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**AUSTRALIAN ARCHAEOLOGICAL ASSOCIATION INCORPORATED**

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6 November 2009

Indigenous Heritage Law Reform  
Heritage Division  
Department of the Environment, Water, Heritage and the Arts  
GPO Box 787  
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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 Archaeological Association Inc. (AAA) regarding proposed reforms to the *Aboriginal Torres Strait Islander Heritage Protection Act 1984*.

Please address all correspondence regarding this submission to the AAA's representative, Dr Annie Ross, who may be contacted as follows:

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Yours sincerely,

A handwritten signature in black ink, appearing to read 'I. McNiven'. The signature is fluid and cursive, with a large initial 'I' and a long, sweeping underline.

**Dr. Ian McNiven**  
President, Australian Archaeological Association Inc.

# Indigenous Heritage Law Reform Discussion Paper

A submission from the  
Australian Archaeological Association Inc.

## Executive Summary

The Australian Archaeological Association Inc. (AAA) represents archaeologists and cultural heritage practitioners (including Aboriginal archaeologists and cultural heritage practitioners) from all over Australia. AAA has over 600 members, the majority of whom have considerable experience in working with Australian Indigenous heritage.

On the whole, AAA welcomes the review of the Federal legislation and supports the general position adopted in the Discussion Paper. Nevertheless, there are some areas with which AAA and its members have concerns, and these relate primarily to the following areas:

1. Definitions of heritage outlined in the Discussion paper are narrowly constructed. They do not reflect the current view in cultural heritage management theory and practice, and in Indigenous perceptions of heritage, that intangible elements of heritage (songs, dance, stories, memories, history, language, etc.) and cultural landscapes frameworks for heritage places (including landscapes created by spirit beings and old people, landscapes created by human action such as fire, modified landscapes such as harvested resource areas, etc) also constitute 'heritage'.
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 and the identification of traditional custodians. This is the process currently applied in Queensland and it has caused a number of concerns amongst Indigenous peoples who, for a variety of reasons, are not interested in being part of the Native Title process. The coupling of the identification of 'Aboriginal Parties' in Queensland to those with registered Native Title claims has caused the 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 (such as ILUAs). Although AAA recommends the value of alternative agreements, we recommend that **all** cultural heritage management plans, whether they be formal CHMPs, ILUAs, or other 'alternative agreements', should be assessed by an independent regulatory authority and registered as part of the heritage management regulatory process.

In the discussion below we elaborate on these concerns and make a number of other more minor observations.

# Discussion

## 1. Definitions

### 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 a recognition of the place of 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 the definition of heritage is now widespread in heritage management literature. The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage recognises that

Cultural heritage is not limited to material manifestations, such as monuments and objects that have been preserved over time. This notion also encompasses living expressions and the traditions that countless groups and communities worldwide have inherited from their ancestors and transmit to their descendants, in most cases orally (UNESCO 2003).

### The concept of 'cultural landscapes'

In addition to the recognition of intangible heritage as part of the overall Indigenous heritage narrative in Australia, the concept of the cultural landscape has been recognised as integral to best practice management of heritage.

A cultural landscape includes the geographical context for the tangible and intangible heritage. Aboriginal cultural heritage officer Badger Bates described this concept in 1993, in his discussion of the preservation of art sites in Mootwingee National Park:

To us the history and spirituality of a place is more important than the art itself. If the art is destroyed by natural processes, this does not destroy the importance of the place to us, only to white people. We feel it is more important to protect the surrounding landscape and associated sites than to preserve the art by ugly gridding, etc. This is why we find it sad that there is no shortage of funds for white people to painstaking[ly] record the art or date it, but where is the money to record what our old people know about Mootwingee? (Bates 1993:65).

There is no recognition for cultural landscapes in the Discussion Paper.

### Definitions of 'Traditional Area' and 'Significance'

Part of the changing emphasis on the definitions of heritage includes recognition of 'living heritage'. The concept of living heritage incorporates the provision that heritage is neither static nor locked in the past; that 'tradition' includes modern application of ancient traditions; that heritage continues in the present and may involve ongoing changes to ancient heritage places. This has important implications for the definition of traditional areas and their significance on page 14 of the Discussion Paper.

As defined on 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.

The Gummingurru is a stone arrangement site on the Darling Downs, SE Queensland is an example of a vitally significant heritage place, but which might not be considered a 'traditional

area' under this definition. In pre-contact times, this was a place that, in accordance with 'traditional laws and customs' was a secret sacred men's initiation site. Today the site has a new meaning and new use as a place of shared learning about Aboriginal culture (Ross 2008, Ross in press; see also [www.gummingurru.com.au](http://www.gummingurru.com.au)). This is not in keeping with narrow definitions of 'traditional laws and customs'. It might be considered 'a subject of a narrative that is part of traditional laws and customs', but this would need as much special pleading as a result of ambiguity as did 'particular significance'. New definitions need 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 elaborated on pages 18 to 22, contain a number of proposals which, if adopted, would **not** lead to the adoption of best practice cultural heritage management. For example:

### 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 standard is that adopted by Queensland in the 2003 Indigenous Cultural Heritage Acts (s.23). This provision has been found to be unworkable and the AAA, in its submission to the Queensland Indigenous Heritage Acts Review in March 2009, provided details of the failure of this approach to provide protection for Indigenous heritage.

In summary, the problems with the Queensland legislation that adopts the Standard proposed here are as follows:

- Development proponents do not have the training or skills 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. Haslam *et al.* 2003, McDonald *et al.* 2007, Rains and Prangnell 2002).
- As a consequence, cultural heritage in Queensland is regularly destroyed because development proponents are not capable of making decisions about surface heritage or buried heritage, and regularly ignore intangible heritage.
  - Data to support these observations come from the Queensland regulatory authority – the Department of Environment and Resources Management (DERM).
  - Between April 2004 and February 2009 there have been over 20,000 applications by proponents to examine the Queensland Aboriginal heritage register, to determine whether or not a heritage assessment should be undertaken.
  - There have been only 91 formal Cultural Heritage Management Plans registered as a consequence.
  - There have been over 2000 developments completed in Maroochy Shire alone during this period, and a recent exercise to relocate known heritage places found that over 80% have been destroyed.

AAA recommends that Standard 1 be revised to read:

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.

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

This standard includes a statement that 'Decisions should be made *after* considering the assessment' (emphasis added).

At first glance this may appear to be an acceptable standard, but if this were to be interpreted, as has occurred in Queensland, that 'significance should be separated from decisions about protection', then state legislation can be written whereby 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 that has been prepared by a person or body with appropriate expertise, background or qualifications who is independent of the person who makes the decision on approval. If the assessment concludes that an activity could have an adverse impact on a traditional area or object the assessment must provide details about the traditional laws and customs that apply to the area or object.

### ***3. Identifying 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'.

Queensland again provides an example of the problems that result when Native Title is coupled with cultural heritage. 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.

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. This has two separate consequences.
  - a. First, even where old claims have 'failed', it can be difficult to replace them, leaving the old claimants as the registered 'traditional owners' or 'custodians' and thereby denying others who may have as good, if not better, claims to enjoy procedural rights in relation to cultural heritage.
  - b. Second, in some cases these older claims were poorly conceived anthropologically, sometimes had only one or two applicants, and were not properly authorised. Despite such weaknesses and flaws, the claimants could continue to enjoy procedural rights under the cultural heritage legislation even when they do not attract any procedural rights under the *Native Title Act 1993 (Cth)* (NTA) (the primary vehicle under which they were developed);
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 in land linked to totemic associations. 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.

The Australian Archaeological Association Inc. 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. Thus, for instance, a claim that failed because it was not authorised by a claim group would not afford procedural rights to the failed claimants. That is, the threshold could operate by being better informed as to the circumstances in which a claim failed.
2. The Act needs to be well-informed anthropologically. Where well-developed anthropological data are available, the Act should have conditional clauses that allow those with established interests in land and cultural heritage but who do not constitute the Native Title claim group to have their interests recognised and to be granted status as traditional custodians.
3. The issue of allowing those with valid interests in important historical sites to be involved in their management can be addressed by having a conditioning clause that provides for this eventuality.

#### ***4. Alternative agreements***

Alternative agreements that can be registered and independently assessed, such as ILUAs, are acceptable alternative agreements in cultural heritage management planning. It would not be acceptable for alternative developments to be private agreements between a development proponent and a traditional custodian.

However, because Native Title and heritage protection are different legal entities, it would be useful for any ILUA that is used as an alternative cultural heritage agreement to be registered as a cultural heritage agreement with the relevant state cultural heritage regulatory authority.

## Other matters

### *A. Reporting Indigenous remains*

It would seem sensible to rationalise the reporting process and only require Indigenous remains to be reported in the state or territory in which they are found, providing that state or territory has accredited provisions for the management of such remains.

### *B. Display of sacred objects*

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

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