

Aboriginal Heritage Act 1975: Review under s.23

Tabling Report

Government Commitment in Response to the Review Findings

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.

The Hon Roger Jaensch MP, Minister for Aboriginal Affairs

1: Introduction

This report (the Tabling Report) is presented in accordance with s.23(2) of the *Aboriginal Heritage Act 1975* (the Act), which requires me, as Minister, to table a report in both Houses of Parliament on the outcome of the review.

The review, required under s.23(1) of the Act, was conducted on my behalf by the Department of Primary Industries, Parks, Water and Environment. The resulting Review Report is attached. The review process commenced in mid-2019 and involved a comprehensive public consultation process. The original schedule included tabling this report in late 2020, but consultation processes were delayed by the COVID-19 pandemic. I thank the organisations and members of the public that made the effort to contribute to the review, whether in public submissions or through consultation with members of the review team.

The review has focussed on the identification and analysis of issues with the provisions of the Act; comparative assessments against Aboriginal heritage legislation in other Australian jurisdictions, together with observation of national trends in this area; and, in particular, careful consideration of the feedback to the review from Tasmanian Aboriginal people and non-Aboriginal stakeholders.

The Government accepts that the Review Report accurately summarises the views of the Tasmanian Aboriginal people, practitioners and wider stakeholder groups who participated in the consultation, and notes that their original submissions remain available for reference.

This Report outlines the Government's initial response to the review's findings, and how we intend to move forward. Our intention will be to develop new legislation as soon as practically possible, subject to the need for further consultation. But the Government also intends to make some immediate commitments that will improve the protection of Aboriginal heritage, ahead of the new law.

2: Issues to be addressed, based on the findings of the Review Report

As will be outlined in the final section, this review is not the last step towards new legislation. The Government is committed to considering in good faith the views that come forward in the course of consulting further on the legislation. However, there are some clear indicators in the Review Report's findings, based on feedback received and the experience of other Australian jurisdictions, as well as proposed national standards. The major issues are clear, even if the directions to be taken are not yet fixed.

The need for a new Act: The review has confirmed the Government's long-standing position that the Act is considerably out of date and that new legislation is required that expands the scope of the Act, beyond being mainly focussed on mitigating the impact of physical activities on Aboriginal heritage of archaeological significance.

It is clear that the Act itself does not provide effective mechanisms for protection, nor does it adequately consider the significance of Aboriginal heritage in the context of Aboriginal culture. This has led to a high level of dissatisfaction for the Act with Tasmanian Aboriginal people, and among most non-Aboriginal stakeholders. In line with modern examples, any new legislation is likely to include acknowledgment that the Aboriginal people of Tasmania are the living custodians of their heritage.

Better definitions, and ownership: The inclusion of an expanded and more appropriate definition of Aboriginal heritage in the Act is expected to be an important change, and one requiring strong input from Tasmanian Aboriginal people, as well as reference to examples from interstate and international law. The Government also assumes that the term 'relic' will be omitted from future legislation.

There are also complex issues around 'ownership', or the term 'custodianship' that is preferred by many, which also requires further consultations with Tasmanian Aboriginal people. Additionally, the Government also expects that any new Act will ensure a best practice regime for dealing with the repatriation or return of removed heritage.

Alignment with the State's planning and development approvals system: The review highlighted a broad desire from local government and developers for more certainty of process (as well as better protection of Aboriginal heritage) by better aligning Aboriginal heritage law with the State's Resource Management and Planning System (RMPS). There is no formal linkage with the RMPS, including the critical *Land Use Planning and Approvals Act 1993*. The most common theme, accepted by the Government, is the need for early consideration of Aboriginal heritage in planning and development approval processes, supported by improved public awareness. Some of the immediate actions we propose to take will begin to address this issue.

Improved processes, timelines etc: Another strongly supported finding was the need for improved transparency and clarity of process for considering and managing Aboriginal heritage. Both Aboriginal people and the development community seek increased confidence and assurance from having clear statutory provisions for assessments and decision making. These are expected to include matters such as

timeframes; transparent steps in making and assessing applications; the way Aboriginal heritage is recorded; and appropriate consultation with Aboriginal people and any relevant specialists.

The representation of Aboriginal people and interests: While there are some important differences of view, most input and precedent favoured the continued existence of an Aboriginal body to represent the interests of Tasmanian Aboriginal people, with clear and broad responsibilities in the management of Aboriginal heritage. There was also support for transparency around appointments and appropriate criteria for membership, and having provisions to support good governance.

Who makes decisions on Aboriginal heritage: The Government acknowledges that positions on this issue range from complete decision making by Tasmanian Aboriginal people to continued decision making only by the Minister or the Director of National Parks and Wildlife, with many variations between. The Tasmanian Government is committed to ensuring that Aboriginal people have a central role in deciding how Aboriginal heritage is to be managed in Tasmania, and this will be a central issue in the consultation process on any new Aboriginal heritage legislation.

Management mechanisms and tools: The review finds a need for additional and appropriate statutory management tools in new legislation, in sharp contrast to the current Act's almost complete absence of the sorts of mechanism that are increasingly standard elsewhere. They include tools such as a statutory register; a system of authorisations that allow for the different scale of possible heritage impacts, including management plans for high-impact activities; a modernised system of protected areas; voluntary management agreements; and appeal provisions.

Compliance and enforcement: The review found a high degree of support for the 2017 maximum penalties, but generally found the Act's compliance and enforcement provisions fall far short of modern standards. As well as possible new provisions like stop work orders, there was widespread support for giving a greater enforcement role to Aboriginal people, and for supporting compliance with improved and increased education and information about the value of Aboriginal heritage to the whole community.

3. What we will do as soon as possible, independent of developing new legislation

The Government believes the main response to the review must be the introduction of new Aboriginal heritage legislation, which is outlined in the final section. But there are also a number of actions we can begin now, to deliver real improvements. These include some steps to improve the early consideration of Aboriginal heritage under the existing planning and development approval law, and second, the commencement or extension of important projects that will deliver benefits whenever they are completed, and support any new legislation.

Planning and development approvals:

- o Introduce measures to require early consideration of potential Aboriginal heritage impacts in the highest (State and regional) level of strategic planning, and in all assessments of rezoning proposals under the *Land Use Planning and Approvals Act 1993* (LUPAA) – to ensure major planning decisions take full account of Aboriginal heritage issues;

- Provision of more and clearer information to proponents to ensure that they are, from the start of planning and development application processes, aware of the need to factor Aboriginal heritage into their thinking; and
- Review and amendment of the assessment procedures under two important non-statutory processes for public land – the Reserve Activity Assessment, and the Expressions of Interest for Tourism Opportunities in National Parks, Reserves and Crown Land – to improve transparency and ensure that consideration of Aboriginal heritage, including cultural landscapes, and appropriate consultation with Tasmania’s Aboriginal community, are prominent requirements in the very early stages of development and assessment of proposals.

New projects to support Aboriginal heritage protection:

- The replacement of the current non-statutory Aboriginal Heritage Register with a new system that will be able to incorporate all the relevant information and administrative records, as well as providing a degree of public access (consistent with the necessary requirements for confidentiality around much of the information);
- Utilising existing information management systems to allow the Land Titles Office to give people considering purchase or transfer of property titles early advice about the presence or proximity of Aboriginal heritage on the land in question; and
- The facilitation of upskilling / training to ensure there is increased capacity among Tasmanian Aboriginal people, so there can be more Aboriginal Heritage Officers on the ground within 18 months.

These projects would be beneficial whatever the precise form of the new legislation.

4. The process to develop new legislation

To begin the process of drafting new Aboriginal heritage legislation, the Tasmanian Government considers that the best way forward is to conduct a simple two-stage consultation and engagement process, seeking comment and suggestions on:

- An intensive consultation process on a high-level outline of policy directions, with a particular focus on the identification of issues where opinions conflict, as well as those where relatively standard provisions are likely to work well; and
- A draft exposure Bill, so that everyone can see the detail of the legislation, and provide fully informed feedback on that detail.

The intention will be to have a final Bill ready for introduction to Parliament after consultation and public exposure of the draft bill and any necessary changes resulting from that. The Government acknowledges that there may be intergovernmental discussions, and policy proposals at a national level, that have the potential to affect the timeline of reforming this Act. It remains a high priority for the Government that we finally achieve a full replacement of the *Aboriginal Heritage Act 1975* as soon as practically possible.

Roger Jaensch
Minister for Aboriginal Affairs