** will then conduct a consultation with the Traditional Owners, the **State Aboriginal Heritage Committee (SAHC)** and any other interested Aboriginal parties, as was the case before the introduction of **RARBs**. Authority from the Minister must be obtained in order to divulge information relating to Aboriginal heritage or Aboriginal tradition, where doing so would contravene Aboriginal tradition. In addition, the **Minister** may issue directions that restrict the activities that may be undertaken in an area and may also enter into an Aboriginal Heritage Agreement with the owner of land (and must invite any Traditional Owners to be party to the agreement). The **Minister** appoints inspectors.			If ACHC decides subject is of State significance, decision always with **Minister**. But State **ACHC** has decision on **Permits** for lesser-impact works.

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Who makes decisions? (continued)			Their singular role is to identify Aboriginal parties for an area. Cultural Heritage Bodies however do not make decisions on behalf of the statutory Aboriginal and Torres Strait Islander parties. The **Chief Executive** may place information on the database to the extent the chief executive considers appropriate, having regard especially to the consistency of the information with existing anthropological, biogeographical, historical and archaeological information.	The **SAHC**, a body representing the interests of Aboriginal people from across the state, decides the appointment of **RARBs**. **Traditional Owners** decide the significance of any Aboriginal heritage.			
How do Aboriginal people participate in decision making?	The Act establishes the **Victorian Aboriginal Heritage Council** which provides a statewide voice for Aboriginal people and advises the Minister in relation to the protection of Aboriginal cultural heritage. The Council is also responsible for overseeing and managing the Aboriginal Ancestral Remains system in Victoria and the Aboriginal Cultural Heritage Fund. The Council consists of up	The NPW Act establishes the **Aboriginal Cultural Heritage Advisory Committee** (ACHAC) which advises the Minister on matters relating to Aboriginal cultural heritage. The *NPW Regulation 2019* sets out a consultation process that must be followed before an Aboriginal Heritage Impact Permit application may be submitted. This process establishes a list of Registered Aboriginal	The legislation acknowledges the recognition, protection and conservation of cultural heritage should be based on respect for Aboriginal and Torres Strait Islander knowledge, culture, traditional practices, and island custom. Aboriginal people and Torres Strait Islanders should be recognised as the primary guardians, keepers and knowledge holders of Aboriginal and Torres Strait Islander cultural	The **SAHC**, along with **Traditional Owners** and Aboriginal organisations / individuals who have an interest, are consulted on applications for authorisation to damage or disturb heritage and the determination of Aboriginal sites and objects. The **Minister** must consider **SAHC** recommendations but is not bound by them. **Traditional Owners** may call into question the validity of an **authorisation** or	Aboriginal representation on the **ACT Heritage Council**. The Council includes a representative of the Aboriginal community and may also include expert members in the disciplines of Aboriginal culture, Aboriginal history and archaeology. The Council consults with **Representative Aboriginal Organisations (RAOs)** on decisions affecting Aboriginal places and objects. For example, before deciding	The **Heritage Council** has 11 members, including representatives from local government and property owners. Six members are appointed by the Minister at their discretion. As far as practicable, the Minister is to ensure at least two members of the Council are of Aboriginal descent. **Aboriginal Areas Protection Authority** (made up of equal numbers of Aboriginal men and women,	No formal statutory role in decision making. There is no requirement for owners to consult with native title holders, registered native title claimants or a prescribed body, or to limit their consultation to these groups, as these bodies have no official status under the Aboriginal Heritage Act. An owner has the right to consult only with Aboriginal individuals or to consult a wider range of people and groups.

Topic	VIC	NSW	QLD	SA	ACT	NT	WA
How do Aboriginal people participate in decision making? (continued)	to 11 Traditional Owners, and may establish and call upon its own advisory committees as required. **Registered Aboriginal Parties** are the voice of Aboriginal people at a local level and hold decision making responsibilities under the Act. The Act also enables the Secretary to establish an **Activity Advisory Group** of Traditional Owners for a project in an area where there is no appointed RAP, to advise on the proposed activity and its impact on Aboriginal heritage.	Parties (RAPs) for that project. These RAPs must be consulted about the project in accordance with the NPW Regulation. **Joint management** processes (eg co-management of parks) give Aboriginal people some decision making powers. **Aboriginal land owners** have decision making responsibility for cultural heritage on their land(s).	heritage. Aboriginal and Torres Strait Islander parties are identified via the **native title determination application process** administered by the National Native Title Tribunal. Native title determination applicants that are registered by the Register of Native Title Claims are defined as the 'native title party'. If there is no native title party, Aboriginal and Torres Strait Islander people with a 'particular knowledge' about the area can be identified and notified. The Queensland legislation is not a government authorisation model but rather establishes a duty of care and direct agreement making model for land users. Aboriginal and Torres Strait Islander parties are identified and notified of proposed developments to assist with the assessment and management of cultural heritage arising from proposed activities.	**determination** of the **Minister** on the ground that there has been a failure to comply with the consultation requirements of the Act. The Act creates **RARBs**, empowered to speak for Traditional Owners and to make decisions and agreements about their heritage. The **SAHC** decides the appointment of all **RARBs** and may revoke or suspend the appointment of non-RNTBC RARBs.	whether to provisionally register an Aboriginal place or object. RAOs also provide input into the cultural heritage assessments and conservation management plans that are prepared by cultural heritage professionals.	mostly custodians of sacred sites) must consult with the **custodians of a sacred site** when an application for an Authority Certificate is received.	Owners have the right to refuse to carry out consultation. **PROPOSED IN NEW BILL** For medium to high impact activities, proponents are required to consult with Aboriginal people and to enter into agreements with relevant Aboriginal parties. This will largely be managed through LACHS. In the absence of a LACHS the Bill sets out who needs to be consulted or be party to an ACHMP. Note that Aboriginal people are responsible for determining whether ACH is important and should be added to the Directory of ACH – providing minimum recording standards are met.

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How do Aboriginal people participate in decision making? (continued)			A corporation may be registered as an Aboriginal and Torres Strait Islander Cultural Heritage Body for an area where the native title parties (or, in their absence, the general Aboriginal and Torres Strait Islander parties) for the area agree that the corporation should be registered. The sole function of a cultural heritage body is to identify Aboriginal and Torres Strait Islander parties for an area.				
What Aboriginal heritage is protected?	'**Blanket protection**' given to Aboriginal places and objects (of particular significance in accordance with tradition) and human remains. Also provides for the explicit protection of registered Aboriginal intangible heritage, such as stories, song and language.	'**Blanket protection**' given to Aboriginal objects and gazetted Aboriginal Places. Natural sacred sites can be protected through declaration as **Aboriginal Places**. Languages, stories and cultural practices are not explicitly protected under the Aboriginal heritage (National Parks and Wildlife) Act. Note that the NSW *Aboriginal Languages Act 2017* is intended to 'grow and nurture' Aboriginal languages in NSW.	'**Blanket protection**' of areas and objects of traditional, customary, and archaeological significance. The cultural heritage **duty of care** and gazetted guidelines help to protect Aboriginal and Torres Strait Islander significant cultural objects and sites.	All Aboriginal sites and objects of significance according to Aboriginal tradition or Aboriginal archaeology, anthropology or history, and all Aboriginal ancestral remains.	The definitions of Aboriginal places and objects have been broadened to ensure that it is clear that all Aboriginal places and objects are protected under the Act, regardless of whether or not they are registered. Aboriginal places or objects may be placed on the Heritage Register if they meet any of the criteria for heritage significance specified in the Act.	The *NT Heritage Act 2011* automatically protects all Aboriginal and Macassan archaeological places and objects, regardless of whether or not they are recorded. All sites that are sacred or significant according to Aboriginal tradition are protected under the Sacred Sites Act.	Aboriginal places & objects of significance – sacred, ritual, ceremonial or traditional – are protected. **PROPOSED IN NEW BILL** Blanket protection for Aboriginal places and objects. The Bill also protects Aboriginal ancestral remains. The Bill also recognises 'cultural landscapes', which may include intangible elements.

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How is Aboriginal heritage protected?	The Act protects Aboriginal heritage in five key ways: by establishing a process for **Aboriginal cultural heritage surveys**, to regulate archaeological surveys which may be conducted for due diligence purposes; through **cultural heritage management plan and permit systems**; by improving knowledge of Aboriginal heritage places in the landscape through an **Aboriginal Heritage Register**; by raising awareness of Aboriginal heritage more broadly and promoting positive heritage management through **agreements**; and by deterring destructive behaviour through **enforcement and penalties**. Once Aboriginal intangible heritage is registered, anyone who wants to use that intangible heritage for commercial purposes has a legal responsibility to seek the permission of the representative group of the Traditional Owners, and may enter into an Aboriginal intangible heritage agreement.	Aboriginal heritage is protected through **conservation** processes (physical works and reservation of land for conservation processes) and **regulation**. Regulation makes it an offence to harm (destroy, deface, damage or move) an Aboriginal object or a declared Aboriginal Place without an exemption or a defence.	By imposing a **duty of care**, with penalties attached for non-compliance. The duty of care can be met by acting: - in compliance with gazetted cultural heritage duty of care guidelines; - under an approved Cultural Heritage Management Plan; - under a native title agreement or another agreement with an Aboriginal party that addresses cultural heritage; - in compliance with native title protection conditions (for low-impact mineral exploration) – but only if the conditions address cultural heritage. It is a criminal offence to harm, remove, excavate, relocate or possess Aboriginal and Torres Strait Islander cultural heritage. Penalties apply to corporations and individuals for breaches of the cultural heritage duty of care. Breaches of the duty of care are determined by a court (primarily the Magistrate's Court).	Provides a range of mechanisms for dealing with Aboriginal heritage, including **Ministerial authorisations** and **directions**, as well as **Aboriginal heritage agreements** and **local heritage agreements** and **Division A2 Agreements** (ie agreements affecting Aboriginal heritage under other Acts such as ILUAs, NTMAs etc). Summary offences for proven breaches of the Act may attract financial penalties or jail time.	The Act establishes a system for the **recognition, registration and conservation** of Aboriginal places and objects. **Heritage agreements** may also be put in place to protect and conserve an Aboriginal place or object. The Act establishes enforcement and offence provisions, including Heritage Directions, Heritage Orders, and Information Discovery Orders. The Act also provides that each Aboriginal object owned by the Territory is kept in a repository declared by the Minister after consulting and considering the views of the Council and each RAO.	The Heritage Act aims to identify, assess, record, conserve and protect archaeological (and other) places and objects. It sets out the process for heritage listing and allows for automatic interim protection once the Heritage Council has decided that a place is worthy of heritage listing (and will make a recommendation as such to the Minister). Includes a mechanism whereby the Minister may protect classes of places (where difficult to list individually). The Act sets out the process for approvals to carry out work on a heritage place or object, and allows the Minister to enter into a heritage agreement with the owner of a heritage object or place in relation to its conservation, use and management.	The Act aims to ensure places which are of traditional and cultural significance to Aboriginal people are properly recorded and their importance evaluated, to assist in the protection of Aboriginal heritage. The **Ministerial consent system** and **specific offence provisions** provide important protection mechanisms. **PROPOSED IN NEW BILL** The Bill will protect Aboriginal heritage in five key ways: through **ACHMP** and **Aboriginal permit systems**; by providing special protection for places of outstanding significance to Aboriginal people that will also allow for these places to be managed by Aboriginal people; by improving knowledge of Aboriginal heritage places through the **Aboriginal Cultural Heritage Directory**; by raising awareness of Aboriginal heritage more broadly; and by deterring destructive behaviour through increased **enforcement and penalties**.

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How is Aboriginal heritage protected? (continued)							In considering **ACHMPs**, if the ACHC is of the view that ACH is of State Significance it will refer the plan to the Minister.
How does the development assessment process work?	The Act establishes **Cultural Heritage Management Plans** and **Cultural Heritage Permit** processes to manage activities that may harm Aboriginal cultural heritage. The Act includes a new voluntary due diligence assessment process – the **Preliminary Aboriginal Heritage Test** - which allows the Secretary to certify whether a management plan is required for a proposed activity. The proponent may then provide the certified preliminary Aboriginal heritage test to the relevant statutory authority (for example a municipal council) to assist them through the planning application process. The Act provides for negotiated **Cultural Heritage Agreements** to support the development of partnerships around the protection and management of Aboriginal cultural heritage.	**Part 6 of the NPW Act** establishes the regulatory system for the protection of Aboriginal objects and declared Aboriginal Places. The Director-General issues (or can refuse) **Aboriginal Heritage Impact Permits** for activities where harm to an Aboriginal object or Place cannot be avoided. Disputes may be appealed to the NSW Land and Environment Court.	Where an environmental impact statement is required by another Act, a **Cultural Heritage Management Plan** is compulsory. Cultural Heritage Management Plans may also be entered into voluntarily. Mediation assistance to deal with disputes that arise during the statutory consultation process is available through the Land Court. Appeal rights are also provided through the Land Court which will recommend a course of action for the Minister's approval or refusal. Otherwise, there are no regulatory triggers that mandate the development of a cultural heritage agreement or cultural heritage management plan.	Ministerial authorisation required to excavate for the purpose of uncovering any Aboriginal site, object or remains, or to damage, disturb or interfere with an Aboriginal site, object or remains. Requests for authorisation can be submitted together with a local heritage agreement made with a RARB. If a local heritage agreement is approved, the Minister must grant the accompanying request for authorisation to the extent that it aligns with what is agreed under the agreement. An approved local heritage agreement by itself does not allow proponents to impact heritage. A proponent may request an **authorisation** to impact heritage in the absence of a local heritage or Division A2 agreement, in which case the request is subject to the consultation provisions	If a proposed development may impact an Aboriginal place or object, the relevant authority engages a cultural heritage specialist and consults with each RAO to determine the extent of the impact and make recommendations to the Council. Under the amended legislation, there are now four key approvals which may apply to enable ground disturbance works to occur at sites which may have archaeological significance including Aboriginal heritage places: • an Excavation Permit issued by the Council; • a Statement of Heritage Effect approved by the Council; • Development Approval under the *Planning and Development Act 2007*; and	Proposed work is clearly categorised as being **major, minor or exempt.** Timelines apply to all decision making. Where a development is proposed, and there is a likelihood of the presence of Aboriginal archaeological places, the Heritage Branch provides advice to proponents about what steps, if any, need to be taken in order to ensure compliance. An approval to carry out work on a heritage place or object (work approval) may be required. If considered appropriate, the Heritage Branch may on occasion utilise the discretion available in the Act to give permission for small-scale disturbance (such as the relocation of isolated stone artefacts) without the need for a formal application.	Where an Aboriginal site exists on land, **consent to use or develop** the land under Section 18 of the Act is needed. The Aboriginal Cultural Material Committee makes a recommendation to the Minister on proposed land use. Minister decides. If an owner is aggrieved by a decision, that decision can be reviewed in the State Administrative Tribunal. **PROPOSED IN NEW BILL** The Bill creates a tiered approval system. The Bill establishes **ACHMPs** and **Aboriginal Cultural Heritage Permit** processes to manage activities that may harm Aboriginal cultural heritage. The ACHC is responsible for issuing **ACH permits** for low impact activities that may harm ACH.

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How does the development assessment process work? (continued)	The Act introduces voluntary Aboriginal Cultural Heritage Land Management Agreements between a public land manager and a RAP for the purpose of managing and protecting Aboriginal cultural heritage during routine land management activities. Alternative dispute resolution is through mediation and where appropriate it may proceed to the Victorian Civil and Administrative Tribunal.			in the Act and the Minister will decide whether to grant the authorisation. **Ministerial directions** may also be issued to restrict activities in an area, or the Minister may enter into an **Aboriginal Heritage Agreement** with the owner of the land about the management of Aboriginal heritage. There are no rights of appeal under the Act. However interested persons may make representations to the Minister with respect to any Ministerial directions. Ministerial decisions may be subject to judicial review.	• a Conservation Management Plan approved by the Council. To make it easier for developers and the public, the *Heritage Act 2004* and *Planning and Development Act 2007* integrate heritage matters into the development assessment process. For a reviewable decision an interested person may apply to the ACT Civil and Administrative Tribunal. However, 3 of the 4 authorities above (SHE, EP and CMP) are not reviewable.	Appeal rights are provided in relation to the Council's or Minister's decision on applications for work approval. An **Authority Certificate** must be obtained under the Sacred Sites Act to carry out work on a **sacred site**. Development proponents have recourse to a **Ministerial review** of an Authority Certificate and may be granted a Minister's Certificate which overrides an **Aboriginal Areas Protection Authority** decision.	For medium to high impact activities that may harm ACH, proponents are required to consult Aboriginal people and to reach agreement with Aboriginal parties through an **ACHMP**. The Council approves agreed plans. Where agreement cannot be reached the Council will work with parties to reach agreement where possible. If agreement is still not possible the plan is referred to the **Minister** for authorisation. The Bill also creates a responsibility for proponents to undertake a due diligence assessment in relation to land use proposals.
How is the protection of Aboriginal heritage enforced?	**Authorised Officers** (public service employees or inspectors / authorised officers under another Act) and **Aboriginal Heritage Officers** (employees of a RAP) are appointed by the Minister under the Act and have extensive enforcement and compliance functions. Both have the power to serve improvement notices and issue	Where an activity or proposed activity is perceived to be detrimental and non-compliant the Act provides for **stop work orders** and **interim protection orders** with regard to Aboriginal objects and Places. It is also an offence to breach the conditions of an AHIP.	**Authorised Officers** (public service employees) appointed by the Chief Executive under the Acts have extensive powers including powers of entry (with consent, or with a warrant), search and seizure. The Minister may issue a stop order under the Acts if it is determined that cultural heritage is or will be harmed by an	**Inspectors** are appointed by **Minister** on the recommendation of the **SAHC**. Inspectors may enter property to inspect Aboriginal sites / objects. Can issue **urgent directions** to protect sites. **Traditional Owners** of an object / site have right to object to a particular inspector.	Several types of **directions or orders** can be given to help enforce the Act: Heritage Directions, Heritage Orders, Heritage Repair Directions, and Information Discovery Orders. '**Authorised people**' with powers of entry, search and seizure are appointed under the Act by the **Director General**.	**Heritage Officers**, appointed by CEO, or police officers, have appropriate enforcement powers, including powers of entry and seizure. Stop orders and repair orders are also provided in Act. Researchers working for the Aboriginal Areas Protection Authority make investigations. The Authority has the	Minister may appoint **honorary wardens** who have entry powers. Minister may enter into covenant with landholder to protect heritage on private land. Minister may make declarations including may declare a temporary (6–month) protected area. Registrar has right to excavate places.

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How is the protection of Aboriginal heritage enforced? (continued)	24-hour stop orders. Authorised Officers are also responsible for conducting or directing cultural heritage audits and have the power to issue stop orders in emergency situations, which can have effect for up to 30 days. Interim and ongoing protection declarations can also be made by the Minister. Both are clearly defined in the Act.	Reports of harm or potential harm to Aboriginal objects can be made to the NSW Government Environment Line.	activity. A stop order can be issued for a maximum of 60 days. Injunctive relief is also available through the *Land Court Act 2000*, to restrain the carrying out of activities that could contravene the cultural heritage protection provisions or otherwise harm Aboriginal and Torres Strait Islander cultural heritage.	Proven summary offence breaches of the Act may attract penalties or jail time.		power to bring **prosecutions** for breaches including: unauthorised entry onto sacred sites; work on sacred sites; desecration of sacred sites; contravention of site avoidance conditions; and unauthorised communication of secret information.	**PROPOSED IN NEW BILL** Inspectors and Aboriginal inspectors may be appointed and will have a range of enforcement powers, including powers of entry (with consent, or with a warrant), search and seizure. The Bill also introduces **stop activity orders** and **prohibition orders** and **remediation orders** with regard to Aboriginal objects and places. The Bill also creates **three levels of harm** with a substantial increase in the penalties that may be issued, along with an increased statute of limitation period.
What register system is used?	A centralised **Aboriginal Cultural Heritage Register and Information System** (ACHRIS) contains records of all known Aboriginal heritage from across the State. Holds all documents prepared under the Act: cultural heritage permits; approved management plans; cultural heritage agreements; Aboriginal cultural heritage land management agreements;	The Act requires the establishment and maintenance of a database of Aboriginal objects and Aboriginal Places in NSW: the **Aboriginal Heritage Information Management System (AHIMS)**. There is a specified process in the Act for submitting site cards to AHIMS. This includes a mobile phone app that is now widely used.	A **Cultural Heritage Database** and **Cultural Heritage Register** have been established under the Acts. The cultural heritage database is not publicly available. However, the Department provides information from the database to: Aboriginal and Torres Strait Islander parties – if the information relates to the party's area of	The central archives, which include the **Register of Aboriginal Sites and Objects**, are maintained by the **Minister** and contain information about Aboriginal sites, objects and ancestral remains. **Minister** has power to determine Aboriginal sites and objects after consulting with the SAHC, Aboriginal organisations,	A centralised **Heritage Register** contains information on heritage places and heritage objects. The register also records each heritage guideline, heritage direction, heritage agreement and enforcement order. The register is maintained by **ACT Heritage** and can be searched online for information on heritage	Two separate registers are maintained for Aboriginal heritage: an **Archaeological Sites Register** of recorded Aboriginal and Macassan archaeological places and objects (some of which make it onto the NT Heritage Register, even though they are automatically protected under the Act), and a **register of sacred sites**.	**Minister** required to record and evaluate significance of places and material. A **Register** of all protected areas, Aboriginal cultural materials, and all other places and objects to which the Act applies is maintained. **PROPOSED IN NEW BILL** The Bill will establish the **ACH Directory**, to

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What register system is used? (continued)	all certified preliminary Aboriginal heritage tests; all information arising from surveys for Aboriginal cultural heritage; all Aboriginal intangible heritage agreements; cultural heritage audits and stop orders; protection declarations and agreements. The Act specifies who can access the Register and for what purpose. Applications for access must be made to the Secretary.		responsibility; and land users – if the information is necessary for them to satisfy their duty of care. The cultural heritage register is available to the public, and is a depository of information for land use planning, and a research and planning tool to help people in their consideration of the Aboriginal and Torres Strait Islander cultural heritage values of particular objects and areas. Summarised information from the database or register can be obtained via an online portal. The Department also maintains reports and other documents relating to sites and places. There are guidelines for accessing this material.	Traditional Owners and other Aboriginal persons with particular interest in the matter. Determination is conclusive proof that an Aboriginal site or object falls within the definition under the Act. Determination of an Aboriginal site or object results in an entry being added to the Register of Aboriginal Sites and Objects. The **Minister** is also required to establish a register of local heritage agreements and agreements to which Division A2 applies.	places and objects that have been nominated, provisionally registered and registered. In some instances, the **Heritage Council** can declare particular information to be restricted.	The **Archaeological Sites Register** is not accessible online due to the sensitive nature of many archaeological sites. It can be accessed for legitimate reasons in relation to development proposals or if a request relates to the management of these archaeological places.	include details not only of ACH, but also of LACHS, knowledge holders and other Aboriginal parties. The Directory will be established and managed by the **ACH Council**, and run in accordance with rules it sets. Access to information on the Directory will be limited to the general public but open to Aboriginal people with recognised interests in particular ACH. The Bill will provide that culturally sensitive information will not be made available to anyone without the consent of the knowledge holder.
What are the key harm offences?	It is an offence to: by an act or omission harm Aboriginal cultural heritage, if at the time the person knew the act or omission was likely to harm Aboriginal cultural heritage, or if the person was reckless or negligent as to whether the act or	The Act creates two offences for harming Aboriginal cultural heritage: (1) for objects only – the 'knowing' offence, where the defendant knew of the existence of the Aboriginal object and caused intentional harm to the object; and (2)	Failure to take all reasonable and practicable measures to ensure an activity does not harm Aboriginal cultural heritage (cultural heritage duty of care). It is an offence to unlawfully harm	Offence to intentionally damage, disturb or interfere with an Aboriginal site, object or remains without authority granted under the Act. Offence to sell or dispose of an Aboriginal object or to remove an	A person commits an offence if the person: (1) engages in conduct that causes damage to an Aboriginal place or object, and is reckless about whether the conduct would cause damage to the Aboriginal place or object; or (2) engages	There are two types of offences: (1) to engage in conduct that results in damage to a heritage place or object, if the person knew it was a heritage place or object; and (2) to engage in conduct that results in damage to a heritage place or object (strict liability).	Offence to: excavate, destroy, damage, conceal or alter a site; or alter, damage, remove, destroy, conceal, deal with uncustomarily, assume possession, custody or control of any object without authorisation of Registrar or Minister.

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What are the key harm offences? (continued)	omission was likely to harm Aboriginal cultural heritage. The Act also includes as of 2016 a strict liability offence for harming Aboriginal cultural heritage, regardless of knowledge or state of mind. Doing an act likely to harm Aboriginal heritage is also covered by this offence. Exceptions apply to the offences including where acting in accordance with a management plan, permit or Aboriginal cultural heritage land management agreement or in accordance with Aboriginal tradition, or when acting in an emergency.	for both objects and places - the 'strict liability' offence, where knowledge of the existence of the Aboriginal object or place is not an element of the offence. It is a defence to both offences that the defendant held an Aboriginal Heritage Impact Permit, the conditions of which had not been contravened. It is a defence to the strict liability offence that the defendant undertook satisfactory due diligence prior to harming the Aboriginal object or place, or that the level of environmental harm was trivial. The Act also contains exemptions for emergency services, Aboriginal cultural activities, and archaeological investigations that comply with the Code of Practice for Archaeological Investigation of Aboriginal Objects in NSW.	Aboriginal and Torres Strait Islander cultural heritage if the person knows or ought to know it is Aboriginal or Torres Strait Islander cultural heritage. A person must not excavate, relocate or take away Aboriginal cultural heritage if the person knows or ought reasonably to know that it is Aboriginal or Torres Strait Islander cultural heritage. A person must not have in the person's possession an object that is Aboriginal or Torres Strait Islander cultural heritage if the person knows or ought reasonably to know that the object is Aboriginal or Torres Strait Islander cultural heritage.	Aboriginal object from the State without authorisation under the Act. Offence to breach the confidentiality of information held within the central archives or to divulge information contrary to Aboriginal tradition. Offence for an owner or occupier of private land, or their employee or agent, not to report the discovery, as soon as practicable, of an Aboriginal site, object or remains.	in conduct that causes damage to an Aboriginal place or object, and is negligent about whether the conduct would cause damage to the Aboriginal place or object. A person also commits an offence if the person engages in conduct that causes damage to an Aboriginal place or object (strict liability offence). For the purposes of the above offences, 'cause damage' includes disturb and destroy.	Offence to enter, remain on, or carry out work on a sacred site without authority, or to desecrate a sacred site.	**PROPOSED IN NEW BILL** The Bill creates three levels of offences for harming ACH: harm, material harm and serious harm. The Bill also provides a range of defences for certain scenarios.