



## Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill 2005

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Law and Bills Digest Section

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## **Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill 2005**

**Date Introduced:** 12 October 2005

**House:** Senate

**Portfolio:** Environment and Heritage

**Commencement:** Sections 1-3 and schedule 3 commence on Royal Assent, and schedule 1 on the day after Royal Assent. Schedule 2 commences on a day fixed by proclamation. However, if no proclamation has been made within a 12 month period after Royal Assent those provisions are repealed

### **Purpose**

Schedule 1 amends the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Heritage Protection Act) so that the export of objects will not be prevented if there is a certificate in force under s.12 of the *Protection of Movable Cultural Heritage Act 1986*.

Schedule 2 repeals Part IIA of the Act relating to Victorian Aboriginal cultural heritage and makes consequential amendments to the Act and to the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987*. This allows Victoria to legislate directly in the area of Victorian Aboriginal cultural heritage.

Schedule 3 indicates which declarations under the Heritage Protection Act are legislative instruments.

### **Background**

#### **Aboriginal and Torres Strait Islander Heritage Protection Act 1984**

The purpose of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* is to preserve and protect places and objects of cultural significance to Aboriginal and Torres Strait Islander peoples. Currently the legislation provides this protection at the national level for all states with the exception of Victoria. In respect of Victoria the legislation operates at the state level. This means that currently the Commonwealth delegates its powers to the State Minister to administer the provisions under Part IIA of the Act relating to matters of preservation of Aboriginal places or objects in Victoria.

Part IIA effectively prevents Victoria passing its own Indigenous heritage protection laws and makes it the only jurisdiction not to have its own Indigenous heritage protection laws.

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## Part IIA Victorian Aboriginal Cultural Heritage

The *Aboriginal and Torres Strait Islander Heritage Protection Amendment Act 1987* inserted Part IIA into the Heritage Protection Act. Part IIA replicated the provisions of an unsuccessful Victorian Aboriginal Cultural Heritage Protection Bill. The second reading speech by Mr Clyde Holding then Minister for Aboriginal Affairs explained the context of these provisions:

These bills represent a unique and important step on the part of this Parliament to recognise the legitimate and traditional interests of the Aboriginal people of Victoria. It is an opportunity for this Parliament to exercise its constitutional power to enact legislation for the benefit of the Aboriginal people in Victoria. Those powers are being exercised at the specific request of the elected Government of the State of Victoria. Such a request, in the face of an intransigent, irrational and unjustifiable stand taken by the Opposition parties in the Victorian Parliament, necessitates the Commonwealth Parliament taking a stand in support of the Aboriginal people who are the subject of these Bills.<sup>1</sup>

The Victorian Government requesting the changes at the time was the Cain Labor Government.

The Amendment Act of 1987 set up mechanisms under which Victorian Aboriginal people could apply to the Minister for an emergency, temporary or other declaration if they considered that Aboriginal objects or places were under threat. The Minister is also empowered to compulsorily acquire any Aboriginal cultural property if the Minister is satisfied that it is of such significance that it is irreplaceable and no other arrangements can be made for its preservation. Such acquisition would carry with it a right to compensation from the Commonwealth.

To summarise the situation once the 1987 Act was passed:

There is a Commonwealth Act [the Heritage Protection Act] which applies to all of Australia yet the amendment inserts a new Part, applicable only in Victoria, which provides stronger protection for Aboriginal cultural heritage than the rest of the Act. In fact the Australia-wide part of the Act does not apply in Victoria unless the “Victoria only” Part cannot be used. It is difficult to imagine such an instance. Secondly the Act has a “roll back” clause, designed to overcome the operation of s.109 of the Commonwealth Constitution, which seeks to preserve the operation of protective measures taken under a pre-existing Victorian law, the Archaeological and Aboriginal Relics Preservation Act 1972.<sup>2</sup>

## Evatt Report 1996

On 20 October 1995, the then Minister for Aboriginal and Torres Strait Islander Affairs, Hon Robert Tickner announced that Hon Elizabeth Evatt had been invited to undertake a

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comprehensive and independent review of the Heritage Protection Act. The report was submitted to Senator Herron in August 1996.

Part IIA of the Act was not dealt with in any detail in the report as the terms of reference did not directly cover this part of the Act. However, the report mentions the Victorian Government as well as submissions from Aboriginal people in Victoria raised a number of issues relating to the problems arising from the operation of Part IIA.<sup>3</sup> The administration of the Act under Part IIA is delegated to the Victorian Minister for Aboriginal Affairs. Section 8A of the Commonwealth Act stipulates that Part IIA is to be used before any declaration by the Commonwealth Minister will be considered. Evatt stated that this situation was unsatisfactory because Victoria has no control over Part IIA and the Commonwealth 'may not have an interest in revising what is a purely a local law.'<sup>4</sup> The view of the Victorian Government in 1996 was that the 'present dual regime is both administratively cumbersome and fraught with problems of interpretation. Their approach is to replace Part IIA.'<sup>5</sup> The Victorian Government submission to the Evatt Review also made the following comments:

The enactment of new Aboriginal cultural heritage legislation at State level would enable the eventual abolition of Part IIA of the Commonwealth Heritage Protection Act. This would be consistent with the Federal Coalition policy that State legislation should be the primary source of statutory protection for Aboriginal cultural heritage, with Commonwealth legislation being used only as a last resort. In principle, Victorian legislation would need to consider mirroring many of the existing provisions of Part IIA, but would also update and incorporate those sections of the existing Archaeological and Aboriginal Relics Preservation Act 1972 which are considered necessary for the effective protection of Victorian Aboriginal cultural heritage.

It is anticipated that such legislative changes should generally be favoured by the Commonwealth, as the enactment of effective Victorian legislation followed by the repeal of Part IIA would promote the role of the Commonwealth Heritage Protection Act as a nation-wide 'backstop' for protection of Aboriginal cultural heritage, to be called upon as a last resort when significant places or objects cannot be adequately protected by State or Territory laws.<sup>6 7</sup>

In 2005, the Victorian Government requested that the provisions relating directly to Victoria be removed from the Commonwealth legislation to enable the Victorian Government to implement its own Aboriginal cultural heritage legislation.<sup>8</sup> The current Bill will remove specific references to Victoria and the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* will then operate in a uniform manner for all Australian states and territories. The provisions of the 2005 Bill allow for a 12 month period before the provisions removing the Victorian references come into force, which allows the Victorian Government time to implement its own legislation. If Victorian legislation is not enacted in this timeframe, the relevant Commonwealth provisions which repeal Part IIA are themselves repealed leaving Part IIA in tact.

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## Export of Objects

The 2005 bill also provides that declarations made under the *Heritage Protection Act 1984* will not prevent the export of objects for which there is a certificate in force under section 12 of the *Protection of Movable Cultural Property Act 1986*. Section 12 enables a person who wants to import an ‘Australian protected object’<sup>9</sup> for ‘a temporary purpose’ or in circumstances where the person may want to subsequently export the object, to apply to the Minister for a certificate authorising the object’s exportation. The provisions allow museums and other cultural institutions in Australia to obtain objects ‘under contractual and other loan arrangements for temporary exhibition in Australia.’<sup>10</sup> Such arrangements are difficult to negotiate unless the overseas lending institutions have the protection of a section 12 certificate.

A difficult and sensitive issue arose recently in Victoria after the staging of an exhibition by Museum Victoria entitled **Etched on Bark 1854**. The amendments in Schedule 1 are the result and ensure that a s.12 certificate cannot be overridden by a declaration under the Heritage Protection Act.

The exhibition ran from 18 March 2004 to 27 June 2004. The exhibition notice stated that:

The earliest surviving Aboriginal bark etchings in Australia, they are the only remaining examples of artistic work done by Kulin men from the Loddon and Murray Rivers during the nineteenth century. Two bark etchings have also been borrowed from the British Museum and the Royal Botanic Gardens, Kew.

The items on loan from these institutions became the subject of temporary declarations under the *Heritage Protection Act*. The Dja Dja Wurrung Group claimed traditional ownership of the items and their return was prevented by the operation of the declarations. Museum Victoria had contractual obligations to return the items to the institutions concerned as soon as the exhibition had finished but was unable to do so. Legal proceedings were then instituted in the Federal Court by Museum Victoria and elders of the Dja Dja Wurrung People.

## Federal Court proceedings

Museum Boards of Victoria v. Carter [2005] FCA 645 20 May 2005

The items which were the subject of the court proceedings were as stated by Justice Ryan in his judgment, two bark etchings originating in Dja Dja Wurrung Country around Boort dating to about 1854, another bark etching dating from the 1870’s in Jupagalk Country in the Lake Tyrell area and a ceremonial emu figure made from river redgum and decorated with red and white ochres. The objects were due to be returned to the British Museum and the Royal Botanic Gardens, Kew by 30 September 2004. A number of successive emergency declarations were obtained under the *Heritage Protection Act* by the Dja Dja Wurrung Native Title Group. Museum Victoria took action in the Federal Court to review

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the decisions to make successive emergency declarations. Eight emergency declarations were made in all.

The case involved whether the inspector under the Heritage Protection Act had the power to make subsequent declarations after the first declaration in respect of the same objects after the first emergency declaration was made. The Judge took the view that the inspector lacked the power to make the second and subsequent declarations. The case had the effect of removing the protective declarations that had operated on the objects.

*Carter v. Minister for Aboriginal Affairs* [2005] FCA 667 923 May 2005

The applicants applied to the Minister on 12 July 2004 for a permanent declaration of preservation under s.21E of the *Heritage Protection Act* and also asked the Minister to compulsorily acquire the objects under s.21L of the Act. Among other things in this case, the Indigenous applicants sought a review of the Minister's failure to make a decision about a s.21E declaration and sought to compel him to make a decision. The applicants were unsuccessful.

The Court also dissolved the injunction which restrained the Museum from removing or permitting to remove the objects in question from Victoria. It was then possible for the Museum to return the objects to the lending institution.

#### Possible Implications for Keeping the Objects

Ms Dawn Casey, formerly National Museum of Australia director and currently Chair of the Community and Industry Advisory Committee of the Centre for Cultural Materials Conservation at the University of Melbourne, has said in an advice to the Victorian Government in relation to these artefacts, that “in my opinion, the impacts of such a decision would include no further loans to any Australian museums including art galleries...notwithstanding the rarity and cultural and historical significance of the artefacts”, the consequences of keeping them in Australia would “far outweigh the benefits.” She warned that for the sake of the three disputed artefacts, 40,000 other indigenous objects and human remains held in overseas institutions “would most probably never be seen in Australia again...Museums in Europe...would cease to lend other indigenous people's cultural material to their countries of origin, she says.”<sup>11</sup> Matters concerning the objects on loan were used in a case study at a seminar run by the Institute of Arts and Law in London. “The seminar, called *Art Loans: Appraising the Loan Environment* draws attention to the “risks involved in lending art overseas” and singles out the bark paintings as a case study.”<sup>12</sup>

#### Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987

In 1986, the Victorian Legislative Council rejected two Bills that would have granted land at Lake Condah and Framlingham Forest to their traditional owners. The Victorian

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Government then asked the Commonwealth to pass the necessary legislation – the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* is the result.

Under Part III which deals with the management of Condah land, the Kerrup-Jmara Elders Aboriginal Corporation is responsible for compiling a register of sacred and significant sites on Condah land. Subsection 16(2) requires that the register be kept in a manner that would prevent the disclosure of its contents other than in accordance with the purposes of Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* without the permission of the governing committee. The current Bill removes this exception. This amendment is consequential on the proposed repeal of Part IIA.

In relation to Framlingham Forest, the Kirrae Whurrong Aboriginal Corporation is required to compile a register of sacred or significant sites and a similar exception also applies in subsection 24(2). That exception is removed.

### **Senate Committee for Environment, Communications, Information Technology and the Arts**

The Bill has been referred by the Senate Selection of Bills Committee to the Senate Committee for Environment, Communications, Information Technology and the Arts for inquiry and report by 8 February 2006. The reasons for its referral are as follows:

- Adequacy of amendments to protect indigenous heritage
- Do the amendments address concerns of indigenous Australians?
- Do the amendments reflect the changes recommended by the Evatt Report?<sup>13</sup>

## **Main Provisions**

### **Aboriginal and Torres Strait Islander Heritage Protection Act 1984**

**Schedule 1 item 1** inserts a **new subsection 12(3A)** into the Heritage Protection Act which provides that declarations issued under subsection (1) of the Act seeking to preserve or protect objects will not apply to objects where there is a certificate in force under s. 12 of the *Protection of Movable Cultural Heritage Act 1986*. A certificate enables a person to import Australian protected objects for temporary purposes and subsequently to export those objects.

**Schedule 1 item 2** inserts a **new subsection 18(2A)** which provides that where emergency declarations are issued under subsection (1) seeking to protect or preserve areas or objects, those declarations will not prevent the export of objects where a certificate is in force under s.12 of the *Protection of Movable Cultural Heritage Act 1986*. The certificate authorises a person to import Australian protected objects and subsequently to export them again.

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**Schedule 1 item 3** introduces **new subsection 21EA** which provides that all declarations made under ss. 21C, 21D or 21E will be subject to any certificates made under s.12 of the *Protection of Movable Cultural Property Act 1986* authorising the export of objects.

**Schedule 2 item 6** repeals Part IIA of the Act which contains the Victorian Aboriginal cultural heritage provisions. Other amendments in schedule 2 remove references to Part IIA and Victoria.

**Schedule 2 item 13** repeals the schedule in the Act that refers to Local Aboriginal communities.

### Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987

**Schedule 2 item 14** amends subsection 16(2) of the Lake Condah and Framlingham Forest Act to remove the reference to Part IIA in the Act that also removes the exception that the contents of the Sacred and Significant sites register recorded by the Kerrup-Jmara Elders Aboriginal Corporation will not be disclosed other than for the purposes of Part IIA under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. That exception will no longer exist.

**Schedule 2 item 15** amends subsection 24(2) to remove the reference to Part IIA in the Act that removes the exception that the contents of the Sacred and Significant sites register recorded by the Kirrae Whurrong Aboriginal Corporation will not be disclosed other than for the purposes of Part IIA under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. That exception will no longer exist. These amendments are consequential on the proposed repeal of Part IIA of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

**Schedule 3** contains technical amendments relating to legislative instruments. ‘Legislative instruments’ under the *Legislative Instruments Act 2003* are subject to the provisions of that Act. This means that legislative instruments are registered on the Federal Register of Legislative Instruments, tabled in Parliament and subject to scrutiny and disallowance procedures of Parliament.

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## Concluding Comments

When the bill becomes an Act, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* will still apply to Victoria, but it will apply in the same manner as it applies to the other states and territories. Removal of the specific references to Victoria will place Victoria on the same footing in relation to protection of Aboriginal cultural property as the other states and territories under the Act. It will allow Victoria to pass its own Aboriginal cultural heritage legislation and the Commonwealth act will continue to act as a “nation-wide ‘back-stop’ as it does for the other states and territories for the protection of Aboriginal cultural heritage, to be called upon as a last resort when significant places or objects are not adequately protected by State or Territory laws.”<sup>14</sup>

The amendments to the Act in relation to declarations for objects which are the subject of a certificate under s.12 of the *Protection of Moveable Cultural Property Act 1986* will allow international institutions to lend objects to Australian cultural institutions and ensure they are returned to the lending institutions overseas.

## Endnotes

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- 1 Aboriginal And Torres Strait Islander Heritage Protection Amendment Bill 1987, second reading speech by Minister for Aboriginal Affairs, 25 March 1987, *House of Representatives Debates*, p. 1517.
- 2 Neil Rees, Commonwealth Acts for Victorian Aborigines, *Aboriginal Law Bulletin* No.29 December 1987 at p. 11.
- 3 Hon Elizabeth Evatt, Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984, 1996 at p. 235.
- 4 *ibid.*, at p. 234.
- 5 *ibid.*, at p. 235.
- 6 *ibid.*, at p. 235–236.
- 7 In any event, the recommendations of the Evatt report were not implemented as part of the *Aboriginal and Torres Strait Islander Heritage Protection Bill 1998*.
- 8 Aboriginal and Torres Strait Islander Heritage Protection Amendment Bill 2005 second reading speech Senate 12 October 2005, *Senate Hansard* p. 2.
- 9 An ‘Australian protected object’ is an object that forms part of Australia’s movable cultural heritage.
- 10 *ibid.*
- 11 Georgina Safe, ‘Artefact stoush risks future loans’, *The Australian*, 22 October 2004.
- 12 *ibid.*

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- 13 Senator Eggleston, *Senate Selection of Bills Committee Report*, Senate Hansard, 9 November 2005.
- 14 Hon Elizabeth Evatt, *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, 1996 at p. 236.

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