

ABORIGINAL HERITAGE LEGISLATION

AUSTRALIAN INTERJURISDICTIONAL ANALYSIS 2018 (Part 2)

	SA	TAS	VIC	WA CURRENT	WA NEW
Act/ Proposal	<i>Aboriginal Heritage Act 1988</i> and <i>Aboriginal Heritage (Miscellaneous) Amendment Heritage Act 2016</i>	<i>Aboriginal Heritage Act 1975</i>	<i>Aboriginal Heritage Act 2006</i> (VIC Act) and <i>Aboriginal Heritage Regulations 2018</i> .	<i>Aboriginal Heritage Act 1972</i>	<i>Proposed new Aboriginal Heritage Act</i>
Aspects of Aboriginal Heritage covered	Aboriginal remains, objects and sites of significance according to Aboriginal tradition or significant to Aboriginal archaeology, anthropology or history	All Aboriginal relics are protected. Definition of a relic (section 2(3)) is extensive and includes a requirement to be 'of significance' to the Aboriginal people of Tasmania. Note Burra Charter used as the standard for 'significance' of 'relics'. Only Aboriginal Heritage Officer or community can give statement of 'social significance'.	<ul style="list-style-type: none"> Aboriginal Place, including landscapes, immediate surrounds Aboriginal objects Secret or sacred objects Ancestral remains Intangible heritage 	<ul style="list-style-type: none"> Place based tangible and intangible Aboriginal heritage 	<ul style="list-style-type: none"> Place based tangible and intangible Aboriginal heritage Skeletal remains <p>Note the definition of 'Place' will be akin to that used in the Burra Charter so that cultural landscapes are specifically covered</p>
Protective Measures	<ul style="list-style-type: none"> All Aboriginal heritage is protected whether recorded/registered or not 	<ul style="list-style-type: none"> All Aboriginal relics are protected whether registered or not (definition of a relic is at section 2(3)) Obligation to report 	<ul style="list-style-type: none"> All Aboriginal heritage is protected whether registered or not Obligation to report Intangible heritage only protected if registered 	<ul style="list-style-type: none"> All Aboriginal heritage is protected whether registered or not 	<ul style="list-style-type: none"> All Aboriginal heritage is protected whether registered or not
Method/tools	<ul style="list-style-type: none"> Ministerial authorisation to allow excavation for Aboriginal heritage; damage, disturbance or interference with Aboriginal heritage and authorisation to sell or remove an Aboriginal object from the state. Discovery Protocols and Legislative Awareness 	<ul style="list-style-type: none"> A permit, issued by the Minister, is required to authorise any interference with Aboriginal heritage The Minister must issue 'Guidelines' which, in effect describe due diligence which, when complied with, may serve as a defence to unintentional interference 	<ul style="list-style-type: none"> Mandatory & voluntary Cultural Heritage Management Plans (plans) & prescribed standards Cultural Heritage Agreements (for access protection and maintenance) Aboriginal Cultural Heritage Land 	<ul style="list-style-type: none"> Mandatory reporting of sites to the Registrar or a police officer Protected Areas; exclusive possession to Minister Ministerial approval to impact site (section 18) 	<ul style="list-style-type: none"> Risk-based desk top assessments by the Department Mandatory reporting of sites to the Department Endorsed agreements between local Aboriginal people and land users Ministerial approval

	<p>regularly imposed as conditions</p> <ul style="list-style-type: none"> Confidentiality of site/object information, with approval processes for disclosure 	<p>with Aboriginal heritage.</p> <ul style="list-style-type: none"> Known Aboriginal heritage is entered in a Register which can be interrogated Unanticipated Discovery Plan Risk based desk top assessments by the Department when advising the Director of National Parks and Wildlife and Minister in relation to applications for a permit 	<p>Management Agreements (between Registered Aboriginal Parties and public land agencies)</p> <ul style="list-style-type: none"> Cultural Heritage Permits (not for intangible heritage or where a CHMP is required under the Act) Intangible heritage agreements (for use of intangible heritage) Preliminary Aboriginal test certificates Strict liability offence for harming Aboriginal heritage Aboriginal Heritage Council has a statutory function of Public education and awareness Mandatory reporting of sites to Department Order to Repair/Restore Ministerial declarations of protection for permanent protection of areas Emergency stop orders of various duration Cultural heritage audits where a plan is not being followed or is inadequate Compulsory acquisition of land containing significant heritage 		<p>required for significant impact of heritage</p> <ul style="list-style-type: none"> Protected Areas; exclusive possession to Minister Stop Work Order (Minister) Restore Order (Court)
<p>Decisions on heritage values</p>	<p>Minister – Must accept views of Traditional owners of the land or object in question before determining the significance.</p> <p>Minister must also consult widely before registration can occur.</p>	<ul style="list-style-type: none"> The Minister makes decisions in relation to granting permits to interfere with Aboriginal heritage, but only on the recommendation of the Director. <p>The Aboriginal Heritage Council provides advice and makes recommendations to</p>	<ul style="list-style-type: none"> Registered Aboriginal Parties (RAPs) Victorian Aboriginal Heritage Council Department, in consultation with Traditional Owners, where no RAP exists Activity Advisory Group of Traditional Owners 	<p>Minister in consideration of advice from Aboriginal Cultural Material Committee (no statutory requirement for Aboriginal members). ACMC evaluates heritage values when land use proposals are made or to determine whether a place is of State Significance.</p>	<p>Local Aboriginal Heritage Services (100% Aboriginal) or local knowledge holders/Traditional Owners</p>

		the Minister and the Director in relation to the operation of the Act (including in relation to issue of permits)	appointed by Department where appropriate and no RAP exists		
Who must be consulted	<p>In most instances, State Aboriginal Heritage Committee (SAHC) – all Aboriginal and gender balanced with members sourced as far as is possible from across the state</p> <p>Traditional owners and all interested Aboriginal parties in the case of an application to authorise damage or disturb heritage or the sale or removal of objects from the state.</p> <p>Recognised Aboriginal Representative Body – statutory function to advise the Minister on Aboriginal heritage matters in a specified area and statutory authority to enter into Local Heritage Agreements in respect of applications to impact Aboriginal heritage sites in their area.</p>	<p>Aboriginal Heritage Council (made statutory by 2017 amendments to the Act) with a statutory requirement that all members (up to ten) must be Aboriginal. [note that referral of permit applications to AHC is matter of practice and not a requirement of the Act]</p> <p>An Aboriginal Heritage Officer (who must be Aboriginal) provides evidence of consultation processes [purely practice]</p>	<ul style="list-style-type: none"> • RAP • All relevant Traditional Owners who are not a RAP when Secretary makes decisions • The owner or occupier of the land to be surveyed. • The Secretary must consult with the Aboriginal Heritage Council before issuing a Permit. 	No statutory requirement for consultation	Traditional owners/Local knowledge holders through Local Aboriginal Heritage Services where they exist
Approving land use proposals	<p>Minister grants authorisations to excavate for heritage; damage, disturb or interfere with heritage (may be conditional)</p> <p>Minister approves Local Heritage Agreements and Division A2 agreements (e.g. native title mining agreements) provided they ‘satisfactorily deal with heritage’</p> <p>Minister enters into Aboriginal Heritage Agreements with</p>	<p>A permit to interfere with Aboriginal heritage is granted by the Minister (considering advice from the AHC, if offered or sought, and the recommendation of the Director)</p> <p>[note nothing in the Act connects to land use planning and it’s a key point that differentiates Tas from several other jurisdictions where integration is explicit</p>	<ul style="list-style-type: none"> • RAPs • The Secretary where there is no RAP • The Secretary (or the Aboriginal Heritage Council if the Secretary or RAP is the sponsor of the CHMP) • Planning permit applications cannot be approved where a plan is required until that plan has been approved 	Minister	Aboriginal Heritage Council (assuming Minister delegates statutory function), where impact on heritage minimal and agreed with Aboriginal people. Minister for all others

	landowners (such agreements 'run with the land')				
Minister's role	<ul style="list-style-type: none"> Protection, preservation of Aboriginal sites, objects and remains Conduct, direct or assist searches to discover Aboriginal sites or objects Conduct, direct or assist research into Aboriginal heritage Appoint members of the SAHC Maintain Central Archive (includes Register of Aboriginal Sites and Objects) Consult with the SAHC and all Aboriginal organisations and persons with an interest when making a determination, giving an authorisation, declaring or not a site or object Appoint suitable persons as inspectors Administer the Aboriginal Heritage Fund Approve Local Heritage Agreements and agreements made under other legislation (e.g. ILUAs, native title mining agreements etc.) Enter agreements with landowners to protect Aboriginal heritage Revoke or suspend PBC appointments as RARBs 	<ul style="list-style-type: none"> Issues statutory Guidelines Grants permits (after considering advice from the Director and, if offered or sought, from the Aboriginal Heritage Council (via Governor) appoints AHC members and its Chair 	<ul style="list-style-type: none"> Oversight of Aboriginal Victoria's administration of the <i>Aboriginal Heritage Act 2006</i> Making Declarations of Protection Appointing Aboriginal Heritage Council members Appointing Aboriginal Heritage Officers and Authorised Officers Approving cultural heritage audits Making land tax or rates remission orders where appropriate, with Treasurer's approval Deciding on exercise of compulsory acquisition powers 	<ul style="list-style-type: none"> Consideration of all applications to impact Aboriginal heritage Ensuring that all objects/places of traditional, ritual or ceremonial significance to Aboriginal people are recorded Ensuring that objects/places of traditional, ritual or ceremonial significance to Aboriginal people are preserved according to their relative importance and available resources Considering recommendations of ACMC to declare a Protected Area and giving notice of such an intent to affected persons Acquisition of Aboriginal cultural objects 	<ul style="list-style-type: none"> Consideration of land use proposals that involve State Significant projects or will cause significant negative impact to Aboriginal heritage Have regard to social and cultural effects and views of Aboriginal people when making decisions on land use proposals and publish reasons for decisions. Issue Stop Work Orders Support AHC in its promotion of Aboriginal heritage Consider recommendations for new Protected areas and issue Regulations to authorise appropriate management of heritage in Protected Areas
Penalties	<p>Breach of conditions to Authorised use:</p> <ul style="list-style-type: none"> body corporate - \$50,000 any other case - \$10,000 	<p>Damage to heritage without a permit:</p> <ul style="list-style-type: none"> Body corporate – 10,000 	<p>Failure to report a site:</p> <ul style="list-style-type: none"> Natural Person - 60 PUs Body Corporate - 300 PUs <p>Knowingly harming Aboriginal</p>	<p>For any offence under the Act where no penalty provided:</p> <ul style="list-style-type: none"> Individual, first offence - 	<p>For any offence under the Act:</p> <ul style="list-style-type: none"> fine of up to \$1 million with a daily penalty

	<p>or 6 months imprisonment</p> <p>Unauthorised disclosure of archive information:</p> <ul style="list-style-type: none"> \$10,000 or 6 months imprisonment <p>Obstruction of Inspector/failure to comply</p> <ul style="list-style-type: none"> \$2,000 or 3 months imprisonment 	<p>PU's [=\$1.63 million]</p> <ul style="list-style-type: none"> Individual or small business – 5,000 PU's [=\$815k] 	<p>heritage:</p> <ul style="list-style-type: none"> Natural person – 1800 PU's Body corporate – 10,000 PU's <p>Recklessly harming Aboriginal heritage:</p> <ul style="list-style-type: none"> Natural person – 1200 PU's Body corporate – 6,000 PU's <p>Negligently harming Aboriginal heritage:</p> <ul style="list-style-type: none"> Natural person – 600 PU's Body corporate – 3,000 PU's <p>Strict liability offence of harming Aboriginal heritage:</p> <ul style="list-style-type: none"> Natural person – 60 PU's Body corporate – 300 PU's <p>Failing to comply with conditions of Cultural Heritage Permit:</p> <ul style="list-style-type: none"> Natural person – 60 PU's Body corporate – 150 PU's <p>Knowingly commencing an activity that requires an approved plan without one:</p> <ul style="list-style-type: none"> Natural person – 240 PU's Body corporate – 1,200 PU's 	<p>\$20,000 and 9 months imprisonment</p> <ul style="list-style-type: none"> Individual, second offence- \$40,000 and 2 years imprisonment <ul style="list-style-type: none"> daily penalty of \$400 Body corporate, first offence - \$50,000 Body corporate, second offence - \$100,000 <ul style="list-style-type: none"> daily penalty of \$1000 Breach of secrecy provisions relating to mining or prospecting operations - \$1,000 	<p>rate of \$50,000</p> <p>For breach of a stop work order</p> <ul style="list-style-type: none"> fine of up to \$1 million with a daily penalty rate of \$50,000 and imprisonment of up to 1 year <p>In addition, Court may make an order for compensation and/or restoration</p>
<p>Additional protection for areas of outstanding cultural heritage value?</p>	<ul style="list-style-type: none"> Minister may restrict access to sites, objects or remains with approval of Governor Minister may acquire land for purpose of protecting a site, object or remains 	<ul style="list-style-type: none"> Protected Sites (3 declared in total) Listing of cultural values as matters of National Environmental Significance under EPBC Act 	<ul style="list-style-type: none"> Declarations – Minister may make interim and ongoing protection declarations over areas of significant heritage value Minister may acquire or grant land by agreement of compulsory acquisition where there are no other practicable means to 	<p>Protected Areas declared by the Minister</p>	<p>Protected Areas declared by the Minister</p>

			ensure its proper protection		
Appeals	Only Traditional Owners may 'call into question' a determination of the Minister	No provision. (Judicial Review Act is only option)	<ul style="list-style-type: none"> Proponents of activities may appeal a decision of a RAP or the Secretary to refuse to approve a plan to the Victorian Civil and Administrative Tribunal (VCAT) Applicants may appeal a decision of a RAP to refuse to issue a cultural heritage permit to VCAT Affected persons may appeal a decision of the Minister to make a protection declaration to VCAT 	Land owners may appeal to the State Administrative Tribunal against the Minister's refusal to grant consent to land use	Equal rights of appeal by affected persons against an administrative decision to the State Administrative Tribunal
Consultants regulated?	No	No, but a register of Aboriginal Heritage Officers approved by the Council and a list of recognised consulting archaeologists are provided on the Aboriginal Heritage Tasmania Website	<ul style="list-style-type: none"> No. A list of qualified heritage advisors is kept by AV. 'Heritage advisor' is a defined term in the Act with stipulated qualifications, knowledge/experience Consultants' practice regulated through the CHMP and permit requirements 	No	No, but a Directory of heritage practitioners, with their qualifications and experience will be published on the Department's website (without endorsement),
Wardens or Inspectors	Inspectors with powers of entry and seizure	Wardens and Honorary Wardens may be appointed with powers of entry, search and seizure [in practice, Honorary Wardens are not appointed]	<ul style="list-style-type: none"> Authorised officers with entry, search and seizure powers. May also issue stop orders. Aboriginal heritage officers with entry, search and seizure powers. May also issue 24 hour stop orders. 	Honorary Wardens provided for in the statute but have fallen into disuse	No
Status of Register	<ul style="list-style-type: none"> A central archive of Aboriginal sites and objects 'Conclusive' proof that a site or object is Aboriginal if it is registered. 	Information repository [Note – the Aboriginal Heritage Register in Tasmania has no statutory basis at all: it's simply the administrative means of embodying "the	<ul style="list-style-type: none"> Source of information about Aboriginal heritage for Heritage Advisors, Traditional Owners and others. Defined Victorian State 	Information repository & planning tool – publically available	Information repository & planning tool – publically available

	<ul style="list-style-type: none">• Conclusive proof it is not Aboriginal if Minister determines a site or object should not be registered	Director's memory", to hold the information reported under s.10 (especially 10(3))	Collection		
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