

## ***Aboriginal Heritage Bill 2026* – draft exposure Bill**

### **Explanatory Clause\*\* Notes**

These notes are intended to provide a brief explanation of the intent, and the legislative mechanisms used, for each provision of the *Aboriginal Heritage Bill 2026*.

\*\* Note that, strictly, provisions in a Bill are ‘clauses’ and don’t become ‘sections’ until the Bill is passed and becomes an Act. However, although ‘clause’ is used in the numbering, ‘section’ (or ‘s.’ for short) is used in the notes to avoid confusion with the Bill’s text, which uses the term throughout.

Consultation Draft

**Explanatory clause notes**

**NOTE:** Council = Aboriginal Heritage Council.

**PART 1 – PRELIMINARY****Clause 1      Short Title *[purely formal]*****Clause 2      Commencement**

This will allow, if necessary or appropriate, for a staggered commencement, with some provisions coming into force before others.

**Clause 3      Objects and principles**

This sets out the high-level principles of the Bill, stressing Aboriginal custodianship and decision making. They include a reference in (d) to the protection and management of Aboriginal heritage as ‘an integral part of the resource management and planning system’ (RMPS).

**Clause 4      Act does not affect operation of certain other Acts**

This clarifies that the Bill will not override the provisions of legislation relating to human remains; or remove a requirement to have an authorisation under any other Act, or to take into account the RMPS.

**Clause 5      Extraterritorial operation of Act**

This section expresses the intention that the Act will apply outside Tasmania, but cannot override other law that applies in those territories. It is a standard provision that will be taken into account by a court.

**Clause 6      Non-application of Act**

This section stipulates exemptions from the Act: (1)(a) allows for other activities to be prescribed (in the Regulations – ie still subject to Parliamentary approval but more flexible than requiring an amendment of the Act itself); (1)(b) covers travelling on land, where such movement is already authorised, for works related to service infrastructure – which is defined in (3); and (1)(c) includes ‘works of a minor nature that are necessarily ancillary’ to activities under either (a) or (b).

(2) provides that the Act will apply in the circumstances outlined in (1) if there is known to be Aboriginal heritage in the area, and the activity is likely to have ‘more than a temporary impact’ on it; or if unforeseen Aboriginal heritage is found.

**Clause 7      Act binds Crown**

An important legal formality, to make it clear the Crown and its Agencies are subject to this Act.

**PART 2 – RECOGNITION OF CONNECTION TO COUNTRY****Clause 8 Acknowledgement of custodians of Aboriginal heritage**

This supplements s.3 above. The Act acknowledges the great age and value of Aboriginal culture, the custodianship of Aboriginal heritage by Aboriginal people, and the intent that where practicable it should be in their custody.

**Clause 9 Traditions of Aboriginal people**

The terminology in relation to traditions is largely standard across legislation relating to Aboriginal land and culture in Australia; the words in (a) and (b) were inserted when the current *Aboriginal Heritage Act 1975* (the AHA) was amended in 2017.

**Clause 10 Traditional use**

The main purpose of this section is to avoid the Bill having the unintended consequence of impinging on rights of Aboriginal people in relation to Aboriginal heritage, provided its use is not contrary to relevant Aboriginal traditions. And (in support of some provisions in Part 5 and s.105) it clarifies that the Bill will not inappropriately force the disclosure of information or require other culturally inappropriate action. It also provides that the Bill does not confer any right of access to land.

**PART 3 – INTERPRETATION****Clause 11 Interpretation**

Much of this is standard content, clarifying the meaning of terms used in the Bill. Certain important terms are separately defined in the following sections.

Significant terms defined here include ‘area’, which is relevant to the definitions of Aboriginal heritage ‘place’ and ‘site’. It also applies in the definition of ‘cultural landscape’, which will depend on an assessment process that is to be prescribed in due course in the Regulations. The term ‘land activity’, which is used throughout in relation to authorisations, is defined to mean ‘any development or use’.

The intent is that ‘Aboriginal heritage site’ will continue to be the term for the most numerous form of Aboriginal heritage, being objects and places comprising or containing physical evidence of Aboriginal occupation. ‘Aboriginal heritage objects’ will be either those requiring a nomination process for registration, or those held in collections. ‘Aboriginal heritage places’ will be those registered by nomination.

‘Registered’ is defined to include all stages, from the first formal steps (notification, nomination etc).

A ‘small business entity’ is defined by reference to the *Commonwealth Income Tax Assessment Act 1997*, where s.328-110 provides the core definition: ie a business with an aggregated turnover of less than \$10 million a year. This is relevant in many of the Bill’s penalty provisions.

**Clause 12**      **Meaning of *Aboriginal human remains***

The provisions in this section are very similar to those in the Victorian legislation and are largely self-explanatory. In the event of dispute, a process can be prescribed, in which it is expected that the Aboriginal Heritage Council (the Council) will play a key role.

**Clause 13**      **Meaning of *harm***

Defines ‘harm’ as acts or omissions that result in ‘damage, defacement, destruction or other harm to, or interference with Aboriginal heritage’, or its ‘permanent concealment’. There are exceptions if the act or omission is in accordance with the Act or an authority under it, or is prescribed in the Regulations as not falling within the definition.

**Clause 14**      **Meaning of *significance***

Sets out a standard list of possible aspects of significance, as already largely adopted in the 2017 amendments of the 1975 AHA. It also refers to potential significance in respect of traditions, stories, arts, etc. This allows intangible elements to be considered in the assessment of Aboriginal heritage values.

**Clause 15**      **Certain objects excluded from definition of *Aboriginal heritage object***

Specifies a number of exclusions, including the one common nationally and already in the AHA, of items made for sale. It also excludes the possibility that the definition of ‘object’ might override the rights of intellectual property holders, such as the ownership rights of creators of artworks.

**PART 4 – ABORIGINAL HERITAGE COUNCIL**

**Clause 16**      **Aboriginal Heritage Council established**

This section provides for the establishment of a new Council, replacing the Aboriginal Heritage Council that became statutory in 2017 when the AHA was amended. It also includes purely formal elements.

**Clause 17**      **Membership of Council**

The core provisions differ somewhat from those in the AHA, such as a minimum of 5 and maximum of 7 members (still all

being Aboriginal people), and appointment by the Minister (who also appoints the Chair). They are to be broadly representative of Aboriginal people across the State.

Other new elements include particular reference to the collective skills that must be present. These are specified to include skills not only in the protection and management of Aboriginal heritage, but also in project delivery, board governance, and working with legislation.

The section refers to Schedules 1 and 2, which contain more detail on the operations of the Council.

### **Clause 18 Functions and powers of Council**

Paragraphs (1)(a)-(f) set out the main functions and powers of the Council.

(a) covers the key decision-making aspects, in relation to permits, Aboriginal heritage management plans (AHMPs) and Aboriginal heritage agreements.

(b) is a general advisory role, specifically noting its role in relation to significance.

(c) & (d) cover general roles in public education and information.

(e) covers the Council's role in advising the Minister, in areas where later provisions require the Minister to seek the advice of the Council.

(f), (g) & (h) allow formally for other powers and functions in any Act or in the Regulations.

(2) provides that the Council cannot hold real property. Real property is land and interests in land.

(3) specifies that the Council must perform its functions in accordance with the RMPS, and any of its functions 'forms part of' the RMPS' (see also s.3(d) above).

### **Clause 19 Delegation of Council functions and powers**

This section provides the Council with a general power of delegation to members of Council, to committees (which have at least 1 Council member), and to the Secretary. This is essential for its practical operations. It will be able to delegate its more operational functions to the Secretary, who in turn may delegate them to others – in practical terms, this will mainly be used to enable Aboriginal Heritage Tasmania to undertake the necessary work to implement the Bill, as appropriate.

**Clause 20 Council may delegate certain administrative or minor functions and powers**

An important aid to efficiency will be having the Council pass responsibility for minor powers and functions to the Secretary. These are to be listed, and that will mean they are automatically taken to be delegated to the Secretary. The list may include cases where activities have minimal impacts on Aboriginal heritage, but still require permits, and where requiring the Council's attention would be unnecessary and inefficient. (It is expected that every exercise of such a delegation will be reported to the Council at each meeting.)

**Clause 21 Power of Council to amend administrative processes**

This section is also in aid of efficiency, and allows the Council to either waive minor procedural matters that it controls, or to make minor amendments to instruments that it issues or approves. It requires the Council to consult, or to act at the request of, affected parties, and is strictly confined to matters that will not have an adverse effect on Aboriginal heritage.

**Clause 22 Committees**

Another critical element in the efficient operation of the Council will be the ability to establish committees. This is likely to develop with experience. Committees could include people who are not Council members, such as for more technical issues; or could consist of Council members who (eg) meet more frequently than the Council itself, to undertake out-of-session work. The section refers to further detail in Schedule 3.

**PART 5 – IDENTIFICATION OF ABORIGINAL HERITAGE****Clause 23 Person must report finding Aboriginal heritage**

Continues and updates the current obligation to report finds known, or reasonably believed, to be Aboriginal heritage. This obligation is qualified by minor exceptions, but the section also allows in (2)(c) for an Aboriginal person not to report a find if they believe, on reasonable grounds, that not reporting is the best way to protect the Aboriginal heritage from harm.

NOTE: this is the first case in the Bill of a continuing offence being created, with a maximum daily fine of one-fifth of the maximum fine for the main offence.

- Clause 24 Notification of potential Aboriginal heritage**  
Allows the Secretary to notify a private landowner of the presence or likely presence of Aboriginal heritage on neighbouring land. This may alert landowners to the need to consider Aboriginal heritage if planning physical works.
- Clause 25 Rights if private land contains Aboriginal heritage**  
Confirms that owners or occupiers with use rights on the surface of their land (including farmers) are entitled, despite the presence of Aboriginal heritage on that surface, to the continued use and enjoyment of the land. This is in line with similar provisions in the two most modern Australian Aboriginal heritage Acts, in Victoria and Queensland. See also s.40(2)(d) below.
- Clause 26 Registration of Aboriginal cultural heritage**  
Provides that the process of registration will be as prescribed in the Regulations. This broad provision will allow for different approaches to the registration of different types of Aboriginal heritage, including by nomination and assessment. More generally, it ensures that all reported Aboriginal heritage is entered in the Register. See also s.97(4) and 130(2)(b)(v & vi), on Regulations.

## **PART 6 – PROTECTION OF ABORIGINAL HERITAGE**

### ***Division 1 – General***

- Clause 27 Protection of Aboriginal heritage**  
This section is introductory and summarises the various means by which Aboriginal heritage can be protected under the Act. This Division (ie sections 27 to 31) applies to all Aboriginal heritage, including if newly discovered (hence, whether registered or not, or known by Aboriginal people or not).
- Clause 28 Person must not harm Aboriginal heritage**  
The key harm provision. It follows the current provisions in the AHA by having 2 main categories of offence (knowingly, and recklessly or negligently) and the same levels of maximum penalty. (A penalty unit is currently \$202, so 10,000 = \$2.02 million.) It also preserves the distinction between corporate and individual or small business offenders.

There is a new offence, though used elsewhere in Australia, for an action likely to harm Aboriginal heritage.

There are a number of defences, again largely reflecting (but modernising) elements already in the AHA, including ‘a necessary and proportionate response’ to emergency circumstances and acting in accordance with guidelines (see s.120) or with codes etc adopted under the Regulations (see s.130).

- Clause 29**     **Sale of objects that resemble Aboriginal heritage objects**  
 This offence is designed to help discourage a market in Aboriginal heritage objects, which encourages trafficking. The sale of replicas supports the market and also creates confusion about the authenticity of Aboriginal heritage generally. There is provision for exceptions.
- Clause 30**     **Acquisition of Aboriginal heritage sites and Aboriginal heritage places**  
 Provides for an unlikely but potentially important contingency. In limited circumstances – ie where Aboriginal heritage of exceptional significance, on private land, cannot be protected in any other way – land may be compulsorily acquired by the Minister. The Council is to be consulted first. Note that the expectation is that any such land would then be transferred to Aboriginal ownership, which would be done under different legislation (the *Crown Lands Act 1976* and the *Aboriginal Lands Act 1995*).
- Clause 31**     **Certain activities may not be undertaken in certain areas**  
 This section has two effects: first, to clarify that the Act does not apply to Macquarie Island; second, and much more important, it provides that no permit or management plan is to be issued on Aboriginal land unless that issue has been approved by the Aboriginal Land Council of Tasmania. This recognises the principle that the Land Council should have full rights over what happens on its own land and it would be incongruous for it to be subject to the decisions, on the key subject of Aboriginal heritage, of any other body.

### ***Division 2 – Aboriginal heritage protection orders***

- Clause 32**     **Interim protection orders**  
 Protection orders are designed for protection of Aboriginal heritage that is of exceptional significance, and which can be protected only by this means.

An interim protection order is designed as the first step to an enduring protection order – see (1)(c). The Minister is to consult

both the Council and any persons likely to be affected by such an order.

**Clause 33 Enduring protection orders**

An enduring protection order, again issued by the Minister, is intended to replace the inadequate and effectively unused ‘protected site’ provisions of the current AHA. Because the level of protection is so high, issuing, varying or revoking an enduring protection order requires approval by the Parliament (like reservations under the *Nature Conservation Act 2002* – see s.121 for the process). The issuing, varying or revoking of an enduring protection order also requires a minimum of 28 days of public consultation.

**Clause 34 Form of protection orders**

Specifies the formal requirements for a protection order. Provides that it may be issued on the Minister’s own initiative, or at the written request of the Council. The order is also to specify what (if any) protective measures are to be taken, and by whom.

**Clause 35 Variation or revocation of protection orders**

Provides that the Minister may by notice, on their own initiative or at the written request of the Council, or on the application of a person affected by the order, vary or revoke a protection order – subject to parliamentary approval, as noted.

**Clause 36 Publication of protection orders**

Mostly provides for the largely formal requirements around publishing the orders. Subsection (3) addresses the possibility that there may be an order that applies to a place whose location is preferably left secret, for its best protection.

**Clause 37 Effect of protection orders**

Clarifies that, to the extent of inconsistency, a protection order prevails over any other instrument affecting the land: ie, it does not void such instruments, but if it contains special provisions required for the protection of the land’s Aboriginal heritage values, those provisions will take precedence over anything inconsistent.

**Clause 38 Contravention of protection orders**

Provides that contravention of a protection order will be subject to a maximum penalty of the highest level used in the Act (up to 10,000 penalty units). It also provides a defence if the order was not published under s.36(3) and the person ‘did not know, and

could not reasonably have been expected to know' that they had contravened the order.

**Clause 39 Naming of area as protected**

This is similar to the intent of s.20 of the Nature Conservation Act, and is a protection against a false claim to the special status of being under a protection order.

***Division 3 – Aboriginal heritage permits***

**Clause 40 Certain activities require permits**

Establishes the basic requirement to have a permit to undertake 'permit activities' as defined in s.41. It also provides for certain exceptions, including for actions in response to emergency circumstances (as in s.28); and if the activity only disturbs ground already similarly disturbed, and such 'that it is not intended, and is not likely, to harm' Aboriginal heritage. This may apply to normal continued or 'like for like' activities, and can be considered to support and complement s.25.

**Clause 41 Types of activities that require permits**

This is a key list. Most of the activities here are currently covered in the AHA, but much less clearly. It is expected that (a) will be the most common, as it covers 'land activities' that may or will harm Aboriginal heritage. This would therefore cover most works that are below the thresholds for a management plan (see s.54 below) but where there is registered Aboriginal heritage, or where it is found.

The rest include 3 related to scientific works – (b), (e) and (f) – and the sale or removal from Tasmania of Aboriginal heritage – (c) and (d). There is specific provision at (g) for works intended to identify whether a management plan is 'required, or desired'. There is also a contingency – (h) – whereby other activities may be prescribed in the Regulations.

**Clause 42 Applications for Aboriginal heritage permits**

Provides in (1) that a 'person may apply to the Council' for a permit – establishing the point that permits are normally considered and determined by the Council. Note that the assumption is that potential proponents will seek advice first, to clarify what information they need to provide in an application.

Provides for the process, including consultation, as the Council advises. The Council is then to consider a core list of matters in (3), most critically to identify the 'nature and significance' of the Aboriginal heritage concerned, clarify the possible impacts on

Aboriginal heritage, and consider whether / how they can be minimised or mitigated.

**Clause 43 Further information may be required for permit applications**  
As in other approval-based legislation, the Council may require further information. Any time that is needed to meet the request is not to be taken into account in relation to the timelines of this Act: ie this is a ‘stop the clock’ provision.

**Clause 44 Determination of permit applications**  
Provides, first, that the Council may approve or refuse an application. Second, and importantly, it also provides for a default timeline of 42 days for the determination of the application, unless a further period has been agreed by the Council and the applicant.

In (3), a refusal by Council of a permit application is specified to be ‘an administrative decision under section 128’. This is the first use of this phrase in the Bill, and is the way that decisions are indicated to be appealable.

**Clause 45 Refusal of permit applications**  
Provides that, if the Council refuses an application, it must inform the applicant that they have a right of appeal. Also specifies that the Council must not approve applications in certain limited circumstances, including where a management plan is required, or s.30 of the *Burial and Cremation Act 2019* applies (ie on exhumation of any human remains, where the Director of Public Health must authorise any activity and set any conditions).

**Clause 46 Failure to determine permit application**  
Addresses the (hopefully very rare) circumstance that the Council fails to meet the 42 day timeline, in which case the applicant may apply to the Minister. This is intended to cover cases of unintended admin error. The Minister has 30 days, though may refer the matter back to Council if confident it can make a decision ‘within a reasonable period’. However, if the Minister then approves the application, the Council has no further role, and the Minister has all the functions and powers otherwise lying with the Council in relation to approved permits under the remainder of this Division.

**Clause 47 Issue of Aboriginal heritage permits**  
The Council then issues the permit. Critically, it may be subject to conditions – (2)(b) – and it is then an offence to contravene such a condition, whether by the holder of the permit or another person

– (3) & (4). There is in (5) a right of appeal against such conditions.

**Clause 48 Duration of Aboriginal heritage permits**

Establishes a default duration of 3 years, but otherwise the duration is as specified in the permit. The holder may apply for, and the Council may grant, one further extension.

**Clause 49 Variation of Aboriginal heritage permits**

The Council may vary a permit, either on its own initiative if the variation is ‘minor or administrative’, or on the application of the holder. If the variation makes the permit more restrictive, or the Council refuses an application from the holder, the Council must give reasons and the holder has appeal rights. (Time to lodge an appeal is provided by the variation not coming into effect for 14 days, and the variation does not come into effect until any appeal is dealt with.)

**Clause 50 Transfer of Aboriginal heritage permits**

A permit holder may apply to the Council to transfer a permit, permanently or temporarily. The Council must consider whether the transfer has negative impacts, but otherwise, it is to approve the transfer. If it refuses the application, the Council must give reasons and the holder has appeal rights.

**Clause 51 Suspension and cancellation of Aboriginal heritage permits**

The Council may cancel or suspend a permit if it reasonably believes (among other things) that the holder has no need for, or has materially contravened the conditions of, the permit, or the permit activity ‘is having an unforeseen impact’ on Aboriginal heritage. The action takes effect either at once or on a specified later date. The Council must give reasons, and the holder has appeal rights (with a 14-day delay, as for s.49, and the variation does not come into effect until any appeal is dealt with).

**Clause 52 Issue of replacement Aboriginal heritage permits**

A contingency only; while it is standard practice to issue electronic instruments, these too may be damaged or lost.

## **Division 4 – Management plans**

### **Subdivision 1 – Management plans generally**

**Clause 53**      **Interpretation of Division**  
 Defines the single term, used several times in Division 4, ‘heritage protection measures’.

**Clause 54**      **Certain land activities require management plans**  
 Provides critical elements of the AHMP process.

First, in (1) it specifies 2 of the 3 pathways to an AHMP, being the 2 that are required: either (a) because the activity is in a class of activities prescribed in the Regulations as requiring a plan, or (b) because the Minister believes it is appropriate in light of the specific circumstances to impose the requirement – ie to ‘call in’ the project.

The thresholds to be prescribed are expected to include being a ‘level 2 activity’ under the *Environmental Management and Pollution Control Act 1994* (with appropriate exceptions), or a subdivision of more than a certain number of lots or a certain area, or a dam of more than a certain capacity or surface area.

Then provides in (2) for certain exemptions: under s.55 below, in emergency circumstances, or if in a class of activities prescribed in the Regulations as exempt.

Finally, specifies in (4) and (5) that if an AHMP is required, the proponent may not start work unless it has been approved; the low-impact preparatory work allowable without the approved plan is defined for this purpose. An offence is created to support this requirement.

**Clause 55**      **Exemption from requirement for approved management plans**

Allows the Council, on application by the proponent, to exempt an activity from the requirement for an AHMP in certain circumstances:

- First, in (2)(a), if the Council is satisfied that ‘in the circumstances there is no need for’ an AHMP. This is to allow discretion for cases where an activity meets a prescribed threshold for a mandatory plan, but is (eg) on reclaimed land, or land that has already been subject to a comprehensive and negative survey.

- Second, in (2)(b), if the Council is satisfied that the ground ‘has sustained significant ground disturbance’, which is then defined in (3); the concept has been used for some time in Victoria.

If the Council refuses to grant an exemption under this section, it must give reasons and there is a right of appeal.

**Clause  
56**

**Voluntary management plans**

Allows the 3<sup>rd</sup> of the 3 pathways to an AHMP – voluntary plans. This can cater for proponents that see an advantage in a comprehensive plan for a project or ongoing activity, rather than having recourse to multiple one-off permit applications. This may be particularly useful for infrastructure providers and broadscale land managers.

***Subdivision 2 – Preparation of management plans***

**Clause  
57**

**Notification of intention to prepare management plans**

Provides for the formal notification of intent to prepare an AHMP, which effectively ‘starts the clock’ in process terms. The notice is to be provided to the Council, with specified details; a simpler notice with only basic details is also to be given to the decision-maker for any other authorisation that the project may require, so they are aware of the need for approval under this Act.

The notice is not expected to be the first contact with the Council, as it will cover matters such as the methodology of the Aboriginal heritage assessment, and the proposed consultation. On such matters, early engagement with the Council will be useful.

In order to allow the proponent to undertake activities that are needed for preparation of the plan (ie beyond those already allowed under s.54(5) above), (4) provides that Council’s confirmation of receipt will be taken to be a permit authorising those activities.

**Clause  
58**

**Council may choose not to consider management plans**

Provides for a case where it may be clear from the start that the Council will not be able to agree to an AHMP. In these circumstances, the Council may within 30 days notify the proponent and the Minister, giving reasons.

If the proponent nonetheless still wishes to prepare a management plan for consideration, they may then notify the Minister that they intend to apply to her or him under the provisions of s.66 & 67. If so, the Minister will issue advice or directions to the proponent and in due course may accept the application and consider the completed draft plan.

**Clause  
59**

**Preparation of management plans**

Clarifies that an AHMP may be prepared by the proponent or by someone on their behalf (eg a consultant). Specifies in (3) that the proponent must carry out an Aboriginal heritage assessment, and ‘make all reasonable efforts’ to remain in cooperative contact with the Council. Also specifies in (4) that ‘the Council is to make all reasonable efforts to consult and cooperate with the proponent’ (see also next). (5) covers the requirements for proponents applying to the Minister.

**Clause  
60**

**Form and content of management plans**

Sets out the basic requirements for an AHMP, including that it specifies the results of the Aboriginal heritage assessment, the ‘known and likely impacts’ of the activity, and the heritage protection measures to be taken.

Importantly, and complementing s.59, it is specified in (3) that the plan is to be ‘prepared in good faith by the proponent’ and ‘considered in good faith by the Council’ or (where applicable) the Minister.

**Clause  
61**

**Change in proponent during preparation of management plan**

Allows for a change of proponent without affecting the requirements on the new proponent (beyond informing the Council or the Minister), unless ‘the nature, or scale’ of the activity also changes.

**Clause  
62**

**Council may request reasons to continue with management plan preparations**

Allows the Council to ask a proponent to show cause as to why the Council should continue to engage if no contact has been made with the Council within a year of the notice of intent. This is to avoid time and effort being wasted on inactive projects.

**Clause 63 Council may withdraw from management plan preparations**

Provides for the possibility that at some time during the preparation of a plan, the Council may decide it cannot continue the process (such as in the case of an irreparable breakdown in the relationship with the proponent). The Council must provide its reasons. It is then to refer the proposed management plan and all relevant documents to the Minister, who may consider it under s.67.

**Clause 64 Discontinuation of management plan preparations**

Simple provision for the Council to be informed of a project's discontinuation, and providing its right to request documents.

***Subdivision 3 – Approval of management plans***

**Clause 65 Council approval of draft management plans**

Provides in (1)-(6) for the normal process. Allows a 42-day period (extendable by agreement) from receipt by Council of the finalised draft, during which 'the proponent and Council must make all reasonable efforts to reach agreement' on the key matters. (Note that if s.59 & 60 have been followed, the plan may be effectively pre-agreed.)

(3) sets out the key criteria for Council's approval, including that the plan 'provides for the relevant land activity to be carried out in a way that avoids, or minimises as much as possible, harm' to Aboriginal heritage, and 'makes satisfactory provision for the protection and management of any Aboriginal heritage likely to be affected'. Under (4), if Council and the proponent 'reach agreement on the matters specified in subsection (3)', the Council 'is to approve the plan' and, under (6), to provide a copy of its approval to the proponent.

Subsection (5) provides that Council must not approve a plan prepared materially contrary to the provisions of the Act.

However, under (7) if the Council and proponent fail to reach such agreement the proponent may apply to the Minister (see next 2 sections).

**Clause 66 Applications for Minister to approve management plans**

This applies to applications under s.58 or 65(7). (No application is needed if the proposal comes to the Minister under s.63, since relevant material is simply passed to the

Minister.) In considering the application the Minister is to take into account the reasons given, if the Council has chosen not to consider the plan under s.58, and may consult or require the proponent to consult as the Minister considers appropriate.

**Clause  
67**

**Minister may approve management plans**

(Note that the power to approve or refuse management plans is one that the Minister may not delegate: see s.119(1)(h).)

Sets out in (2) the matters that the Minister must consider. They repeat those applicable to the Council in s.65(3) regarding the avoidance or minimisation of harm etc, and also include the reasons or representations provided by the Council. If possible the decision should be within 30 days, or within an agreed further period. Under (4), the Council must be given the opportunity 'to provide feedback or comment'.

Under subsections (7) – (9), if the Minister refuses to approve, the proponent has a right of appeal. Whatever the decision, the Minister is to publish the reasons for it.

***Subdivision 4 – Operation of approved management plans***

**Clause  
68**

**Commencement of approved management plans**

A plan commences either when approved or on a date specified in the plan.

**Clause  
69**

**Effect of approved management plans**

Provides for the obligations on those implementing an approved plan. Creates offences, with significant maximum penalties, for non-compliance and for taking (or causing someone else to take) actions that contravene or negate a plan.

**Clause  
70**

**Variation of approved management plans**

The Council may vary a plan, but only in limited circumstances: either if the change is 'minor or administrative', on its own initiative (in any case); or on the application of the proponent. Variation is also the means by which there may be a change of proponent.

In considering any variation, the Council is to consult the proponent. Further, if the proponent disagrees with a variation, they have a right of appeal. More importantly, they

may also appeal if they apply for a variation that the Council refuses to make. In both cases the Council must give its reasons. (See also s.71(3) & (4).)

**Clause 71**      **Minister may approve variation of management plans in certain circumstances**

Provides for the Minister to vary a management plan that they have approved it, in a process that largely mirrors that for the Council in s.70. In considering a variation, the Minister must consult the Council as well as the proponent. If the variation is on the Minister's own account, or if the Minister refuses to vary on the application of the proponent, they must give reasons and there are appeal rights.

**Clause 72**      **Cessation of approved management plans &c.**

Provides cessation times to cover a range of circumstances, including: completion of the activity and implementation of all heritage protection measures; if the activity is not commenced within 3 years (though this is extendable by agreement with the approver of the plan); abandonment of the project; death or entry into administration of the proponent.

Importantly, to provide for longer-term plans, such as those potentially entered into by infrastructure providers, (2) provides for plans that may remain in force until revoked by either party. Under (3), plans approved by the Minister may not have a life exceeding 10 years.

(4) and (5) provide that the Council may revoke a plan if satisfied that the proponent has been convicted of an offence under s.69(2) or (3). The Council is first to allow the proponent to make submissions.

**Division 5 – Audits of land activities**

**Clause 73**      **Interpretation of Division**

The purpose of this clause is to define the terms 'authorised activity' (ie under a permit or management plan), 'relevant approval', and 'responsible person', in relation to this Division.

**Clause 74**      **Power of Minister to order audits of certain activities**

Provides for the Minister to order audits in relation to authorised activities under certain circumstances, including suspected non-compliance, approval based on false or

misleading information, or a changed understanding of the impact of the activity on Aboriginal heritage.

If the Minister issues an audit order, under (3) they must also issue a stop order for the authorised activity. This is an appealable decision, and the stop order is of no effect while the appeal is under way.

- Clause 75**      **Audit orders**  
 Specifies certain information which needs to be in the audit order, including which authorised officer is to undertake it, and provides for the services of a particular consultant to be engaged. Also sets out the procedural requirements to be followed upon issue of the order. Under (4), an order may not 'either directly or indirectly' require the making of 'a particular finding'.
- Clause 76**      **Conduct of audits**  
 Requires authorised officers to carry out audits in accordance with the audit order, and provides for them to have such powers as are reasonably necessary in carrying out the audit.
- Clause 77**      **Audit reports**  
 Sets out the reporting requirements in relation to an audit order, including providing for recommendations to be made in relation to the authorised activity.
- Clause 78**      **Approval or rejection of audit reports**  
 Requires the Minister to either approve or reject the audit report. (3) provides that the Minister 'is not entitled to reject an audit report solely' because they do 'not agree with its findings or recommendations' (see also s.80(3)).
- Clause 79**      **Actions following approval of audit reports**  
 Sets out procedural requirements following approval of an audit report. Provides for the Minister to implement recommendations contained in the report if they relate to an approval issued by the Minister. If they relate to an approval issued by the Council, it may implement or refuse to implement the recommendations, and if refusing, is to give reasons to the Minister.

**Clause 80      Action following rejection of audit reports**  
 Sets out actions that the Minister may take upon rejecting an audit report, and related procedural requirements. Under (3) the Minister is to provide reasons.

**Clause 81      Effect of stop orders on audits**  
 Provides for actions taken in accordance with audit orders or reports to be undertaken without contravening any stop order (ie including the stop order issued under s.74(3)).

**PART 7 – STOP ORDERS**

**Clause 82      Interpretation of Part**  
 Defines ‘stop’ in relation to Part 7. (Note that the roles of the Minister and Secretary in this Part may all be delegated to the appropriate level.)

**Clause 83      Minister may stop land activities in certain circumstances**  
 Provides for the Minister to stop land activities if an audit order is issued, or if satisfied that the activity contravenes the Act, or ‘believes on reasonable grounds’ it is harming Aboriginal heritage. It may be issued on the Minister’s own initiative or at the written request of the Council.

**Clause 84      Minister may stop permit activities in certain circumstances**  
 Provides for the Minister to stop a permit activity (ie as listed in s.41, noting that land activities are already covered by s.83) if satisfied that the activity contravenes the Act or is harming Aboriginal heritage. Procedural requirements are also specified.

**Clause 85      Power to make interim stop orders for land activities**  
 Provides for the Secretary or an authorised officer to require a person to stop a land activity temporarily, if he or she reasonably believes that the activity contravenes the Act or is harming Aboriginal heritage, and it is ‘not possible or expedient to refer the matter to the Minister’. Procedural requirements are also specified.

- Clause 86**      **Power to make interim stop orders for permit activities**  
 Provides for the Secretary or an authorised officer to require a person to stop a permit activity (see s.84) temporarily, if he or she reasonably believes that the activity contravenes the Act or is harming Aboriginal heritage, and it is not possible to refer the matter to the Minister. Procedural requirements are also specified.
- Clause 87**      **Form and content of stop orders and interim stop orders**  
 Sets out the required form of, and information included in, stop orders and interim stop orders. The orders must identify the Aboriginal heritage concerned and clearly identify the area of land to which they apply (ie so they do not apply inappropriately to whole project areas).
- Clause 88**      **Duration of stop orders and interim stop orders**  
 Provides for a stop order to be in force for a maximum of 30 days (unless related to an audit order, when it lasts until that is complete – but see also s.90), and for interim stop orders to be in force for a maximum of 48 hours. If the order is subject to an appeal, it is of no effect while the appeal is ongoing.
- Clause 89**      **Service of stop orders and interim stop orders**  
 Specifies the procedural requirements for serving stop orders and interim stop orders.
- Clause 90**      **Extension of stop orders**  
 Provides for stop orders to be extended for one further period of up to 14 days (so, up to 44 days in total). Specifies that an interim stop order may not be extended (so 48 hours in total).
- Clause 91**      **Revocation of stop orders and interim stop orders**  
 Provides for a stop order to be revoked by the Minister and an interim stop order to be revoked by the Minister, the Secretary or the authorised office who issued it. Revocation may be on the application of the person served with the order. Also specifies procedural requirements.
- Clause 92**      **Contravention of stop orders and interim stop orders**  
 Makes it an offence to contravene a stop order or interim stop order. The highest maximum penalties are attached (ie as for s.28 etc) and there is also a daily penalty for continuing offences.

## **PART 8 – ABORIGINAL HERITAGE AGREEMENTS**

- Clause 93**      **Power of Council to enter into Aboriginal heritage agreements**  
 The Council has the power to enter into Aboriginal heritage agreements. Agreements may be used to make arrangements to protect or manage Aboriginal heritage, but cannot provide permission to harm that heritage. For example, an agreement might be used to provide access to an Aboriginal site by Aboriginal people or to rehabilitate an Aboriginal heritage site, object or place. Agreements would not attach to the land and would not apply to future owners of the land.
- Clause 94**      **Parties to Aboriginal cultural heritage agreements**  
 The Council would always be a party to an Agreement, on behalf of the Aboriginal community. If the Agreement relates to land, the owner of the land must also be a party. In the case of Crown land, the relevant party is the Minister administering the *Crown Lands Act 1976*.
- Clause 95**      **Form and duration of agreements**  
 An Agreement is to be in a form approved by the Council. If it relates to land, it must contain a description or map of the boundaries of the land. The Council may terminate an Agreement if it is satisfied that a party is in breach of the Agreement. An Agreement relating to land is terminated on the sale of the land.
- Clause 96**      **Variation of agreements**  
 Provides for Agreements to be varied by agreement between the parties.

## **PART 9 – ABORIGINAL HERITAGE REGISTER**

- Clause 97**      **Aboriginal Heritage Register**  
 Provides for the Secretary to keep a register of relevant information on Aboriginal heritage. Identifies certain items that are to be entered into the register, including authorities (ie permits and AHMPs) and management and enforcement mechanisms. It requires in (3) consideration of ‘the recommendations of the Council’, and ‘any relevant

registration criteria, Ministerial guidelines and guidelines issued under section 98(3) – see below.

(4) clarifies that the Regulations may provide for many relevant registration processes, including nomination and assessment requirements, and whether ministerial or parliamentary approval is required for registration. They are expected in practice to provide much of the relevant detail.

**Clause 98**      **Access to the Register**  
Provides for the Council to access the Register in performing its responsibilities, and for the Secretary to grant access to certain others at any time: the Minister, courts (where relevant), law enforcement agencies, and State servants maintaining the Register.

(3) and (4) provide that other access provisions are to be covered in guidelines that the Secretary is to establish ‘in consultation with the Council’, and that these may also preserve some information from public access. (5) provides a broad power for the Regulations to prescribe who may apply for access, and how.

**Clause 99**      **Application of *Right to Information Act 2009***  
This provision clarifies that information in the Register is not subject to the RTI Act. Sensitive information would probably be protected anyway, with some effort, but it is considered better in principle to exclude the Register from the RTI Act, leaving access to it governed only by s.98.

**PART 10 – ENFORCEMENT [NOTE: these are largely standard provisions, similar to those in other modern legislation]**

***Division 1 – General***

**Clause 100**      **Application of Part**  
Provides that a power under Part 10 does not generally apply on Aboriginal land unless the Aboriginal Land Council has approved the exercise of the power.

**Clause 101**      **Authorised officers**  
The Secretary may appoint authorised officers ‘for the purposes of this Act’. Police officers are also authorised officers by virtue of their office (see definition in s.11). Authorised officers are to be issued with an identity card

and to produce the identity card ‘as soon as practicable’ after being requested to. If the authorised officer is also a police officer, they may produce other identifying details.

### ***Division 2 – Powers of authorised officers***

- Clause 102**      **Power of search and entry**  
Sets out powers of authorised officers in carrying out their responsibilities, including entering and searching premises and vehicles, requiring a person to give assistance, and examining and taking copies of documents relating to Aboriginal heritage. Where a premises is being used as a principal residence, authorised officers need either the permission of the occupant or a warrant to enter the premises.
- Clause 103**      **Power to require information**  
Gives authorised officers the power to request information or documents relevant to the authorised officers’ powers and functions, and creates an offence for refusal of such a request.
- Clause 104**      **Power to require name and address**  
Where an authorised officer suspects a person has committed an offence against the Act, the authorised officer may require that person to state their name and address (a very common power). Includes penalties for non-compliance.
- Clause 105**      **Power to require disclosure of location of Aboriginal heritage**  
Gives authorised officers the power to require a person to disclose the location of an item, object or place, where they reasonably believe such items to be Aboriginal heritage that is not registered, and needs to be in order to be protected. Also includes a penalty for non-compliance and defence provisions. These include a specific defence in (3)(c) for Aboriginal persons who reasonably believe that non-disclosure is the best way to protect the Aboriginal heritage from harm.
- Clause 106**      **Power of seizure**  
Gives authorised officers the power to seize Aboriginal heritage objects, documents issued under the Act, and other items, where the authorised officer reasonably

believes that an offence has been committed under the Act, to which the item is relevant.

**Clause 107**      **Dealing with objects, documents or things seized**  
Specifies the processes required in relation to seized items, including their custody (with the Council in the case of Aboriginal heritage items), their possible return (including if no proceedings are commenced within 3 years), and court-ordered destruction or forfeiture.

**Clause 108**      **Power to require persons to leave protected places**  
Gives authorised officers the power to require a person to leave a registered Aboriginal heritage site, an Aboriginal heritage place, or an area where a protection or stop order is in force, if the authorised officer reasonably suspects that the person is committing, has committed, or is about to commit, an offence against the Act. Includes a penalty for non-compliance.

**Clause 109**      **Power of arrest**  
First, defines an ‘endorsed authorised officer’: ie a police officer, or an authorised officer who is also empowered under other legislation to use powers of arrest (which may include NRE employees authorised under this Act). Then provides them with the power to arrest a person without warrant if the officer suspects certain offences against the Act have been, are being, or are about to be committed.

### ***Division 3 – Offences relating to authorised officers***

**Clause 110**      **Person must comply with request of authorised officer**  
Makes non-compliance with a request from an authorised officer, without reasonable excuse, an offence.

**Clause 111**      **Obstruction of authorised officers**  
Creates an offence for actions including obstruction of, or attempts to intimidate or improperly influence, an authorised officer in the performance of their functions.

**Clause 112**      **Assault of authorised officer**  
Creates an offence for assaulting, abusing or threatening an authorised officer, or someone assisting them.

**Clause 113**      **False and misleading statements**  
 Makes it an offence for a person to give a false or misleading statement.

***Division 4 – Offences generally***

**Clause 114**      **Infringement notices**  
 Defines an ‘infringement offence’ for the purposes of the Act. The offences will be prescribed in the Regulations. Provides for authorised officers to issue infringement notices and under what circumstances. They may not relate to more than 3 offences, or be served on a person under 18 years old.

**Clause 115**      **Offences by employees or agents**  
 If an employee commits an offence, the employer is taken to have committed the same offence. There are defences for employers where due diligence has been undertaken and where the defendant did not know that the offence was to be committed; and for employees if they were acting under direction and could not reasonably have known an offence would result.

**Clause 116**      **Offences by bodies corporate**  
 Governance members of bodies corporate are to be held responsible for offences committed by the body corporate if they ‘knowingly or negligently authorised or permitted the contravention’.

**Clause 117**      **Presumption of state of mind**  
 Standard inclusion to make clear that it is not necessary for the prosecution to prove any intention or state of mind in establishing that an offence has been committed. This is ‘unless otherwise specified’, so does not apply to offences defined by reference to knowing certain matters, or acting recklessly or negligently.

**Clause 118**      **Time for instituting proceedings**  
 Specifies that proceedings for offences under the Act must be commenced within 3 years of evidence coming to the attention of an authorised officer (it is currently 2 years, under the AHA). This means that a complaint or indictment must be filed in a relevant court within 3 years after the first evidence came to the attention of an authorised officer.

**PART 11 - MISCELLANEOUS**

- Clause 119**      **Delegation**  
Provides for most of the Minister's and Secretary's responsibilities and functions under the Act to be able to be delegated, with specified and important exceptions in the case of the Minister (including appointments to the Council and approval or refusal of management plans). This allows efficient functioning and implementation of the Act.
- Clause 120**      **Ministerial guidelines**  
Provides for guidelines to be issued. Guidelines are a flexible and adaptive statutory instrument. Guidelines under the Act are expected to provide details such as differing levels of assessment of Aboriginal heritage, and to provide information on the engagement and use of Aboriginal heritage consultants and other experts.
- The process of making guidelines requires consultation with the Council, followed by public consultation for at least 4 weeks.
- Clause 121**      **Approval by Parliament**  
Provides the process to apply if any instrument under this Act needs the approval of Parliament. (At the moment this covers only the issue etc of an enduring protection order, under s.33(5), but in due course is expected to apply also to the approval of a cultural landscape under the Regulations.) The process allows up to 10 sitting days for a deemed approval, but the expectation is that such approval would be sought by a motion on behalf of the Government.
- Clause 122**      **Effect of destruction of certain Aboriginal cultural heritage**  
Clarifies that if an object or area is destroyed in accordance with an Aboriginal heritage permit or management plan, it ceases to be Aboriginal heritage.
- Clause 123**      **Recovery of certain costs**  
Allows the Secretary to charge a person a fee for an action undertaken by the Department, or an authorised officer, but only an amount necessary to cover reasonable costs. This therefore refers to one-off circumstances, not the standard fees raised under the Regulations: see 130(2)(a).

- Clause 124**      **Certain money to be used for the purposes of this Act**  
Addresses the long-standing desire of Tasmanian Aboriginal people that normal fees, and especially fines (including under infringement notices), raised under the legislation should be dedicated to the benefit of Aboriginal heritage. Fines will be unpredictable and possibly rare, but the proceeds could usefully be applied to projects providing (eg) research, protective works, interpretation and so on. The Minister must consult the Council on the use of such funds.
- Clause 125**      **Service of notices**  
Formal. Sets out required processes for service of notices.
- Clause 126**      **Protection from liability**  
Intended to protect a member of the Council or other person from personal liability when carrying out, in good faith, their functions or responsibilities under the Act.
- Clause 127**      **Application procedures generally**  
Sets out required processes for applications made under the Act. Also includes grounds for refusing to accept applications (eg materially non-compliant, or repeating a previously refused application).
- Clause 128**      **Waiver and refund of fees**  
Provides for fees or charges under the Act to be waived or refunded, in full or in part.
- Clause 129**      **Appeals**  
'Administrative decisions' may be appealed to the Tasmanian Civil and Administrative Tribunal, within 14 days after the applicant is notified of the administrative decision to which the appeal relates. These are decisions where the existence of a right of appeal is either (for the most significant instances) provided explicitly in the Act, or is prescribed in the Regulations.
- Appeals will be on process and natural justice grounds, rather than seeking to have TASCAT reconsider the decision afresh, on its merits.

- Clause 130**      **Regulations**  
Provides for the Governor to make regulations for the purposes of the Act. They will include details not appropriate for the Act, and which are suitable for the somewhat easier process of making and amending Regulations – although they still require parliamentary scrutiny.
- They may cover a broad range of matters, including: the setting of fees; registration of Aboriginal heritage (a very important mechanism, as it will make clear the different processes required to recognise and register different sorts of Aboriginal heritage); additional appealable decisions; exemptions; setting of offences and penalties for contraventions of provisions in the Regulations (to a maximum of 50 penalty units); and savings and transitional matters. Others (such as specifying infringement notice offences and penalties under s.114) are provided for in the relevant sections.
- They may also adopt external codes, standards or guidelines, as now under s.21A of the AHA (see also Schedule 4, cl.5).
- Clause 131**      **Status of certain instruments under Act**  
Legal clarification only.
- Clause 132**      **Review of Act**  
A statutory review will be required by 5 years after commencement, with its report tabled in Parliament.
- Clause 133**      **Administration of Act**  
Identifies the Minister and government department initially responsible for administration of the Act (the Minister for Aboriginal Affairs and the Department of Natural Resources and Environment Tasmania).
- Clause 134**      **Savings and transitional provisions**  
Provides the head of power for the transition between the current AHA and the new legislation (actual details of savings and transitional provisions are then given in Schedule 4).

<b>Clause 135</b>	<b>Legislation repealed</b> Provides for repeal of the current AHA (the sole Act listed in Schedule 5).
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**[NOTE – each Schedule refers to a provision in the Bill, shown in [ ] after the title]**

### **SCHEDULE 1 – MEMBERSHIP OF COUNCIL [s.17(5)]**

Covers the normal and mainly formal matters dealt with in statutory bodies of this sort. Specific provisions include:

- Members appointed for up to three 3-year terms (2)
- Grounds for removal include absence from 3 consecutive meetings without permission of other members (6(2)(a)) and failure to declare a significant pecuniary interest (6(2)(c))
- On vacancy, a replacement may be appointed for the remainder of a member's term (6(3))

### **SCHEDULE 2 – MEETINGS OF COUNCIL [s.17(6)]**

Also largely standard provisions. Specific provisions include:

- Council to meet at least 10 times a year (2(4))
- A quorum is a majority of members – ie if there are 7 or 6 appointed members, quorum is 4; if 5, quorum is 3. The quorum cannot be less than 3 at any meeting.

### **SCHEDULE 3 – COUNCIL COMMITTEES [s.22]**

Brief, and also mainly standard provisions. Flexible on membership – Council may appoint committees of any size, and although they must contain at least 1 Council member, there is no fixed proportion (1).

### **SCHEDULE 4 – SAVINGS AND TRANSITIONAL PROVISIONS [s.133]**

*[NOTE – these are provisional at this stage. There will be a need to develop a comprehensive set in due course, to ensure fair and efficient transition from the current AHA and its procedures to the new Act (including matters such as incomplete permit processes, or legal proceedings).]* The Bill's current contents indicate some matters expected to be covered, including:

- If the new Aboriginal Cultural Heritage Council has not been appointed, the continuation of the former Aboriginal Heritage Council (a contingency only, not expected to be needed)
- The continuation of permits issued under the AHA, under the same terms and conditions

- The continuation, if necessary, of the codes etc adopted under the AH (also only a contingency)
- Reporting of privately held Aboriginal heritage objects, for registration (note that collections reported in the period after the Relics Act was first commenced in 1976 (under s.10(1) – still part of the current Act) were not included in the Register as it developed over the decades.)

**SCHEDULE 5 – LEGISLATION REPEALED [s.138]**

At this stage, only the AHA is intended to be repealed.

Consultation Draft