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Tasmanian Planning Commission
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Submission – 6.1 Aboriginal Cultural Heritage Policy

About the Aboriginal Land Council of Tasmania

The Aboriginal Land Council of Tasmania (ALCT) is the statutory body, established under Tasmania's *Aboriginal Lands Act (1995)*, to own and manage returned land on behalf of lutruwita/Tasmania's Aboriginal community.

ALCT owns and is responsible for the management of approximately 70,000 ha of land, returned to Aboriginal ownership since 1995. This represents less than 1% of the land mass of lutruwita/Tasmania.

This submission is made in the knowledge that all land and sea in Tasmania was Aboriginal Land and none was ever ceded. This truth is beyond dispute and includes land and sea, and landscapes/seascapes important for all elements of the Tasmanian community and economy.

The Aboriginal community aspires to achieve more land and sea returns across lutruwita and has active claims over some areas and latent claims over others. This aspiration includes freehold land.

ALCT believes all Aboriginal heritage should be legally owned by the Aboriginal people and is actively working to achieve better levels of protection and respect for the heritage of our old people.

ALCT is engaged with departmental staff over numerous processes pertaining to Aboriginal heritage protection, including some with direct relevance to the Aboriginal Cultural Heritage Protection Policy. This includes the review of the *Aboriginal Heritage Act*, the review of the Reserve Activity Assessment process, the 2030

Tasmanian Visitor Economy Strategy and the APCA and West Coast off-road vehicle project.

Aboriginal heritage protection in lutruwita/Tasmania

Tasmania's Aboriginal heritage protection legislation, the *Aboriginal Heritage Act* (1975), is comprehensively rejected by all relevant stakeholders and is universally acknowledged as being inadequate.

The relevant minister has admitted in Parliament that current application is unable to actually demonstrate protection of Aboriginal cultural heritage values and this reality has been borne out with the assessments of numerous proposed developments, including the cable car on kunanyi, Robbins Island wind farm, Lake Malbena helicopter-accessed huts and Little Dog Island tourism accommodation, amongst many others.

In response to a formal review process, in July 2021, Minister Roger Jaensch tabled a report in Parliamentⁱ that both makes this admission, and commits Government to the introduction of new legislation and other actions.

Amongst other things, Minister Jaensch's tabling report states:

"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." (pg. 2 - emphasis added)

No new legislation has been presented to Parliament.

The 2021 tabling report goes on to state:

*"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.*

*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. (pg. 3 and 4 emphasis added)*

Neither the RAA or EOI processes have been amended. Despite this, the Coordinator General's [website](#) lists 13 tourism developments in parks and reserves as having 'approvals underway.' (pg. 3)

In addition, it commits to:

"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."

We understand that the Aboriginal Cultural Heritage Policy is presented to, at least in part, give effect to this last commitment.

Concern about the impact of development on Aboriginal heritage is widespread.

The most recent report of the statutory advisory body on Aboriginal heritage, the Aboriginal Heritage Council, has explicitly articulated the parlous state of Government treatment of its advice, and concern about tourism developments in national parks and reserves. In its 2021/22 [Year In Review](#), the Council states:

"Six permits were opposed by Council but subsequently approved by the Minister." (pg. 11)

And

Tourism

One of the ongoing concerns for Council during the 2021-22 period has been the growing demand for tourism ventures in the Tasmanian Wilderness World Heritage Area (TWWHA). Council clearly voiced its opposition to development in wilderness areas that impact Aboriginal heritage, particularly in the TWWHA. To be clear, the Council is not opposed to all tourism, but would like to see proposals that do not have direct or indirect impacts to our heritage. (pg. 13)

ALCT notes that, with active reviews of the *Aboriginal Heritage Act (1975)*, Reserve Activity Assessment and EOI processes underway and proposed ways forward yet to be finalised, Aboriginal people are demonstrably disadvantaged in the consultation over this Aboriginal Cultural Heritage Policy.

Without finalised and effective Aboriginal heritage protection legislation and processes, it is impossible to have a full picture of the treatment of Aboriginal heritage and how it is to be assessed and protected. This is lamentable and continues an approach that disadvantages Aboriginal interests, disenfranchises Aboriginal people and is an indictment on the approach of government.

Submission

This submission works through the Aboriginal Cultural Heritage Policy systematically and makes the below observations.

State Policy

Given the significance of Aboriginal cultural heritage to lutruwita/Tasmania's shared history, and the purported commitment the state government holds towards Aboriginal people and the protection of our heritage, an Aboriginal Cultural Heritage Policy should be developed and gazetted as a State Policy.

This would inform a whole-of-government approach to Aboriginal heritage protection and assist with ensuring a consistent, equitable and effective approach to Aboriginal heritage and its protection, across all elements of government business and decision making.

6.1.1 Objective

'Support' should be changed to 'Ensure'.

See below re commentary on the notion of 'custodianship' and the definition of 'places'.

6.1.3 Strategies

1.a) - ALCT makes the point that, until Aboriginal people are afforded legal ownership of Aboriginal heritage, and final decision-making power over its fate, we will never be afforded true 'custodianship' of Aboriginal cultural heritage values.

Formal and urban definitions of a 'custodian' include being an owner and carer of property and one entrusted with guarding and keeping something (or someone) safe.

As it stands, and as currently proposed for new Aboriginal Cultural Heritage Protection legislation, Aboriginal people neither own Aboriginal heritage values not on Aboriginal Land, nor have genuine capacity to ensure and insist it is safeguarded against damage, including by planned and assessed development. The six permits approved by the minister in 2021/22, against the advice of Aboriginal people, are case in point.

Whilst describing Aboriginal people as 'custodians' of their cultural heritage is common practice and engenders positive feelings and perceptions in both the author and the reader, it is demonstrably not borne out in reality.

If 'custodian' is to be retained as a descriptor of the status of Aboriginal people's relationship to their heritage values, corresponding powers of legal ownership and

protection must be afforded to Aboriginal people across all statutory mechanisms and policy platforms of government. Failure to do so will render this claim meaningless.

1.d) An Aboriginal Cultural Heritage 'place' is not defined in the Aboriginal Cultural Heritage Policy or in any other instrument used for the identification and protection of Aboriginal heritage.

With regards to 'place', other assessment processes under review (*Aboriginal Heritage Act*, Reserve Activity Assessment) and management frameworks (Tasmanian Wilderness World Heritage Area Management Plan and Wellington Park Management Plan as examples) explicitly identify the heritage value of a 'Cultural Landscape' as requiring prescription and mechanisms for protection.

The draft Aboriginal Cultural Heritage Policy omits to mention 'Cultural Landscape' as an explicit Aboriginal heritage value, despite its widespread acceptance. It instead introduces the nebulous and ill-defined concept of 'place'. Are they the same thing? Should there be consistency across government approaches to Aboriginal heritage?

ALCT fails to see how strategy 1.d) is to be meaningfully implemented without a framework to proactively identify and declare Aboriginal heritage 'places', and the development of credible and implementable avenues (via planning and other mechanisms) for Aboriginal people to '*identify, manage and, where appropriate, continue to use and cultural identify*' with them.

ALCT sees nothing in the Resource Management and Planning System (RMPS) that can or will give effect to this strategy or assist with the identification and declaration of Aboriginal heritage 'places'.

2. The use of the word 'encourage', as opposed to 'ensure', in Strategy 2 does not instil confidence that this strategy will make a meaningful difference to the protection of Aboriginal heritage.

Developers and proponents are frequently well-aware of the significance of Aboriginal heritage on land they are proposing an activity on, with little regard for its protection. Indeed, we have seen cases where they take active steps to minimise or diminish understanding and assessment of the impact of their proposal on that Aboriginal cultural heritage.

By way of example, the Tasmanian Government's proposal to expand 4WD tracks on the takayna coastline is case in point. More recently and currently (admittedly in the development application context) the kunanyi cable car proponent and the kunanyi zipline proponent ignore(d) minimum guidelines pertaining to the production of an Aboriginal Heritage Assessment report to dodge a full understanding of their proposal's impact on Aboriginal heritage and the Aboriginal community's view on it.

Unless this strategy in the Policy is backed up with clear, enforceable requirements for Aboriginal heritage to be properly assessed and protected, ALCT would place little value in this, seemingly voluntary, strategy.

Further, under the planning system there is no established framework or assessment criteria to guide the '*investigation of land for the presence of Aboriginal Cultural Heritage places and objects*' and to establish if a proposal '*could potentially harm and Aboriginal Cultural Heritage values associated with that land*'.

The State Planning Provisions do not provide for zones or codes that explicitly or implicitly provide prescriptions for the protection and management of Aboriginal cultural heritage. Indeed, some codes, such as the Local Historic Heritage Code explicitly exclude Aboriginal cultural heritage values (see clause C6.1.2).

Knowledge and registration of Aboriginal Cultural Heritage 'sites' is limited by a range of factors, including where surveys have occurred, who holds the knowledge and whether that knowledge has been formally reported to the official database. Nobody would claim that the Aboriginal heritage register is comprehensive and complete, making an 'investigation' inherently inadequate.

ALCT notes that the Historic Cultural Heritage Policy uses much clearer and prescriptive language in its draft strategies. For example, the Historic Cultural Heritage Policy, states "*Identify buildings, part of buildings, places/features, infrastructure, precincts and landscapes that contain significant local historic cultural heritage values, describe the significance of those values, and promote access to this information to ensure identified values are considered early in strategic and statutory planning processes.*" (clause 6.2.3 (2)) and then states "*Provide for the protection, and encourage the restoration of identified buildings, part of buildings, infrastructure, places/features, precincts and landscapes that contain local historic cultural heritage significance.*" (Clause 6.2.3(3) emphasis added)

By contrast, the Aboriginal Cultural Heritage Policy lowers the bar to '*encourage the understanding and consideration of Aboriginal Cultural Heritage and support the investigation of land for the presence of Aboriginal Cultural Heritage places and objects where that land is proposed to be designated for use and development that could potentially harm any Aboriginal Cultural Heritage values associated with that land.*' (emphasis added)

There appears not to be equivalence in the strength of language used when comparing the two draft policies. If this is because the real mechanisms to protect Aboriginal heritage values sit outside the RMPS and within the *Aboriginal Heritage Act* (or a new Act), this should be made explicit, and it reinforces our call for the new Act to assume responsibility for delivering the aspirations of this policy.

As mentioned above, 'places' has no meaning or definition so it is difficult to see how Aboriginal Heritage Tasmania (AHT) can consider investigation of this value and assess impact.

If this policy is to be given genuine effect, ALCT believes its intent and function should be captured in a new *Aboriginal Heritage Protection Act* and clear processes, (including community consultation) and criteria established.

Failure to do so leaves AHT exposed to providing 'advice' using a nebulous definitions and process and no assessment criteria against which to measure potential impacts on Aboriginal Heritage values.

Additionally, AHT is an agency within the Department of Premier and Cabinet and entirely subservient within that context. It does not 'represent' Tasmanian Aboriginal people and its involvement in the provision of advice does not constitute the involvement of the Aboriginal community.

As such, there are embedded inconsistencies within this Aboriginal Cultural Heritage Policy. While the intent of the objective and strategies 1. a) and b) are to empower and support Aboriginal people in the oversight and management of our heritage, Strategy 2 limits involvement to a government agency and even then, constrains power to the provision of 'advice' as part of an 'investigation'. Others make the decisions.

3. While Strategy 3 is noble in intent and a welcome articulation of aspiration, ALCT notes that there is no mechanism within the RMPS for the involvement of Aboriginal people as part of giving it effect.

Unless there is some linkage to the new *Aboriginal Heritage Protection Act*, it is difficult to see how this Strategy will deliver meaningful change, as intended in the Tabling Report into the review of the *Aboriginal Heritage Act (1975)*.

Conclusion

There is no doubt, and even less, contention that statutory and other mechanisms to deliver meaningful protection of Aboriginal heritage values is in a parlous state in Tasmania.

While much of the intent of the Aboriginal Cultural Heritage Policy is welcome, we see it delivering little meaningful improvement for Aboriginal people and our heritage. Strategies appear either unable to be credibly implemented, or already essentially in place.

The policy introduces concepts, such as an Aboriginal Heritage Place which, while we support the concept (all of lutruwita is an Aboriginal Heritage Place), does not exist in statute.

The RMPS does not include tangible, well defined and accountable consideration of impacts on Aboriginal heritage. For a range of reasons, many sound, this role is outsourced to the *Aboriginal Heritage Act (1975)*, however as acknowledged by the relevant minister, this statute '*does not provide effective mechanisms for protection, nor does it adequately consider the significance of Aboriginal heritage in the context of Aboriginal culture*'.

Without deference, or some tangible link across to new Aboriginal heritage protection legislation, with its objective and strategies enlivened in that legislation, this policy will only serve to give the false impression of care and consideration of Aboriginal heritage, and Aboriginal people's role in the stewardship of it.

Planning law is complex and complicated. Nebulous, ill-defined and unimplementable policy does not serve to simplify understanding or strengthen the processes and protections with those laws.

<https://www.aboriginalheritage.tas.gov.au/Documents/Tabling%20Report%20-%20Review%20of%20the%20Aboriginal%20Heritage%20Act%201975.pdf>ⁱ