14 December 2012

Aboriginal Heritage Legislation
Department of Primary Industries, Parks, Water and Environment
GPO Box 44
Hobart TAS 7001

via email: ahl@dpipwe.tas.gov.au

Dear Sir/Madam,

REVIEW OF THE ABORIGINAL HERITAGE PROTECTION BILL 2012

Please find attached a submission from Australia ICOMCOS commenting on the exposure draft of the Aboriginal Heritage Protection Bill 2012.

ICOMOS – the International Council for Monuments and Sites – is a non-government professional organisation that promotes expertise in the conservation of cultural heritage. Our organisation was formed in 1965, and among other duties has a responsibility to advise UNESCO in the assessment of sites proposed for the World Heritage List. Australia ICOMOS, formed in 1976, is one of over 100 national committees throughout the world. Australia ICOMOS has over 500 members in a range of heritage professions and is managed by an Executive Committee of 15 people, elected from the membership. We have expert members on a large number of ICOMOS International Scientific Committees, as well as on expert committees and boards in Australia. Australia ICOMOS has a number of members involved in professional heritage work throughout Tasmania and Australia in the practice area of Aboriginal cultural heritage. Australia ICOMOS seeks to be a strong advocate for best practice approaches in heritage protection and management.

Thank you for the opportunity to participate in this important process. We would also welcome the opportunity to work with the State Government further in any post-submission consultation and/or reviews with regard to the above.

Yours Sincerely,

ELIZABETH VINES, OAM
President, Australia ICOMOS
This submission by Australia ICOMOS (International Council on Monuments and Sites) is in response to the draft exposure of the *Aboriginal Heritage Protections Bill 2012* (AHPB 2012) that has been released for public comment.

Australia ICOMOS appreciates the opportunity to provide comment on the AHPB 2012. We are supportive of any measures that are undertaken where there is an opportunity to promote best practice in heritage management and we see the AHPB 2012 as one such opportunity. We would like to commend the initiative to move towards a legislative and operations approach that is more consistent with other Australian jurisdictions, However, we would add that caution needs to be applied to ensure that the positive aspects of legislative change in these other jurisdictions are adopted, not the elements that have led to negative outcomes.

Initiatives within the AHPB 2012 that Australia ICOMOS is supportive of are:

- The establishment of an Aboriginal Heritage Council;
- The recognition that Aboriginal heritage is more than ‘relics’, and that concepts such as *intangible heritage* and *modern heritage* receive some consideration;
- The intention to better integrate Aboriginal heritage legislation with the existing planning framework in Tasmania;
- The provision of clearer permit and agreement and protection mechanisms;
- Recognition that ongoing audit and compliance regimes are required; and
- Increasing the financial penalties relating to breaches.

Australian ICOMOS recognises the enormity of the task that the AHPB 2012 process is attempting to resolve. Any attempt to amend existing or propose new legislation is a large and complex task and as a result needs to be the subject of considerable dialogue, feedback and review if it is to meet the expectations of key stakeholders. Unfortunately, in this instance, the evidence of this appears to be very limited, and the consultation that has occurred appears to have been some 6-7 years ago, with no substantive attempts to build on this in recent years.

Australia ICOMOS strongly recommends that more thorough engagement with key stakeholders (particularly the Aboriginal community and its representatives) be undertaken to remedy this situation. There is a significant risk that support for the AHPB 2012 from key stakeholders will not materialise if this does not occur. This lack of support will prove to be a significant impediment to the successful implementation of the AHPB 2012 and will further compromise the recognition, protection and management of Aboriginal heritage throughout Tasmania.

There are a number of other more specific concerns that Australia ICOMOS has with the proposed legislation, including the following:

**General Comments**

- The Bill is very long and will create confusion as it is difficult to understand and interpret, particularly over the lack of clarity with some definitions and processes;
- There is concern that the powers of the Minister do not appear to have appropriate checks or review mechanisms;
- The Bill appears highly focussed on development controls and does not address Aboriginal heritage ownership matters which may be seen as a key failing by the Aboriginal community;
- Ownership of human remains, one of the most sensitive cultural and heritage matters for the Aboriginal community, has not been properly devolved to the Aboriginal community;
- With regard to many aspects of the Bill, there is a lack of detail, for example in key definitions and the operation of the Aboriginal Heritage Council. While this may be based on a regulation-based model this makes it difficult to see how the legislation will work in
practice. Also any future regulations will need to be drafted carefully to ensure proper processes and outcomes are delivered;
- How the Aboriginal Heritage Register will operate is not clear; there needs to be better definition of different types of Aboriginal heritage, so that decisions about what is protected and why informs management planning.

Further to the above Australia ICOMOS has identified certain aspects that have raised additional concerns. These include:

**Aboriginal Heritage Council**
- There is a lack of detail on selection to the Aboriginal Heritage Council.
- The role of the Aboriginal Heritage Council appears to be essentially of an advisory nature. No real decision making power sits with the Aboriginal Heritage Council, which raises concerns over the level of Ministerial power and discretion.
- The ability for the Aboriginal community to be involved appears limited, even working through the Aboriginal Heritage Council, based on the way the Bill is currently framed.

**Definitions and interpretation**
- Definitions of key words and concepts are missing or ambiguous.
- The current definitions used in the Bill lack clarity and/or are very complicated which does not help improve a broader understanding of what Aboriginal heritage actually is;
- The interpretation of the AHPB 2012 relies heavily on the content of the Aboriginal Heritage Protection Regulations (AHPR), which at this stage appear to be in early stages on preparation and therefore the operation is unable to be understood.
- Certain definitions within the AHPB 2012 require clarification, foremost is that of ‘intangible and modern Aboriginal heritage’. The definition needs to be separated into ‘Intangible Aboriginal Heritage’ and ‘Modern Aboriginal Heritage’.
- The recognition and enjoyment of traditional Aboriginal practices, as part of intangible heritage, has not been addressed and is expected to be a major issue of concern to the Aboriginal community.

**Potential legislative conflict**
- The State Resource Management and Planning System, and its planning process, set out in Schedule 1 to the Land Use Planning and Approvals Act 1993 may require a person to take into account objectives that are inconsistent with the stated objectives of the proposed Bill. Clarification is required on which act should take precedence and if other conflicts exist.
- There appears to be the possibility that places or objects could be listed on both the AHR and the THR which could raise cross-jurisdictional issues and/or conflict with other legislation.

In preparing our submission we have been fortunate to have reviewed the submission of our colleagues from Cultural Heritage Practitioners Tasmania (CHPT). Their submission is very detailed and comprehensive and Australia ICOMOS supports their suggestions.

The proposed bill claims to be

“An act to provide for the recognition, protection and management of Aboriginal heritage, to establish an Aboriginal Heritage Council, to repeal the Aboriginal Relics Act 1975, to consequentially amend certain other legislation and for related purposes.”

Whilst there is no doubt that the proposed Bill seeks to achieve this it is disappointing to see such a strong emphasis on mechanisms that facilitate destruction of Aboriginal heritage without due consideration.

At this stage Australia ICOMOS is unable to provide more detailed comments and we would welcome further opportunities to engage in consultation over this legislation, in particular the proposed Aboriginal Heritage Protection Regulations.
The AHPB 2012 is an excellent opportunity to aim for best practice in Aboriginal cultural heritage recognition, protection and management. Unfortunately the manner in which it has been drafted has shown there to be many inconsistencies, undefined words and concepts and under-developed mechanisms being proposed. Given the AHPB 2012 status is as an exposure draft this is understandable; however Australia ICOMOS strongly advocates for a second series of consultation, more thorough and encompassing of stakeholder groups than presently undertaken, once a more refined version of the AHPB 2012 is available and certainly prior to its consideration by State Parliament.

Australia ICOMOS would welcome the opportunity to provide further comment and be involved in ongoing consultation regarding this legislation. Please do not hesitate to contact our Secretariat should you have any questions regarding this submission or if future opportunities for input arise.

AUSTRALIA ICOMOS
14 December 2012