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Review of the Aboriginal Heritage Act 1975
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Australian Archaeological Association and Australia ICOMOS Submission on A New Aboriginal Cultural Heritage Protection Act Consultation Paper (March 2022)

Thank you for the opportunity to comment on the high-level policy directions for new Aboriginal heritage legislation in Tasmania as proposed in *A New Aboriginal Cultural Heritage Protection Act Consultation Paper on High-level Policy Directions* (Department of Natural Resources and Environment, March 2022).

This letter is provided as a joint submission from the Australian Archaeological Association (AAA) and Australia ICOMOS (AICOMOS), two national peak bodies concerned with the protection and long term management of cultural heritage in Australia, including Aboriginal cultural heritage. A joint submission was considered desirable to emphasise the similar viewpoints within the cultural heritage profession on this important matter of developing new Aboriginal heritage protection legislation for Tasmania.

AICOMOS has previously made submissions on this matter (correspondence of 30/9/2019 & 24/11/2020), as well as in relation to the amendment of the *Aboriginal Relics Act 1975* (correspondence of 24/2/2017). AAA also made a submission on 20 September 2019. AAA, AICOMOS and Cultural Heritage Practitioners Tasmania also met jointly with Department of Natural Resources and Environment staff in November 2020 to discuss the review of the Tasmanian Aboriginal heritage legislation.

As you will be aware, AICOMOS (the Australia national committee of the International Council on Monuments and Sites) is a non-government, not-for-profit organisation of cultural heritage professionals that was formed as a national committee of ICOMOS in 1976. AICOMOS' mission is to lead cultural heritage conservation in Australia by raising standards, encouraging debate and generating innovative ideas. AICOMOS supports national standards and best practice within the heritage field. This includes legislative and regulatory tools that contribute to the best-practice management of Australia's heritage.

The Australian Archaeological Association is the largest ,archaeological organisation in Australia, representing professionals, researchers, students, and others with an interest in archaeology. AAA's mission is to promote practice, knowledge and conservation of archaeology and archaeological sites and materials through the discussion and dissemination of archaeological information and ideas. AAA also supports the development of national standards and archaeological ethics. Since its inception in 1973, AAA has made many submissions to State and Federal governments on these issues.

As previously noted, AAA and AICOMOS acknowledge the deficiencies in the existing Aboriginal heritage legislation (the *Aboriginal Heritage Act 1975*) and strongly support the development of new Aboriginal heritage legislation for Tasmania. This was recommended for urgent implementation in the recent *Pathway to Truth-Telling and Treaty: Report to Premier Peter Gutwein* (Kate Warner, Tim McCormack & Fauve Kurnadi 2021, recommendation 19).

As also previously noted, it is our strong view that any new legislation needs to respond positively to the concerns of the Aboriginal community and meet current best practice with respect to recognising and conserving cultural heritage and in relation to recognising the rights of Indigenous people. In relation to the latter, the rights prescribed in the 2007 *United Nations Declaration on the Rights of Indigenous People* (UNDRIP), including the right to Free Prior and Informed Consent by Aboriginal people to decisions that affect their heritage, should be supported.

More recently, *Dharuwa Ngilan*, a vision and guidelines for Aboriginal and Torres Strait Islander heritage protection in Australia, was developed by the Heritage Chairs and Officials of Australia and New Zealand (HCOANZ 2020). This contains important 'Best Practice Standards in Indigenous Cultural Heritage Management and Legislation' that any new Tasmanian Aboriginal heritage protection legislation should meet.

Having reviewed *A New Aboriginal Cultural Heritage Protection Act Consultation Paper on High-level Policy Directions* (the Consultation Paper), we note that many of our concerns and previous recommendations for the direction and development of new Aboriginal heritage legislation in Tasmania, including the key principles for Aboriginal heritage legislation suggested by AICOMOS (correspondence 30/9/2019), have been adopted. We commend the government for this.

However, AAA and AICOMOS still have concerns about several aspects of the Consultation Paper. Our key, high-level policy concerns are outlined below (by Consultation Paper heading).

1. Purposes and objectives

AAA and AICOMOS generally support the proposed purpose, principles, and objectives, but:

- are concerned about the implications of Aboriginal heritage management being an integral part of the State's Resource Management and Planning System should it be too strongly integrated, such that it is controlled by other priorities and timelines (see item 6 below for more detail); and
- would like to see what is proposed regarding the relationship of the proposed new legislation to current and proposed Commonwealth Aboriginal heritage legislation.

2. Better definitions of Aboriginal heritage

- To operate in any meaningful way, the Act must be able to identify and provide measures to manage intangible heritage and extensive heritage (e.g., serial sites, heritage areas, cultural landscapes). The proposal appears ambiguous on these aspects of Aboriginal cultural heritage. For example, although the term 'site' is defined to include areas, the term does not explicitly recognise that areas with multiple sites can be included where it is the collection of places that are important.
- AAA and AICOMOS have concerns around definitions primarily in relation to the use of the concept of 'significance'. A major part of this concern is that requiring Aboriginal heritage to be 'significant' is a move away from the important blanket protection that is currently provided. It is our view therefore that:
- No test of significance should be included for heritage objects or sites, and the test for inclusion should be limited to objects or sites having an origin in Aboriginal tradition, with an appropriate definition or qualification of 'tradition' (it is noted that the definition for Aboriginal human remains is not problematic in our view). Instead, sites and objects should be managed according to a range of possible values, as per the Australia ICOMOS Burra Charter. This is in line with heritage reforms and modernisation in other Australian states, e.g. WA and Queensland.

- Intangible heritage and Aboriginal heritage areas, which are more difficult to identify, could be partly defined as areas having heritage value(s) for all or for specific groups of Palawa people. However, if this occurs:
 - the values must be Aboriginal community defined (although other significance may be recognised) – we suggest the AICOMOS Burra Charter be used as the basis for best practice assessment;
 - the values must be clearly articulated, and in the case of heritage areas a clear boundary should be established; and
 - registration of intangible or extensive forms of heritage be accompanied by a conservation policy or plan that is based on the maintenance of the assessed values. In the case of a heritage area, the plan could be a Cultural Heritage Management Plan (CHMP), a widely recognised management tool.
- We support the inclusion of all categories on the one heritage register and acknowledge that different categories may need different treatment.

3. Ownership of Aboriginal heritage

- AAA and AICOMOS generally support this section if decisions of ownership are made by the Palawa people, and the Aboriginal community is empowered to make these decisions about this heritage, which they own.
- Noting the special nature of Aboriginal human remains, and the desire for the repatriation of these and other highly significant objects to Country expressed in *Pathway to Truth-Telling and Treaty* (2021), we recommend special provisions be made in the legislation for these to be owned by the relevant traditional custodians, and for these to be returned to Country where requested.
- We strongly support the proposal that Aboriginal heritage ownership can coexist with freehold property rights (as is the case with mining rights and freehold property rights).

4. Representation of Aboriginal people and interests

- Given the lack of a clear single mechanism for Aboriginal representation, AAA and AICOMOS generally support the continuation of a representative Aboriginal Heritage Council. However, as we have noted previously, in our view it is critical that all recognised Aboriginal custodial groups are equitably recognised and represented on such a Council.
- It is also critical that the new Act specifies how representatives are selected, to ensure that there can be confidence in heritage processes. If no pathway for this can be agreed by the Aboriginal community, then AAA and AICOMOS recommend that the Act or associated legislation operate similarly to the *Aboriginal Heritage Act 2006 (Victoria)*, but modifying the requirement for Council members to be traditional owners to meet the Tasmanian context (where there are no formally recognised traditional owners).
- AAA and AICOMOS strongly endorse the proposal to include clear criteria for Aboriginal Heritage Council membership, and clear information about membership and the Council's operation.

5. Who makes decisions about Aboriginal heritage

- It is AAA's and AICOMOS' strong view that Aboriginal people should make decisions about their heritage and we generally endorse the proposal that the legislation recognise this right.
- However, AAA and AICOMOS do not feel the proposal goes far enough in ensuring that Tasmanian Aboriginal people will have the right of free, prior and informed consent (FPIC). We believe that more thought needs to be put into how this can be realised. Having clear and equitable representation on the Aboriginal Heritage Council, and a Council with real decision-making ability will help. We believe clearer heritage protection and long-term management decision and review procedures and resourcing are also required.
- We do not agree with the proposition to create separate low risk and higher risk decision-making pathways, with the Minister to make the decision for higher risk matters. In our view, higher risk matters should be resolvable by a proper CHMP process, where the relevant Aboriginal parties have final approval in recognition of their right of FPIC. We suggest that the appropriate role of the Minister in relation to higher risk matters might be to consider appeals on CHMPs (see item 6).

6. Who makes decisions about Aboriginal heritage

- AAA and AICOMOS support the better meshing of new legislation with the State's Resource Management and Planning System, but strongly reject the proposal that approvals, permits and appeals be closely aligned to the planning system. In our view the alignment of approvals, permits and appeals with statutory timelines is not needed and is not workable for Aboriginal heritage given the way in which heritage is protected, and the need to protect FPIC. We suggest that ensuring there is an Aboriginal Heritage Standard in the *Tasmanian Planning Scheme* that requires planning applications to show they have met the requirements of the Aboriginal heritage legislation is sufficient and adequate alignment.
- In relation to appeals, while we do not support appeals through the planning system for Aboriginal heritage, we appreciate there may be a need for a review of the Aboriginal Heritage Council's decisions from time to time. We propose that consideration be given to this role being performed by a specially constituted independent body operating under the oversight of the Heritage Minister.

7. Modern Management Mechanisms

- As noted above, it is AAA's and AICOMOS' strong view that the Aboriginal Heritage Council be the main decision making body in relation to matters under any Aboriginal heritage protection legislation, and that the role of the Minister should include ensuring transparency and terms of reference for an independent review body for any appeals. What can be reviewed and appealed, and the process, will need to be prescribed in the legislation.
- As seen with the reviews of other States' Aboriginal Heritage Acts, the effectiveness of heritage legislation is highly dependent on properly resourced and authorised management entities to provide proactive management and decision making. While AAA and AICOMOS understand that this is not a matter for inclusion in the legislation, we strongly urge the Tasmanian government to make this a firm, long-term commitment.

8. Compliance

AAA and AICOMOS generally support what is proposed in relation to compliance.

- We note that compliance is best achieved through proactive management, ideally by the Aboriginal community or dedicated Aboriginal positions (e.g. Rangers and Compliance Officers) within the Department of Natural Resources and Environment, or otherwise appointed to work on Country; and
- We strongly support the inclusion of emergency protection provisions, as proposed.



Thank you for your consideration of the views of the Australian Archaeological Association and Australia ICOMOS in this important issue. We would be happy to provide clarification or further discuss this submission should you wish.

Tasmania is in an ideal position to learn from the heritage policy settings and outcomes in other States and enact truly world-leading, best practice Aboriginal heritage legislation with accompanying management frameworks. The Australian Archaeological Association and Australia ICOMOS look forward to this becoming a reality through the new legislation.

Yours sincerely

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