NORTHERN MIDLANDS COUNCIL

COUNCIL POLICIES

C+D 2

Policy Name:	**Bond Payment and Return Policy**
Originated Date:	Adopted XXXXXX Min Ref: .../19
Amended Date/s:	
Applicable Legislation:	
Dataworks Reference:	44/001/001
Objective	To provide guidelines for the payment and return of bonds as security for incomplete infrastructure works at development sites.

1. PURPOSE

The purpose of this policy is to identify at what point developers are required to pay a bond to Council for infrastructure works, such as driveway, kerb, channel, landscaping and footpaths resulting from a development. The policy also identifies the requirements to be met by the developer to trigger return of the bond.

2. APPLICABLE LEGISLATION

Land Use Planning and Approvals Act 1993
Local Government (Building & Miscellaneous Provisions Act) 1993
Local Government (Highways) Act 1982
Urban Drainage Act 2013
Building Act 2016

3. DEFINITIONS

Building Construction Bond – applicable for Class 1-10 building works, collected when development, building or plumbing works are close to or within Council infrastructure and risk damage to Council infrastructure.

Council – Northern Midlands Council

Council Infrastructure – any road, driveway, kerb, channel, nature strip, footpath, fencing or landscaping in its control.

Damaged Infrastructure works – any road, driveway, kerb, channel, nature strip, footpath, fencing or landscaping that has been damaged by the developer during the development.

Development bond – applicable where Infrastructure works are incomplete prior to title plans being sealed.

Developer – person or company responsible for Development.

Development – any subdivision, building or landscaping occurring in accordance with a planning permit issued by the Northern Midlands Council.

Fee schedule – fee schedule as approved by Council each financial year.

Inadequate infrastructure works - any driveway, kerb, channel, nature strip, footpath, fencing or landscaping to be completed by a developer in accordance with their planning or building permit, that has not been completed to Council standard.

Infrastructure works - any driveway, kerb, channel, nature strip, footpath, fencing or landscaping to be completed by a developer in accordance with their planning or building permit, that has been completed to Council standard.

4. OPERATION – BUILDING CONSTRUCTION BOND

4.1 Payment of a Building Construction bond

Where development occurs requiring Infrastructure works to be completed by the developer, the developer must pay Council a bond in accordance with Council's fee schedule.

A bond can be paid in cash or by way of bank guarantee.

4.2 Waiver of a Building Construction bond

A developer may make application to Council to waive a bond. An application must be in writing and approved by Council's Works Manager or General Manager.

4.3 Timeframe for completion of works to which a Building Construction bond relates

A developer has twelve (12) months from the date of commencement of a subdivision development to complete the Infrastructure works. A developer may make an application to Council for an extension of time to complete the Infrastructure works. An application must be in writing and approved by Council's Works Manager.

Or

A developer has three (3) months from the date of Certificate of Building Completion to complete the Infrastructure works. A developer may make application to Council for an extension of time to complete the Infrastructure works. An application must be in writing and approved by Council's Works Manager.

4.4 Failure to complete works to which a Building Construction bond relates

Infrastructure works must be completed to the satisfaction of Council's Works Manager or Engineering Officer. Failure to complete works at all, or, to the satisfaction of the Works Manager or Engineering Officer will result in the works being Inadequate

Infrastructure Works. Inadequate Infrastructure Works must be rectified by the developer.

If a developer fails to complete or repair Inadequate Infrastructure Works within three (3) months of it being identified by Council the bond will be forfeited to Council.

Council may complete the works and apply the bond being held to the cost of completion of the Inadequate Infrastructure Works.

4.5 Refund of a Building Construction bond

If a developer has completed the Infrastructure works or Inadequate infrastructure works to the satisfaction of Council's Works Manager or Engineering Officer, and, an application to return bond has been received by Council, Council will refund the bond in full.

An application to return bond form is available on Council's website.

5. OPERATION – DEVELOPMENT BOND

5.1 Payment of a Development bond

Where Infrastructure works are incomplete, Council may accept a bond prior to the sealing of final title plans.

A Development bond is calculated in accordance with the value of the work required to be completed as agreed by the developer and Council.

A bond can be paid in cash or by way of bank guarantee.

5.2 Waiver of a Development bond

A developer may make application to Council to waive a bond. An application must be in writing and approved by Council's Works Manager or General Manager.

5.3 Timeframe for completion of works to which a Development bond relates

A developer has six (6) months from the date of payment of the Development bond to complete the Infrastructure works. A developer may make an application to Council for an extension of time to complete the Infrastructure works. An application must be in writing and approved by Council's Works Manager.

5.4 Failure to complete works to which a Development bond relates

Infrastructure works must be completed to the satisfaction of Council's Works Manager or Engineering Officer. Failure to complete works at all, or, to the satisfaction of the Works Manager or Engineering Officer will result in the works being Inadequate

Infrastructure Works. Inadequate Infrastructure Works must be rectified by the developer.

If a developer fails to complete or repair Inadequate Infrastructure Works within three (3) months of it being identified by Council the bond will be forfeited to Council.

Council may complete the works and apply the bond being held to the cost of completion of the Inadequate Infrastructure Works.

5.5 Refund of a Development bond

If a developer has completed the Infrastructure works or Inadequate infrastructure works to the satisfaction of Council's Works Manager or Engineering Officer, Council will refund the bond in full, and, an application to return bond has been received by Council, Council will refund the bond in full.

An application to return bond form is available on Council's website.

5. REVIEW

This Policy is to be reviewed every 4 years.

NORTHERN MIDLANDS COUNCIL
COUNCIL POLICIES

C+D 3

Policy Name:	**Public Open Space Contribution**
Originated Date:	Adopted 13 December 2004 – Min. No. 406/04 (as Policy 40)
Amended Date/s:	Amended 20 February 2012-Min. No. 41/12 Amended 15 June 2009 – Min. No. 169/09 Amended 21 June 2010 – Min. No. 150/10 Amended 16 February 2015 – Min. No. 53/15
Applicable Legislation:	Section 117 of the *Local Government (Building & Miscellaneous Provisions) Act 1993* Section 205 of the *Local Government Act 1993*
Dataworks Reference:	44/001/001
Objective	To establish a consistent approach on the application of public open space for new subdivisions.

That the Council in accordance with Section 117 of the *Local Government (Building and Miscellaneous Provisions) Act* 1993 adopt the following policy on the application of public open space for new subdivisions.

Application of Policy

1 Public Open Space shall be taken in accordance with this policy on land zoned general residential, general industrial, light industrial, commercial, local business, general business, low density residential, rural living and village.

2 Public Open Space contributions in excess of this policy may be offered by the developer or in all other circumstances as resolved at a General Council meeting.

3 With regard to subdivision of land, the rate specified in the *Local Government (Building and Miscellaneous Provisions) Act 1993* is 5% of the land area contained in the Plan of Subdivision.

4 The location of the land contribution, within the subject land, shall be as determined by Council at a General Council meeting or otherwise agreed between Council and the developer.

5 At Council's discretion, a cash contribution may be accepted in lieu of all or part of the land requirement.

The Public Open Space Rate

1 The Public Open Space Rate shall be $1,200 per additional lot created (i.e. A subdivision that

turns one lot into four has created three additional lots and will attract a public open space contribution/fee of $3,600.)

OR

2 The applicant may, at his or her discretion, obtain a current (not less than one month old) valuation, by a registered land valuer, of the subject land, less one of the proposed lots (or strata units). The Public Open Space Rate shall total 5% of that value.

Effect of Previous Public Open Space Contribution

1 Where it can be shown that previous Public Open Space contributions have been paid in regard to the creation of the subject land title(s), Council may, at the developer's request, have regard to this and apply a reduced contribution.

2 In its consideration of any request under section 10, the following decision of the Resource Management and Planning Appeal Tribunal is relevant.

3 In *G Cooley v Glenorchy City Council [2008] (TASRMPAT 256)* The Tribunal held that the previous contributions did not preclude the Appellant from having to make a contribution in relation to this subdivision. The Tribunal was satisfied that the additional subdivision further increased the demand for public open space and it was therefore appropriate to require a contribution as a condition of the approval.

Policy Name:	**Public Open Space Contribution**
Originated Date:	Adopted 13 December 2004 – Min. No. 406/04 (as Policy 40)
Amended Date/s:	Amended 15 June 2009 – Min. No. 169/09 Amended 21 June 2010 – Min. No. 150/10 Amended 20 February 2012-Min. No. 41/12 Amended 16 February 2015 – Min. No. 53/15 Amended 2019 – Min. No. ..../19
Applicable Legislation:	Section 117 of the *Local Government (Building & Miscellaneous Provisions) Act 1993* Section 205 of the *Local Government Act 1993*
ECM Reference:	44/001/001
Objective	To establish a consistent approach on the application of public open space for new subdivisions.

Council in accordance with Section 117 of the *Local Government (Building and Miscellaneous Provisions) Act* 1993 adopts the following policy on the application of public open space for subdivisions.

Application of Policy

1 Public Open Space shall be taken in accordance with this policy on land zoned general residential, general industrial, light industrial, commercial, local business, general business, low density residential, rural living and village.

2 Public Open Space contributions in excess of this policy may be offered by the developer or in all other circumstances as resolved at a General Council meeting.

3 With regard to subdivision of land, the area specified in Section 116 (1) of the *Local Government (Building and Miscellaneous Provisions) Act 1993* is one-twentieth (5%) of the whole area contained in the Plan of Subdivision.

4 At Council's discretion, a cash contribution may be accepted in lieu of all or part of the land requirement.

5 This policy does not apply to a boundary adjustment as defined within Clause 9.3.1 of the *Northern Midlands Interim Planning Scheme 2013*.

The Public Open Space Rate

Additional Lots Created

1 The Public Open Space Rate shall be $1,400 per additional lot created (i.e. a subdivision that turns one lot into four has created three additional lots and will attract a public open space contribution/fee of $4,200.)

OR

2 The applicant may, at his or her discretion, obtain a current (not less than one month

old) valuation, by a registered land valuer, of the subject land, less one of the proposed lots (or strata units). The Public Open Space Rate shall total 5% of that value.

No Additional Lots Created

1 Where no additional lots are created, the Public Open Space Rate shall be $1,400 per lot that did not meet the requirements for a minimum lot under Section 109 of the *Local Government (Building & Miscellaneous Provisions) Act 1993*.

OR

2 The applicant may, at his or her discretion, obtain a current (not less than one month old) valuation, by a registered land valuer, of the subject land, less the lots that met the requirements for a minimum lot under Section 109 of the *Local Government (Building and Miscellaneous Provisions) Act 1993*. The Public Open Space Rate shall total 5% of that value.

Effect of Previous Public Open Space Contribution

1 Where it can be shown that previous Public Open Space contributions have been paid in regard to the creation of the subject land title(s), Council may, at the developer's request, have regard to this and apply a reduced contribution.

2 In its consideration of any request under the preceding clause, the following decision of the Resource Management and Planning Appeal Tribunal is relevant.

3 In *G Cooley v Glenorchy City Council [2008] (TASRMPAT 256)* the Tribunal held that the previous contributions did not preclude the Appellant from having to make a contribution in relation to this subdivision. The Tribunal was satisfied that the additional subdivision further increased the demand for public open space and it was therefore appropriate to require a contribution as a condition of the approval.

C+D 4

Minister for Aboriginal Affairs
Minister for Disability Services and Community Development
Minister for Sport and Recreation
Minister for Women
Level 5, 4 Salamanca Place, Parliament Square Building HOBART TAS 7000 Australia
GPO Box 123 HOBART TAS 7001 Australia
Ph: +61 3 6165 7770
Email: jacquie.petrusma@dpac.tas.gov.au

Tasmanian Government

30 May 2019

Mr Des Jennings
General Manager
Northern Midlands Council
council@nmc.tas.gov.au

Dear Mr Jennings

The Tasmanian Government recognises Tasmania's remarkable 40,000 plus years of Aboriginal heritage and culture and remains strongly committed to its ongoing management and protection. It is because we have a genuine desire to make a positive difference that we amended the former *Aboriginal Relics Act 1975* in 2017 to address some of its most outdated and problematic elements, and replaced it with the *Aboriginal Heritage Act 1975*.

One of the important amendments we introduced was a commitment to review the *Aboriginal Heritage Act 1975* (the Act) within three years. The time to start consultation is now and so I write to invite your involvement in the review process.

There will be multiple opportunities throughout 2019 and 2020 for people and organisations to contribute their views. The first opportunity is a 16-week period for public comment, starting on Saturday 1 June 2019 and running through to Saturday 21 September 2019.

A Discussion Paper has been prepared by the Department of Primary Industries, Parks, Water and Environment to provide information and to stimulate discussion on the design and operation of the current Act.

The Discussion Paper, along with further information about the review process, is available for viewing and download on the Department's website at: www.dpipwe.tas.gov.au/aboriginalheritageact

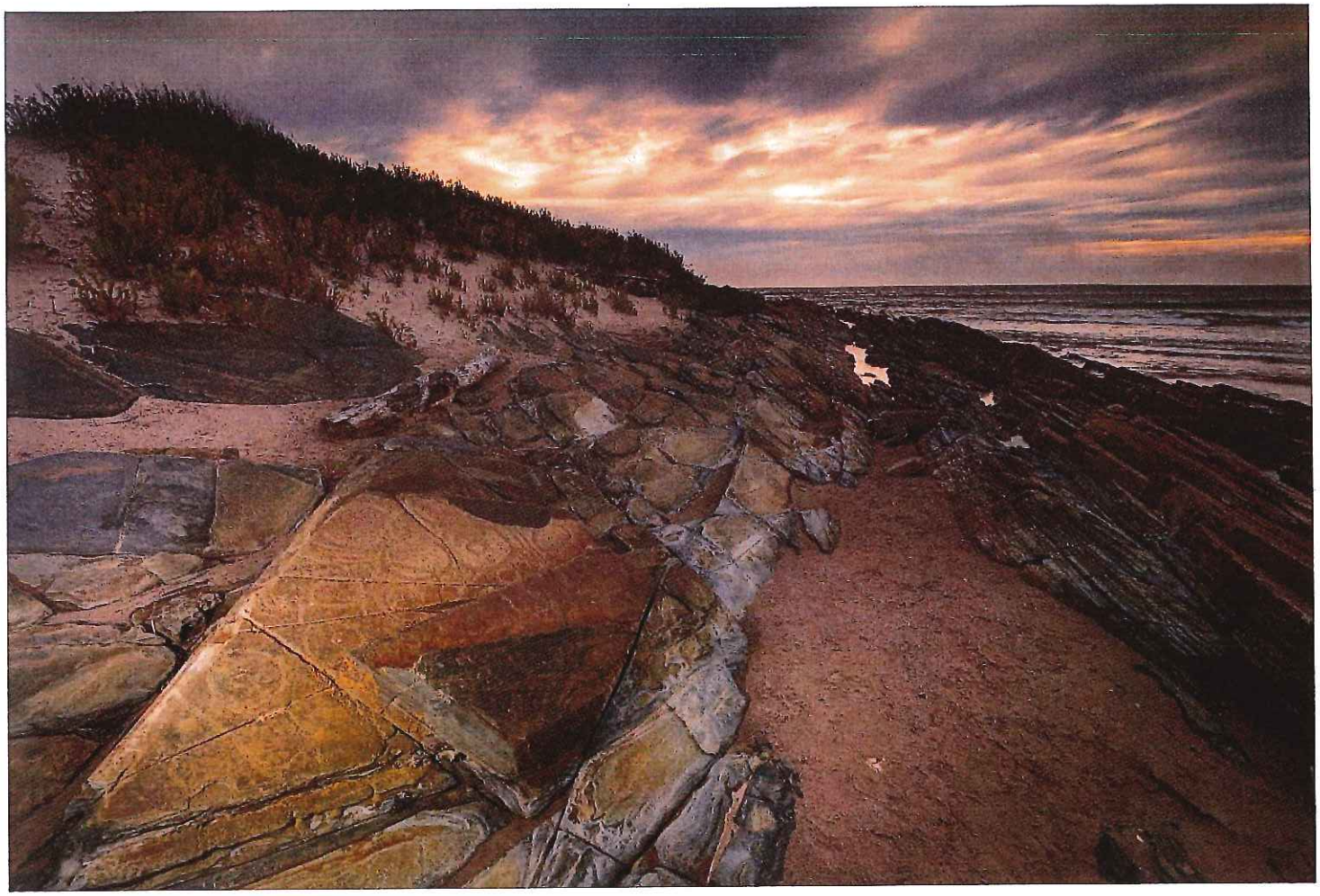
I encourage you to please provide a written submission in response to the Discussion Paper. As well, the review team is also available to meet with your organisation during the consultation period. If you would like to meet with the review team to discuss your views, please email: aboriginalheritage@dpipwe.tas.gov.au or phone 03 6165 3201.

Your response to this first stage of consultation is a very important step in the review process. It will enable you to have your say and also let us know your thoughts, ideas and concerns. Your comments can then be considered and further explored through the consultation process in the second stage of the review.

I know that you have a longstanding interest in the legislation around Aboriginal heritage, and we look forward to being able to consider your views on this important issue.

Yours sincerely

Hon Jacquie Petrusma MP
Minister for Aboriginal Affairs



Discussion Paper:

Statutory Review of the *Aboriginal Heritage Act 1975*

May 2019

Department of Primary Industries, Parks, Water and Environment

Tasmanian Government

Department of Primary Industries, Parks, Water and Environment

GPO Box 44 Hobart TASMANIA 7001

www.dpipwe.tas.gov.au

27 May 2019

Cover photo: Petroglyphs at Sundown Point. Photograph by Nick Monk

Overview

Tasmania has been home to Aboriginal people for more than 40,000 years and spanning two ice ages. Throughout that time, Tasmania's Aboriginal people have led rich cultural lives with deep connections to the land and sea-scapes around them. Today, Tasmania's Aboriginal people continue to live rich cultural lives and their cultural heritage and traditional cultural practices continue as one of the oldest continuing living cultures in the world. Tasmania's Aboriginal cultural heritage is ancient and unique and is immensely important to Tasmanian Aboriginal people – past, present and future. Not only that, our Aboriginal heritage has great significance for the broader Tasmanian community, as well as having significant value at national and international levels.

Tasmania's Aboriginal cultural heritage is the legacy of Tasmania's First people – those places, objects and traditions that have been passed down through thousands of generations. It also includes intangible values where there may be no physical evidence of past cultural activities, for example, places of spiritual or ceremonial significance or travel routes where trade relations took place.

From shell middens, rock markings, hut depressions and stone artefacts that are some of the finest examples in Australia, through to whole landscapes and ecosystems that have been carefully and sustainably managed and sculpted by many thousands of years of Aboriginal activity including hunting, trading and cultural burning – Tasmania's landscape today carries the evidence of its First people. The importance of understanding, respecting and protecting this ancient and living culture cannot be overstated.

The *Aboriginal Heritage Act 1975* (the Act) is a stand-alone piece of Tasmanian legislation which defines what Aboriginal heritage is and sets out how that heritage must be managed.

The Act was amended in 2017 for the first time since it was created in 1975. The amendments served to address some of the most outdated and problematic parts of the Act, and were seen as a positive step. However, aside from the amended provisions, the Act as a whole remains largely outdated and continues to reflect the thinking and attitude of a predominantly white bureaucracy from a period close to half a century ago.

The 2017 amendments were also an interim step with a requirement added to the Act requiring a full review of the legislation within three years.

The review will consider the design and operation of the current legislation through broad consideration of:

- the views and aspirations of Tasmanian Aboriginal people.
- the views of non-Aboriginal stakeholders.
- approaches to Aboriginal heritage legislation in other Australian jurisdictions; and
- the interface between Aboriginal heritage management legislation and other legislative processes (primarily relating to resource management and planning processes).

Purpose of the Discussion Paper

The Government of Tasmania is seeking the input of all Tasmanians, and from Tasmanian Aboriginal people in particular, to understand issues with the operation of the *Aboriginal Heritage Act 1975*.

Multiple opportunities will be provided throughout 2019 and 2020 for people to contribute to the review.

The first opportunity to contribute to the review is a 16 week comment period on the information and questions presented in this Discussion Paper.

Your response to this first stage of consultation is an important step in the review process. It is where you get your first opportunity to have your say and let us know your thoughts, ideas and concerns. Your comments will be considered and further explored through consultation in a second stage of the review.

The Discussion Paper is structured around the following key topics relating to the management of Aboriginal heritage in Tasmania:

1. What is the *Aboriginal Heritage Act 1975* trying to achieve?
2. What is Aboriginal heritage?
3. Ownership of Aboriginal heritage.
4. Making decisions about what happens to Aboriginal heritage.
5. The Aboriginal Heritage Council – what it is and what it does.
6. Offences under the *Aboriginal Heritage Act* and penalties for doing the wrong thing.
7. When can Aboriginal heritage be interfered with?
8. Enforcement of the legislation.
9. Other ways the legislation protects Aboriginal heritage; and
10. Other matters covered by the legislation.

The Discussion Paper presents information on how the Act works in relation to each of the key topics and then asks some questions in relation to each topic to help prompt discussion.

Not every section of the Act is discussed in detail, however you are invited to provide comment on the structure and operation of any part of the Act.

The Discussion Paper also provides an opportunity to comment on any other matters relating to the management of Aboriginal heritage in Tasmania.

How you can contribute

Each section of the Discussion Paper concludes with a series of questions. These questions are designed as prompts only. Written submissions need not address these questions specifically.

All written submissions must be received by the end of Saturday 21 September 2019.

Written submissions can be forwarded to:

Email: aboriginalheritageact@dpipwe.tas.gov.au

Mail: Aboriginal Heritage Act Review
GPO Box 44
Hobart TAS 7001

A number of face-to-face meetings with Aboriginal groups and key non-Aboriginal stakeholders will also be held around Tasmania.

If you would like to request a special information session for yourself or your organisation, please contact the DPIPWE Review Team at Email: aboriginalheritageact@dpipwe.tas.gov.au

Submissions will be treated as public information and will be published on the Department of Primary Industries, Parks, Water and Environment website at www.dpipwe.tas.gov.au/aboriginalheritageact following the closing of the consultation period, unless you request otherwise.

Further information on how your submission will be handled can be found at the end of this Discussion Paper.

Next steps

⇒ A Consultation Report summarising all the feedback received through the first stage of consultation will be prepared and made available to the public. It is envisaged that the Consultation Report will be released before the end of 2019.

⇒ Feedback received through the first stage of consultation will be used to inform a second Stage of the Review, where further discussions with Tasmanian Aboriginal people and non-Aboriginal stakeholders will be held to explore views on specific issues in more detail, and identify pathways to resolve stakeholder concerns/suggestions. The second stage of consultation will take place in 2020.

⇒ Following the second Stage of consultation, a Review Report will be prepared presenting the findings of the Review and recommendations relating to options for change. The Review Report will be provided to the Minister for Aboriginal Affairs in August 2020 and is expected to be tabled in each House of Parliament before the end of the Parliamentary year in 2020.

1. What is the *Aboriginal Heritage Act 1975* trying to achieve?

The *Aboriginal Heritage Act 1975* provides the current legislative framework for managing and protecting Tasmania's Aboriginal heritage.

In summary, the Act:

- defines what Aboriginal heritage is.
- establishes, as a principle, that Aboriginal heritage must not be damaged, destroyed, defaced, concealed or otherwise interfered with, unless otherwise authorised under the Act.
- sets out actions that may be taken to protect Aboriginal heritage that is at risk of being harmed;
- specifies what a person must do if they discover Aboriginal heritage.
- prescribes penalties that may be applied if the 'rules' of the Act are broken.
- identifies circumstances where Aboriginal heritage may be destroyed, damaged, defaced, concealed or otherwise interfered with; and
- establishes a Council of Aboriginal people to provide advice and make recommendations to the Minister for Aboriginal Affairs and to the Director of National Parks and Wildlife (the Director), on matters relating to Aboriginal heritage.

Some legislation incorporates clearly stated objectives which provide additional guidance and clarity around what the Act has been established to deliver, and must be taken into account by anyone making decisions in relation to the Act. The *Aboriginal Heritage Act 1975* does not contain any specific information or overarching principles clarifying the objectives of the Act.

Questions:

⇒ How clear is the Act regarding what it is trying to achieve?
⇒ Could this be improved, and if so, how?

2. What is Aboriginal heritage?

Under the Act, anything that is considered to be Aboriginal heritage is described as a 'relic'. The definition of a relic is provided in Section 3 of the Act and includes:

- any artefact, painting, carving, engraving, arrangement of stones, midden, or other object, made or created by any of the original inhabitants of Australia or the descendants of any such inhabitants.
- any object, site, or place that bears signs of the activities of any such original inhabitants or their descendants; and
- the remains of the body of such an original inhabitant or of a descendant of such an inhabitant that are not interred in a cemetery or marked grave.

An important amendment to the Act in 2017 was the removal of references to 1876 as the cut-off date for creation of Aboriginal heritage (or a 'relic'). This change recognises that Tasmania's Aboriginal culture is a living culture which continues to create Aboriginal heritage to this day, and which will continue to create Aboriginal heritage into the future.

Tasmania's Aboriginal people consider the term 'relic' to be outdated and not relevant to the way they view their heritage. The term suggests something that is ancient and a thing of the past, and does not acknowledge or capture the part of their heritage that is contemporary and living. While the title of the Act was changed in 2017 from the *Aboriginal Relics Act 1975* to the *Aboriginal Heritage Act 1975* in recognition of this view, the use of the term relic to define Aboriginal heritage has remained in the Act.

A further important amendment in 2017 was the introduction of additional criteria for a relic as having to be of significance to Tasmanian Aboriginal people, with the significance 'test' being further qualified as being in accordance with Tasmanian Aboriginal history and tradition.

An issue that has been raised by Aboriginal people and other indigenous experts in recent years is how to define and protect that part of Aboriginal heritage, culture and tradition that may not have a physical form or evidence – that is intangible.

Under Victorian legislation, intangible heritage is recognised and includes ceremony, stories, traditional skills and practices, language and dance. In the Tasmanian Aboriginal cultural context, use of the term intangible has tended to extend to including the spiritual essence of a place or broader landscape where Aboriginal people once lived, hunted and practiced culture.

The current definition of Aboriginal heritage in the Act does not attempt to recognise or manage intangible Aboriginal heritage. It is noted, however, that intangible values, and the potential for those values to be impacted, can be difficult to define and manage.

Questions:

⇒ How well does the Act define Aboriginal heritage?

⇒ Could this be improved, and how?

⇒ Does the definition of a 'relic', adequately capture all elements of Aboriginal heritage that should be protected and managed?

⇒ Should use of the term 'relic', and the way Aboriginal heritage is recognised and defined, be changed?

3. Ownership of Aboriginal heritage

The Act has several provisions relating to ownership of relics:

- Section 10 of the Act required persons owning or holding relics at the time the Act commenced to report that fact to the authorities.
- Section 11 of the Act provides that relics on Crown lands are owned by the Crown; and
- Section 12 of the Act contains provisions for the compulsory acquisition of relics by the Minister, if the Minister determines that the relic is required by the Crown.

The Act is silent on ownership of relics on lands other than Crown lands (e.g. privately owned land).

Although the Act is largely silent on ownership of relics by people other than the Crown, it is clear from Sections 10 and 12 that the Act recognises that circumstances exist where a person, other than the Crown, can own a relic.

It is noted that the concept of ownership does not fit with how Aboriginal people view Aboriginal heritage. While it is without doubt that Aboriginal people consider it their heritage, they view themselves as custodians rather than owners of their heritage.

Irrespective of who may be considered under the Act to be the owner of a relic, it is clear that all the provisions in the Act, including those relating to the protection and management of relics, apply to everyone – including the 'owner'. As such, it has been argued that the matter of ownership, while somewhat undefined in the Act, does not alter the level of protection that is provided to a relic.

The more complicated question around ownership is not just who should own or be the custodian of Aboriginal heritage, but also what decisions about how that heritage is managed, the owner or custodian of the Aboriginal heritage should be able to make.

Questions:

⇒ How clearly does the Act describe ownership of Aboriginal heritage?

⇒ Are provisions in the Act providing for ownership reasonable?

⇒ Who should own Aboriginal heritage?

⇒ Is the concept of 'ownership' the right way to think about who is responsible for Aboriginal heritage?

⇒ Should the 'rules' in the Act apply to everyone in every situation?

⇒ Should land tenure on which Aboriginal heritage exists make any difference to who owns/how the heritage is to be managed?

4. Making decisions about what happens to Aboriginal heritage

The Minister for Aboriginal Affairs is the primary decision maker under the Act and makes decisions in relation to:

- Issuing permits to interfere[1] with Aboriginal heritage.
- Declaring 'protected sites'.
- Compulsory acquisition of relics; and
- Issuing Guidelines.

Issuing Guidelines and declaring 'protected sites' are discussed further, at protected Section 7 and 9 respectively.

The Director of National Parks and Wildlife has a limited decision making role in relation to managing 'protected sites' and issuing permits to interfere with relics and infrastructure on those sites.

In making decisions, the Minister and the Director are largely not bound to seek advice or recommendation from any person, other than the Director of National Parks and Wildlife in the case of the Minister. However, in practice, the Minister and the Director routinely seek advice from the Aboriginal Heritage Council. While this intention was clearly outlined as the expectation when the 2017 amendments establishing the statutory Council were developed, it is not a requirement of the Act.

Under very limited circumstances relating to disposal of relics owned by the Crown, the Minister must seek and consider a recommendation from the Aboriginal Heritage Council.

Under the Act, only the Aboriginal Heritage Council is recognised as being in a position to provide advice or recommendations. No person or entity other than the Minister or the Director has any statutory decision making powers in relation to managing Tasmania's Aboriginal heritage.

The approach the Act takes to decision making has been highlighted as a longstanding issue for Aboriginal people and a number of other people with an interest in Aboriginal heritage. Aboriginal people consider themselves the rights-holders and custodians of their heritage and have a strong desire to continue to be responsible for managing their heritage. It is important to also note that private land owners want to be able to continue to make their own decisions to practice certain use rights associated with their land.

Tasmania's Aboriginal people have advocated that an Aboriginal body, such as the Aboriginal Heritage Council, should have decision making powers. If this were to be the case, it may be necessary to include provisions providing rights to review or appeal of decisions, consistent with other legislation that provides for independent decision making powers.

---

[1] Use of the term 'interfere' in this Discussion Paper refers to a full description in the Act of what a person must not do to a relic (see Section 14(1) of the Act), and includes destroy, damage, deface, conceal, remove, sell, search for or otherwise interfere with a relic.

Questions:

- ⇒ Is the way the Act describes who makes decisions, and how decisions must be made, adequate and reasonable?
- ⇒ How can decision making be improved?
- ⇒ Who should make decisions under the Act?
- ⇒ Are there circumstances where different people, or parties, should make decisions about how to manage Aboriginal heritage? How should decisions be made?

5. The Aboriginal Heritage Council – what it is and what it does

The Act establishes the Aboriginal Heritage Council as an independent statutory body which provides advice and makes recommendations to the Minister and the Director. The inclusion of provisions to establish the Aboriginal Heritage Council, comprising Aboriginal people, was an important component of the amendments made to the Act in 2017.

The scope of the matters that the Council can provide advice on is confined to matters that are covered by the Act. This is set out in detail in Section 3 of the Act, and includes matters on which the Minister and the Director make decisions under the Act.

As discussed in Section 4 of this Paper, the Minister and the Director are not bound under the Act to seek advice from the Council, however the Council can provide advice regardless of whether it has been sought. The Minister and the Director are not bound under the Act to adopt advice and recommendations received from the Council.

In preparing advice and recommendations, the Act specifies that the Council itself is to seek advice from any person or body the Council believes, on reasonable grounds, to have expertise in relation to the matters concerned. The Act also provides for the Council, in performing its role, to consult with Tasmanian Aboriginal people where it is appropriate and practicable to do so.

The Act specifies that the Council can have up to 10 members, who must be Aboriginal persons. Members of the Council are appointed by the Governor, on the recommendation of the Minister. Other than being Aboriginal persons, the Act does not specify any additional criteria for Council membership (e.g. skills or representation) or how members are selected. However Government policy requires gender balance and regional representation as far as is practicable.

Questions:

- ⇒ How should members for the Aboriginal Heritage Council be chosen?
- ⇒ Should the Act specify criteria for Council membership, and what criteria should apply?
- ⇒ How clearly does the Act describe the role and function of the Aboriginal Heritage Council?
- ⇒ Is the role of the Aboriginal Heritage Council adequate and appropriate?
- ⇒ Could this be improved, and if so, how?

6. Offences under the Act and penalties for doing the wrong thing

The Act specifies a range of actions affecting Aboriginal heritage that are against the law. These offences include:

- Interfering with a relic.
- Interfering with a 'protected object' or a 'protected site'.
- Failing to advise the appropriate authority of a relic being discovered; and
- Failing to comply with requests from authorised officers (discussed further in Section 8)

By far the most important, and in practice the part of the Act under which most of the administrative work is undertaken is Section 14(1) which says that relics must not be interfered with unless in accordance with the terms of a permit granted by the Minister. It is under this section that the Minister grants permits to interfere with relics and under which most compliance action occurs.

In each case where an offence is specified in the Act, a corresponding maximum penalty is also specified.

The penalties in the Act were significantly increased when the Act was amended in 2017. The maximum penalties in the Act are now among the highest of any other Aboriginal heritage legislation in the country, and in line with similar offences for damaging European heritage.

Penalties are described in terms of the maximum number of 'penalty units' that can be applied.

Each penalty unit has a monetary value that is set each year. The current value of a penalty unit in Tasmania is $163.

Penalties in the Act are scaled to differentiate between individual persons (or small business entities) and body corporates – with penalties being significantly greater for body corporates.

Penalties in the Act are also scaled to differentiate between offences that a person has knowingly committed and offences that a person has committed unwittingly through negligence or recklessness on their part – with persons knowingly or deliberately doing the wrong thing attracting significantly higher penalties.

The highest maximum penalty prescribed in the Act applies to circumstances where a body corporate knowingly interferes with a relic. This equates to a maximum of $1.63 million.

By way of example:

- 1,000 penalty units = $163,000 (maximum penalty for an individual recklessly or negligently interfering with Aboriginal heritage).
- 2,000 penalty units = $326,000 (maximum penalty for a body corporate, other than a small business entity recklessly or negligently interfering with Aboriginal heritage).
- 5,000 penalty units = $815,000 (maximum penalty for an individual knowingly interfering with Aboriginal heritage).
- 10,000 penalty units = $1,630,000 (maximum penalty for a body corporate knowingly interfering with Aboriginal heritage).

Only a magistrate can determine whether an offence has been committed and decide what level of penalty to apply.

There is concern among Aboriginal people that broader society has not yet placed an equal value on Aboriginal heritage relative to European heritage. A criticism of the current offence provisions has been a lack of understanding of the value of Aboriginal heritage and therefore failure to impose appropriate (large enough) penalties.

While the maximum penalties in Tasmania may now be in line with those for damaging European heritage, there have been no prosecutions under the amended Act to date, therefore the new, harsher penalties have not been tested. There are signs that the importance, and therefore the value, of Aboriginal heritage is becoming better understood, however ongoing efforts to educate and create awareness and understanding across the broader community will be a critical part of the ongoing protection and management of Aboriginal heritage in Tasmania.

As previously discussed in this Paper, the offence provisions in the Act apply to everyone. However, it could be argued that under the Act, Tasmanian Aboriginal people practicing culture at their cultural sites may in fact be interfering with Aboriginal heritage and, if doing so without a permit, they would be breaking the law. While a person's circumstances would be taken into account when determining a penalty, these circumstances would generally not be able to be considered in determining if an offence has been committed.

Questions:

⇒ How well does the Act describe and manage offences?

⇒ Are the penalties adequate?

⇒ Could the offences and penalties provisions in the Act be improved, and if so, how?

⇒ Are there circumstances where the 'rules' of the Act should apply differently to different people?

7. When can Aboriginal heritage be interfered with?

The Act provides for circumstances where a person can be provided with a legal authority to interfere with a relic. The Act also provides for circumstances where a person's failure to comply with the Act can be justified, or 'defended' legally. Generally, the offence provisions in the Act apply to every person and every circumstance, however a number of circumstances are specified in the Act where either a legal authority or a legal defence can exist. They are where:

- A person is acting in accordance with a permit granted by the Minister or Director (see also Section 4);
- A person is acting in accordance with Guidelines issued by the Minister, or relying on another person's compliance with the Guidelines; or
- A person is carrying out emergency works.

There is little guidance in the Act for the process which must be followed for seeking a permit to interfere with a relic. However, in practice the Director, through their oversight of the Department of Primary Industries, Parks, Water and Environment, has established a longstanding and robust policy-based process for assessing the merit of every application for a permit. This is set out in the *Aboriginal Heritage Standards and Procedures* published by Aboriginal Heritage Tasmania. The process entails a desktop assessment to determine if Aboriginal heritage is at risk. Where a risk is determined, and depending on the nature of the risk, further information is obtained including:

- Specialist surveys.
- Site visits.
- Advice from the Aboriginal Heritage Council; and
- Consideration of the broader social, economic and environmental implications.

A permit to interfere – usually to conceal or relocate, but sometimes to destroy a relic – may then be granted by the Minister on the recommendation of the Director.

Section 21A of the Act specifies that the Minister must issue 'Guidelines'. The intention of the 'Guidelines' is to set out the things that a person must do to ensure they have undertaken all reasonable precautions to minimise the risk that the activity they are proposing to undertake will result in impacting Aboriginal heritage.

Measures in the current Guidelines include:

- Contacting the 'Dial Before You Dig' service.
- Conducting a search through the Aboriginal Heritage Property Search tool administered by Aboriginal Heritage Tasmania.
- Acting in accordance with the standards and procedures which have been adopted by the guidelines. These are:
    - Aboriginal Heritage Tasmania's *Aboriginal Heritage Standards and Procedures;*
    - *Procedures for Managing Aboriginal Cultural Heritage when Preparing Forest Practices Plans;* and
    - *Mineral Exploration Code of Practice.*
- Contacting Aboriginal Heritage Tasmania directly; and
- Acting in accordance with any advice received from Aboriginal Heritage Tasmania, including in relation to unanticipated discoveries of Aboriginal heritage.

Emergency works are specified in the Act as being works undertaken in accordance with Section 5 of the *Electricity Supply Industry Act 1995*, or any work that is necessary and proportionate to save lives, prevent injury and prevent damage or loss of property. An example of this would be the clearing of fire breaks to control a fire or to prepare for an impending fire. Emergency management teams routinely inform their decisions with information about the natural and cultural values of an area, and wherever practical they take steps to minimise impacts on those known values as they deliver their emergency services.

Questions:

⇒ Are the defence provisions in the Act adequate and reasonable?
⇒ Could the defence provisions be improved, and if so, how?
⇒ Do the Guidelines provide adequate protection for Aboriginal heritage?
⇒ Could the Guidelines be improved, and if so, how?

8. Enforcement of the legislation

The provisions in the Act are legal requirements and must be complied with. As discussed in Section 6 of this Paper, a magistrate determines whether a person has committed an offence, and will decide the proportion of the maximum relevant penalty that will be imposed.

An important amendment to the Act in 2017 was an extension of a statutory limit on the amount of time within which a prosecution must be initiated – from within six months of an offence being committed, to within two years of discovery of evidence of an offence having been committed. This change recognised that breaches of the Act were sometimes reported long after alleged offences were committed (eg, vandalism of rock art in remote areas) and the considerable length of time required to conduct robust investigations prior to decisions being made to proceed with prosecution.

The Act also provides for people to be 'authorised' under the Act to make certain types of decisions and take certain actions such as:

- Requiring a person to provide their name and address.
- Requiring a person to leave a 'protected site'.
- Requiring a person to disclose the location of a relic.
- Seizing objects (relics and property); and
- Obtaining a warrant to search a premises.

Police officers are automatically authorised officers. Any State Service employee may also be authorised as a warden on a case-by-case basis. The practice is for State Service employees to undergo relevant training, to ensure their competence and safety prior to them being authorised. Honorary wardens with lesser powers, and who are not required to be State Service employees, can also be appointed.

Unlike most other legislation that regulates development activity/works, the Act does not provide for the issue of stop-work notices. The key issue here is that a determination of an offence and penalty by a magistrate necessarily takes some time (often years) and there are no mechanisms in the Act to legally require a person (e.g. a contractor or a developer) to stop what they are doing and to not start again until further notice, thereby exposing Aboriginal heritage to ongoing risk of potential damage. A number of other Acts, including Tasmania's *Historic Cultural Heritage Act 1995,* do have this type of provision.

A number of Acts governing the protection of natural and cultural values also have infringement notice provisions which allow for an immediate judgement and on-the-spot fine, where an authorised officer has determined that a breach of the relevant Act has occurred. Infringement notices can be an efficient and immediate means of issuing a penalty. They are usually issued in relation to actions which are considered to constitute breaches that are less serious or minor in nature, and the associated penalties tend to be a small fraction of the (potentially maximum) penalties that might be applied by a magistrate for serious offences.

Questions:

⇒ How well does the Act provide for enforcement of its provisions?

⇒ Could this be improved, and if so, how?

⇒ Should the Act include stop-work provisions?

⇒ Should the Act include provision for infringement notices and associated on-the-spot fines?

⇒ Should offences in the Act be further scaled to distinguish between minor and non-minor offences?

9. Other ways the legislation protects Aboriginal heritage

The Act provides a number of other mechanisms which are intended to provide further protection for Aboriginal heritage, in addition to the general provisions already discussed in this Discussion Paper.

The first mechanism (which has been mentioned earlier in this Discussion Paper) is the ability for the Minister to declare a site to be a 'protected site' where the Minister is satisfied that steps should be taken to protect or preserve a relic at that site. In principle, the provisions in the Act provide for a greater level of management attention, aimed at protecting relics, than may otherwise be available.

This mechanism has rarely been used and only three 'protected sites' have been declared, one of which was revoked when that land was formally returned to the Aboriginal community under the *Aboriginal Lands Act 1995*. In practice, it has been more useful and effective to administer such sites under the broader reserve and Crown land management systems administered by the Parks and Wildlife Service.

The second mechanism is a provision for the Governor to make Regulations under Section 25 of the Act which provide additional prescriptions relating to the care, control and management of 'protected sites'. Regulations were initially made in 1978, however these Regulations lapsed in 2000 and Regulations have not existed since that time.

Questions:

⇒ How well does the Act protect and manage Tasmania's Aboriginal heritage?

⇒ Could this be improved, and if so, how?

⇒ Are 'protected sites' a useful mechanism for protecting Aboriginal heritage?

⇒ Is the provision for the making of Regulations useful?

10. Other matters covered by the legislation

The Act also has a number of miscellaneous provisions that while relatively minor are important.

Section 22 specifies that any monies received under the Act, primarily as a result of fines being imposed, will be paid to the Government's consolidated fund. The section also specifies that the Tasmanian Government will pay any expenses incurred through administration of the Act.

Section 23 specifies that the Act must be reviewed within three years of the 2017 amendments.

Section 24 specifies that the *Aboriginal Heritage Act 1975* does not affect the operation of certain other acts, namely Section 139 of the *Criminal Code Act 1924* and the *Coroners Act 1995*.

Other considerations

The focus of the review of the Act, and therefore this Discussion Paper, is around the design and operation of the current Act. There are, however, some additional aspects relating to the protection and management of Aboriginal heritage that are not directly or indirectly referenced in the Act, and are important to acknowledge.

There are multiple elements to the effective management of Aboriginal values. Legislation and subordinate or subsidiary statutory instruments and processes are a key part, however there are an array of non-statutory mechanisms that may have the potential to support and significantly strengthen the whole system. Central to concerns that have been expressed by Tasmania's Aboriginal people in previous consultation is the importance of educating broader society to promote a better understanding and appreciation of the value and importance of Tasmania's Aboriginal heritage.

A great deal of resources are directed to protecting, managing and promoting Tasmania's Aboriginal heritage. Examples include work on understanding and presenting the Aboriginal values of the Tasmanian Wilderness World Heritage Area, developing and supporting joint management arrangements, as well as the Parks and Wildlife Service's Aboriginal Trainee Ranger Program, and support of Aboriginal tourism.

A key issue with the protection and management of Aboriginal heritage in Tasmania continues to be a lack of understanding and clarity for people who are planning activities which have the potential to impact on Aboriginal heritage. Currently there are a range of key administrative processes that aren't prescribed in detail in the Act – notably specific steps and timeframes to be followed and adhered to when seeking advice on whether a permit for an activity is required, and when making a decision in relation to granting of such a permit. There is also no provision in the current Act for a decision to be appealed, should a party be unsatisfied with how the Act is administered. A theme that emerged from land use and development stakeholders and industries through the consultation for the 2017 amendments was that tighter prescriptions and stronger penalties were not opposed, provided there was clarity and certainty in the requirements and operation of the Act. Some noted a desire to see statutory processes and timeframes for the handling of enquiries regarding whether Aboriginal heritage permits were required and for decisions to be made in relation to applications for permits.

A further but related matter for consideration is how the Act should relate to other Tasmanian planning legislation. Unlike the *Historic Cultural Heritage Act 1995*, the Act is not part of Tasmania's Resource Management and Planning System (RMPS) and there are no triggers in, nor alignment with Tasmania's core planning Act (the *Land Use Planning and Approvals Act 1993*). Integration of Aboriginal heritage legislation with the RMPS would necessarily increase the complexity of the Act.

Questions:

⇒ Is there anything else you would like to see included in Aboriginal heritage legislation in Tasmania?
⇒ Are there any other comments that you would like to make with regard to Aboriginal heritage management in Tasmania?

Important information regarding your submission

Publication of submissions

Your submission will be published in accordance with the Tasmanian Government's *Public Submission Policy*, which requires that Government departments publish online all written submissions made in response to broad public consultation on major policy matters.

Confidentiality

Your name (or the name of the organisation) will be published unless you request otherwise.

In the absence of a clear indication that a submission is intended to be treated as confidential (or parts of the submission), the Department will treat the submission as public.

If you would like your submission treated as confidential, whether in whole or in part, please indicate this in writing at the time of making your submission. Clearly identify the parts of your submission you want to remain confidential. In this case, your submission will not be published to the extent of that request.

Personal information protection

Personal information collected from you will be used by DPIPWE for the purpose of acknowledging your submission. Your submission may be published, unless it is marked "confidential". Personal information will be managed in accordance with the *Personal Information Protection Act 2004*.

Accessibility of submissions

The Government recognises that not all individuals or groups are equally placed to access and understand information. We are therefore committed to ensuring Government information is accessible and easily understood by people with diverse communication needs. Where possible, please consider typing your submission in plain English and provide it in a format such as Microsoft Word or equivalent. The Government cannot, however, take responsibility for the accessibility of documents provided by third parties.

Copyright

Copyright on submissions remains with the author(s), not with the Tasmanian Government.

Defamatory material

DPIPWE will not publish, in whole or in part, submissions containing defamatory or offensive material. If your submission includes material that could enable identification of other individuals then either all or parts of the submission will not be published.

Right to Information Act 2009

Information provided to the Government may be released to an applicant under the provisions of the *Right to Information Act 2009* (RTI). If you have indicated that you wish for all or part of your submission to be treated as confidential, your statement detailing the reasons may be taken into account in determining whether or not to release the information in the event of an RTI application for assessed disclosure. You may also be contacted to provide any further comment.

Useful links

- *Aboriginal Heritage Act 1975*
- *Aboriginal Heritage Act 1975* - Statutory Guidelines
- Aboriginal Heritage Tasmania
- Aboriginal Heritage Council

West Point midden – West Coast of Tasmania.

Tasmanian Government

Department of Primary Industries, Parks, Water and Environment

Email: aboriginalheritageact@dpipwe.tas.gov.au

Web: www.dpipwe.tas.gov.au/aboriginalheritageact