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Aboriginal Heritage Office
Department of Tourism, Arts and the Environment
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Dear Sir / Madam

New Tasmanian Aboriginal Heritage Legislation

Thank you for the opportunity to make comments in relation to the development of new Aboriginal Heritage legislation.

The Environmental Defenders Office (*EDO*) is a non-profit, community based legal service specialising in environmental and planning law. Protection and management of cultural heritage is an important aspect of environmental management in Tasmania.

The EDO strongly supports the proposal for new Aboriginal Heritage legislation and commends the Aboriginal Heritage Office for the work it has carried out to date. This reform proposal will enhance the capacity of Aboriginal People to protect significant elements of their culture and to continue the contemporary practise of customs and beliefs.

Our submission responds to a number of issues raised in the Consultation Package.

SUMMARY OF COMMENTS

- The EDO strongly supports the proposal to develop new Aboriginal Heritage legislation
- The definition of “Aboriginal Heritage” must come from the indigenous community and must recognise contemporary heritage
- Awareness materials should explain the distinction between “native title” and “aboriginal heritage”
- The EDO supports the enforceable duty of care approach proposed. The legislation should clearly state whether compliance with practical duty of care guidelines will be sufficient to discharge the duty of care.
- Duty of care guidelines must make it clear that the proponent must also assess and manage indirect and off-site impacts of their activities.
- The EDO strongly supports the establishment of an Aboriginal Representative Body. Measures should be taken to ensure a gender balance in the composition of the body.
- Duty of care guidelines should make it clear that the database maintained by the Aboriginal Representative Body is not the sole indicator of the presence of Aboriginal heritage at a site.
- Provision should be made to protect sensitive information, and to penalise anyone who discloses such information inappropriately.

- The EDO strongly supports integration of the proposed legislation into the RMPS. Where other land-uses remain outside this system, amendments to those industry-specific planning systems will be necessary to ensure Aboriginal Heritage is protected.
- The Aboriginal Representative Body should be responsible for approving development that may impact on Aboriginal Heritage. Where this responsibility is delegated to local governments, the Aboriginal Representative Body should produce guidelines or a planning directive to assist local governments to assess Aboriginal heritage issues consistently.
- The EDO supports the development of voluntary cultural management plans. However, the quality of these plans should be reviewed by the Aboriginal Representative Body. Also, provision should be made to require voluntary plans to be amended where new information becomes available.
- The legislation should provide “triggers” to prompt preparation of a cultural heritage survey, including activities for which an EIS is required, development on registered places, dam construction, development involving significant ground disturbance and development in areas where cultural heritage features have been identified (e.g. middens). The absence of a ‘trigger’ does not mean that a cultural heritage survey is *not* required – if there is reason to suspect that Aboriginal heritage issues may arise, the duty of care provisions should require a cultural heritage survey to be carried out.
- Appeal provisions should be consistent with other RMPS legislation. Where appeals are made to the Tribunal in relation to Aboriginal heritage issues, the Tribunal must include a member with expertise in that field.
- The new legislation should include power to issue stop-work and restoration notices.
- Penalties under the new legislation should be consistent with penalties for harming historic cultural heritage under the *Historic Cultural Heritage Act 1995*

Need for New Legislation

Australia has both legal and moral obligations to ensure appropriate measures are adopted to protect indigenous cultural heritage. The best way to meet these obligations is through the implementation of effective legislation which provides indigenous people with the means to identify heritage and to play a significant role in the assessment and management of proposals which may impact on that heritage.

The EDO agrees that the current legislative regime is inadequate to protect and manage Aboriginal Heritage in Tasmania. We therefore strongly support the proposal to develop new legislation.

Definition of Aboriginal Heritage

A fundamental principle of the proposed legislation must be recognition that protection and conservation of Aboriginal cultural heritage should be based on respect for Aboriginal cultural, traditional and contemporary practices.

The EDO therefore supports comments in the Consultation Package that the definition of Aboriginal Heritage must be developed by the Tasmanian Aboriginal community, and must not have an arbitrary cut-off date.

The definition of Aboriginal Heritage must recognise that places and objects are significant because of the cultural and spiritual significance they have for Aboriginal people, rather than the general public. As Justice Mason observed in *The Commonwealth v Tasmania* (1983) 57 ALJR 450 at 501:

...something which is of significance to mankind may have a special and deeper significance to a particular people because it forms part of their cultural heritage. Thus an aboriginal archaeological site which is part of the cultural heritage of people of the

aboriginal race has a special and deeper significance for aboriginal people than it has for mankind generally.ⁱ

Therefore, the legislation must adopt a broad definition which involves Aboriginal people in the identification of Aboriginal Heritage. This will be critical to making sure that the proposed legislation provides effective protection for Aboriginal cultural heritage.

As acknowledged in the Consultation Package, it is also critical that the definition adopted in the legislation recognises that Aboriginal heritage is a living culture which includes contemporary activities. This is consistent with the findings of the *Review of the Commonwealth Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (the Evatt Report)*ⁱⁱ:

‘Heritage protection laws and programmes should be based on the assumption that Aboriginal culture is living and evolving today as it was prior to European arrival. It should not be confined to protecting ‘relics’ or areas where there is physical manifestation of human habitation’.ⁱⁱⁱ

Any definition adopted in the proposed legislation must expressly recognise that Aboriginal traditions may evolve over time.

From a practical perspective, awareness material supporting the proposed legislation should clearly explain the distinction between native title and Aboriginal Heritage. The legislation may face some unnecessary resistance from landowners if this distinction is not understood.

Providing Certainty Through a Duty of Care

The EDO supports the enforceable ‘duty of care’ approach proposed in the Consultation Package. The duty of care must impose a positive obligation to take all reasonable and practicable measures to ensure that an activity does not have a negative impact on Aboriginal Heritage. The duty of care should require proponents to adopt a precautionary approach.

The proposed legislation should expressly state the situations in which a proponent will be taken to comply with their duty of care obligations. These situations could include:

- The person is the owner of the Aboriginal Heritage, or acts under the authority of the owner of the Aboriginal Heritage
- The person is acting under an approved management plan (whether voluntary or mandatory)
- The person complies with published duty of care guidelines
- The action was taken in an emergency situation (e.g. bushfires)

The EDO also supports the release of practical guidelines to assist proponents to understand how to discharge their duty of care. As stated above, the legislation should specify whether compliance with these guidelines will be sufficient to satisfy the duty of care obligation. Experience with the *Aboriginal Cultural Heritage Act 2003* in Queensland has shown that proponents are more likely to comply with the duty of care guidelines where they have some certainty that compliance will satisfy their obligations under the Act.

The legislation and / or the supporting guidelines must make it clear that proponents must also consider and manage **indirect or off-site impacts** (such as downstream

impacts of a dam project). A broad approach to “impact” is necessary to provide comprehensive protection to Aboriginal Heritage. This approach is also consistent with recent judicial discourse regarding the extent of impacts that should be assessed in relation to proposed developments (see, for example, *Minister for the Environment and Heritage v Queensland Conservation Council Inc and WWF Australia* [2004] FCAFC 190 30 July 2004 (the Nathan Dam case)).

Aboriginal Representative Body

Recognised principles of self-determination require a high level of Aboriginal involvement in Aboriginal heritage protection. A clear finding of the Evatt Report was that, as far as possible, Aboriginal people should administer Aboriginal heritage protection programmes^{iv}. This should include planning, identification and management of heritage areas, assessing significance and risks, making decisions about whether or not to protect heritage, taking enforcement action and developing education and awareness programmes.

The EDO strongly supports the establishment of an Aboriginal Representative Body to fulfil these roles.

Composition of the Aboriginal Representative Body

It is appropriate that the composition of a representative body be determined largely by the Tasmanian Aboriginal community. However, we note the recommendations of the Evatt Report that indigenous cultural heritage bodies should:

- be independent;
- be controlled by Aboriginal members
- be representative of Aboriginal communities;
- have gender balance;
- have adequate staffing, expertise and resources; and
- have access to independent advisers, eg anthropologists, archaeologists^v.

We consider gender balance to be an important criterion for composition of the Aboriginal Representative Body, to ensure appropriate management of gender-sensitive areas or objects. Section 6 of the *Northern Territory Sacred Sites Act 2000* is a good model provision regarding composition of an indigenous representative body.

Functions of the Aboriginal Representative Body

The EDO supports the functions of the Aboriginal Representative Body discussed in Information Sheet 6.

The Aboriginal Representative Body could have the following additional functions:

- facilitating discussions between custodians of Aboriginal Heritage sites and proponents (see s.10 of the *Northern Territory Sacred Sites Act 2000*);
- carrying out (or sponsoring) research that would assist with its functions;
- assessing and approving proposals for research by third parties relating to Aboriginal Heritage. The Representative Body would also be responsible for maintaining a database of research records (subject to restrictions on sensitive information);

- assisting in the assessment, promotion and management of appropriate tourism activities in respect of places of Aboriginal heritage significance (the Tasmanian Heritage Council has a similar function in relation to place of historic cultural heritage significance – see s.7(1)(g) of the *Historic Cultural Heritage Act 1995*).

Resource Issues

As with any council or authority, it will be essential to ensure that the Aboriginal Representative Body is provided with adequate resources to fulfil its functions.

Managing Information

Maintaining database of Aboriginal Heritage information

The EDO acknowledges the importance of a centralised database of information regarding Aboriginal Heritage and agrees that the Aboriginal Representative Body should be responsible for maintaining this database.

However, as with all lists, there are practical difficulties in ensuring that the database is accurate, up to date and exhaustive (see, for example, *Nettlefold v Hobart City Council* [2001] TASSC 120). Therefore, the legislation or guidelines should make it clear that information in the Database is a useful planning and management tool, but should not be relied on as the sole determinant of whether to undertake a cultural heritage study. For each proposed development, particularly those involving ground disturbance, advice should be sought from the Aboriginal Representative Body regarding the need for a cultural heritage survey.

As discussed above, it may be appropriate for the Aboriginal Representative Body to have a role in assessing and approving research proposals in relation to Aboriginal Heritage issues. This role could involve facilitating meetings with Aboriginal parties, releasing information (with or without conditions) and maintaining a database of all research papers.

Sensitive information

In general terms, Aboriginal customary law restrictions on information and knowledge about an area, site or object underpin and define social relationships^{vi}. This is particularly true of the division between women's and men's business^{vii}.

Any new legislation must acknowledge the importance of restricting the disclosure of sensitive information. Without adequate measures to protected sensitive information, the legislation may lead to disclosures which will adversely impact the cultural heritage the laws are designed to protect. Unless this risk is managed, Aboriginal people may be reluctant to engage with the legislation – this will seriously undermine the objectives of the proposed heritage protection regime.

The Evatt Report proposed the following standards for protecting restricted information:

- 4.1 Heritage protection laws should respect Aboriginal customary law restrictions on the disclosure and use of information about Aboriginal heritage.
- 4.2 Procedures under heritage protection laws should minimise the amount of information Aboriginal people need to give about significant areas or sites to ensure protection and avoid injury or desecration.
- 4.3 The laws and related procedures must ensure that customary law restrictions on information received for the purpose of administering heritage protection law or received in related legal proceedings are respected and observed.

- 4.4 Heritage protection legislation should specifically provide that a claim for public interest immunity may be made for restricted information.^{viii}

It is appropriate for the Aboriginal Representative Body to determine what information can be released to the public, and to proponents. Where the Aboriginal Representative Body believes that the proponent needs to be aware of sensitive information in order to meet its duty of care, the information could be released to the proponent (and its consultants) subject to restrictions on further disclosure.

The legislation must include offence and penalty provisions relating to inappropriate disclosure of sensitive information.

Integration with Resource Management and Planning System

The Evatt Report identified the following common threats to Aboriginal Heritage^{ix}:

- construction work for urban development;
- building of roads, bridges or dams;
- mining;
- exhibition or sale of objects; and
- entry of persons into places contrary to customary laws or traditions^x.

Given the threats presented by development, the lack of integration between the *Aboriginal Relics Act* and the planning system is a major shortcoming of the current regulatory regime. The EDO strongly supports the integration of new Aboriginal Heritage legislation into the Resource Management and Planning System, and the adoption of the standard RMPS objectives.

Incorporating Aboriginal Heritage issues into the planning process will ensure early consideration of potential impacts, and improve certainty and consistency in relation to land-use decision-making. The RMPS regime also provides opportunities for public participation and inclusive appeal rights.

This approach would also ensure that Aboriginal Heritage is afforded similar rights and protections to Historic Cultural Heritage.

Like the role of the Tasmanian Heritage Council, the Aboriginal Representative Body should be generally responsible for assessing and approving applications for works that will impact Aboriginal Heritage (see s.32 of the *Historic Cultural Heritage Act 1995*). In most cases, where a proposed development is likely to impact on Aboriginal Heritage, the local government must refer the application to the Aboriginal Representative Body.

The Aboriginal Representative Body may choose to delegate responsibility for some minor works applications to local government. Any delegation should be supported by practical guidelines on how to assess potential impacts on Aboriginal Heritage.

As discussed in the Consultation Package, the legislation should specify that planning authorities must not make decisions that are contrary to cultural heritage surveys or approved management plans. Consideration could also be given to developing a Planning Directive to ensure all planning schemes adopt a consistent approach to the assessment of Aboriginal heritage issues.

The EDO is a strong advocate for bringing all land use activities, including forestry and mining, within the Resource Management and Planning System. However, while

these activities remain outside the RMPS, measures must be taken to incorporate Aboriginal Heritage protection into industry-specific planning systems. For forestry activities, the Forest Practices Code will need to be amended to identify triggers for the development of an Aboriginal heritage management plan. The Aboriginal Representative Body **must** be consulted during the development of the Forest Practices Plan and any heritage management plan.

Similarly, the Aboriginal Representative Body must be consulted during negotiations for mineral and exploration licences under the *Mineral Resource Development Act 1995*. Licences could include a provision that additional authorisation from the Aboriginal Representative Body is required if works will take place on a registered Aboriginal Heritage site (similar to Authority Certificates under the *Northern Territory Sacred Sites Act 2000*).

Surveys and Management Plans

The EDO supports the idea of voluntary management plans to encourage early negotiation with any Aboriginal community affected by development activities. Provided there are mechanisms to ensure the voluntary management plans are appropriate (such as endorsement by the Aboriginal Representative Body), compliance with the plan should be sufficient to discharge the duty of care. However, provision should be made to require amendment to a voluntary plan where items of Aboriginal Heritage are identified during development activities that the parties were not aware of at the time that the plan was made.

The EDO supports identifying triggers to prompt the need for cultural heritage surveys and management plans. In addition to level 2 activities, called-in level 1 activities and development on registered places, triggers should include:

- dam construction
- development involving significant ground disturbance / excavation
- development in areas where cultural heritage features have been identified (e.g. middens)

It must be made clear that, despite the identification of triggers, the paramount obligation regarding cultural heritage management is the duty of care provision. If Aboriginal Heritage is identified, or likely to exist at a site, then a proponent must comply with guidelines regardless of whether the activity they are undertaking is a specified trigger.

Where cultural heritage management plans are required as a condition of approval, it must be clear that the cultural heritage management plan must be approved by the Aboriginal Representative Body *prior to commencing work on the site*.

It is essential that Aboriginal parties be given the opportunity to be involved in all cultural heritage surveys, and to provide advice on how to manage a proposed activity.

Effective Appeal Provisions

The legislation should encourage voluntary negotiation and provide a mediation process to facilitate mutually beneficial negotiations between proponents and Aboriginal parties^{xi}. The models used under the *Northern Territory Sacred Sites Act*

2000 and the *Aboriginal Cultural Heritage Act 2003* (Qld) provide strong and empowering mediation options for indigenous parties.

Appeal rights under the proposed legislation should be consistent with all other appeal procedures under the RMPS. Appeals would be made to the Resource Management and Planning Appeal Tribunal (the *Tribunal*).

The legislation should also provide for civil enforcement opportunities, both for the Aboriginal Representative Body and for interested third parties. The provision of third party rights is important to address situations where an Aboriginal person feels aggrieved by a decision and the Aboriginal Representative Body is not willing to take action. This could occur for a number of policy and resource issues. Provisions allowing the Tribunal to dismiss frivolous and vexatious litigation will prevent any 'misuse' of third-party enforcement rights.

Where an appeal or civil enforcement action relates to Aboriginal Heritage, the Tribunal must include a person with relevant expertise and experience in relation to indigenous cultural heritage. Section 277 of the *Water Management Act 1999* (Tas) is a good model provision regarding composition of the Tribunal where specific expertise is required.

Compliance and Enforcement

Power to stop work

To provide comprehensive protection for Aboriginal heritage, it will be necessary in some situations to take action to prevent activities likely to harm Aboriginal heritage places or objects. Therefore, the legislation must empower the Aboriginal Representative Body to issue "stop work" orders where it becomes aware that an activity is being carried out, or is about to be carried out, which will harm Aboriginal heritage. The 'stop-work' provisions under Part 8 of the *Historic Cultural Heritage Act 1995* are a good model for such powers.

Civil enforcement provisions should also allow an interested party to apply to the Tribunal for an injunction to stop work where appropriate.

Proponents should be given a right to appeal against a stop-work or a restoration order.

Offences

As discussed above, the EDO supports the enforceable duty of care approach to the proposed legislation. This encourages proactive assessment and management of Aboriginal heritage issues, and provides flexibility in the approaches that can be taken by the proponent. This is the approach adopted in the Queensland legislation, and it is not surprising that the majority of management plans under that Act are entered into voluntarily.^{xiii}

However, to ensure that proponents take these obligations seriously, the penalty for failing to discharge the duty of care **must** be sufficient to deter non-compliance. This provision should also be supported by an offence of harming Aboriginal heritage if the proponent knows or ought reasonably to know about the existence of the Aboriginal heritage (see s.24 of the *Aboriginal Cultural Heritage Act 2003* (Qld)).

Other offences under the proposed legislation should include:

- disclosing sensitive information;

- failing to report a cultural heritage find (this offence would not apply to Aboriginal parties); and
- failing to comply with a stop-work order.

The proposed legislation should also empower the Aboriginal Representative Body to issue restoration notices. These could be issued for ‘minor’ impacts on Aboriginal heritage, where a full prosecution may not be warranted. However, it would be an offence not to comply with a restoration notice.

Penalties

The objective of the proposed legislation is to recognise the importance of Aboriginal Heritage, both to Aboriginal people and to the wider Tasmanian community. To reflect this, penalties must serve as a disincentive to harm Aboriginal Heritage. For this reason, heavy penalties should be imposed on individuals and corporations who fail to comply with the legislation.

The penalties should be consistent with those imposed under the *Historic Cultural Heritage Act 1995*. For example, the maximum penalty for unauthorised works in a heritage area that adversely impact historic cultural heritage significance is:

- (a)_ a corporate body, a fine not exceeding 10 000 penalty units; or
- (b)_ an individual, a fine not exceeding 5 000 penalty units.

The proposed legislation could also consider introducing the possibility of imprisonment for a serious breach of the legislation.

The Environmental Defenders Office 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
Per:

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Interim Principal Lawyer

The EDO wishes to thank Naomi Wakelin for her invaluable assistance in preparing this submission.

ENDNOTES:

- ⁱ *The Commonwealth v Tasmania* (1983) 57 ALJR 450 at 501 per Mason J.
- ⁱⁱ Elizabeth Evatt AC 1996. Review of the Commonwealth Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (the Review). para 3.68.
- ⁱⁱⁱ Ibid..
- ^{iv} Evatt Report, para 3.66
- ^v Evatt Report, Recommendation 6.3
- ^{vi} Weiner, J F "Anthropologists, Historians and the Secret of Social Knowledge" in *Anthropology Today* Vol 11 No 5, October 1995, p 5 cited in Evatt Report at para 4.9.
- ^{vii} Bell, D "Sacred Sites: The Politics of Protection" in *Aborigines, Land and Land Rights* Peterson, N and Langton, M (eds) Australian Institute of Aboriginal Studies 1983, p 281.
- ^{viii} Evatt Report, Chapter 4 Respecting Customary Restrictions on Information.
- ^{ix} Evatt Report, para 2.7
- ^x Ibid.
- ^{xi} Evatt Report, Chapter 9: Encouraging Agreement: The Role of Mediation.
- ^{xii} Information Sheet 13 for the Tasmanian Aboriginal Heritage Legislation project – Surveys and Management Plans: Looking for and Managing Aboriginal Heritage. Aboriginal Heritage Office and Office of Aboriginal Affairs. www.tahl.tas.gov.au accessed 2006-12-10