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International Council on Monuments and Sites

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23 March 2022

The Honourable Craig Crawford MP
Minister for Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships
Cultural Heritage Acts Review
Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships
PO Box 15397
City East Queensland 4002

Dear Minister

Review of the Aboriginal Cultural Heritage Act 2003 and Torres Strait Islander Cultural Heritage Act 2003

Thank you for the opportunity to comment further on the review of the above pieces of legislation. I provide this submission on behalf of Australia ICOMOS. It responds to the December 2021 Options Paper *Finalising the Review of Queensland's Cultural Heritage Acts*, and builds on Australia ICOMOS' earlier submission on 2 August 2019.

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 official 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 750 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, which provides us with an exceptional opportunity to see best-practice internationally.

The review of the Queensland *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 with the existing cultural heritage legislation, that the legislation in its current form would benefit from amendments to improve efficiencies and heritage outcomes. This submission has been prepared with assistance from Queensland members of Australia ICOMOS and the Australia ICOMOS Indigenous Heritage Reference Group.

General Comments

The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance, was first produced and adopted by Australia ICOMOS in 1979. Since then, the *Burra Charter* has guided heritage conservation in Australia, and its core principles have informed heritage conservation across the globe. The *Queensland Heritage Act 1992*, and local government planning instruments in Queensland, draw heavily on the *Burra Charter*. However, Australia ICOMOS is concerned that the *Burra Charter's* principles have never been fully integrated into Indigenous heritage management frameworks in Queensland. The statutory review provides an important opportunity for this to occur.

The *Burra Charter* requires that the management response at a heritage place be determined by the nature and level of a place's *significance*. 'Significance' can take a number of forms: scientific, social, spiritual, historical, aesthetic (the *Burra Charter* Process flowchart is provided at Attachment A). This 'values-based' approach is now widely accepted as best practice. In contrast, the Options Paper indicates that the revised legislation's main focus will be on 'risk' to potential heritage places, with the level of 'risk' being the critical determinant of the management response. The Options Paper includes considerable discussion on how to

establish 'risk'. This leaves out the critical first step: assessing heritage significance against established heritage assessment criteria.

A number of Australia ICOMOS' Queensland members have advised us that the focus on risk and lack of guidance on significance in the existing legislation has created notable uncertainty and poor heritage outcomes in the state.

Recommendation 1: The review should be refocused on significance instead of risk, in accordance with *Burra Charter* principles and international heritage management best practice.

A shift of focus from risk to significance (ie. to a values-based approach) is required, for determining management responses. The review process will need to establish heritage assessment criteria relevant to assessing significance of an Indigenous place. An example of how this operates in current Indigenous heritage legislation is the *Victorian Aboriginal Heritage Act 2006*.

The *Burra Charter* provides a solid and replicable framework that can be applied in a transparent, well understood process. Based upon historic, scientific, social, spiritual and aesthetic values, the *Burra Charter* criteria are relevant to both Indigenous and non-Indigenous people and places. The *Burra Charter* provides a language and framework to describe the multiple forms of heritage significance that a place may embody, including for Indigenous heritage places. It also equips managers with the information necessary to manage a place's heritage significance.

Importantly, there should be no 'hierarchy' of significance. A place with scientific significance (eg. an archaeological site) will not necessarily be more important than a place of spiritual significance (eg. a Dreaming place).

Recommendation 2: Embed objective heritage assessment criteria in the legislation so that the heritage significance of places can be fully understood and appropriately responded to in impact assessments and management planning.

Incorporating the above recommendations in the next stage of the review process will address 'Proposal 3.3' of the Options Paper which states: 'Amend the Cultural Heritage Acts to expressly recognise intangible elements of cultural heritage'.

Embedding 'spiritual' and 'social' significance as heritage assessment criteria in revised legislation will provide Indigenous parties with the framework for the identification, assessment and management of Dreaming places, songlines, ceremony sites, bush tucker places, bush medicine places, and any other physical locations that embody a spiritual or social dimension.

The *Burra Charter* defines 'place' very broadly, such that it can include places with associated intangible heritage, and the new legislation would benefit from drawing on this definition to appropriately define 'place' and 'heritage'.

In this regard, it is possible that the phrase 'intangible heritage' in the Options Paper is not being used in the way that it is understood in international heritage management. For example, Article 2 of the *UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage* identifies 'intangible heritage' that can exist independent of physical places (eg. song, cuisine, dance and traditional medicine). The legislative review process needs to appropriately distinguish between the internationally recognised 'intangible heritage' and places that embody social and spiritual significance.

Recommendation 3a: Embed 'social significance' and 'spiritual significance' in any revised legislation so that places that embody these things can be identified and conserved.

Recommendation 3b: In future Options Papers and Discussions Papers, look to define 'intangible heritage' to align with international practice and conventions, to distinguish heritage that exists independent of physical places from places that embody spiritual and/or social significance (if there is interest from Indigenous people in Queensland for this heritage to be protected under legislation).

The Options Paper seeks to embed the concept of Free, Prior and Informed Consent (FPIC) within future legislation. Australia ICOMOS supports this principle, which is globally seen as important in recognising the rights of Indigenous peoples following the United Nations *Declaration on the Rights of Indigenous Peoples 2007*. The proposed legislation must, however, clearly define 'free', 'prior', 'informed' and 'consent' to ensure

clarity and certainty for all parties. Where there is uncertainty, there is an elevated risk of poor heritage outcomes.

We recommend that future iterations of the Options Paper consider the following questions:

- What happens if there is disagreement within an Indigenous community about who speaks for country (ie. who can give consent)?
- What if consent is given for an action but it is later withdrawn after a proponent has invested considerable resources on the basis of the original consent? For example, when the composition of an Indigenous group's decision-making body changes or the significance of a place changes?
- What level of information should be provided to Indigenous parties to ensure that they are 'informed'?
- When should that information be provided and how far 'prior' to relevant activities?

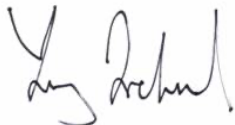
Future legislative regimes will need to provide mechanisms to resolve these challenging issues. However, it is possible that the suggested First Nations Body or Advisory Group underestimates the challenges that members might have in terms of managing community expectations. There is also the potential for such a body to create tension within Indigenous communities and with Indigenous individuals.

Recommendation 4a: Provide absolute clarity in future legislation on the critical dimensions of Free, Prior and Informed Consent, to minimise adversarial interactions between Indigenous parties and proponents. This must include clear statutory timeframes for phases of consultation, and prescriptive guidance on the kinds of information that are sufficient for a party to be appropriately 'informed'. All parties should be given certainty about what constitutes 'consent', including the grounds for its withdrawal where that is appropriate (eg. when the nature or significance of a place has changed or increased).

Recommendation 4b: Continue to investigate the form, scope and function of a future First Nations Advisory Body and how it will relate to the Government's role in heritage management.

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

Yours sincerely



**Professor Tracy Ireland, M.ICOMOS, FSA
President**

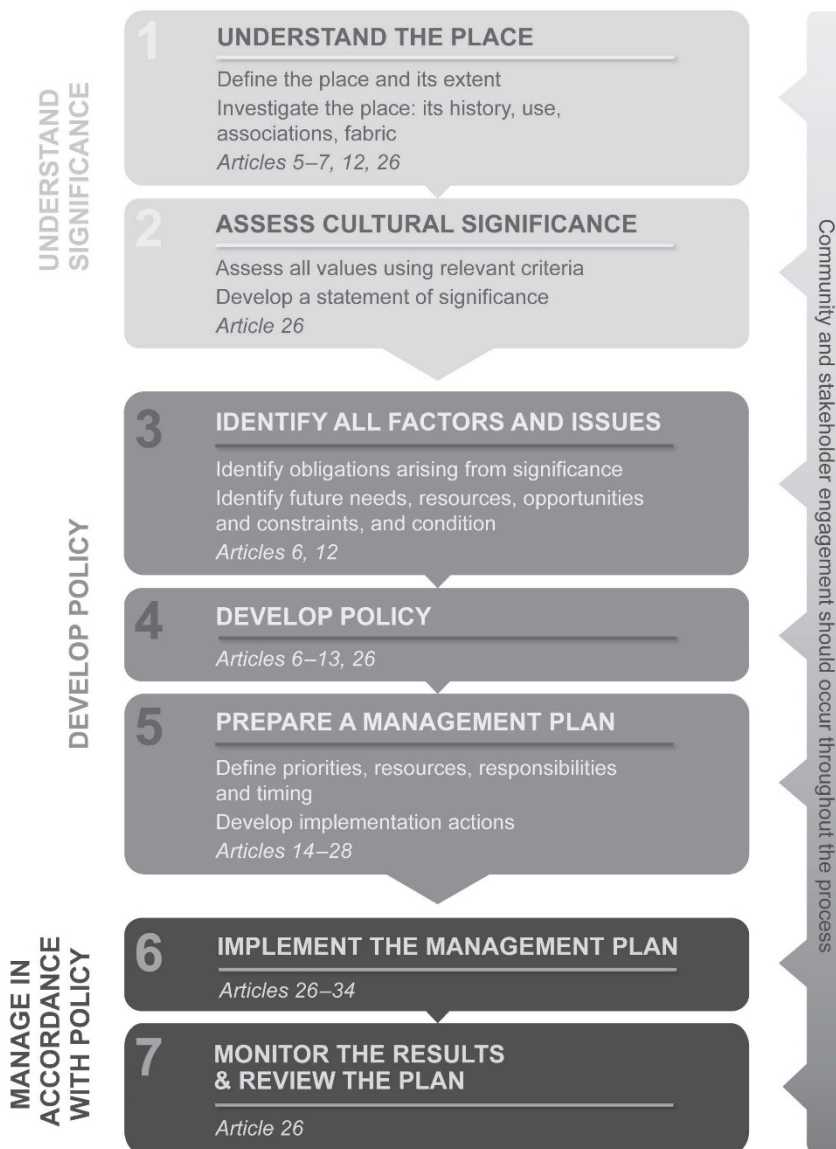
Attachment A: The Burra Charter Process

The Burra Charter Process

Steps in planning for and managing a place of cultural significance

The Burra Charter should be read as a whole.

Key articles relevant to each step are shown in the boxes. Article 6 summarises the Burra Charter Process.



The Burra Charter Process: flow chart from the *Australia ICOMOS Burra Charter, 2013, p10*.

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