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AUSTRALIAN ASSOCIATION OF CONSULTING ARCHAEOLOGISTS INC

6 November 2009

Indigenous Heritage Law Reform
Heritage Division
Department of the Environment, Water, Heritage and the Arts
GPO Box 787
CANBERRA ACT 2601

atsihpa@environment.gov.au

To whom it may concern,

RE: Response to proposed reforms to the *Aboriginal Torres Strait Islander Heritage Protection Act 1984*

Please find attached a submission from the Australian Association of Consulting Archaeologists Inc. (AACAI) regarding proposed reforms to the *Aboriginal Torres Strait Islander Heritage Protection Act 1984.*

Please address all correspondence regarding this submission to AACAI's President at the following address:

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Yours sincerely,

Oona Nicolson

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AUSTRALIAN ASSOCIATION OF CONSULTING ARCHAEOLOGISTS INC

Indigenous Heritage Law Reform Discussion Paper

A submission from the

Australian Association of Consulting Archaeologists Inc.

Summary of response

The Australian Association of Consulting Archaeologists Inc. (AACAI) represents consulting archaeologists from all over Australia. AACAI welcomes the review of the Federal legislation and supports the general position adopted in the Discussion Paper. There are some areas with which AACAI and its members have concerns, these are as follows:

1. Definitions of heritage outlined in the Discussion paper are narrowly constructed and do not reflect the current best practise view in cultural heritage management theory or Indigenous perceptions of heritage. ' Heritage' can also include intangible elements (songs, dance, stories, memories, history, language, etc.) and cultural landscapes frameworks (including landscapes created by spirit beings, by human action such as fire, and as harvested resource areas, etc).

2. Accreditation standards proposed will not always result in the assurance of national adoption of best practice cultural heritage protection principles and practices. Our main concerns relate to:
   - The provision that *proponents* will take the lead role in the identification of potential Indigenous heritage issues in development (Standard 1);
   - The apparent separation of significance assessment from management planning (Standard 3)

3. The coupling of Native Title with the identification of traditional custodians. This coupling has the potential to cause disempowerment of many Aboriginal peoples with traditional rights and responsibilities toward heritage places and landscapes.

4. The importance of a process for the registration of alternative heritage agreements. Although AACAI recognises the value of alternative agreements, we recommend that **all** cultural heritage management plans, whether they be CHMPs, ILUAs, or other 'alternative agreements', should be assessed by an independent regulatory authority and registered as part of the heritage management regulatory process.

We elaborate on these concerns below.

Definitions of Cultural Heritage

Throughout the document there appears to be an assumption that heritage comprises only tangible heritage remains. For many years now, the heritage profession and Indigenous Australians have stressed the importance of intangible heritage, along with recognition for Indigenous knowledge systems and Indigenous intellectual property in heritage management discourse and practice. It is important that revisions to any Federal Indigenous heritage protection legislation should recognise such principles throughout the Act.

The recognition of intangible heritage as an integral component of heritage is widespread in heritage management literature. The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage recognises Intangible heritage, and it is vital that Australian legislation is in keeping with this international covenant.

The concept of 'cultural landscapes'

The concept of the cultural landscape has been recognised as integral to best practice management of heritage for several decades now. A cultural landscape includes the geographical context for the tangible and intangible heritage.

There is no recognition given to cultural landscapes in the Discussion Paper.

Definitions of 'Traditional Area' and 'Significance'

Heritage is neither static nor locked in the past. 'Tradition' includes modern application of ancient traditions and heritage continues into the present and may involve ongoing changes to ancient heritage places. This has important implications for the definition of traditional areas and their significance (Discussion Paper: page 14).

> *Traditional area* means an area that meets both of the following criteria:
>
> • The area has a use or function under traditional laws and customs, or is a subject of a narrative that is part of traditional laws and customs.
>
> • The area is protected or regulated under traditional laws and customs.
>
> A traditional area includes any traditional objects that are located in the area under traditional laws and customs.

There are many examples of significant heritage places, which might not be considered a 'traditional area' under this definition. A new definition is needed to include the idea of a living, evolving heritage.

In short, the answer to Question 2.2:

> Would the proposed definitions leave out any areas and objects that are covered by the current legislation because they are 'of particular significance to Aboriginals in accordance with Aboriginal tradition'?

is YES!

2. Accreditation

The proposed accreditation standards, outlined on pages 17-18 (and see pages 18 to 22), contain a number of proposals which, if adopted, would **not** lead to the adoption of best practice cultural heritage management.

Standard 1: The early identification of Indigenous heritage issues

This accreditation standard requires ***proponents*** to determine whether or not heritage assessment should be undertaken. This provision has been adopted by Queensland through the 2003 Indigenous Cultural Heritage Acts (s.23) and found to be a failure in providing protection for Indigenous heritage.

The problem with this proposed standard is:

- Development proponents do not have the expertise to recognise the full range of cultural heritage.
- Proponents are not trained to take account of the likelihood of buried cultural heritage. The survival of buried heritage, even in the most extreme cases of prior ground disturbance, has been well documented in archaeological literature (e.g. McDonald *et al*. 2007).

AACAI recommends that Standard 1 be revised as follows:

> In an accredited state or territory these standards would mean that any developer, mining company, farmer or other person who is planning an activity would need to apply to the regulatory authority for an assessment of whether the activity could have adverse effects on areas that are important to Indigenous people in their traditions.

A corollary to this standard would be that regulatory authorities must be adequately funded to employ trained heritage professionals to provide such advice.

Standard 3: Independent assessments based on the advice of Indigenous people

At first glance this may appear to be an acceptable standard, but if this were to be interpreted that 'significance should be separated from decisions about protection', then a Cultural Heritage Management Plan can be developed *without* the prior need to assess the heritage potential and consequent significance of an area.

Separation of site identification and significance assessment from cultural heritage management planning, as seen in CHMPs, is not in line with best practice cultural heritage management (see Burra Charter 1999; Pearson and Sullivan 1995: Chapters 4 and 5). Linking these processes together provides greater certainty for developers that accidental discovery of cultural heritage will not interfere with development.

Standard 3 needs to include a clear statement that:

> In an accredited state or territory a cultural heritage assessment is deemed integral to management planning and there must be provision for a qualified assessment of the likely cultural heritage impact of development – undertaken by relevant Indigenous traditional owners and a qualified heritage professional - and an assessment of the significance of any cultural heritage area or object, to be undertaken prior to the development of a cultural heritage management plan.

Alternatively, standard 3 should be closely linked to Standard 12, which states:

> Independent assessment of impacts: The laws must require that, before a decision is made as to whether to approve an activity, advice about any impact an activity could have on a traditional area or object be obtained and considered. The advice must be a written assessment prepared by a person or body with appropriate expertise, background or qualifications who is independent of the person who makes the decision on approval'

3. Indentifying traditional custodians

Question 5.2 asks

> Does it make sense to rely on existing legal processes like native title processes to identify traditional custodians?

The answer to this is 'No'.

Native Title and cultural heritage are not linked, legislatively speaking. There are many traditional custodians who have rights and responsibilities with respect to cultural heritage management but who do not, for various reasons, wish to seek Native Title. The reliance on Native Title as the primary basis for determining the composition of Traditional custodians disenfranchises Aboriginal people who may have a close connection to land and heritage without necessarily being able or willing to claim Native Title. In some States this would also contradict the planning legislation whereby there is a recognised Aboriginal governance structure (e.g. the Land Councils through the NSW Land Rights Act) which is not dependant on Native Title processes.

There are significant issues surrounding the use of Native Title to identify Traditional custodians. These issues include:

1. It is proving increasingly difficult to register Native Title claims.

2. The process of using Native Title as the preferred basis for determining a traditional custodian is anthropologically ill-informed. People may have substantial interests in cultural heritage management despite not having the dominant Native Title interest in an area. For instance, privileging Native Title claimants over non-Native Title claimants does not take account of well understood concepts such as secondary rights. It also denies interests in important historical sites, such as missions and reserves, on the part of people who were forcibly removed to such places, many of which were situated away from traditional country. As a consequence, such people today have difficulty in asserting a Native Title claim.

AACAI recommends that an alternative provision for identifying traditional custodians is provided in the revision to the Federal legislation. If Native Title is to remain part of the identification process, then the following provisions regarding identification of traditional custodians for cultural heritage assessment should be included:

1. The Act should establish a threshold at which possession of a Native Title claim affords procedural rights. And,

2. The Act needs to be well-informed anthropologically.

Other matters

Reporting Indigenous remains

Providing that the different state or territory has accredited provisions for the management of Indigenous remains, there is a need to rationalise the reporting process. Indigenous remains need only be reported in the state or territory in which they are found.

Display of sacred objects

Consistent Australia-wide laws for the display of Indigenous sacred items are needed and this proposal is supported.

References cited

Australia ICOMOS 1999 *The Burra Charter*

McDonald, J. D. Donlon, J. Field, R. Fullagar, J. Brenner Coltrain, P. Mitchell and M. Rawson 2007 The first archaeological evidence for death by spearing in Australia. *Antiquity* 81:877-885.

Pearson, M. and Sullivan, S. 1995 *Looking after heritage places* Melbourne Uni Press.