24 February 2017

Amendments to the Aboriginal Relics Act
Policy Branch
Department of Primary Industries, Parks, Water and Environment
GPO Box 44 Hobart TAS 7001

By email: relicsact@dpipwe.tas.gov.au

Dear Sir/Madam,

COMMENT - DRAFT RELICS AMENDMENT BILL 2016
(PROPOSED 2016 AMENDMENTS TO THE TASMANIAN ABORIGINAL RELICS ACT 1975)

The following is Australia ICOMOS’ comment on the Draft Relics Amendment Bill 2016, which amends the Tasmanian Aboriginal Relics Act 1975. We appreciate the opportunity provided by the Tasmanian government to comment on the proposed amendments via the public exposure draft released for comment on the 9 February 2017.

As you may be aware, 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 over 600 members in a range of heritage professions. We have expert members on a large number of ICOMOS International Scientific Committees, as well as on expert committees and boards in Australia. Many of our members work on the management of Aboriginal heritage.

In general terms Australia ICOMOS supports the intent of the proposed amendments and regards them as positive overall, recognising that they are intended to improve protection for Aboriginal heritage in the State and to address some particular concerns of Tasmanian Aboriginal people (in particular the 1876 cut-off date for a ‘relic’). However we have some concerns arising from the fact that, although the proposed amendments are not extensive, they will have a significant effect on the operation and interpretation of the amended Aboriginal Relics Act 1975. Our specific comment is provided below, and is made with particular regard to the standards for practice embodied in the Australia ICOMOS Burra Charter and other ICOMOS doctrine.

Changing the name of the Act

While Australia ICOMOS understands the intent of renaming the amended Act to the ‘Aboriginal Heritage Act 1975’ (i.e., to remove the term ‘relic’ which is outmoded), we believe that the proposed new name will lead to confusion regarding what is heritage and what is a relic (since the term ‘relic’ is to be retained within the Act) as well as confusion between the amended and unamended Act, and hence it is not appropriate. We also note with concern that the wording of the amendment (‘may be cited’) indicates the use of this name is optional, which in our view will also lead to confusion.
We therefore suggest, for clarity and to avoid confusion, that:

2. The use of the new name be mandatory.
3. The proposed Section 24 amendments be revised in the light of the above.

Definition of Significance
Australia ICOMOS is fully supportive of the proposed removal of the 1876 cut-off date for what is considered as Aboriginal heritage, but is concerned that in order to define what Aboriginal heritage is a test of significance has been introduced which fundamentally changes the nature of the legislation from blanket legislation to one which protects only ‘significant heritage’. In Australia ICOMOS’ view blanket legislation for Aboriginal heritage is the most appropriate form of legislation given the difficulties inherent in imposing a western assessment system on Aboriginal heritage and the extremely rare and valuable nature of Aboriginal heritage.

In relation to the test for significance we are particularly concerned by the definition for significance that has been used in that this introduces a number of new and undefined terms, in particular ‘archaeological and scientific history’ and ‘anthropological history’. In our view these will be extremely problematic in using and interpreting the legislation. We do however support the inclusion of contemporary historic value and traditional value. Clear and well understood definitions are critical in legislation, especially in cases such as these where high penalties for breaches are proposed and due diligence guidelines are being introduced. It is also disappointing that the approach has not used the more standard and well recognised approach embodied in the Australia ICOMOS Burra Charter.

We also note the proposed amendment that a relic must be ‘of significance to the Aboriginal people of Tasmania’ and suggest that as currently worded this clause implies that it must be of significance to all Aboriginal people in Tasmania. We assume that this is not what was intended as this is an unrealistic requirement, and such an inclusive test is not required in other heritage legislation which has a test for significance.

We therefore recommend in relation to this proposed amendment that:

1. The proposed requirement for relics to be ‘of significance to the Aboriginal people of Tasmania’ be reworded to remove the implied requirement for it to be of significance to all Aboriginal Tasmanians.
2. The definition of significance be amended so that the test for something being a relic is simply that it has heritage value, rather than introducing complex measures that are difficult to interpret and introducing tests of significance that remove blanket protection. It is suggested that one way in which this could be done is to require that to be recognised as a relic, a relic have ‘historical value’ (this replaces the 1876 cut off test) and ‘traditional value to Aboriginal Tasmanians’ (this importantly allows for intangible values to be recognised).

Establishing a new statutory Aboriginal Heritage Council
While Australia ICOMOS supports the replacement of the Aboriginal Relics Advisory Council with a new Aboriginal Heritage Council and generally supports the role of the Council, we have some specific concerns in relation to the proposed amendments.

Firstly, in our view it will be critical for the smooth operation of the amended Act and broad acceptance by Tasmanian Aboriginal people that the Council membership represents the range of Aboriginal people/communities in Tasmania. The proposed amendment as it currently stands provides no guidance on how the Council will be comprised, leaving this solely to the discretion of the Minister. In our view, to give the Aboriginal community some confidence that there will be broad representation, the amended Act, or the associated regulation, must include clear direction on how the members will be selected. Any regulation attached to the Act should also be placed on public exhibition.

Secondly, we also note with concern that all provisions for the tenure, selection and removal of Council members and the operation of the Council have been removed and not replaced. Again, to give confidence in the operation of the Council, it is our view that these matters should be part of the legislation. We note that this is generally the case with heritage legislation.

We also suggest the role of Council could be expanded to include Aboriginal heritage assessments, particularly in relation to significance assessment and community consultation.
We therefore recommend that:

1. The amendments include direction on the composition of the Aboriginal Heritage Council, and that these are designed to provide broad Tasmanian representation. While this is most appropriately a matter for the Aboriginal community to determine in consultation with the Minister, one simple but effective option is to base membership on organisational (recognised Aboriginal community organisation) representation.

2. The amended Act include provision for the tenure, conduct, replacement and removal of Council members, and for the operation of the Council, consistent with the unamended 1975 Act or the Historic Cultural Heritage Act 1995.

**Increasing the penalties for damage to Aboriginal heritage (including a system of tiered offences).**

Recognising the very low penalties in the 1975 legislation, Australia ICOMOS is supportive of the proposal to increase penalties. We do however have some concerns about the level of the penalties being proposed, and believe that while some breaches of the Act, eg, wilfully and knowingly destroying a site for commercial gain, should attract high penalties, that there will be more minor breaches where fines of $157,000 upwards for individuals or small businesses would seem excessively high.

We also generally support the proposed rewording in relation to tiered offences and the proposed removal of Section 21. However since the removal of Section 21 removes the defence of ‘unknowingly’ carrying out an act that damages a relic, in our view it is important that this defence still applies in particular circumstances to provide protection where this is genuinely the case and prior knowledge would be unlikely. While this defence is accommodated in various ways in the amendments, we suggest it should also be applied to Section 10 in relation to the owning and holding of relics and their return.

We therefore suggest that:

1. The penalty for breaches be reviewed and allow for lesser penalties for lesser damage or other less consequential breaches, particularly in relation to individuals and small business entities. We suggest that penalties might be comparable with those in the Historic Cultural Heritage Act 1995.

2. That the wording of the new proposed Section 10 (10) (a) be amended to include “knowingly owns a relic, or has a relic in ...”

**Introduction of due diligence guidelines**

Although Australia ICOMOS sees some merit in introducing due diligence guidelines to assist heritage protection and in the defence of breaches of the Act, it is not possible to comment on the proposal without having some understanding of what these would look like and how they would work. We are therefore concerned that this mechanism is being introduced without a proposed framework for the guidelines and their operation, and without provision for consultation in their development.

We also note that the Due Diligence Guidelines are proposed to also contain external standards and codes. We welcome this and would recommend that the Australia ICOMOS Burra Charter be included as one such standard given that is recognised as the key standard for heritage practice in Australia and there is considerable legal experience in interpreting it. The Australian Heritage Commission Ask First guidelines should also be considered for inclusion as these are generally accepted across Australia and, while general, embody important principles for working with Aboriginal heritage.

We therefore suggest that:

1. Draft Due Diligence Guidelines and a guide to their operation are drafted as a matter of priority; and that there be consultation with the Aboriginal community, heritage professionals, and others who are likely to be impacted by the guidelines before the guidelines are tabled in Parliament for approval to ensure the guidelines are effective and reasonable.

2. That consideration be given to including nationally accepted guidelines for practice, in particular the Australia ICOMOS Burra Charter, as standards in the Due Diligence Guidelines.

**Setting a statutory deadline for further review of the Act**

Australia ICOMOS supports this amendment and further suggests that this review should specify a major review and potential replacement of the current 1975 legislation with newer, more modern rights based legislation that also properly addresses matters such as intangible heritage, and also enables the full removal of the term ‘relic’ and its replacement with ‘heritage’.
Comment on the proposed amendments development process

Given Australia ICOMOS’ recognised expertise in heritage conservation, we ask that we be included in consultation on the due diligence guidelines.

We also wish to note that we have been disappointed in the level of consultation in the preparation of the Draft Relics Amendment Bill 2016 and we are also disappointed at the very limited 2 weeks available for public comment on the Bill. As consultation with all interested and affected parties is an important part of heritage management, it is important that consultation be broad based and genuine. Although the Aboriginal Heritage Tasmania website notes that there was public consultation in June-July 2016, Australia ICOMOS was not aware of this, even though Tasmanian members had made enquiries about the progress of the amendments. We also note that the Aboriginal Heritage Tasmania website notes that following the June-July 2016 public consultation that there was “further direct consultation with the Aboriginal community and stakeholders”. Given that Australia ICOMOS and its Tasmanian members who work in Aboriginal heritage were unaware of this further consultation, and we are aware that there is at least one Aboriginal community organisation that feels it has not been adequately consulted, we are interested to know what consultation did in fact occur. We would therefore appreciate it if you could advise us of the actual extent of consultation and the timing of this.

Yours faithfully

Mary Knaggs
Vice-President, Australia ICOMOS