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Aboriginal Heritage Legislation Review

AUSTRALIA ICOMOS SUBMISSION ON THE ABORIGINAL HERITAGE ACT 1975 (TAS) REVIEW STAGE 1 (MAY 2019 DISCUSSION PAPER)

Thank you for the opportunity to comment on the current *Aboriginal Heritage Act 1975* Review. I provide this letter as a submission on behalf of Australia ICOMOS. Please also accept our thanks for allowing Australia ICOMOS to provide late comment (i.e. by 30 September 2019).

Australia ICOMOS (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. Australia ICOMOS' mission is to lead cultural heritage conservation in Australia by raising standards, encouraging debate and generating innovative ideas. Australia ICOMOS supports national standards and best practice within the heritage field. This includes legislative and regulatory tools that contribute to the management of Australia's heritage.

Australia ICOMOS is of the view that a review of the 1975 Act is well overdue (the 2017 Amendments notwithstanding) and that there is a need for new legislation, not merely an amendment to the current Act. The resulting legislation needs to respond positively to the concerns of the community and meet current best practice with respect to recognising and conserving cultural heritage and in relation to recognising the rights of Indigenous people (for example as prescribed in the 2007 *United Nations Declaration on the Rights of Indigenous People UNDRIP*, in particular in relation to articles 11, 12, 25 and 31). We congratulate the government on the broad nature of the review and consultative process that it is taking in carrying out this review.

The proposed new Act is also an opportunity to move away from a place/site-based management paradigm and also to allow Aboriginal people control over the management of their own heritage, thereby reflecting current international standards. It presents an opportunity for Tasmania to be a leader in Aboriginal heritage management in Australia.

Australia ICOMOS particularly commends to the Tasmanian government the following directions for new legislation which we regard as key principles that should underpin any new Aboriginal heritage legislation:

- Continued blanket protection for Aboriginal heritage;
- The expansion of what is included as Aboriginal heritage to include ancestral remains, intangible cultural heritage, places of major historical, social and spiritual significance, and cultural landscapes;
- The primary role in determining heritage value and significance and protection being given to the Tasmanian Aboriginal people as the traditional owners and custodians of this heritage;
- That values protection be the aim and driver of management decision making;

- Greater involvement given to Aboriginal people in decision making, and a reduction in the involvement of the Minister;
- Transparency of decision making and procedural fairness; and
- For Aboriginal heritage to be celebrated as well as protected.

These principles recognise current best practice for cultural heritage conservation and protection at the national and international level and that Aboriginal heritage, as with all cultural heritage, is non-renewable. Their adoption is also important in acknowledging that Aboriginal cultural heritage in lutruwita/Tasmania is extremely diminished through over 200 years of European occupation, that this saw the dispossession of Aboriginal people from their land, and that until the 1990s their existence and continuity of culture was not recognised.

Other important considerations in Australia ICOMOS' view are the need for:

- An effective compliance framework;
- Legislating transparency and accountability in decision-making processes;
- Building capacity in Aboriginal corporations to engage in heritage management; and
- Government support for the implementation and operation of the legislation, including for affected landowners.

In addition, Australia ICOMOS offers the following specific comment and recommendations as part of the AHA 1975 Review consultation. This comment is based on the May 2019 *Discussion Paper: The comment is made under the ten Discussion Paper 'Key Topics'*.

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

1. Australia ICOMOS suggests that a statement of overarching principles in this regard would be a useful starting point for this discussion and would help provide certainty and give meaning to the legislation. Such principles might include (subject to agreement by the Tasmanian Aboriginal people) that:

- The purpose of the Act is to prevent harm to Aboriginal heritage;
- This is not at the expense of the ability of Tasmanian Aboriginal people being able to interact with, and manage their own heritage; and
- Aboriginal people are the custodians of their heritage, and therefore the primary decision makers in its management.

(In other words, the Act should make clear that Aboriginal heritage is protected *for the benefit of Tasmanian Aboriginal people*. This links to the right of peoples to participate in cultural life (*United Nations Universal Declaration on Human Rights UDHR* Articles 22 & 27 and *UNDRIP* Articles 9 - 15, 16, 25, and 31)).

2. A Tasmanian Aboriginal Heritage Act should achieve real protection for significant Aboriginal cultural heritage of all types in Tasmania.

For example, a Tasmanian Aboriginal Heritage Act should be able to identify, list and provide for the protection of:

- i. The Aboriginal cultural landscape and other heritage values of tarkayna/the Western Tasmania Cultural Landscape; and
- ii. Kutalina, on the Jordan River at Brighton.

These are two examples of highly significant Tasmanian Aboriginal cultural heritage where the state legislation has proven inadequate and/or inapplicable in relation to their protection, and where no national level protection has been afforded. The former is currently at risk through proposed new use, and the latter having has been substantially destroyed by development.

3. A Tasmanian Aboriginal Heritage Act should be responsive to Tasmanian Aboriginal interests and concerns, and acknowledge Tasmanian Aboriginal people as having the primary rights to, and responsibilities for, this heritage through the legislative provisions.
4. A Tasmanian Aboriginal Heritage Act should also provide for the recognition and celebration of Aboriginal heritage, and, where appropriate, its maintenance. This is important in relation to intangible heritage and spiritual/custodial values where appropriate observation, practices and expression need to be provided for.

2. What is Aboriginal heritage?

1. The Tasmanian Government has an opportunity to expand the breadth of what is defined as heritage, and by whom, to enact world-class Indigenous heritage legislation that is in line with current best practice understandings of heritage and its conservation. The Victorian legislation is a good start in terms of mapping values across landscape and recognising intangible cultural heritage. But to be effective, the consultation system around identifying and managing those values needs to be robust and to be supported by government.
2. In line with current best practice in relation to heritage conservation, definitions of Aboriginal heritage should:
 - Encompass the broad range of heritage types both tangible and intangible (eg, objects, sites, structures, land, landscapes, traditional practices); and
 - Include objects, sites and intangible heritage that is of pre-colonial origin AND objects, sites, places, landscapes and intangible heritage which have historical, social, spiritual, aesthetic and/or scientific significance/value (as per the Burra Charter; and also recognised in the HERCON criteria).
3. In defining Aboriginal heritage, Aboriginal people should not have to justify or assess the significance of their traditional heritage, which should have blanket protection.
4. It is Australia ICOMOS' view that Aboriginal human remains should be included under this legislation as they are not provided for in other legislation. But this is very much a matter for the Aboriginal community to determine given the sensitivity of this matter to Tasmanian Aboriginal people.
5. References to an unchanging past are not appropriate and should not be part of any definition of Aboriginal heritage.

3. Ownership of Aboriginal heritage

1. Ownership needs to be distinguished from, and not confused with, 'interest' or 'significance/value' to people.
2. In line with an Indigenous rights-based approach to heritage protection, and in acknowledgement that the Aboriginal heritage in Tasmania is the legacy of Tasmanian Aboriginal people, Tasmanian Aboriginal people should be regarded as the owners of the Aboriginal heritage of Tasmania as a matter of principle.
3. We suggest that this ownership would most appropriately be collective, not assigned to individual people or local groups (except possibly in relation to human remains). This approach however is dependent on establishing a fair and effective mechanism for Tasmanian Aboriginal people to make decisions about and to manage this heritage. Such a mechanism might allow for custodial responsibility to be given to particular Aboriginal groups, much as happens with returned land in Tasmania under the state *Aboriginal Land Rights Act 1995*.
4. In practice this ownership may mean different things for different types of heritage. For example, in relation to heritage objects, human remains and intangible cultural heritage, ownership can and should imply complete Aboriginal control over these. In relation to sites, places and cultural landscapes, where the land is not owned by Aboriginal people, ownership most practically would translate into Tasmanian Aboriginal people being the primary decision makers about how this heritage is managed (e.g. through an Aboriginal Heritage Council or other appropriate body), but with a requirement to take into account other land management obligations and/or work with the landowner/manager.
5. Concepts of ownership/custodianship of Aboriginal heritage may appear problematic when it coincides with other kinds of recognised ownership, such as in the case of private land. However, this already occurs with regard to mineral rights, which would suggest it is a workable arrangement. In addition, if the focus is on managing the values, as opposed to the material, it is easier to reconcile Aboriginal ownership of cultural heritage with private land or other forms of ownership, as the matter is more about reconciling conflicts between intended land use and the integrity of those values.

4. Making decisions about what happens to Aboriginal heritage

1. As noted above, if a rights-based approach is taken, as should be the case, then the key decision makers for Aboriginal heritage in Tasmania should be the Tasmanian Aboriginal people. The starting point for Aboriginal heritage legislation therefore should be that it is Aboriginal people who should make decisions relating to their cultural heritage. It is also therefore important that the decision making process should be jointly designed with Aboriginal people.

2. Decision making about Aboriginal heritage in Tasmania needs to be equitable across the Aboriginal community of Tasmania and fair for all communities. It also needs to be open and transparent, including in relation to processes, mechanisms and decisions (excepting obviously in relation to genuine culturally sensitive matters).
3. Tasmanian Aboriginal people need to have a genuine voice and genuine decision making powers. This will require a significant change from the present Act where the Aboriginal Heritage Council has only limited, and then largely advisory, powers, with most of the decision making powers resting with the Minister.
4. Australia ICOMOS does not wish to propose a particular model for Aboriginal decision making for Aboriginal heritage, but the current model used across Australia is via representative 'heritage councils', and in the absence of other better models we would support this approach. An Aboriginal heritage council would though need to be fully representative, have real decision making powers and operate in a clear and transparent manner.
5. If Tasmanian Aboriginal people elect to be represented by a body such as a representative Aboriginal heritage council, then there need to be clear guidelines for its decision making, including the need for the council to have all necessary information in order to make these decisions, and that such decisions are based on community consultation.
6. Decisions about what happens to Aboriginal heritage should be made on the basis of:
 - good heritage item/place information,
 - a comprehensive understanding of the cultural heritage significance/value of the item/place, and what is necessary to retain the significance/value of that place; and
 - a comprehensive assessment of the potential impacts of the proposed 'interference'.
 (This is in essence the basic requirement for evidence based decision making and the best practice approach recommended by the Australia ICOMOS *Burra Charter* and increasingly adopted worldwide).
7. It is Australia ICOMOS' view that a heritage listing approach is at present still the best basis for identifying known Aboriginal heritage and protecting it under legislation (we may though support alternative approaches if these were shown to be workable). Lists have the advantage of being objective and holding the information in one central place. However, different type lists with different approaches and access are likely to be required for the different types of Aboriginal heritage covered by the legislation (as per the approach in Victoria where intangible cultural heritage is managed through a different process to sites/places). We suggest that the following categories will need to be treated as different categories of heritage: tangible heritage (sites, places, landscapes); objects; human remains; and intangible heritage. Cultural landscapes might also warrant consideration separately to sites and smaller, simpler places.

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

1. The role of the Aboriginal Heritage Council should be determined in consultation with Tasmanian Aboriginal people.
2. A key matter is the constitution of an Aboriginal representative body. Australia ICOMOS is aware that currently there are issues around representation on the Tasmanian Aboriginal Heritage Council that have resulted in a situation where a significant part of the Tasmanian Aboriginal community has chosen not to be represented on the Council. This is not tenable in the long term, and for any new legislation to be successful the vexed issue of Aboriginal representation will have to be resolved. It is Australia ICOMOS's view that the satisfactory resolution of this matter is fundamental to creating effective new Aboriginal heritage legislation for Tasmania. A mechanism/model for representation must be found that is fair and equitable and has broad Aboriginal community support. This will require genuine consultation (and some creativity), but Australia ICOMOS's believes that this is achievable.
3. As noted above (see topic 4), in the absence of other models, Australia ICOMOS would support a representative Heritage Council as a mechanism for Aboriginal heritage decision making. However, as also noted above, an Aboriginal heritage council must have broad decision making powers and not simply be an advisory body. This is essential if Aboriginal ownership of the Aboriginal heritage is to be acknowledged and a rights-based approach adopted.
4. Australia ICOMOS also believes that, as with all heritage councils, an Aboriginal Heritage Council should:
 - Be properly supported to do its work;
 - Be consultative, open and transparent in its work; and

- Have a set role, with its operation, including responsibilities and terms of members, statutorily established through the legislation.

We suggest that the government look to achieve general parity, to the extent relevant, between the Aboriginal Heritage Council and the Tasmanian Heritage Council (the latter established under, and provided for in, the Historic Cultural Heritage Act 1995).

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

1. Australia ICOMOS supports penalties for actions that destroy, damage or interfere with Aboriginal heritage, particularly where those committing the act were aware of the consequences of their actions.
2. Penalties for actions that destroy, damage or interfere with Aboriginal heritage should reflect the seriousness of such acts which result in the irretrievable loss of non-renewable values. We suggest that they be commensurate with penalties for actions that destroy, damage or interfere with historic cultural heritage.
3. Aboriginal interactions with their own heritage for custodial or other community authorised purposes should not be regarded as an offence.

7. When can Aboriginal heritage be interfered with?

1. Recognising that Aboriginal heritage is non-renewable and much is extremely significant to Tasmanian Aboriginal people, it is Australia ICOMOS' view that Aboriginal heritage should not be interfered with unless it is:
 - To allow for the cultural evolution of the heritage;
 - For legitimate and necessary custodial and ceremonial purposes;
 - For approved conservation purposes; or
 - For research that the Aboriginal community agrees is useful and is approved.
2. Where potential interference will be due to a proposed new use or development, then it is Australia ICOMOS' view that Aboriginal heritage should not be interfered with unless:
 - The new use or development is determined to be essential or of outstanding social value of a type that is not incompatible with the Aboriginal values of the object/site/place;
 - The new use or development has taken all feasible and practical measures to mitigate the impacts/interference; and
 - The interference is approved by the Aboriginal Heritage Council (or other decision making body established under the legislation).

(Note: 'Interference' will have a different meaning and consequence depending on the type of heritage).

3. The legislation should enshrine the 'precautionary principle' in relation to decision making about new or existing use or development where Aboriginal heritage is potentially threatened or impacted.
4. Where Aboriginal heritage is threatened by new or existing use or development, interference with the heritage should not be contemplated unless there is no prudent or feasible alternative, including on privately owned land.
5. Australia ICOMOS does not support statutory exemptions for particular classes of use, works or development, or for areas of land based on size or ownership. Obviously, with so little known about the Aboriginal heritage of Tasmania and with the potential for Aboriginal heritage to occur in a range of environments and in very small areas, exemptions could lead to unacceptable damage to/interference with Aboriginal heritage.
6. The current risk assessment process is inadequate in that it relies on already recorded sites as the basis for determining risk. Clearly not every piece of Aboriginal heritage, or place with significance, has been recorded. 'Triggers' for assessment should be based on the kind of work intended to be carried out, as well as the potential presence of cultural material. There may be utility in requiring emergency services and others to develop standing management plans for situations that can be anticipated – e.g. fighting bush fire.
7. In principle, Australia ICOMOS supports the use of site/values predictive assessment (sensitivity assessment) to guide decisions about Aboriginal heritage protection. This approach recognises the currently limited knowledge about the nature and location of Aboriginal heritage in Tasmania, but also that there are areas of Tasmania unlikely to have sites or other place values, and that there is a cost to developers in carrying out assessments. If such an approach is adopted then the predictive

assessment approach needs to be soundly based, clear and transparent, and accessible (including supporting research) to Aboriginal people and other Aboriginal heritage professionals. Also, its use will need to be limited to particular categories of heritage, i.e. to sites and places of historical use and other importance, since it is not an appropriate tool for objects, cultural landscapes or intangible cultural heritage.

8. Enforcement of the legislation

1. Australia ICOMOS does not have a particular view on this matter, except that enforcement of the legislation is obviously of critical importance. We do though suggest that enforcement might be an opportunity for further Tasmanian Aboriginal involvement, including both training and employment, particularly for compliance officers.
2. The legislation needs to be supported by a genuine commitment from Government to build a framework around regulation. Again, this is something that has to be determined jointly with Tasmanian Aboriginal people. In response to the specific questions in the *Discussion Paper*:
 - Compliance does need to be improved, as the Act is extremely weak in this area and relies on an outdated mechanism that does not include Aboriginal people;
 - Australia ICOMOS would support stop-work provisions (this is in line with legislative provisions for historic cultural heritage in Tasmania, and is a useful precautionary emergency measure); and
 - Australia ICOMOS would support the scaling of offences to distinguish between minor and non-minor offences.

9. Other ways the legislation protects Aboriginal heritage

1. Australia ICOMOS has not provided particular comment in relation to this question, as any response will be highly dependent on the broad approach taken by the new revised Aboriginal heritage legislation. As noted above, Australia ICOMOS is of the view that a revised Act will need to be substantially different to the present Act.

10. Other matters

1. A substantial review is greatly needed. As acknowledged in the *Discussion Paper*, the current Act is now outdated. The 2017 amendments, as noted, were minor and did not address a number of core issues, and, in our view, they created new issues (e.g. a problematic definition of Aboriginal heritage, excessive ministerial decision making powers, and the removal of all terms of reference for the Aboriginal Heritage Council).
2. The government needs to recognise that it has broader functions around the operation of the Act that make it work. These include those discussed in the *Discussion Paper*, such as awareness-raising and public education. But they also include, more importantly, an effective compliance framework, the capacity to ensure effective consultation, and support for Aboriginal groups to be actively engaged in management of their heritage.
3. Australia ICOMOS supports the continuity of protection for all places currently protected under the *Aboriginal Heritage Act 1975* in the transition to the new legislation and associated heritage system.
4. At present other Australian legislation can provide limited useful guidance. But all states other than Queensland and Victoria have equally outdated legislation and the Northern Territory takes a quite different approach which is not suitable for Tasmania. Also, New South Wales, Queensland and Western Australia are also currently reviewing their legislation and are not sufficiently advanced for us to know what this will look like. At present Vic provides the best example of Aboriginal heritage management legislation, but there are still issues with this legislation. It is also important to bear in mind that each state has its own unique Aboriginal cultural, historical, environmental, development and use, planning, land and heritage management contexts. Each state, including Tasmania, needs to develop legislation that is appropriate to its particular context.
5. The relationship of the revised legislation to existing Commonwealth legislation will need to be considered, and unnecessary duplication avoided. Australia ICOMOS would however not oppose some duplication or parallel provisions if this achieves stronger heritage protection, such as in relation to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and *Protection of Movable Cultural Heritage Act 1986*.
6. Australia ICOMOS is aware that Tasmania is also in the process of reviewing its Aboriginal land return legislation, the *Aboriginal Lands Act 1995*. While this is a different process and pathway to the

recognition of Aboriginal heritage, we note that there are potential cross-overs, in particular in relation to recognising social and/or spiritual value to Tasmanian Aboriginal people and providing protection for related land. We recommend that synergies or sympathetic parallel pathways in relation to Aboriginal powers and decision making be considered to avoid confusion, imbalances and duplications.

7. Australia ICOMOS does not support the merging of historical cultural heritage protective legislation with Aboriginal cultural heritage protective legislation (a direction that has been proposed in some quarters). In our view a separate Act is required for Aboriginal cultural heritage, especially to ensure that the rights of Aboriginal people are recognised and provided for in relation to Aboriginal heritage.
8. Given the issues to be resolved and the significant change in approach that is required to revise the Act, Australia ICOMOS recommends that the government adopt a two stage process in developing the new legislation. We suggest something along the following lines:

Stage 1 - Establishment of the legislative framework - this would establish principles for the legislation, key structural elements (e.g. purpose of the Act, the definition of Aboriginal heritage, and different categories of heritage based on different heritage protection needs, and a broad approach); and

Stage 2 - Development of legislation details (i.e. development of mechanisms and related provisions for the protection of the Aboriginal heritage in line with the agreed framework).

Thank you again for your consideration of the views of Australia ICOMOS in this important issue. We would be happy to provide clarification on any of the above points, should this be desirable.

Yours faithfully

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President, Australia ICOMOS

