

1987

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

SENATE

ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE
PROTECTION (AMENDMENT) BILL 1987

SUPPLEMENTARY

EXPLANATORY MEMORANDUM

(circulated by authority of the Minister representing

the Minister for Aboriginal Affairs

Senator the Hon Susan Ryan)

GENERAL OUTLINE

The Government of the State of Victoria has requested the Commonwealth Parliament to enact legislation to provide for the involvement of Aboriginals in the protection of their cultural heritage in Victoria. The Aboriginal and Torres Strait Islander Heritage Protection (Amendment) Bill 1987 will amend the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 to:

- . exclude the operation of the concurrent law of the State of Victoria for the protection of Aboriginal cultural property (clause 3);
- . exclude protective declarations under Division 1 Part II of the 1984 Commonwealth Statute as it related to Victorian cultural property except where the new scheme (see below) would be inappropriate or could not apply (clause 4);
- . exclude the operation of sections 20 and 21 of the 1984 Commonwealth Statute from operation in Victoria (clauses 5 & 6);
- . provide a new scheme for the protection of Victorian Aboriginal cultural heritage (clause 7, Part II A) which allows for:
 - (a) emergency (section 21C), temporary (section 21D) and indefinite duration declarations (section 21E) to preserve items and land of particular cultural significance;
 - (b) arbitration of declarations of preservation for indefinite periods (sections 21E & 21F);

- (c) notices on protected land (section 21G), agreements about land use (section 21K), compulsory acquisition (section 21L) and compensation (sections 21M & 21N);
- (d) the disposal of Aboriginal remains in Victoria (sections 21P & 21Q);
- (e) powers of search and seizure (section 21S); and
- (f) penalties for interfering with land or objects (section 21U), related and evidentiary matters (section 21Z).

FINANCIAL IMPACT

Apart from administration costs, the Act (clause 7, Part II A section 21L), provides for the compulsory acquisition of irreplaceable property which could not otherwise be preserved. This would entail the payment of compensation under (section 21M). Compensation may also be paid to a person affected or likely to be affected by a declaration (section 21N).

NOTES ON CLAUSESClauses 1 and 2: Principal Act, Short Title and Commencement

1. The first two clauses provide that the Principal Act which this Bill amends is the Aboriginal and Torres Strait Islander Heritage Protection Act 1984. The clauses provide also for the short title and for the Bill to come into operation on the day on which it receives Royal Assent.

Clause 3: Application of Other Laws

2. The provision excludes and limits the operation of any Victorian law for the preservation or protection of Aboriginal cultural property, even though that legislation is capable of operating concurrently except for registrations under the Archeological and Aboriginal Relics Preservation Act 1972 of Victoria made before this Bill receives Royal Assent.

Clause 4: Application of Part II to Victoria

3. No declarations to protect objects or areas shall be made under Part II of the Principal Act by the Minister unless an application has been made under Part II A or, in the opinion of the Minister, would be inappropriate or not possible. Similarly, no declaration shall be made by an authorised officer under Part II A unless he considers a declaration under Part II would be inappropriate or not possible.

Clause 5: Discovery of Aboriginal Remains

4. Under this provision section 20 of the Principal Act would not apply to Aboriginal remains in Victoria.

Clause 6: Disposal of Aboriginal Remains

5. Under this provision section 21 of the Principal Act would not apply to Aboriginal remains in Victoria.

Clause 7: Part II A: Victorian Aboriginal Cultural Heritage

Section 21A: Interpretation

6. The terms Aboriginal cultural property, Aboriginal cultural heritage agreement, Aboriginal folklore, Aboriginal object, Aboriginal place, local Aboriginal community, police officer and State Minister are defined.

Section 21B: Delegation

7. The Commonwealth Minister for Aboriginal Affairs may delegate to a Victorian State Minister or his officers, powers under this Part. A State Minister may authorise a person to exercise those powers. This does not prevent the Commonwealth or State Minister respectively exercising the powers even though there has been a delegation or authorisation. Where the exercise of a power is dependant upon the Minister's opinion, belief or state of mind, the delegate or authorised person may rely on his own state of mind.

DIVISION 2 - Preservation of Victorian Aboriginal Cultural Property

Section 21C: Emergency Declaration of Preservation

8. An inspector appointed under section 21S, the Minister or a magistrate (the latter only on application of the local Aboriginal community) may make an emergency declaration where he reasonably believes that an object of particular religious, historical or cultural significance is under threat and can only be protected from injury or interference by the making of an emergency declaration. An emergency

declaration may be varied or revoked by the maker of it. Once made, reasonable steps will be taken to notify persons affected by a declaration.

Section 21D: Temporary Declaration of Preservation

9. Where the Minister, on his own motion or upon application to him, determines that a place or object should be protected by a temporary declaration of preservation, of up to 120 days, he shall give persons likely to be affected by the proposed declaration an opportunity to be heard, consult with any relevant State Minister and, if appropriate, make the declaration including details of the manner of preservation. A declaration may be varied or revoked by the Minister. The local Aboriginal community or a person likely to be affected by a declaration may require that an arbitrator review the Minister's decision.

Section 21E: Declaration of Preservation

10. Where the Minister determines, on his own motion or upon application to him, that a declaration of preservation shall be made, he shall give persons likely to be affected an opportunity to be heard, consult with any relevant State Minister and, if appropriate, make the declaration, including details of the manner of preservation. The Minister may vary or revoke the declaration at any time. The local Aboriginal community or a person likely to be affected by the declaration may require that the Minister's decision shall be reviewed by arbitration.

Section 21F: Arbitration

11. The arbitrator may confirm or vary the Minister's decision or make a new decision in substitution. The arbitrator's decision has effect from the date of the variation or new decision.

Section 21G: Notices

12. A local Aboriginal community may post notices of a declaration. There are penalties for interfering with a notice of \$500 for a natural person and \$2,500 for a body corporate.

Section 21H: Penalties for Contravening Declarations

13. A person who contravenes a declaration relating to a place may be penalised up to \$10,000, and/or 5 years imprisonment, for a natural person and up to \$50,000 for a body corporate. A person who contravenes a declaration relating to an object may be penalised up to \$5,000 or 2 years imprisonment if a natural person or up to \$25,000 if a body corporate.

Section 21J: Obligation to Protect Land

14. A declaration concerning a place does not excuse compliance with any other law for the protection or conservation of the land which is consistent with the declaration.

Section 21K: Aboriginal Cultural Heritage Agreement

15. A local Aboriginal community may agree with the owner or possessor of cultural material concerning the preservation, maintenance, exhibition sale or use of the property.

Section 21L: Compulsory Acquisition

16. The Minister may compulsorily acquire property that is irreplaceable and cannot otherwise be preserved. The property shall then either be vested in, or held in trust for, the local community or Aboriginals in Victoria generally.

Section 21M: Compensation for Acquisition of Property

17. Where a declaration is, in effect, an acquisition on less than just terms (for example where it prohibits permanently any dealing in an object) the Minister and the owner shall attempt to negotiate reasonable compensation or, in default, the amount of compensation will be decided by the Federal Court.

Section 21N: Compensation may be paid in certain circumstances

18. The Minister may pay compensation to a person affected, or likely to be affected, by a declaration of preservation under section 21F. The amount payable is as agreed, or as determined by arbitration.

DIVISION 3 - Discovery and Disposal of Aboriginal Remains

Section 21P: Discovery of Aboriginal Remains

19. A person who discovers what he or she reasonably believes to be Aboriginal remains shall report the discovery to the Minister who shall consult with the relevant Aboriginals.

Section 21Q: Disposal of Aboriginal Remains

20. The Minister may return the remains to the local Aboriginal community, or deal with them as directed reasonably by that community, or transfer them to a prescribed authority for safekeeping.

Section 21R: Inspectors

21. The Minister may, after consultation with a local Aboriginal community, appoint a person with suitable expertise to be an inspector.

Section 21S: Power to enter, search etc

22. Where an inspector can show reasonable grounds, a magistrate may issue a warrant to allow the inspector and a police officer to search any premises or vehicle and seize objects which are under threat. The objects may be kept for 60 days, unless they are compulsorily acquired.

Section 21T: Honorary Keepers or Warders

23. A local community may appoint an honorary keeper to record and maintain property.

Section 21U: Defacing Property

24. There is provision for penalties of \$10,000 and/or 5 years for a natural person and \$50,000 for a body corporate for interfering with, or doing an act likely to endanger, an Aboriginal object or place.
25. Where a local community or the Minister, where there is no local community, agrees to the excavation of a place or object, or to interference with a place or object, no offence shall have been committed.

Section 21V: Register

26. The Minister shall cause to be kept a register of declarations.

Section 21W: General meetings of local Aboriginal communities

27. Representatives of local Aboriginal communities may meet to advise the Minister about cultural property and to make recommendations about the operation and/or amendment of this Part.

Section 21X: Negotiation for return of Aboriginal remains

28. A local Aboriginal community may request that the Minister negotiate for the return of Aboriginal remains.

Section 21Y: Indictable offences

29. Defacing property, contravening a declaration and those offences prescribed by section 23 are indictable offences but may be tried summarily by consent.

Section 21Z: Evidence

30. A conviction for a contravention of a declaration, or for defacement of a place or object, shall not be made unless it is proved that the defendant knew, or ought reasonably to have known of, the declaration or that the object or place was an Aboriginal object or place respectively.

Section 21ZA: ALCOA Smelter

31. This proposed section will ensure that the provisions of part IIA do not apply to the ALCOA Smelter site at Portland. That Company has entered into suitable agreements with local Aboriginal people to protect sites of significance.

Clause 8: Body corporate responsible for acts of servants or agents

32. A body corporate is deemed to know of a declaration under this Part where a director, servant or agent knows, or ought reasonably to know if it.

Clause 9: Injunctions

33. The Federal Court may, upon receiving an application of the Minister, grant an injunction to restrain breaches of declarations under this Part.

Clause 10: Proceedings in camera

34. Proceedings under Part II A are excluded from those which may be held in camera under the provisions of the Principal Act.

Clause 11: Compensation for acquisition of property

35. Section 28 of the Principal Act does not apply to Part II A. Section 21N provides for compensation under this Part.

Clause 12: Legal Assistance

36. Where the Minister has sought an injunction to restrain the breach of a declaration under this Part, the person proposed to be enjoined is excluded from those who under the Act may be granted Legal Aid.

Clause 13: Delegation

37. Section 31 of the Principal Act does not apply to Part II A. Section 21C provides for the appropriate delegation of powers under this Part.

Clause 14: Schedule I

38. This clause adds Schedule I which is the list of local Aboriginal communities required by the definition of 'local Aboriginal community' at section 21A.









