2004-2005

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

ABORIGINAL AND TORRES STRAIT ISLANDER HERITAGE PROTECTION AMENDMENT BILL 2005

EXPLANATORY MEMORANDUM

(Circulated by authority of Senator the Hon Ian Campbell, Minister for the Environment and Heritage)
GENERAL OUTLINE

The purpose of this Bill is to amend the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (‘the Act’) in order to:

(a) provide greater certainty to international cultural loan arrangements by ensuring that declarations made under the Act cannot act to prevent the return of objects imported temporarily to Australia with a certificate of exemption under the *Protection of Movable Cultural Heritage Act 1986*;

(b) provide for the repeal of Part IIA and other provisions in the Act that only apply to places in Victoria to enable the Victorian Government to administer Aboriginal heritage protection in Victoria directly through its own legislation; and

(c) bring the Act into line with the *Legislative Instruments Act 2003* by making amendments to clarify which class of instruments contained in the Act are non-exempt legislative instruments for the purposes of the *Legislative Instruments Act 2003* and, accordingly, subject to its provisions.

Consequential amendments are also made to the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987*. The *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* obliges two Aboriginal Corporations, in whom certain land in Victoria is vested, to prevent disclosure of the contents of their registers of sacred or significant sites without the permission of the relevant Governing Committee or Community Council. An exception to this obligation was disclosure for the purposes of Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. The amendment removes the exception to the obligation.

FINANCIAL IMPACT STATEMENT

The Bill will have no financial impact.

REGULATION IMPACT STATEMENT

The Office of Regulation Review has considered these proposed amendments and determined that a Regulation Impact Statement is not required for the amendments.

NOTES ON INDIVIDUAL CLAUSES

Clause 1 - Short title

1. This clause provides that the short title by which the Act may be cited is the *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 2005*. 
Clause 2 - Commencement

2. Paragraph 1 of the table in subclause (1) provides that the commencement date for sections 1, 2 and 3 and anything in the Bill not covered elsewhere by the table in subclause (1) is the day on which the Bill receives the Royal Assent.

3. Paragraph 2 of the table in subclause (1) provides that the commencement date for the provisions in Schedule 1 is the day after the day on which the Bill receives the Royal Assent.

4. Paragraph 3 of the table in subclause (1) provides that the commencement date for the provisions contained in Schedule 2 will be on the day to be fixed by Proclamation and within 12 months of the day on which the Bill receives the Royal Assent. If the provisions of the Bill contained in Schedule 2 do not come into force by Proclamation, the provisions of the Bill will be automatically repealed on the first day after the end of that period. This allows the special provisions in the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* for Aboriginal heritage protection in Victoria to continue if, for example, replacement Victorian legislation is not ready to commence by the end of the 12-month period.

5. Paragraph 4 of the table in subclause (1) provides that the commencement date for the provisions in Schedule 3 is the day on which the Bill receives the Royal Assent.

Clause 3 - Schedules

6. This clause provides that each Act specified in the Schedules is amended or repealed as set out in the Schedule and other items in the Schedule have effect according to their terms.

Schedule 1 – Effect of declarations

*Aboriginal and Torres Strait Islander Heritage Protection Act 1984*

Item 1 – After subsection 12(3)

7. This item inserts a new clause 12(3A) that provides that a declaration made pursuant to subsection 12(1) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* cannot prevent the export of an object if there is a certificate in force under section 12 of the *Protection of Movable Cultural Heritage Act 1986* authorising its export. The insertion of this new clause, together with the new clauses 18(2A) and 21EA, removes ambiguity in relation to the operation of declarations made pursuant to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and the operation of a certificate in force under section 12 of the *Protection of Movable Cultural Heritage Act 1986*. The new clauses clarify the relationship between the two Acts by providing that a declaration made pursuant to subsections 12(1), 18(1), 21C, 21D or 21E of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* cannot prevent the export of an object if there is a certificate in force under section 12 of the *Protection of Movable Cultural Heritage Act 1986* authorising its export.
Item 2 – After subsection 18(2)

8. This item inserts a new clause 18(2A) that provides that a declaration made pursuant to subsection 18(1) of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* cannot prevent the export of an object if there is a certificate in force under section 12 of the *Protection of Movable Cultural Heritage Act 1986* authorising its export.

Item 3 – After subsection 21E

9. This item inserts a new subclause 21EA that provides that a declaration made pursuant to section 21C, 21D or 21E of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* cannot prevent the export of an object if there is a certificate in force under section 12 of the *Protection of Movable Cultural Heritage Act 1986* authorising its export.

Schedule 2 - Repeal of Part IIA

*Aboriginal and Torres Strait Islander Heritage Protection Act 1984*

Item 1 - Subsection 7(1)

10. Following the commencement of the repeal of Part IIA of the Act, this item amends subsection 7(1) by deleting a reference in the provision to Part IIA that excluded and limited the operation of Victorian law from operating concurrently with Part IIA of the Act. The removal of the reference to Part IIA from subsection 7(1) is necessary following the repeal of Part IIA of the Act. The effect of the removal of the exemption will, notwithstanding the repeal of Part IIA, bring the treatment of the law of Victoria into line with that of the laws of the other States and Territories under the Act by preserving the operation of any law of a State or Territory that is capable of operating concurrently with the Act. Where there is a direct inconsistency, the Act will prevail (see subsection 7(1) of the Act and s.109 of the Constitution).

Item 2 - Subsection 7(1A)

11. This amendment will, at the time of commencement of the repeal of Part IIA of the Act, repeal subsection 7(1A). That subsection provided an exemption to the *Archaeological and Aboriginal Relics Act 1972* of Victoria from the limitations placed on the operation of Victorian law operating concurrently with Part IIA of the Act pursuant to subsection 7(1). The preservation of the *Archaeological and Aboriginal Relics Act 1972* allowed that Act to operate concurrently with Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. The removal of the preservation of the *Archaeological and Aboriginal Relics Act 1972* from the operation of Part IIA through this amendment is necessary following the repeal of Part IIA of the Act. The repeal of the subsection 7(1A) will not affect the current operation of the *Archaeological and Aboriginal Relics Act 1972* of Victoria as, following the repeal of Part IIA, the *Archaeological and Aboriginal Relics Act 1972* will be brought into line with the others laws of the States and Territories under the Act pursuant to subsection 7(1) and, accordingly, its operation will be subject to that provision which preserves the operation of any law of a State or Territory that is capable of operating concurrently with the Act.
Item 3 - Section 8A

12. Following the commencement of the repeal of Part IIA of the Act, this item amends Section 8A of the Act by repealing the section. That section required that no declaration to protect objects or areas made under Part II can be made by the Minister unless an application had been made under Part IIA and had been rejected, or that such an application would be inappropriate or could not be made. Similarly, the repeal of the section will also remove the requirement that no declaration shall be made under Part II by an authorised officer unless the officer was satisfied that an application in relation to the area or object under Part IIA would be inappropriate or could not be made. The removal of section 8A is necessary following the repeal of Part IIA of the Act. Following the repeal of section 8A, the provisions for the making of a declaration under Division 1 of Part II or under Division 2 of Part II of the Act will apply to Victoria as they currently apply to the other States and Territories.

Item 4 - Subsection 20(1)

13. Following the commencement of the repeal of Part IIA of the Act, this item amends subsection 20(1) by removing the exemption contained in that provision that section 20 of the Act does not apply to Aboriginal remains found in Victoria. The removal of the reference to the exemption for Victoria from subsection 20(1) is necessary following the repeal of Part IIA of the Act. The effect of the amendment will be to apply the same reporting requirements contained in section 20, in terms of giving the particulars of the remains and of their location to the Minister, to a person who makes a discovery of Aboriginal remains in Victoria that apply to Aboriginal remains found by a person in the other States and Territories.

Item 5 - Subsection 21(1)

14. Following the commencement of the repeal of Part IIA of the Act, this item will amend subsection 21(1) by removing the exemption contained in that provision that section 21 of the Act does not apply to Aboriginal remains found in Victoria. The removal of the exemption for remains discovered in Victoria from subsection 21(1) is necessary following the repeal of Part IIA of the Act. The effect of the amendment will require the Minister, in accordance with section 21, to deal with Aboriginal remains found in Victoria in a like manner as those found elsewhere in Australia.

Item 6 – Part IIA

15. This item repeals Part IIA of the Act. That Part provided a self-contained prescription for the preservation of the Aboriginal cultural heritage in Victoria that was agreed between the State of Victoria and the Commonwealth and introduced into the Act by the Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987. At the request of the State of Victoria, the repeal of Part IIA is intended to allow the Victorian Government to administer Aboriginal heritage protection in Victoria directly through its own legislation. The repeal is to commence upon Proclamation at a date to be fixed, to allow for the preparation of State legislation to replace the Commonwealth provisions that applied only to protect Aboriginal heritage in Victoria. To ensure that there is no gap in protection of
Aboriginal heritage in Victoria, the amendments contained in this item and the other items of this schedule of the Bill will be repealed if they are not proclaimed within 12 months of the date that the Bill receives the Royal Assent.

**Item 7 – Paragraph 25(1)(b)**

16. Following the commencement of the repeal of Part IIA of the Act, this item amends paragraph 25(1)(b) by removing the reference in the paragraph to Part IIA declarations. The removal of the reference to Part IIA declarations is necessary following the repeal of Part IIA of the Act. The amendment will not affect the operation of the paragraph upon the remaining Part II declarations that provides that a body corporate is deemed to know of the existence of a declaration where a member of the governing body, director, servant or agent of a body corporate knows or ought reasonably to know of it.

**Item 8 – Paragraph 26(1)(a)**

17. Following the commencement of the repeal of Part IIA of the Act, this item amends paragraph 26(1)(a) by removing the reference in the paragraph to Part IIA declarations. The removal of the reference to Part IIA declarations is necessary following the repeal of Part IIA of the Act. The amendment will not affect the operation of the paragraph upon the remaining Part II declarations that provides that the Federal Court may, upon receiving an application from the Minister, grant an injunction to restrain breaches of declarations under the Act if satisfied that a person has engaged in, or is proposing to engage in conduct that would contravene a provision of a declaration under Part II.

**Item 9 – Section 27**

18. Following the commencement of the repeal of Part IIA of the Act, this item amends subsection 27 by removing the exemption that proceedings under Part IIA are excluded from those which may be held in camera under the provision of the Act. The removal of the exemption is necessary following the repeal of Part IIA of the Act. Following the amendment, the court may, on application, hold proceedings in camera in relation to any proceedings arising under the Act or make orders to prevent or limit disclosure of information with respect to the proceedings.

**Item 10 – Subsection 28(1)**

19. Following the commencement of the repeal of Part IIA of the Act, this item amends subsection 28(1) by removing the exclusion for compensation payable to a person for the acquisition of property in Victoria to which Part IIA of the Act applied. The removal of the exclusion is necessary following the repeal of Part IIA of the Act. Following the amendment, a person in Victoria, as elsewhere, will be entitled to compensation if the operation of the Act or a declaration made under Part II would result in the acquisition of property from a person otherwise than on just terms.

**Item 11 – Subparagraph 30(1)(c)(ii)**

20. Following the commencement of the repeal of Part IIA of the Act, this item amends subparagraph 30(1)(c)(ii) by removing the exclusion for the grant of legal or financial
assistance to a person(s) against whom proceedings for an injunction have been initiated by
the Minister, pursuant to section 26 of the Act to restrain the breach of a declaration made
under Part IIA. The removal of the exclusion for Part IIA declarations is necessary
following the repeal of Part IIA of the Act. The amendment does not affect the current right
of a person(s), in Victoria as elsewhere, to apply to the Attorney-General for legal or
financial assistance in circumstances where the Minister has initiated proceedings for an
injunction to restrain a breach of a declaration made under Part II of the Act.

Item 12 – Subsection 31(1)

21. Following the commencement of the repeal of Part IIA of the Act, this item amends
subsection 31(1) by removing the reference that section 31 of the Act does not apply to Part
IIA. That provision expressly prohibited the Minister from delegating his or her powers and
functions under Part IIA as this was otherwise provided for in section 21B of Part IIA. The
removal of the exclusion of Part IIA from section 31 is necessary following the repeal of
Part IIA of the Act. The amendment does not, however, alter the remaining prohibitions on
the Minister’s powers to delegate under the Act in relation to sections 9, 10 and 12,
subsection 13(2) and section 26 of the Act. The amendment also does not affect the general
provision for the delegation of the Minister’s powers and functions under the Act.

Item 13 – Schedule

22. Following the commencement of the repeal of Part IIA of the Act, this item repeals the
Schedule to the Act that sets out the names of the Local Aboriginal communities in Victoria
which was required for the purposes of defining ‘local Aboriginal community’ at section
21A of the Act. The Schedule operated only for the purposes of Part IIA and is removed
following the repeal of Part IIA.

Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987

Item 14 - Subsection 16(2)

23. Following the commencement of the repeal of Part IIA of the Act, this clause provides for a
consequential amendment to be made to the Aboriginal Land (Lake Condah and
Framlingham Forest) Act 1987. That Act obliges the Kerrup-Jmara Elders Aboriginal
Corporation, in whom certain land in the Parish of Condah, Victoria, is vested, to prevent
disclosure of the contents of its register of sacred or significant sites without the permission
of the Governing Committee. An exception to this obligation was disclosure for the
purposes of Part IIA of the Aboriginal and Torres Strait Islander Heritage Protection Act
1984. The amendment removes the exception to the obligation following the repeal of Part
IIA from the Aboriginal and Torres Strait Islander Heritage Protection Act 1984.

Item 15 - Subsection 24(2)

24. Following the commencement of the repeal of Part IIA of the Act, this clause provides for a
further consequential amendment to be made to the Aboriginal Land (Lake Condah and
Framlingham Forest) Act 1987. That Act obliges the Kirrae Whurrong Aboriginal
Corporation, in whom certain land in the Parish of Purnim, Victoria, is vested, to prevent
disclosure of the contents of its register of sacred or significant sites without the permission
of the Community Council. An exception to this obligation was disclosure for the purposes
of Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. The amendment removes the exception to the obligation following the repeal of Part IIA from the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

**Schedule 3 – Technical amendments relating to legislative instruments**

*Aboriginal and Torres Strait Islander Heritage Protection Act 1984*

**Item 1 - Subsection 9(1)**

25. This clause provides for an amendment to be made to subsection 9(1) of the Act to clarify that, for the purposes of the *Legislative Instruments Act 2003*, an emergency declaration made under subsection 9(1) by the Minister, in relation to significant Aboriginal areas that are under serious and immediate threat of injury or desecration, is a non-exempt legislative instrument.

**Item 2 - Subsection 9(3)**

26. This clause provides for an amendment to be made to subsection 9(3) of the Act to clarify that, for the purposes of the *Legislative Instruments Act 2003*, an extension of the emergency declarations made under subsection 9(1) by the Minister, in relation to significant Aboriginal areas that are under serious and immediate threat of injury or desecration, is a non-exempt legislative instrument.

**Item 3 - Subsection 10(1)**

27. This clause provides for an amendment to be made to subsection 10(1) of the Act to clarify that, for the purposes of the *Legislative Instruments Act 2003*, a declaration made under subsection 10(1) by the Minister, in relation to significant Aboriginal areas that are under threat of injury or desecration, is a non-exempt legislative instrument.

**Item 4 - Subsection 12(1)**

28. This clause provides for an amendment to be made to subsection 12(1) of the Act to clarify that, for the purposes of the *Legislative Instruments Act 2003*, a declaration made under subsection 12(1) by the Minister, in relation to an object that is a significant Aboriginal object or a class of objects that is a class of significant Aboriginal objects that are under threat of injury or desecration, is a non-exempt legislative instrument.

**Item 5 - Paragraph 14(1)(b)**

29. In order to avoid any confusion in relation to the date of commencement of a Part II Division 1 declaration made under the Act, this clause amends the paragraph by removing the reference to “date of publication in the *Gazette*”, and substituting with “day after the day of its registration under the *Legislative Instruments Act 2003*”. The effect of this amendment will also allow for the continued gazettal and publication of the declaration in a local newspaper pursuant to paragraph 14(1)(a), notwithstanding section 56 of the *Legislative Instruments Act 2003*.
Item 6 - Section 15

30. This clause provides for the repeal of section 15. That section provided that sections 48 (other than paragraphs (1)(a) and (b) and subsection (2)), 48A, 48B, 49 and 50 of the Acts Interpretation Act 1901 applied to declarations made under Division 1 of the Act as though in those sections of the Acts Interpretation Act 1901 references to regulations were references to declarations, references to a regulation were references to a provision of a declaration and references to repeal were references to revocation. The section provided for review by Parliament for declarations made pursuant to sections 9, 10 and 12 of the Act.

With the commencement of the Legislative Instruments Act 2003, section 57 of that Act provides that compliance with tabling and disallowance provisions in the Legislative Instruments Act 2003 will constitute compliance with those provisions of the Acts Interpretation Act 1901. From 1 January 2005, therefore, declarations made pursuant to sections 9, 10 and 12 of the Act have accordingly been required to comply with the tabling, scrutiny and disallowance procedures under Part 5 of the Legislative Instruments Act 2003. The repeal of section 15 of the Act by this Bill will, for purposes of clarifying this position, accordingly bring declarations made under Division 1 of the Act into line with the Legislative Instruments Act 2003.

Item 7 – After subsection 18(2)

31. This clause inserts a new clause 18(2) that clarifies, for the purposes of assisting readers, that an emergency declaration, in relation to areas or objects, made pursuant to subsection 18(1) of the Act is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act 2003 and, accordingly, is not subject to its provisions. Rather, declarations made pursuant to section 18 continue to be subject to the requirements of the Act.