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using the law to protect the natural and built environment

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Brighton Bypass Consultation
Department of Primary Industries, Parks, Water & Environment
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Dear Sir / Madam

Re Construction of a Vehicular Bridge across part of TASI 10757

EDO Tasmania is a non-profit, community based legal service specialising in environmental and planning law. Our comments are made in connection with the two applications made in June 2010 under the Aboriginal Relics Act 1975 (**the Act**) in relation to the Jordan River Levee site at Brighton, being:

- The application by the Tasmanian Aboriginal Centre Inc (**TAC**) seeking declaration of TASI 10757 (**the Site**) as a protected site under section 7 of the Act.
- The application by the Department of Infrastructure, Energy and Resources (**DIER**), seeking a permit to interfere with the Site, under section 14 of the Act.

Our comments, which relate primarily to the planning and heritage aspects of the decision process, are summarised below.

SUMMARY OF COMMENTS

- The objectives of the Resource Management and Planning System and the Burra Charter should guide the exercise of the Minister's discretion in both applications. In particular, a precautionary approach should be adopted.
- The Minister must also ensure that all critical information is obtained prior to making a decision, including confirming appropriate boundaries of the Site.
- There is sufficient information currently available to warrant the exercise of powers under s 7 of the Act to declare the Site as a protected site.
- While we acknowledge the Director's comments regarding weaknesses in the *Aboriginal Relics Act 1975* regarding protection of places of cultural significance, and the range of other options that may provide more appropriate protection, the fact remains that the only protection currently available is the requirement for a permit under s 14 of the Act.

- Given the identified weakness in the protection afforded to the Site, it is understandable that other avenues are being pursued, including the potential listing of the Site under the World Heritage and National Heritage provisions of the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* and the challenge to the refusal to list the Site under the *Historic Cultural Heritage Act 1995*. In our view, the Minister should refuse the application by DIER or, at least, defer his decision pending the outcome of the other processes currently being pursued.
- The fact that extensive road works have been allowed to continue at significant cost, despite substantial evidence regarding the value of the Site, is a reflection of a poor planning framework. Any decision by the Minister that rewards such defective planning by accepting DIER's application on the basis that substantial work has already been completed sets a poor precedent for planning decisions for infrastructure projects in the future.

Relevant objectives and guidelines

The *Aboriginal Relics Act 1975* is an outdated legislative regime, which has been subject to review for a number of years. The Act pre-dates the integrated Resource Management and Planning System (**RMPS**), which introduced uniform, integrated objectives to guide planning decisions in Tasmania.

- to promote the sustainable development of natural and physical resources and the maintenance of ecological processes and genetic diversity;
- to provide for the fair, orderly and sustainable use and development of air, land and water;
- to encourage public involvement in resource management and planning
- to facilitate economic development in accordance with the objectives set out in the above paragraphs; and
- to promote the sharing of responsibility for resource management and planning between the different spheres of government, the community and industry in the State.

Section 14 of the *Aboriginal Relics Act 1975* does not specify any criteria to guide the exercise of the Minister's discretion to grant a permit to interfere with relics. In our view, this decision should be guided by the principles of relevant international instruments and the objectives of the RMPS. This would be consistent with the approach adopted for European cultural heritage in Tasmania.

The *Burra Charter* embodies the principles endorsed by the International Council on Monuments and Sites established under the *International Charter for the Conservation and Restoration of Monuments and Sites 1964*. The Charter adopts a hierarchy of preferred approaches, from avoiding impact to mitigating impact and managing impact. This is also reflected in the *Environment Protection and Biodiversity Conservation Act 1999*, which expressly endorses a precautionary approach (EPBC Act, s 3A).

It is critical that the consideration of this matter of national and international importance be done in accordance with the objective of the RMPS and that the

appropriate amount of time be taken to understand all the road alternatives and the full social, scientific, cultural and potential World Heritage values of the Site.

Declaration of the Site as a protected site

In our view, there is no justification to deny the TAC application, or to defer a decision on that application. Section 7(1) relevantly provides:

(1) Where the Minister is satisfied that there is on or in any land a relic and that steps should be taken to protect or preserve that relic, he may... declare an area of land within which it is situated to be a protected site.

It is clear that relics exist on the land, and there is compelling (and largely uncontested) evidence that steps should be taken to protect or preserve those relics. The importance of the Site was identified in the Director's statement of reasons and recommendations on the DIER application (page 12):

"Therefore it appears to be established that the JRL site is:

- 1. the only site thus far documented in Tasmania, and probably Australia, which has evidence of continuity of occupation by Aboriginal people from the Pleistocene (circa 41,000 BP) through to the early 19th century;*
- 2. a well preserved large, stratified open site with the capacity to be dated, and as such, it is exceptionally rare in an Australian context; and*
- 3. a site of such antiquity that it is not only a site of great potential cultural value to Aboriginal people but has the potential to provide understandings in relation to the global spread of Homo sapiens across the planet."*

We believe that the site therefore satisfies the criteria in s 7(1) for declaration as a protected site.

We acknowledge the Director's comments regarding whether any additional protection is offered by such a declaration, and the ongoing debate regarding the form that protection and preservation of the site should take. However, there is sufficient evidence to warrant a declaration under s 7 and the existence of other options for protection is largely irrelevant. To this extent, we disagree with the Director's recommendation to defer consideration of the TAC application.

Assessing new information

The Director's reasons emphasise that information regarding the significance of the Site was not available at the outset of planning the transport corridor or seeking planning permits. We do not dispute that the permits obtained to date have been lawful. However, a precautionary approach demands adaptability when new information becomes available, particularly discoveries which completely alter the nature of the issues being considered.

Unlike the *Historic Cultural Heritage Act 1995* or the EPBC Act, the *Aboriginal Relics Act 1975* does not provide for provisional or emergency listing of significant sites. As such, the only real possibility for avoiding the risk of irreparable harm is to deny the granting of a permit to interfere with the Site.

Other options for protection

We agree that the *Aboriginal Relics Act 1975* is deficient and in need of review. We also agree that other avenues would potentially provide greater protection or opportunities for sustainable management of the Site, including reservation of the

Site under the *Nature Conservation Act 2002* or listing under the *Historic Cultural Heritage Act 1995*, in the event that the current challenge to the application of that Act to Aboriginal heritage is successful.

In that regard, we note the Director's comments that the Site may not be eligible for reservation under the *Nature Conservation Act 2002* in light of that litigation. In our view, this fails to appreciate that the current litigation addresses the express exclusion of Aboriginal heritage values under a 98 of the *Historic Cultural Heritage Act 1995*, rather than any suggestion that 'cultural heritage' values generally do not include Aboriginal heritage values. In our view, sites which exhibit Aboriginal heritage values would be eligible for reservation under the *Nature Conservation Act 2002* on the basis of those values.

However, regardless of whether more appropriate protection measures could be available under other legislation, those measures are not currently available. The only current opportunity to protect the Site rests with the Minister under s 14 of the *Aboriginal Relics Act 1975*.

TAC have also referred the Site to the Federal Minister to consider emergency heritage listing under the EPBC Act, and potential World Heritage listing. At p15 of this recommendation in response to the TAC application, the Director states "*it is considered most appropriate to await the response to that application, rather than to pass an opinion on the subject now*".

We agree that it is appropriate to await the outcome of that assessment. The Site may soon enjoy national and international recognition and it would be imprudent to allow the values that would warrant that recognition to be interfered with before an assessment was finalised. Therefore, we believe that it is inappropriate to grant a permit under s 14 of the *Aboriginal Relics Act 1975* while the applications under the EPBC Act are pending.

The DIER application

Section 14 of the Act provides no criteria for consideration to guide the decision whether to allow interference with Aboriginal relics or with a protected site. However the Director's discussion of the numerous values of the site – and of the highway project – provides a good summary of the interests in tension.

As outlined above, we believe that the RMPS objectives provide a good framework for the exercise of the Minister's discretion. It is critical that the consideration of this matter of national and international importance be done in accordance with those objectives and that the appropriate amount of time be taken to understand all the road alternatives as well as understanding the full social, scientific, cultural and potential World Heritage values of the Site.

In order to provide for the "fair, orderly and sustainable use and development" in connection with the Site it is critical that the process is orderly and the values of the Site are fairly considered. The Director acknowledges the flawed process on page 7 of the DIER application by stating "to be requiring a permit for this section at this stage of the process cannot be viewed as good process".

The need for caution

The heritage value of the Site was emphasised in the Davies heritage assessment, which concluded that "*proceeding with the road construction in terms of heritage*

impact is not justifiable and that the impact on the road site will involve an embarrassing loss of face for Tasmania in terms of its place in the world community".

Given the lack of options for emergency protection in light of the new evidence as to the significance of the Site, the only real possibility for precaution is to deny, or defer, granting the permit under s14 of the *Aboriginal Relics Act 1975* to interfere with the Site.

Refusing the permit application pending full investigation of alternatives, for example for site management of project funding, would be the natural and perhaps only avenue for a genuine precautionary approach to protect a site of local, national and potentially international significance. The State government has made significant investment in the project to date, and it is clear that a solution must be reached that balances the complex matrix of interests here at stake. Given the potential significance of this site, we would encourage the Minister to refuse the s14 application pending the creation of a balanced solution that addresses all valid concerns so fully as possible under the circumstances.

Conclusion

We urge the Minister to declare the site as a protected site in recognition of the identified cultural heritage values of national and international significance, and to continue negotiations with the Federal Infrastructure Minister regarding funding options for alternative routes which would protect the recognised values. We further urge the Minister to refuse, or defer consideration of the DIER application, pending the outcome of other options for protection being pursued

The EDO appreciates the opportunity to make these comments. Please do not hesitate to contact us if you wish to discuss anything raised in this submission.

Kind regards,

Environmental Defenders Office (Tas) Inc



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