



# TASMANIAN ABORIGINAL CENTRE INC.

ABN 48 212 321 102

HEAD OFFICE:   
198 ELIZABETH STREET,  
G.P.O. BOX 569,  
HOBART TAS. 7001  
Phone: (03) 6234 0700  
Fax: (03) 6234 0799  
Email: hobart@tacinc.com.au

182 CHARLES STREET,  
P.O. BOX 531,  
LAUNCESTON TAS. 7250  
Phone: (03) 6332 3800  
Fax: (03) 6332 3899  
Email: launceston@tacinc.com.au

53 ALEXANDER STREET,  
PO. BOX 536,  
BURNIE TAS. 7320  
Phone (03) 6431 3289  
Fax: (03) 6431 8363  
Email: burnie@tacinc.com.au

## Aboriginal Heritage Protection Act 2012: an assessment

### Summary

With widespread agreement that the Aboriginal Relics Act 1975 was out of date, it was expected that any replacement legislation would be progressive and finally dignify the Aboriginal relationship with heritage. As for standards of protection, management and administration, it was thought similar models for dealing with non-Aboriginal heritage in Tasmania would be followed, or bettered.

Disappointingly, this Bill maintains the State's hotly disputed claim to Aboriginal heritage and creates greater rights in those dealing with Aboriginal heritage than Aborigines themselves. Standards set under the *Historic Cultural Heritage Act 1995* for protection of European heritage have been abandoned in this Bill, leaving Aborigines with a comparatively poor protection regime. The Bill fails to establish the long overdue outlet for Aboriginal management and decision making, retaining instead control with the Minister. Underlying the arrangements proposed is a distinct policy of 'Aboriginal heritage must not be allowed to prevent development'.

### 1. How the proposed new law would work

#### a) Objects

The Bill<sup>1</sup> would no longer give theoretical blanket protection for objects that are covered under the *Aboriginal Relics Act*. Under this proposal, objects not proved 'significant to Aboriginal persons' are not Aboriginal heritage and therefore may be destroyed<sup>2</sup>. Section 33 of the Bill imposes serious penalties for anyone engaging in an activity that may cause harm or even conduct scientific examination without a permit. But a permit can only apply to objects 'significant to Aboriginal persons'. How an undiscovered object can possibly be so categorised is difficult to imagine. This means that objects found during an assessment for a development can be moved out of the way or destroyed unless Aboriginal 'persons' prove the objects are significant to them. This is not the case under the Relics Act where a permit is required.

#### b) Ownership of Aboriginal heritage

There is no recognition of any right for Aboriginals to inherit and own their past. Aboriginal heritage is treated as objects, places and things to be dealt with as the

<sup>1</sup> Until a piece of 'legislation' is passed through the Parliament and receives the Governor's assent, it is a Bill, not a law or legislation.

<sup>2</sup> see sections 4 definition and section 6 'objects'

Government sees fit. The Aboriginal people, as a distinct people, are neither recognised nor given any significant role to play under this proposed law.

Compensation is payable to land owners for acquisition of an Aboriginal place<sup>3</sup> but no compensation is payable to Aboriginal people where permits, management plans or other authority<sup>4</sup> is granted to destroy Aboriginal heritage.

c) Human remains and places

The definition of Aboriginal heritage extends beyond ‘stones and bones’ to all Aboriginal human remains not buried in a public cemetery; any object that relates to Aboriginal occupation *and* is significant to Aboriginal persons, and any place that is significant to Aboriginal persons.

d) Images

The definition of ‘Aboriginal heritage’ does not include images. However ‘intangible and modern’ Aboriginal heritage placed on the Register<sup>5</sup> but wrongful use of images against the wishes of Aboriginal people cannot be regarded as harm<sup>6</sup> and is therefore not protected by the heavy penalties.

The absence of a declaration of Aboriginal rights over places and objects in the Bill means Aborigines have no clear legal right to prevent wrongful use of images of those places and objects other than where there is unconscionable, misleading or deceptive conduct involved. Even then there are problems. There is no protection against production of masks or busts of the Aboriginal dead that may offend Aboriginal people. The public are free<sup>7</sup> to photograph Aboriginal places such as cave paintings, rock carvings or burial places and reproduce the images world-wide.<sup>8</sup>

e) Protection

No one must harm Aboriginal heritage<sup>9</sup> defined as Aboriginal human remains not buried in public cemeteries<sup>10</sup>, or objects or places significant to Aboriginal ‘persons’, not Aboriginal people.<sup>11</sup>

---

<sup>3</sup> s27 (2)

<sup>4</sup> s29 (3)

<sup>5</sup> s 4 definition

<sup>6</sup> s4 ‘damage, deface and destroy’

<sup>7</sup> under the Bill taking photographs is not harm and a management plan could not prevent access because management plans only apply where there is ‘*a proposed land activity*’.

<sup>8</sup> A photographer would have protection of copyright laws against any Aboriginal effort to prevent taking and use of images. The *Competition and Consumer Act 2010*, that protects a disadvantaged party where one party knowingly exploits the special disadvantage of another, would only apply where a commercial activity was involved. If a photographer placed the images on the internet, there is nothing Aborigines could do to prevent it.

<sup>9</sup> s28

<sup>10</sup> s5

<sup>11</sup> ss6 & 7

However, exemptions allow for further harm to Aboriginal heritage where there has been ‘serious ground disturbance’<sup>12</sup> such as farming, road works or other superficial damage to the environment.

Significant penalties ranging from \$65,000 for an individual and \$330,000 for a corporation up to \$200,000 for individual, \$1m for a corporation- depending on their culpability- knowing, reckless or negligently harm- would protect petroglyphs, hand stencils and undamaged middens.<sup>13</sup>

f) Effective Aboriginal involvement

Unlike other heritage law<sup>14</sup> that established a Council representative of the community to make decisions on European/ non-Aboriginal heritage, the Aboriginal Act places practically all authority with the government and reduces the Aboriginal Council to virtual advisors.

Government applies to itself to destroy Aboriginal heritage in the way of government development policies and projects. The Minister issues permits to harm or protect; stop work orders, requires an audit for Aboriginal heritage or impose management plans. The legislation does not provide Aboriginal people with any right to challenge the Minister.

g) Specific requests for the Bill to return the Mollison genealogies to the Aboriginal community (they are currently freely available in libraries and some parts of the documents are offensive to Aboriginal families) are ignored. The possession of part of the Preminghana petroglyphs vandalised and moved by TMAG to some dungeon in Hobart is not dealt with.

## 2. Aboriginal rights to Aboriginal heritage

The draft law is ‘dry and barren’ in dealing with the relationship between Aboriginal people and their heritage. This law treats manifestations of Aboriginal heritage as objects requiring management or destruction by whites so that development is not hindered by the presence of Aboriginal culture. The rich cultural relationship of Aborigines to their past is all but ignored. That past provides a unique and dynamic record of human activity, shaped by Aboriginal people since time began, responding to their surroundings from one generation to the next, giving force to their inherited identity.

That heritage gives distinctiveness, meaning and quality to a modern Aboriginal community, providing a sense of continuity and a source of identity for the original people. Yet under this proposed law, the ‘Aboriginal community’ gets a single fleeting reference in 194 pages of legislation.

---

<sup>12</sup> s44 (2) (a)

<sup>13</sup> s28

<sup>14</sup> Historic Cultural Heritage Act 1995

Under Tasmanian law, anything that is permanently affixed to the land belongs to the owner. Middens, the caves where paintings exist, and rock carvings, for example, are owned by the crown because they are part of the land. In the absence of native title or statute law recognising an Aboriginal legal right to crown land where Aboriginal heritage exists, that heritage vests in the crown. The law fails to deal with this fundamental issue.

The legal position dealing with human remains is different from laws dealing with land and cultural objects. There is no property in human remains.<sup>15</sup> There is a right of descendants of the dead to deal with the dead (funerals, estates). To retrieve Aboriginal human remains from Britain, the TAC sought and got an order from the Supreme Court to take legal control of the 17 Aboriginal dead. The order, made by Chief Justice Underwood in *Re An Application by the Tasmanian Aboriginal Centre Inc*<sup>16</sup> was as good as Aboriginal ownership of the 17 deceased people. Therefore the concession in the *Aboriginal Heritage Protection Act* that Aborigines, through the Minister's hand-picked Aboriginal Council, will own Aboriginal human remains is a Clayton's concession. There is no other form of express recognition of Aboriginal ownership of heritage. This means the new legislation fails to address Aboriginal rights to their inheritance.

Because the Aboriginal Act fails to confirm any broad Aboriginal rights over their heritage, Aborigines can be punished up to \$50,000 for taking cutting tools from a registered Aboriginal place protected by Order of the Minister<sup>17</sup>. This is so even where "*Aboriginal persons have a special relationship with the object or place*"<sup>18</sup> and the reason for the Order in the first place was to preserve that relationship.<sup>19</sup>

The *Aboriginal Relics Act 1975*<sup>20</sup> acknowledges an Aboriginal right to possess an Aboriginal object. This defence is removed under the new Act. There is no stated defence when an authorised officer demands personal particulars from an Aboriginal believed to have committed an offence under the Act.<sup>21</sup>

It is an offence punishable by \$20,000 for an Aboriginal to refuse to disclose the location of unregistered Aboriginal heritage to a government employee<sup>22</sup>. This can lead to an absurd result: an Aboriginal accompanying their white spouse may discover an unregistered midden. The spouse has no obligation to disclose information to authorities because they did not 'reasonably believe' the object or place was Aboriginal.<sup>23</sup> An Aboriginal is unlikely to be believed and could therefore be prosecuted.

---

<sup>15</sup> *Doodeward v Spence* (1908) 6 CLR 406

<sup>16</sup> [2007] TASSC 5

<sup>17</sup> s110

<sup>18</sup> s102 (2) (b)

<sup>19</sup> s102 (2) (c)

<sup>20</sup> s12 (7)

<sup>21</sup> s121 penalty \$10,000.

<sup>22</sup> s23 (3) & s118

<sup>23</sup> s22 (1)

Aborigines in the Northern Territory may access sacred sites despite any contrary law (private property) by 'reasonable means and the most direct practical route'.<sup>24</sup> Tasmanian Aborigines will be denied the same right by this new Tasmanian law.

The Aboriginal Heritage Council can make heritage agreements<sup>25</sup> including for access to or use of an Aboriginal place but if the land is crown land, only with the crown,<sup>26</sup> or if private land, only with the owner<sup>27</sup>. There is no power for the Council to confirm Aboriginal rights to heritage places or objects.

### 3. Register of heritage

How things get on the Register is somewhat confusing. Equivalent heritage law, the *Historic Cultural Heritage Act*, provides for the Heritage Council of its own accord, or on application by any person, to list a place that satisfies the criteria.<sup>28</sup> Further procedures for permanent listing are set out in Part 4 of that Act. There is nothing like that in the Aboriginal Act.

Things that can be registered under the *Aboriginal Heritage Protection Act* are Aboriginal human remains<sup>29</sup>, objects, places, permits, management plans, heritage agreements, stop orders and similar administrative records.<sup>30</sup>

The Register will be kept by the department<sup>31</sup>. The Register will identify the whereabouts of Aboriginal heritage and describe what the heritage consists of.<sup>32</sup> Other features of the Register are:

- there is *no right* for *Aboriginals* to access the register although the following have a *right of access*:
  - crown lands department;
  - local council;
  - any public servant needing access as part of their job;
  - an applicant for a permit to destroy etc;
  - a developer;
  - a developer wanting to build a dam or council proposing a planning scheme;
  - Value-General for valuing land;
  - a public servant responsible for administering the Register.
  - a member of the public to a synopsis of the register on a computer data base.
- the Secretary of the department, in their *absolute discretion*, may grant access to an owner or prospective purchaser of land. Aborigines do not have to be consulted.

#### Public access to the Register

---

<sup>24</sup> s47 Northern Territory Aboriginal Sacred Sites Act

<sup>25</sup> s77

<sup>26</sup> s78 (2) (a)

<sup>27</sup> s78 (2) (b)

<sup>28</sup> s16 HCHA

<sup>29</sup> not buried in a public cemetery- see s5

<sup>30</sup> s112

<sup>31</sup> s112

<sup>32</sup> s113 (2) (a)& (b)

“To assist the Tasmanian public”, s115 states the Secretary may establish a public/summary computer data base for public inspection. The data base must make it easy for the public to search for Aboriginal heritage although a particular reason for access is not required. As there is no mention of Aboriginal people in Part 11 dealing with the Register, it must be taken that Aborigines have no greater right of access than the public.

### **Restricted information**

After consulting the Aboriginal Council, the Secretary has an absolute discretion<sup>33</sup> to decide if information on the publicly accessible data base should be restricted. The Council can only make recommendations<sup>34</sup> for restricting access.

## **4. Powers of Minister**

The Minister has an absolute discretion to:

- grant permits;
- exhibit or authorise scientific or other investigation of an unregistered Aboriginal object or place provided (s)he gets the agreement of the possessor of the object, or owner of the land where the place is<sup>35</sup>. The Minister is not required to gain Aboriginal permission so long as the Council is consulted.<sup>36</sup>
- approve or not approve<sup>37</sup>, or vary<sup>38</sup> a management plan. Any appeals against the Minister’s decision are with the developer, not Aborigines.<sup>39</sup>
- appoint the Aboriginal Heritage Council<sup>40</sup>.
- require or approve Aboriginal heritage management plans.
- protect Aboriginal heritage.

The Minister may compulsorily acquire a registered Aboriginal place but not just because the place is of exceptional significance to Aboriginal persons: *the Minister must believe* the place is of exceptional significance to Aboriginal persons<sup>41</sup>.

## **5. The 7 member Aboriginal Heritage Council**

The members must be Aboriginal. The Minister appoints the members and the Chairperson for 3 years. Members can be public servants.

### **Powers of Aboriginal Council**

- a) Owns Aboriginal human remains not buried in public cemeteries. This would include all Aborigines buried in the Cape Barren cemetery, or outside Oyster Cove or at Wybalena;
- b) decides scientific examination of Aboriginal place or object, or removal from Tasmania of an object listed on the register<sup>42</sup>;

---

<sup>33</sup> s114 (4) & s116 (3)

<sup>34</sup> s116 (3) (c)

<sup>35</sup> s24 (2)

<sup>36</sup> s24 (2) AHPA

<sup>37</sup> s53 (5)

<sup>38</sup> s57

<sup>39</sup> s62 (4) does not expressly exclude Aborigines but appeals are aimed at the developer. S74 (2) benefits the developer as well.

<sup>40</sup> s14 (1)

<sup>41</sup> s27

- c) advise the Minister whether heritage is significant;<sup>43</sup>
- d) act as a consultant<sup>44</sup> to the Minister so the Minister is not required to obtain Aboriginal community views;
- e) replaces TALSC under the Coroners Act as the body to deal with **human remains** uncovered from burial grounds.<sup>45</sup> If the Council believes a person has Aboriginal remains it can demand possession of them.<sup>46</sup> If the person refuses on the grounds they are not Aboriginal remains the Council can ask the Minister to have the remains examined<sup>47</sup> but the Minister is not compelled to agree.<sup>48</sup> A person in possession of Aboriginal remains who claims the remains have suffered destruction through ‘natural forces’<sup>49</sup> can ignore the Council’s demand for handing the remains over;
- f) the Council must notify the Registrar of having possession of Aboriginal human remains and must recommend an appropriate entry in the Register
- g) if it chooses to evaluate a management plan<sup>50</sup> can require a developer to consult them but, if the developer disagrees with the Council’s evaluation, the Council is powerless to go further.<sup>51</sup>

## 6. Management Plans

Any development that causes environmental harm involving damage to native vegetation or the habitat or native animals, or an alteration of the environment to its detriment or degradation<sup>52</sup> may require an Aboriginal heritage plan.<sup>53</sup> This mandatory requirement is no longer mandatory if the Director of Environmental Management does *not* require the development to be considered under s24 of the *Environmental Management and Pollution Control Act 1994*<sup>54</sup>. Even then, the regulations can exempt the development which overrides the Director of Environmental Management.<sup>55</sup>

Alternatively, the Minister may impose<sup>56</sup> a management plan on a developer or the regulations may require it<sup>57</sup> unless the development is exempt. The Council is able to recommend a management plan.<sup>58</sup>

A plan can cover an area of land, water, natural feature, archaeological site or an area surrounding such places<sup>59</sup>. The plan must set out the results of an assessment including what Aboriginal heritage may be affected and what measures will need to be taken<sup>60</sup>.

---

<sup>42</sup> s32

<sup>43</sup> s15

<sup>44</sup> s15 (c)

<sup>45</sup> s142

<sup>46</sup> s21

<sup>47</sup> s21 (7)

<sup>48</sup> s21 (8)

<sup>49</sup> s21 (6) (c)

<sup>50</sup> s49

<sup>51</sup> s51 (11)

<sup>52</sup> s 3A WA EPA

<sup>53</sup> s 43 AHPA

<sup>54</sup> s42 (a) AHPA

<sup>55</sup> s44 (1)

<sup>56</sup> s43 (1) (c)

<sup>57</sup> s43 (1) (a)

<sup>58</sup> s43 (4) (b) although the section is unclear as to whom the Council is making the recommendation.

<sup>59</sup> s4 definition AHPA

<sup>60</sup> s42 AHPA

An assessment involves human remains, or objects<sup>61</sup> or places that are significant to Aboriginal persons.<sup>62</sup>

Fences, or a temporary stage, or ‘*construction or maintenance works on, over or under established transport infrastructure*’ such as air, rail, road, water, cable, pipelines,<sup>63</sup> or their demolition<sup>64</sup> are exempt from mandatory management plans<sup>65</sup>. Subdivisions of generally small areas are exempt along with dams the size of which is determined by the Minister, or any other development the Minister declares exempt under regulation.<sup>66</sup>

Any area of land the developer can show has been subject to serious ground disturbance such as ploughed farms, middens damaged by vehicles or dams made by bull dozers, is exempt and does not need a management plan<sup>67</sup> and the Minister may further exempt any high impact works by regulation<sup>68</sup>.

None of the exemptions apply where the area has *registered* Aboriginal heritage or where Aboriginal heritage is discovered during works.<sup>69</sup> Any developer who can demonstrate that ‘*in the circumstances*’ (not defined) there is no need for a management plan is also exempt.<sup>70</sup>

## 7. The Aboriginal people

There is no express recognition of the rights of Aborigines to their heritage. Whether heritage is significant depends on the views of ‘Aboriginal persons,’<sup>71</sup> not ‘Aboriginal people’. This could provide for the Minister to only seek the views of the Ministerial hand-picked Council members.

The only reference to ‘the Aboriginal community’ in the whole Act is where the Council is required to consult about scientific examination, removal of an object from the State or sale of an object.<sup>72</sup>

Aborigines will have a legal duty to notify the Secretary of an Aboriginal object or place and can be fined up to \$50,000 if they fail to notify.<sup>73</sup>

## 8. Appeals

Relevant land owners, but not Aborigines, are to be consulted where an assessment for Aboriginal heritage is carried out under permit.<sup>74</sup> The issuing authority- Minister, local government or Aboriginal Council, must notify the applicant<sup>75</sup> but is not required to notify Aborigines.

Developers and consultants,<sup>76</sup> have automatic rights of appeal<sup>77</sup> against a Ministerial decision.

Aborigines have no such similar right. Aborigines are not given explicit rights to negotiate or appeal but may argue they have ‘an interest’ in Aboriginal heritage.<sup>78</sup>

---

<sup>61</sup> s5 AHPA

<sup>62</sup> s7 AHPA

<sup>63</sup> dictionary definition of ‘transport infrastructure’

<sup>64</sup> s8 AHPA

<sup>65</sup> s43 (2) (a) AHPA

<sup>66</sup> s8 (1) (k) AHPA

<sup>67</sup> see definition of ‘serious ground disturbance’ in s4

<sup>68</sup> s44 (1)

<sup>69</sup> s8 (2) AHPA

<sup>70</sup> s44 (2) (b)

<sup>71</sup> see section 6 & 7

<sup>72</sup> s34 (2) (a)

<sup>73</sup> s21 (2)

<sup>74</sup> s34 (4)

<sup>75</sup> s34 (9)

<sup>76</sup> s42



## 9. Comparison of laws for European and Aboriginal heritage

### a) Stop work orders

Under the Heritage Act, stop work orders apply to ‘stop or not commence any works’<sup>79</sup>. Under the Aboriginal Act, stop work orders only apply to unstarted or preparatory works<sup>80</sup>.

### b) Aboriginal Council and Tasmanian Heritage Council

The Tasmanian Heritage Council administers the Register, determine if heritage places are registered or removed, require the Minister declare a heritage area,<sup>81</sup> approve or prevent works in a registered area,<sup>82</sup> and powers of the Minister to make heritage agreements<sup>83</sup> or give stop work orders<sup>84</sup> cannot be made without support of the THC. The Aboriginal Council has no such powers.

The THC delegates are appointed by the Minister but must represent particular groups or interests<sup>85</sup>. In contrast, delegates to the Aboriginal Council are not required to represent Aboriginal people.<sup>86</sup>

Michael Mansell  
Legal Director  
15<sup>th</sup> November 2012

---

<sup>77</sup> s62

<sup>78</sup> for example, where a management plan is in issue under s50 (7) (c)

<sup>79</sup> s57 (2)

<sup>80</sup> s91 definition of ‘stop’.

<sup>81</sup> s29 HCHA

<sup>82</sup> s32 HCHA and 39 (1) (b)

<sup>83</sup> s47 HCHA

<sup>84</sup> s57 HCHA

<sup>85</sup> s6 HCHA

<sup>86</sup> s14 AHPA