



12 December 2012

## The Arts Law Centre of Australia

### **A submission in response to the Draft *Aboriginal Heritage Protection Bill* 2012**

The Arts Law Centre of Australia (Arts Law) is the national community legal centre for the arts. Arts Law was established 1983 with the support of the Australia Council and provides expert legal and business advice, publications, education and advocacy services each year to over 2,500 artists and arts organisations throughout Australia.

Arts Law provides an Indigenous arts service – *Artists in the Black* (AITB). The aim of AITB is to increase access to legal advice and information about arts law issues for Indigenous artists and communities. Arts Law is focused on supporting and advocating for effective protection of Aboriginal heritage (including cultural places and objects, languages, stories, spiritual knowledge and creative works).

Arts Law supports the development of the *Aboriginal Heritage Protection Bill 2012* (hereafter the **Draft Bill**) to improve the management and protection of Aboriginal heritage in Tasmania and applauds the Tasmanian Government for opening the Draft Bill to public comment.

At the outset we make the general comment that the Draft Bill only addresses one aspect of Aboriginal cultural heritage, specifically cultural objects and places and human remains. Aboriginal cultural heritage or ICIP (Indigenous Cultural Intellectual Property) encompasses not only human remains and objects and places of cultural significance but also traditional languages, stories, medicines, and ceremonies. Full protection of Aboriginal cultural heritage cannot be achieved without further reform of existing property and intellectual property regimes and we urge the Tasmanian Government to continue its efforts beyond the enactment of this Draft Bill to secure a broader protection regime.

After a careful review of the Draft Bill (and subject to the general reservation outlined above), Arts Law would like to submit the following recommendations for consideration which we believe will improve the protection mechanisms outlined in the Draft Bill for Aboriginal heritage in Tasmania.

## **1. THE DRAFT BILL SHOULD REFLECT THE PRINCIPLES ENshrINED IN THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES**

The *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* seeks to provide fairer protection to Aboriginal peoples and their heritage. UNDRIP was endorsed by the Federal Government in 2009 and thus any Bill which deals with the protection of Aboriginal heritage should be informed by and built upon these essential principles.

Articles 31 of UNDRIP states:

*“Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures... They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”*

Most importantly, Article 32 of UNDRIP states:

*“Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. **States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources.**”*

While the Draft Bill does establish a mechanism for consultation with the Aboriginal Heritage Council, it falls short of the protection envisaged by Article 32 of UNDRIP as consultation appears to be discretionary rather than mandatory.

<p><b>Recommendation 1: The Draft Bill should make consultation with the Aboriginal Heritage Council mandatory in relation to all third party activities affecting Aboriginal places and objects.</b></p>
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## **2. INDEPENDENCE OF THE ABORIGINAL HERITAGE COUNCIL**

Sections 13 and 14 of the Draft Bill establish the Aboriginal Heritage Council (the **Council**), which is to be made up of seven Aboriginal people appointed by the Governor on the nomination of the Minister. The Council, as part of the State’s resource management and planning system, is to play a key role in the protection and management of Aboriginal heritage in Tasmania. Arts Law supports the Council’s creation and function. However, to ensure the Council is truly representative of the Aboriginal language groups in Tasmania, Arts Law recommends that in making such appointments, the Minister seek recommendations from, and consult with, appropriate peak Aboriginal cultural organisations in Tasmania such as the Aboriginal Land Council of Tasmania and/or the Aboriginal Elders Council of Tasmania.

<p><b>Recommendation 2: Council appointments to be made in consultation with peak Aboriginal cultural organisations.</b></p>
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### **3. STRENGTHENING OF THE ROLE OF THE COUNCIL**

As the representative of the Aboriginal people of Tasmania, the Council will be best placed to identify and understand what constitutes Aboriginal heritage and how best to protect it. Thus it is advisable that the Council's guardianship role be as active as possible. For these reasons, and consistently with Article 32 of UNDRIP, the Minister should place greater importance on consultation with and recommendations of the Council.

Accordingly, Arts Law suggests the following amendments to the Draft Bill:

**Part 4 - Aboriginal Heritage Permits:** The Draft Bill establishes a permit system for certain restricted activities that affect Aboriginal heritage. Arts Law strongly recommends that the determination of **all** permit applications be in consultation with the Council.

Consistently with Article 32 of UNDRIP, the procedure under section 34(2)(b) should be amended to make it mandatory for the Council to be consulted on each permit application.

**Part 5 - Aboriginal Heritage Management Plans:** Arts Law agrees that the application for approval of Aboriginal Heritage Management Plans should remain under the ambit of the Minister's powers, and supports the involvement of the Council in the evaluation of every plan unless it notifies otherwise. However, the following amendments to Part 5 are recommended:

**Section 44 (1):** Art Law is concerned with the absence of any indication in the Act as to what type of activities are likely to be classed as exempt from the requirement for an Aboriginal Heritage Management Plan. This has the potential for exemptions to be created for activities that involve substantial damage to Aboriginal heritage. Arts Law recommends that all categories of exemptions be approved by, or determined after consultation with, the Council.

**Section 50 (11):** Arts Law supports the establishment under Section 50(8) of a process of dispute resolution via mediation if the Council and an applicant fail to reach an agreement on an Aboriginal Heritage Management Plan. However, under section 50(11) if the Council and an applicant fail to reach an agreement, the applicant may prepare the plan for Ministerial approval without further reference to the Council. Arts Law would like to see provision for the Council to provide a written report of their concerns for submission to, and consideration by, the Minister in such circumstances.

**Section 50 (12):** Arts Law supports the central role the Council is to play in the development of Aboriginal Heritage Management Plans. However, our experience is that culturally appropriate consultation with Indigenous communities can require some time. The Australia Council for the Arts has undertaken in-depth research on how to engage with Aboriginal communities and the cornerstones of its protocols are acknowledgement, consultation and respect. These principles should be reflected in the process of evaluation of projects by the Council. In our view, the deadlines by which time the Council has to give its advice on each plan are too short and we recommend the extension of the evaluation deadlines as follows:

- For the *preliminary consultation period* : a 75-day period rather than a 60-day period, and
- For the *supplementary consultation period*: a 60-day period rather than a 45-day period.

**Section 53 (2):** In considering applications for approval of plans under this section, the Minister may consult with the Council. Consistently with Article 32 of UNDRIP, Arts Law recommends the section be amended so that the Minister **must** consult the Council on every application. The Minister will thus retain the right to make the final decision, but must utilise the wealth of knowledge held by the Council in coming to that decision.

**Section 57 (3) and (4):** For the same reasons that amendment to section 53(2) is suggested, Arts Law recommends this section be amended so that the Minister **must** consult the Council in regards to all variations of Aboriginal Management Plans.

**Part 6 - External Regulatory Approvals – Section 71 (2) (g):** Again and for the same reasons, Arts Law recommends this section be amended so that the Minister **must** liaise with the Council in regards to all external applications.

**Part 7 - Aboriginal Heritage Agreements:** As an Aboriginal Heritage Agreement relating to an Aboriginal place does not attach to the land (section 77(7)(b)) and is taken to terminate automatically on the sale of the land, this limits the efficacy of the agreement to protect and manage Aboriginal heritage on a long-term basis. Arts Law recommends that if land over which an Aboriginal Heritage Agreement exists is sold, there be an obligation on the subsequent owner to negotiate a new agreement with the Council for the protection or management of the relevant Aboriginal heritage.

**Recommendation 3:** (a) The Minister should be obliged to consult the Council when approving Aboriginal Heritage Permits, Aboriginal Heritage Management Plans and External Applications, (b) exemptions under s44(1) to be determined by or in consultation with the Council, (c) Council to be allowed to provide written reports of its concerns to the Minister in the case of ongoing disagreement between the Council and applicants under s50(11), (d) Council evaluation deadlines to be extended under s50(12), and (e) subsequent owners of land where an Aboriginal Heritage Agreement existed are obliged to negotiate a new agreement with the Council.

#### **4. INCREASED PROTECTION FOR ABORIGINAL HERITAGE**

**Part 3, Division 1 - Aboriginal human remains:** Aboriginal human remains are of significant importance to Aboriginal peoples. Arts Law supports the ownership of Aboriginal human remains being vested in the Council as trustee for the Aboriginal community in Tasmania. However, Arts Law recommends an additional protection mechanism to be inserted into section 21 in the form of a duty of disclosure. Inserting a duty of disclosure into section 21 will be in line with disclosure requirements regarding Aboriginal objects and places under sections 22 and 23 of the Draft Bill. Under section 22 a person has a duty to report the finding of a place or objects that the person knows, or reasonably believes, to be an Aboriginal object or Aboriginal place. Failure to comply with this duty is an offence. Arts Law recommends similar protection for Aboriginal human remains under section 21, with reporting to be directly to the Council.

**Part 3, Division 2 - Aboriginal objects and Aboriginal places - Section 27:** Arts Law supports the Minister's power to acquire a registered Aboriginal place in the event the place is of exceptional significance to Aboriginal persons and acquisition is the only way of protecting or managing the Aboriginal place. However, under the current version of this section, the Council is excluded from the acquisition process. Due to the collective knowledge and understanding of its members, and guardianship role it is undertaking, Arts Law recommends the Minister be obliged to seek recommendations from the Council in respect of any such acquisition. In addition, the Council should have the power to make proposals to the Minister in regards to Aboriginal places that may fulfil the requirements of section 27.

<p><b>Recommendation 4: (a) Duty of disclosure to exist in relation to Aboriginal human remains, and (b) Council to be involved in any acquisition of Aboriginal places.</b></p>
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## **5. ADDITIONAL COMMENTS**

### **Request for information powers for the Council**

To assist the Council in its function, the Draft Bill should provide the Council with the power to request information from third parties regarding Aboriginal heritage or potential Aboriginal heritage implications of a proposed activity or the characteristics of property or land which may have cultural significance, and impose a requirement on such third parties to provide information within their possession within a reasonable time.

### **Creation of a presumption of Aboriginal heritage**

Arts Law recommends the Draft Bill create a presumption of further Aboriginal heritage in each place where Aboriginal human remains or Aboriginal objects are found. The discovery of, for example, an Aboriginal object may signify further Aboriginal activity in the area. Such a presumption would enable any Aboriginal cultural heritage items or places to be identified and appropriate management plans to be implemented.

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### **FURTHER INFORMATION**

Arts Law is available for further consultation on any aspect of this submission. Arts Law can be contacted at [artslaw@artslaw.com.au](mailto:artslaw@artslaw.com.au) or on (02) 9356 2566.