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2 August 2019

Hon Jackie Trad
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CHA Review – Department of Aboriginal and Torres Strait Islander Partnerships
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Hon. Jackie Trad,

Review of the Aboriginal Cultural Heritage Act and Torres Strait Islander Cultural Heritage Act

Thank you for the opportunity to comment on this legislative review. I provide this letter as a submission on behalf of Australia ICOMOS.

ICOMOS – the International Council for Monuments and Sites – is a non-government professional organisation that promotes expertise in the conservation of cultural heritage. ICOMOS is also an Advisory Body to the World Heritage Committee under the World Heritage Convention. Australia ICOMOS, formed in 1976, is one of over 100 national committees throughout the world. Australia ICOMOS has almost 700 members in a range of heritage professions, including expert members on a large number of expert committees and boards in Australia.

The review of the *Aboriginal Cultural Heritage Act 2003* and *Torres Strait Islander Cultural Heritage Act 2003* provides a welcome opportunity to improve the effectiveness of legislation designed to protect and conserve Queensland's indigenous heritage. There is a consensus amongst the Queensland members of Australia ICOMOS, particularly those that work within the framework of the existing Cultural Heritage Acts, that the legislation, in its current form, is deficient and would benefit from modification to improve efficiencies and heritage outcomes.

This Submission has been prepared by Queensland members of Australia ICOMOS, who recommend that the following points comprise the principal standards underpinning any new Cultural Heritage Acts. Alternatively, these same points should be elements of any amendments to the current Cultural Heritage Acts, if this becomes the preferred approach.

General Comments
Management of Indigenous cultural heritage in Queensland needs stronger governance structures. The government prides itself on keeping out of the process as much as possible on the grounds that Aboriginal parties should be permitted to manage their own heritage without government oversight. However, the real outcome is that many Indigenous groups are under-funded and skills-poor and yet find themselves negotiating with powerful and well-resourced proponents and their lawyers. The power dynamic is very unfair for the average Indigenous group and can place them at great disadvantage.

Cultural heritage management is a skill and its practitioners are professionals. However, in Queensland (again, as a result of insufficient regulation by government) cultural heritage managers are commonly excluded from the process by legal representatives. The perverse result is that archaeological management plans and heritage management recommendations are being prepared by solicitors with no relevant experience. Further, it makes the consultation process adversarial where it should be collaborative.

Definitions of Cultural Heritage

The Cultural Heritage Acts do not recognise the breadth of definitions of Aboriginal heritage used in modern cultural heritage management. It is now widely recognised that definitions of 'cultural heritage' should no longer be restricted to tangible remains as documented by archaeologists in the mid- to late-twentieth century (Ellis 1994). In accordance with the Indigenous Archaeologies methodology that informs cultural heritage management practice globally (Byrne 2003; Colwell-Chanthaphonh and Ferguson 2007; King 2003;), 'cultural heritage' incorporates both tangible and intangible heritage (as defined by the UNESCO in 2003, and by the Australian Heritage Commission *Ask First* guidelines). Intangible heritage includes cultural and behavioural phenomena, such as stories, songs, dance and beliefs, and places associated with intangible heritage, such as:

- places created by Ancestral Beings (some of these places are still occupied by such beings);
- ceremonial places, not all of which have a material manifestation;
- story places – or places where stories are situated; and
- resource places, where people managed and collected resources.

Despite the definition of 'cultural heritage' in the Cultural Heritage Acts being broad enough to recognise the tangible and intangible heritage places outlined here, and s. 12 of the Aboriginal Cultural Heritage Act expressly recognising that Aboriginal heritage does not require physical evidence, in practice the focus has been almost entirely on archaeological sites, particularly surface archaeological sites. Even in cases where intangible heritage is well documented through oral testimony or other records, the Cultural Heritage Acts fail to offer adequate protection to intangible heritage. Without creating a clear definition of broader cultural heritage concepts, the Cultural Heritage Acts will continue to fail to have adequate protection mechanisms for Indigenous Cultural Heritage.

Cultural heritage also includes the concept of living heritage (as defined by ICROM n.d.; see Russell 2012; Smith and Burke 2005). Living heritage includes past cultural activities that are continued into the present (such as hunting, fishing and gathering) and the places at which such practices are implemented (Ross et al. 2011) as well as modern practices that have evolved from earlier traditions and which have value in the creation of cultural identity in the present. As for intangible heritage, the Cultural Heritage Acts fail to offer protection to living heritage.

> ***RECOMMENDATION:*** *That the Cultural Heritage Acts recognise that Indigenous cultural heritage is living and dynamic. Definitions of cultural heritage must be widened to incorporate intangible aspects of Indigenous cultures including language, song lines, ancestral connection, belief systems and aesthetics, as well as cultural landscapes and seascapes.*

Identification of Indigenous Stakeholders

The 2017 Nuga decision has created a degree of uncertainty for land users in determining who should be consulted to assist in managing impacts on cultural heritage arising from their activities. Furthermore, the Cultural Heritage Acts do not adequately identify Traditional Owners with connection to land, heritage sites and cultural places. The link between the Native Title Act 1993 and identification of Indigenous stakeholders is problematic; many Traditional Owners are either not able or not willing to enter into the native title claims process, even if they have undisputed connections to place and heritage on their Country. The current process disenfranchises considerable numbers of Indigenous people and denies them the opportunity to meet their cultural obligations to law and Country. Unfortunately, there are few other mechanisms to identify Indigenous stakeholders.

The legislation should provide a system where a degree of certainty is returned to the process, and Indigenous people with cultural authority for a specific place or region will have primacy in making decisions about, and having control over, their heritage. Traditional custodial rights and laws should be recognised, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples, which Australia has adopted.

Indigenous communities need to maintain participation in decision-making processes and management of their cultural heritage, including capacity to develop opportunities for the co-management of Indigenous cultural heritage with Indigenous custodians and communities.

> *RECOMMENDATION: That DATSIP investigate a range of mechanisms to identify Indigenous stakeholders, including through the use of the native title process, but which also recognise Traditional Owner connections to Country that may fall outside the native title claims process.*

RECOMMENDATION: That Indigenous custodians and stakeholders and Traditional Owners be included in all decision-making processes, and that Indigenous consultation remain an essential part of the heritage management process.

Dispute Resolution

Current legislation includes only a brief and poorly articulated dispute resolution process. As a result, dispute resolution processes are under-developed. There are mediation processes sanctioned by the Cultural Heritage Acts but short of going to the Land Court there are not many mechanisms for dispute resolution

The Guidelines indicate that a duty of care requirement will continue despite an absence of agreement between a proponent and the Aboriginal Party, but the Guidelines also imply that a proponent may proceed with development, even without the consent of an Aboriginal Party. This is on the proviso that the proponent does not harm Aboriginal cultural heritage, but proponents are usually unskilled in matters pertaining to the identification of Aboriginal cultural heritage, and there is often no requirement for the activity to be monitored by a person with skills and training in heritage identification. This is entirely contrary to the principles of the Cultural Heritage Acts, and to the principles of the Ask First guidelines to which the Duty of Care Guidelines makes specific reference. Furthermore, the process is impractical and fails to provide certainty to land users and Traditional Owners when agreement cannot be reached. A clear process is needed, including the use of independent experts and, if needed, the appointment of an external mediator.

RECOMMENDATION: That a transparent and accessible appeals process must be established which is open to Indigenous people, and that sufficient mechanisms for meaningful dispute resolution be developed. Such a process should establish a pathway for action on dispute resolution which can be regulated by DATSIP.

Cultural Heritage Management Plans

The Cultural Heritage Acts do not provide a clear process for either proponents or Traditional Owners with regard to the effective management, protection and conservation of cultural heritage. The Cultural Heritage Acts should be simple to understand, simple to operate and must be adequately resourced. This should include empowering Aboriginal bodies and groups, through Government grants and funding and with the assistance of cultural heritage practitioners, to maintain and manage Aboriginal landscapes, places and objects.

While the current trigger for needing a Cultural Heritage Management Plan [CHMP] is clear, the required content, extent and nature of CHMPs is unregulated and, as a result, is highly variable. Guidelines and regulations should be developed with clear information regarding the content, extent and nature of a CHMP, and the management principles it needs to contain. Definitions relating to Indigenous heritage and the processes for conservation and protection need to be clear, coherent and transparent, and requirements for the management and mitigation of impacts to Indigenous heritage values must be clearly defined in protocols and guidelines. Also, the trigger for a mandatory CHMP is currently too high; there should be a mandatory requirement for a significance assessment at the impact assessable development level.

As a result of the government's desire to keep out of the process, CHMPs and other reports tend to be very low quality in Queensland compared to other states. There is no oversight or endorsement by government of these products. DATSIP should have a review function of CHMPs and the like and where they fail to reach an established standard they should be returned for correction. DATSIP would need additional funding for this role.

RECOMMENDATION: That any revisions to the Cultural Heritage Acts be simple to understand, and that obligations under the Acts be consistent and foreseeable so that Proponents, cultural heritage service providers, and Indigenous communities alike can manage expectations.

RECOMMENDATION: That a process be developed for regulating the content of CHMPs and a transparent process for their approval.

Significance Assessments

Where necessary assessments relating to the significance of Indigenous cultural heritage must be separated from decisions about land use and impacts to Indigenous heritage. Significance assessments should include tangible and intangible values and should be undertaken in line with The Burra Charter: the Australia ICOMOS charter for places of cultural significance (Australia ICOMOS, 2013) and

associated Practice Notes, which are recognised as cultural heritage management best practice. Significance must be considered on a local, regional and state-wide basis, and a clear and simple process must be developed to ensure consistency and transparency in the significance assessment process. The significance assessment process and associated criteria should be unambiguous and included in the Acts, rather than regulations, in order to foster consistency in all decision-making now and in the future. The process should require the significance assessment to consider Indigenous cultural knowledge, through a consultation process, and the expert advice of suitably qualified specialists (e.g. archaeologists, anthropologists).

RECOMMENDATION: That the Cultural Heritage Acts include a clear and simple process for determining the significance of Indigenous cultural heritage based on Indigenous community consultation.

DATSIP Database

The current cultural heritage database and register maintained by DATSIP is not the product of a mandatory recording process. As a result, the database is not exhaustive and is therefore ineffective. Data and reports generated by cultural heritage surveys should be lodged with DATSIP. This should not be optional. Presently, enormous quantities of research data are being generated at great cost and those data then disappear. Further, the situation sometimes arises where a survey is done and ten years later it is done again because there is no record of the earlier work. Compulsory registration of data and reports will ensure that an ever-increasing corpus of local and regional data will be available to inform new assessments and development. All Indigenous places and sites should be included in an accessible, on-line Register and all associated reports be lodged in an accessible electronic format with the relevant State authority for approved use. Where Traditional Owners indicate that information is culturally sensitive, it can be classified as restricted and only be made available when required permissions have been given by the relevant custodians. Access to the database should also be regulated through an approvals process, where appropriately qualified cultural heritage providers can gain continuing access.

RECOMMENDATION: That an exhaustive, state-wide database of Indigenous cultural heritage sites and places be established that can be accessed by qualified cultural heritage providers and Indigenous stakeholders.

Management Protocols

All developments and planning projects should be required to incorporate Indigenous heritage management protocols. This should occur early on in the design phase of any project so that impacts can be minimised in a timely and cost-effective manner. Any decision that allows an impact on Indigenous heritage must: (a) have regard to the wishes of the relevant Indigenous stakeholders, (b) be accountable to those Indigenous custodians and the wider community, and (c) be supported by compelling reasons of public interest that take into account any social and cultural effects.

RECOMMENDATION: That Indigenous cultural heritage continue to be afforded protection, and that an equitable, transparent permit process for approved impacts be developed.

Thank you again for your consideration of the views of Australia ICOMOS in this important issue.

Yours faithfully

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President, Australia ICOMOS

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