



# Update on the new *Aboriginal Cultural Heritage Protection Act*

## Message from the Minister

The Tasmanian Government recognises the importance of Tasmania's Aboriginal cultural heritage to Tasmanian Aboriginal people and to all Tasmanians, and we remain committed to introducing new, stronger Aboriginal Cultural Heritage legislation. We will do this by repealing the *Aboriginal Heritage Act 1975* and replacing it with a new Aboriginal Cultural Heritage Protection Act. The new Act will deliver a modern approach to the protection and management of Tasmania's Aboriginal cultural heritage.

I am pleased to report that significant progress has been made towards the development of a new Act. Drafting, taking into account feedback received to date – including in response to our most recent consultation paper, [A new Aboriginal Cultural Heritage Protection Act – High-level Policy Directions](#) – is well underway.

This update provides a high-level overview of the proposed new Act, ahead of the release of a full exposure draft as soon as possible in 2024.

The Government acknowledges that it has taken a long time to get to this point. However, we are taking a careful and considered approach. As we have seen in other States and Territories, this type of reform is complex. It is critical that we get the detail right to ensure that the new Act is effective and balanced and, most importantly, provides for the contemporary protection and management of Tasmania's unique Aboriginal cultural heritage by the rightful owners and custodians of that heritage – Tasmanian Aboriginal people.

The development of the new Act will be complemented by a range of other measures, including the development of a new purpose-built statutory Aboriginal Heritage Register, and the promotion of the early consideration of Aboriginal cultural heritage in planning and approval processes.

I will provide further updates as we work towards delivering the new Act.

Roger Jaensch MP  
Minister for Aboriginal Affairs



## Introduction

In 2021, the Tasmanian Government completed a review of the *Aboriginal Heritage Act 1975* (the 1975 Act) which concluded with the tabling of a [Review Report](#) in Parliament. The Review confirmed the need for a new and contemporary Aboriginal Cultural Heritage Protection Act.

A consultation paper – [A new Aboriginal Cultural Heritage Protection Act – High-level Policy Directions](#) – which outlined the Government’s proposed approach to new Aboriginal cultural heritage legislation, was released for public consultation in March 2022.

The Government received nearly 40 submissions in response to the consultation paper. These are published on Aboriginal Heritage Tasmania’s [website](#). As with all complex reforms, the submissions expressed a range of views. However, there was broad support for the Government’s proposals for the new Act.

The submissions, along with feedback received during an earlier consultation process, have been guiding the drafting of the new Act.

Drafting is also being informed by best practice in other jurisdictions while giving due consideration to Tasmania’s unique history and Aboriginal cultural heritage. The Government is taking into account lessons learned from other States and Territories, particularly Western Australia, with its experience highlighting the need for continued and effective engagement with both Aboriginal communities and non-indigenous stakeholders. The Government will ensure both that Tasmania’s new legislative framework is easy to understand and that the level of management required is proportionate to the scale and risk the activity presents to Aboriginal cultural heritage (ACH).

The Government is strongly committed to listening to feedback and refining the details of the new Act as drafting progresses. The Government looks forward to releasing a full exposure draft Bill for public comment as soon as practicable in 2024, prior to a final Bill being tabled in Parliament.

## A new Aboriginal Cultural Heritage Protection Act for Tasmania

As identified in the consultation paper, the new Act will:

- have explicit objectives and a clear purpose;
- incorporate modern definitions, in line with best practice nationally;
- provide clarity around ‘ownership’;
- prioritise the role of Aboriginal people and interests in decisions made under the Act;
- establish practical and proportionate decision-making processes and modern statutory mechanisms to better protect and manage Aboriginal cultural heritage; and
- have an improved focus on practical and effective compliance and enforcement.

As well as providing for the protection of Tasmania’s irreplaceable ACH, the reforms will provide clear procedures and greater certainty for landowners, land managers and developers than exists under the current system, without introducing unnecessary red tape. To ensure this, the new Act is being developed consistent with the following principles:

- transparent and clear processes;
- accountability for decision makers;
- simple and efficient operation; and
- effective protection and management of Aboriginal cultural heritage.



This paper gives an update on the progress to date and explains how the approaches proposed in the consultation paper will be addressed in the new Act. The paper also provides an overview of how the new Act will differ from the current legislative framework.

The Government will continue to discuss these reforms with Tasmanian Aboriginal people and non-Aboriginal stakeholders throughout the drafting process to refine the detail of the proposals. All feedback will be taken into account, including after the release of the Exposure draft.

## Definitions

The definitions in the 1975 Act, while partially improved in 2017, are still far behind those used in modern legislation and accepted best practice.

The new Act will introduce a new definition of ACH that recognises objects, places, sites, human remains, and intangible Aboriginal cultural heritage.

For the purposes of the new Act, intangible Aboriginal cultural heritage is about the knowledge, skills and traditions held by Aboriginal people and includes things such as songs, dance, language and medicinal practices. Intangible Aboriginal cultural heritage will be recognised and valued through a formal registration process that will include public consultation and assessment, but will not form part of the permit or management plan approval processes which are designed to protect physical Tasmanian Aboriginal cultural heritage.

## Roles and Responsibilities of the Aboriginal Heritage Council

The new Act will change the role of the existing Aboriginal Heritage Council (the Council) from an advisory body to an important regulatory body responsible for making decisions about the protection and management of ACH. There will also be new provisions which detail the appointment process and membership, ensuring that the Council collectively possesses the appropriate knowledge, experience and skills necessary to meet its new responsibilities.

The Council's role will be fundamentally expanded to include: making decisions in relation to applications for ACH Permits and adequacy of Aboriginal Cultural Heritage Management Plans (ACHMPs); and consideration of nominations for intangible cultural heritage to be added to the Aboriginal Cultural Heritage Register. The Government proposes that the Council also play a role in the repatriation of ACH and the establishment of 'keeping places', noting that these matters are entirely for Aboriginal people to manage. With this in mind, the Government will be seeking further guidance from Tasmanian Aboriginal people on how best to incorporate these matters in the legislative framework, noting that there are some interjurisdictional limitations to consider.

The Council will be required to make decisions that are consistent with the objectives of Tasmania's Resource Management and Planning System (RMPS) and its decisions will be subject to appeals processes.

The Council will also have the authority to delegate some of its powers, and the ability to determine when and to whom it may provide advice on matters relating to the protection and management of ACH in Tasmania.



## Protection and Management of Aboriginal Cultural Heritage

Authorisation to impact ACH will be required under the new Act, as it is now. However, under the new Act, the type of approval required and the pathway to obtain it will be proportionate to the scale and risk the activity presents to ACH. Processes and timeframes for the various approval pathways will be specified within the legislative framework to ensure consistency and certainty of process for developers and for the Council. Where practical, steps and timeframes for gaining an approval will be consistent with other legislation in Tasmania's RMPS, including those in the *Land Use Planning and Approvals Act 1993*, the *Historic Cultural Heritage Act 1995* and the *Environmental Management and Pollution Control Act 1994*.

All decision makers will be accountable for their decisions through provisions for appeals.

This new approach is expected to provide certainty to all parties, particularly in relation to having legislated timeframes, and stepped-out processes that will be more like those familiar from other legislation and other jurisdictions.

Figure 1 shows the main pathways for obtaining approvals under the new Act. The majority of activities will not require prior approval on the grounds that they are simple and low risk in nature, and they do not intersect with known ACH. Current data shows that approximately 10 per cent of enquiries of the Aboriginal Heritage Register indicate the existence of known ACH. Early consideration of this information allows proponents to proactively avoid the ACH and only a very small proportion of activities end up requiring a permit to interfere with the ACH.

### Aboriginal Heritage Permits

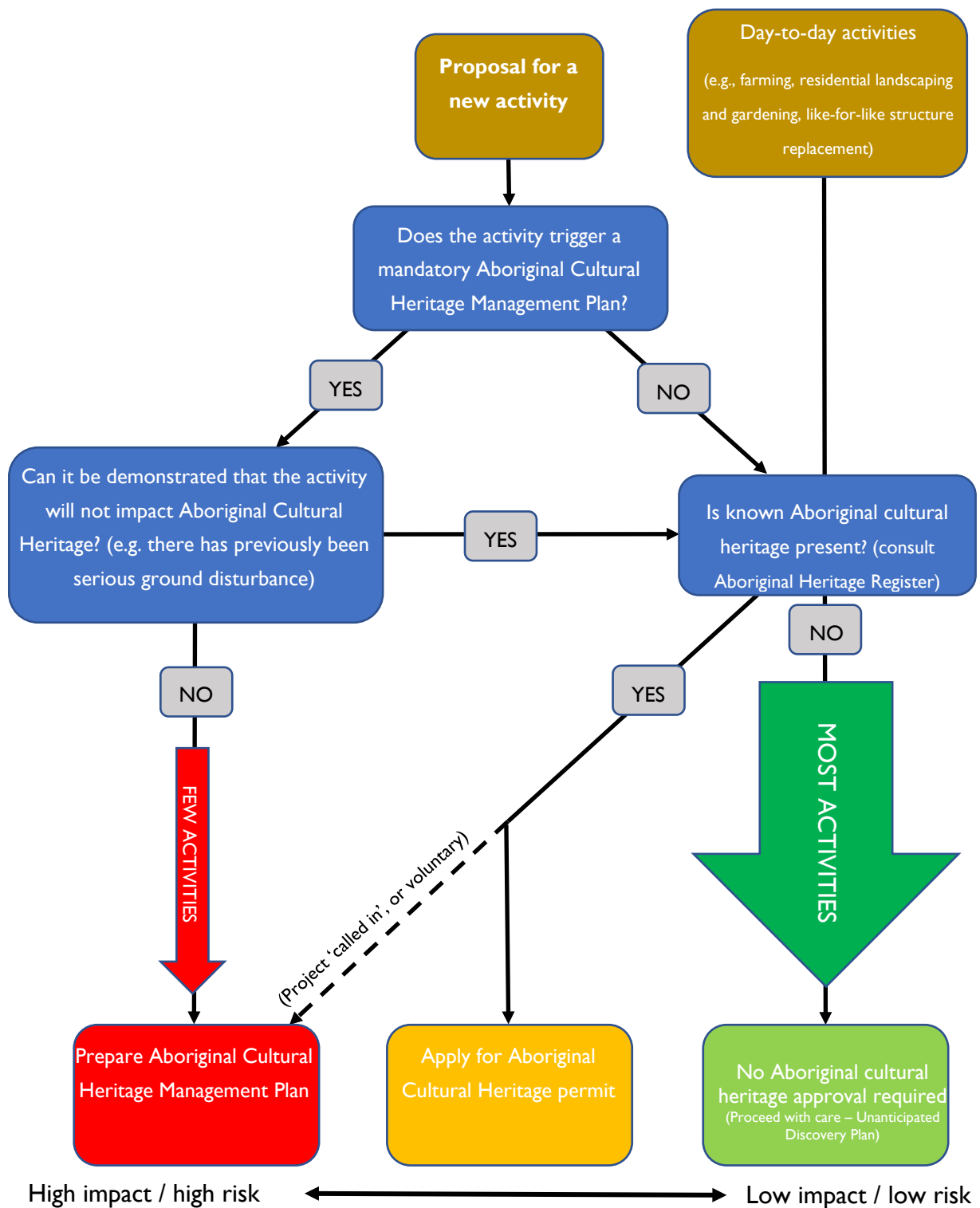
The focus of the Act will always be on the avoidance of harm to ACH, wherever possible. However, if harm cannot be avoided, ACH permits will be available when an activity is not extensive or has only a minor impact on ACH values.

Under the new Act, the Council rather than the Minister will be responsible for considering applications for permits and issuing or refusing them. Like other legislation within Tasmania's RMPS, there will be legislated steps and timeframes for the decision-making process, and appeal rights for the person who applied for the permit. This will deliver significant improvements over the current 1975 Act which fails to set out any clear or defined processes for ACH permits to be considered.

The Council will have the ability to delegate decision making, and this will be an opportunity for very simple 'administrative' type permits to be issued or varied by the Department responsible for administering the Act (currently the Department of Premier and Cabinet). It is envisaged that the Council may agree to administrative permits covering matters such as approval to backfill excavations that have inadvertently exposed ACH, approval to relocate or conceal isolated artefacts in certain circumstances, and approval for like-for-like replacement of infrastructure in circumstances where ACH is known to be present and has already been impacted by the original construction or installation. This will significantly improve efficiencies over the 1975 Act which has no provisions of this type.



**Figure I. Flowchart showing main pathways for approvals under the new Act**





## Aboriginal Cultural Heritage Management Plans (ACHMPs)

ACHMPs have been common in several other States for some time. They offer a way to ensure that large and more complex proposals, or those with potentially high-level impacts on ACH, consider Aboriginal heritage issues from the very start of their planning so that the values are appropriately identified, and ways to protect and manage them are agreed and documented.

Scale-based triggers will identify high-risk activities for which proponents **must** prepare an ACHMP. Triggers will be set for parameters such as: the area of land that will be disturbed, the quantity of material that will be excavated, the volume of a dam that is to be constructed and the number of lots in a subdivision. The final settings of specific trigger values will be discussed and refined through ongoing consultation.

ACHMPs provide a consolidated and consistent way to address complex issues, agree ways to avoid or minimise impacts to ACH and provide authorisation for expected impacts. Once agreed by the Council, an ACHMP will provide a high degree of certainty for proponents proceeding with more complex projects and will help avoid the potential delays that proponents face under the 1975 Act when ACH is encountered part-way through their developments.

For that reason, ACHMPs will also be able to be prepared voluntarily, if proponents consider an ACHMP will be preferable to relying on seeking a series of ACH permits.

Importantly, where an activity does not meet the threshold for a mandatory ACHMP but is still considered likely to have a high impact on ACH, the new Act will provide for the Minister (including at the request of the Council) to require that an ACHMP be prepared. Similarly, if a proponent of a development that has triggered the requirement for preparation of an ACHMP can demonstrate that the activity does not pose a risk to ACH – for example a survey demonstrates that no ACH is present or the history of the site is such that any ACH that may have been present will have been destroyed (e.g. significant ground disturbance has occurred) – the Council will have the power to ‘waive’ the requirement for one to be prepared.

The Council will have the primary role of guiding a proponent’s development of an ACHMP and, subsequently approving the final ACHMP. In the event that the parties cannot agree on the terms of an ACHMP, the new Act will contain provisions to guide the proponent and the Council through an independently supported mediation process. Central to this process will be a requirement for each party to negotiate in good faith.

The Minister’s role in considering ACHMPs will be limited to circumstances where the Council is unable or declines to make a decision on an application. The Minister will be obliged to consider an ACHMP in circumstances where the Council has determined that it does not want to consider the matter itself. The Minister may be asked to play the role of decision maker in situations where parties have first undergone mediation but failed to reach agreement. If the Minister is the decision maker, a statement of reasons will be required to support the decision.



Exemptions from needing an ACH permit or ACHMP will apply in specific circumstances such as emergency works (as now), and where it can be demonstrated that an area has already been seriously disturbed and any pre-existing ACH, whether known about or not, would have lost its ACH value or been destroyed. Like-for-like activities, including infrastructure replacement and ongoing farming of land, will be allowed where the area and nature of disturbance does not exceed that which has occurred previously.

The combined effect of all these provisions is intended to be that most day-to-day activities, such as the management of already working land, will not be affected. However, as is the case now, all activities will be required to proceed with caution, and awareness of the need to report the discovery of previously unknown ACH.

### Aboriginal Cultural Heritage Agreements

The new Act will introduce a new voluntary instrument called an Aboriginal Cultural Heritage Agreement (ACHA). Again, this is familiar in some other States. These will be available when an approval under the new Act is not needed but it is useful to formalise some arrangements relating to known ACH.

ACHAs will be voluntary agreements entered into between landowners, government and others and the Aboriginal community (represented by the Council). The Council will involve other Aboriginal people or groups where there are local or family connections to the ACH.

An ACHA will put in place a partnership that provides a flexible and adaptable approach that can address a range of matters, such as ongoing maintenance and management of ACH, access to sites and so on. The benefit of an ACHA is that it will provide certainty to both landowners and Aboriginal people and, importantly, will encourage building of relationships and cooperative protection measures.

### Compliance and Enforcement

The new Act will modernise and greatly improve the ability to undertake necessary compliance and enforcement activities. The new measures will ensure potential risks to ACH can be managed efficiently, fairly and effectively. This will address a key limitation of the current Act, which is limited to the threat of prosecution in the event that ACH is actually harmed.

Provisions to support compliance and the ongoing protection of ACH include:

- Stop Work Orders – when urgent intervention is required to prevent harm or the threat of harm to ACH. These will be for short periods, with Authorised Officers able to issue interim orders (maximum of up to 48 hours), and the Minister (including at the request of the Council) able to issue orders lasting up to 30 days;
- Audit Orders – where there is a suspicion that relevant conditions of a Permit or ACHMP are not being complied with, or when the impact on ACH from an activity is greater than expected; and
- Aboriginal Heritage Protection Orders that can be issued at the Minister's own initiative or at the written request of the Council when ACH needs either interim protection, for up to three months, or ongoing protection (an 'enduring' order). Aboriginal Heritage Protection



Orders will be issued when the ACH is of exceptional value and is both necessary, and the only practical way, to protect that value from harm.

Penalties will apply for non-compliance with all these orders.

The compliance and enforcement measures that are proposed are similar to those that apply to the management of historic cultural heritage under the *Historic Cultural Heritage Act 1995*.

## The Aboriginal Cultural Heritage Register

Statutory registers have become standard in most similar legislation elsewhere; however, Tasmania's 1975 Act does not provide for one.

The new Act will establish a statutory Aboriginal Cultural Heritage Register (the Register) to hold records of ACH (both those records that are currently held and any new additions). The information on the Register will be used to inform decision making and underpin compliance and enforcement activities.

As well as holding information about heritage sites and items, there will be a new and formal process for nominating and registering some forms of ACH. An example of this is intangible ACH. The Council will consider nominations and decide whether to accept the nomination and formally 'register' the information, following a public process to ensure that all relevant information and views are available for the Council to take in to account.

Importantly, the new Act will recognise that Aboriginal people are the primary custodians and knowledge holders of Aboriginal cultural heritage. In line with this principle, the register will not be a public register and access will be carefully managed. This will ensure important cultural sensitivities are managed and avoid the possibility that information might be misinterpreted. However, access to the most basic information, such as whether there is registered ACH in an area where an activity is planned, will be available. This information represents the minimum required to determine the appropriate approval pathway for a planned activity.

Aboriginal people will be able to access the Register, and so will certain organisations such as those that provide essential services, but only to the extent that they need access to fulfil their functions.

The Council will play a lead role in determining the terms and principles for access to the information on the Register as well as overseeing its operations. This will ensure that Tasmanian Aboriginal people have a say in who gets insight into the locations of their heritage in Tasmania.





## Next Steps

The Department of Premier and Cabinet will continue drafting the proposed Bill, in consultation with relevant Tasmanian government agencies, Tasmanian Aboriginal people and key non-Aboriginal stakeholders. A complete exposure draft Bill will be released for public comment as soon as practicable in 2024, prior to a final Bill being tabled in Parliament. The Government commits to allowing sufficient time for stakeholders to provide feedback on the Exposure Bill. The exposure Bill will be accompanied by further explanatory material and an implementation plan to ensure that the detail of the Bill is clear and that transitional arrangements are appropriately provided for.

The Government welcomes comments or feedback on this update, which can be provided up until 16 February 2024:

- via email: [aboriginalheritageact@dpac.tas.gov.au](mailto:aboriginalheritageact@dpac.tas.gov.au)
- via post: Review of the Aboriginal Heritage Act 1975  
Department of Premier and Cabinet  
GPO Box 123  
Hobart TAS 7001
- by requesting a face-to-face meeting via the above email address.