

1984

THE PARLIAMENT OF THE COMMONWEALTH
OF AUSTRALIA

HOUSE OF REPRESENTATIVES

ABORIGINAL AND TORRES STRAIT ISLANDER
HERITAGE (INTERIM PROTECTION) BILL 1984

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Minister for Aboriginal Affairs,
The Hon. Clyde Holding, M.P.)

OUTLINE

The Aboriginal and Torres Strait Islander Heritage (Interim Protection) Bill 1984 has two main purposes :

- (1) to preserve and protect areas in Australia and Australian waters which are of particular significance to Aboriginals or Islanders in accordance with Aboriginal or Islander traditions; and
- (2) to preserve and protect objects, including Aboriginal or Islander human remains, which are of particular significance to Aboriginals or Islanders in accordance with Aboriginal or Islander traditions.

Effect will be given to these purposes by the making of declarations in respect of significant Aboriginal areas and objects. These declarations will set out provisions for the protection and preservation of the areas or objects from injury or desecration.

NOTES ON CLAUSES

PART I - PRELIMINARY

Clauses 1 and 2

1. The first two clauses provide for the short title and commencement of the legislation. The Bill will come into effect on the day it receives Royal Assent.

Clause 3: Interpretation

2. The following words and phrases are defined:

"Aboriginal" means a member of the Aboriginal race of Australia and includes a descendant of the indigenous inhabitants of the Torres Strait Islands. It is used with reference to members of either group throughout the Act.

"Aboriginal remains" means the bodily remains of an Aboriginal other than those which are legally buried or buried in areas used or recognised as traditional burial grounds. Objects which are made from bodily material but which are not recognizable as human remains (e.g. hair belts) are not included in this definition, nor are bodily remains which are legally dealt with in medical treatment or post mortem examinations.

"Aboriginal tradition" is defined to recognise that variations occur between the traditions of different Aboriginal communities and groups, and that those traditions cover a wide range of observances, customs and beliefs.

"Area" is defined to include a site, but it is not necessarily confined to a site. For example, the definition allows for recognition that an area beyond a clearly defined geological feature or rock painting, may be of particular significance to Aborigines. "Significant Aboriginal area" should be read accordingly (see clauses 9, 10 and 18, paras 11, 12, 23 and 24 below).

"Australian waters" is defined to permit the declaration of significant Aboriginal areas within the territorial sea of Australia or an external territory, or the sea over the continental shelf of Australia (see clauses 9, 10 and 18, paras 11, 12, 23 and 24 below).

"Federal Court" means the Federal Court of Australia, which will be empowered to grant injunctions (see clause 26, para 32 below) and determine compensation (see clause 28, para 34 below).

"Significant Aboriginal area" is defined to mean an area of particular significance to Aboriginals in accordance with Aboriginal tradition, and may be an area of land in Australia or an area of Australian waters.

"Significant Aboriginal object" means any object, including Aboriginal remains, which is of particular significance to Aboriginals in accordance with Aboriginal tradition. Some object, or class of objects, may be of particular significance only to a particular community or group of Aboriginals, which may wish to seek protection or preservation of the object or objects.

3. Reference is made in the clauses dealing with applications for declarations in respect of significant Aboriginal areas and objects, that the applications seek the preservation and protection of the areas or objects from "injury or desecration" (see clauses 9, 10 and 12; see also clauses 18 and 26, paras 11, 12, 14-16, 23 and 32 below). Sub-clause 3(2) provides that the phrases "injured or desecrated" and "injury or desecration" be construed widely to cover a range of activity in respect of significant Aboriginal areas and objects. For example, the construction of a road through or near a significant Aboriginal area, entry by tourists to such an area in a way inconsistent with the entry restrictions of local Aboriginal tradition, or the construction of a dam near to such an area which will result in the inundation of that area, may all constitute injury or desecration of a particular significant Aboriginal area. In the case of a significant Aboriginal object, physical mutilation as well as public display of or commercial dealing with the object may constitute injury or desecration. Sub-clause 3(3) provides that the likelihood of such injury or desecration shall be taken to be a threat of injury or desecration.

Clause 4: Purposes of Bill

4. The purposes of the Bill are as set out in the outline above.

Clauses 5 and 6

5. The Bill is expressed to extend to every external Territory of Australia, and will bind the Crown in right of the Commonwealth, each State and the Northern Territory, and Norfolk Island.

Clause 7: Application of other laws

6. Clause 7 preserves the operation of any law of a State or Territory that is capable of operating concurrently with this Bill. Where there is direct inconsistency, the Bill and regulations and declarations made under it, will prevail (see sub-clause 7(2); see also s.109 of the Constitution).

7. The Bill is not intended to cover the legislative field in this area. It will, where necessary, supplement existing State or Territory laws. As sub-clauses 13(2)-(5) indicate, the effectiveness of those laws will determine whether the Minister for Aboriginal Affairs makes or later revokes a declaration (see paras 17-19 below).

8. The rights of individuals to any other remedies are preserved. Nothing in this Bill will render a person liable to be punished more than once in respect of the same act or omission for which he may also be prosecuted and convicted under a law of a State or Territory.

Clause 8: Application of Bill

9. Subject to Australia's obligations under international law, the Bill will apply to all persons and vessels, including foreigners and foreign vessels, whether or not they are within Australia and Australian waters.

PART II - PROTECTION OF SIGNIFICANT ABORIGINAL AREAS AND
OBJECTS

Division 1 - Declarations by Minister

Clauses 9, 10 and 11

10. These clauses provide the scheme for the making of declarations by the Minister for Aboriginal Affairs in relation to areas of land or water of particular significance to Aborigines.

Clause 9: Emergency declarations in relation to areas

11. On receipt of an application by or on behalf of Aborigines, the Minister may make a declaration containing provisions for and in relation to the protection and preservation of an area from injury or desecration (see clause 3, para 2 above; see also clause 11). Before making the declaration the Minister will need to be satisfied that the area is a significant Aboriginal area which is under serious and immediate threat of injury or desecration. Such an emergency declaration will have effect for not more than 30 days, although the Minister may extend the effect of the declaration for a further period up to 60 days from the day on which the declaration first came into effect.

Clause 10: Other declarations in relation to areas

12. If the Minister receives an application as in clause 9, and he is satisfied that a threat exists, but it is not serious and immediate, he may make a declaration in similar terms to those outlined in clause 9. However, unlike the emergency declaration, he will also be required to have received and considered a report in respect of the application from a person nominated by him. The person will publish a notice inviting interested persons to make representations in connection with the report. He will give due consideration to any such representations and will attach them to the report. That report will deal with

a range of matters relevant to the Minister's decision whether to make a declaration, and the contents and duration of any such declaration. In making his decision the Minister may consider such other matters as he thinks relevant. The declaration will have effect for such period as is specified in it.

Clause 11: Contents of declarations under section 9 or 10

13. A declaration made by the Minister will describe the significant Aboriginal area and contain provisions for and in relation to the protection and preservation of the area from injury or desecration. As there will be variations in the nature and significance of such areas, and the restrictions attaching to them, in accordance with Aboriginal tradition, the provisions in declarations will differ. For example, entry to one area may be restricted to certain people or classes of people but entry to another area may be unrestricted. In some cases there may need to be a restriction or prohibition on building or other activity within or near the area. In others the prohibition may be against damage to cave paintings or stone formations.

Clause 12: Declarations in relation to objects

14. On receipt of an application by or on behalf of Aboriginals, the Minister will be able to make a declaration in relation to a significant Aboriginal object or objects. That declaration will describe the object or objects and contain provisions for and in relation to the protection and preservation of it or them from injury or desecration (see clause 3, para 2 above). Before making a declaration the Minister will need to be satisfied that the object is a significant Aboriginal object and is under threat of injury or desecration. He will also be required to consider any effects which making a declaration may have on the proprietary interests of persons other than those by or on whose behalf the application was made. He will be required to consider such other matters as he considers relevant.

15. As there will be variations in the nature and significance of such objects, and the restrictions attaching to them, in accordance with Aboriginal tradition, the provisions in declarations will differ. For example, it may be inconsistent with Aboriginal tradition to publicly display or sell certain objects or classes of object. A declaration may restrict or prohibit the display or disposal of such objects.

16. In the case of Aboriginal remains, sub-clause 12(4) provides that a declaration may include provisions ordering the delivery of the remains to the Minister or certain Aboriginals. Where Aboriginal remains are delivered to the Minister pursuant to such a declaration, sub-clause 21(1) sets out the Minister's obligations in respect of them (see para 27 below).

Clause 13: Making of declarations

17. Before making a declaration in relation to an area, object or objects (see clauses 9, 10 and 12) located in a State or the Northern Territory the Minister will be required to consult with the Minister of that State or Territory responsible for Aboriginal affairs to ascertain whether there is, under the law of that State or Territory, effective protection of that area, object or objects from the threat of injury or desecration. In the case of Norfolk Island he will consult with an executive member. On occasions the State or Territory Minister may be unable to consult with the Minister for Aboriginal Affairs, but it is important that a declaration be made. Failure to consult will not invalidate a declaration.

18. Where the Minister makes a declaration and is later satisfied that the law of a State or Territory makes effective provision for the protection of the area, object or objects to which the declaration applies, he will be required to revoke the declaration to the extent that it relates to the area, object or objects. This provision may be invoked, for example, where a State or Territory law which had not been enforced at the date of the declaration is later enforced, or a State or Territory law is enacted after the declaration is made.

19. Sub-clause 13(3) provides that where the Minister has received an application for a declaration he may request certain people to consult, either with him or his nominee, with a view to resolving any matter to which the application relates. This consultation could precede or follow the making of a declaration. Where a declaration has been made the resolution of the matter to the satisfaction of the applicant and the Minister may result in the revocation or variation of the declaration (see sub-clause 13(6)). Where there is resolution of the matter before the Minister has made a declaration there may be no need for a declaration, or a declaration will contain different provisions from those it might otherwise have contained.

Clause 14: Publication and commencement of declarations

20. A declaration made by the Minister will be published in the Gazette and any local newspaper circulating in any region concerned. A declaration will come into operation on the date on which it is published in the Gazette or on a later date specified in the declaration. The Minister will be required to take reasonable steps to give written notice of a declaration to persons likely to be substantially affected by it. Where a declaration relates to an area he will also be required to serve a copy of the declaration on the Australian Institute of Aboriginal Studies and, in certain circumstances, the Institute will register it. Failure by the Minister to publish a declaration in a newspaper or give notice of the declaration will not affect the validity of the declaration.

Clause 15: Declarations reviewable by Parliament

21. Declarations will be treated in many respects as are regulations under sections 48, 49 and 50 of the Acts Interpretation Act 1901. For example, a declaration will be laid before each House of the Parliament within 15 sitting days of that House after the making of the declaration. Either House may pass a resolution disallowing the declaration, within the statutory period. A declaration may be deemed to be disallowed in other specified circumstances. Where a declaration is disallowed or deemed to be disallowed, no declaration which is the same in substance as the disallowed declaration can be made within 6 months after the date of disallowance, except in specified circumstances. The repeal of a declaration will not affect such things as rights acquired or liabilities incurred under the repealed declaration. Review by the Houses of Parliament will, in effect, be the only review of the merits of a Minister's decision to make a declaration.

Clause 16: Refusal to make declaration

22. Where the Minister refuses to make a declaration applied for he will be obliged to take reasonable steps to notify the applicant or applicants of his decision.

Division 2: Declarations by Authorized OfficersClauses 17 and 18

23. People who are designated by the Minister as authorized officers and who have been issued with an identity card will be able to make declarations in respect of an area, object or objects in certain emergency circumstances. Before making such a declaration the authorized officer will have to be satisfied that the circumstances would justify the making of a declaration by the Minister under clause 9 (see para 11), but that the injury or desecration is likely to occur before such a declaration can be made. He will also have to be satisfied that no declaration has been made under this clause in relation to the area, object or objects within the preceding 3 months because of a threat that is substantially the same.

24. A declaration made by an authorized officer will be in writing and remain in effect for not more than 48 hours. It will describe the area, object or objects to which it relates and will contain provisions for or in relation to the protection and preservation of the area, object or objects from injury or desecration. Where a declaration relates to Aboriginal remains it may provide for their custody. Such a declaration may be revoked or varied by the Minister or any authorized officer.

Clause 19: Notification of declarations

25. After an authorized officer has made such an emergency declaration he will notify the Minister of the declaration and the reasons for it and take reasonable steps to notify persons likely to be substantially affected by it. Failure to notify the Minister or the other persons will not invalidate a declaration.

Division 3 - Discovery and Disposal of Aboriginal Remains

Clause 20: Discovery of Aboriginal remains

26. A person discovering what he suspects to be Aboriginal remains will be obliged to report to the Minister details of the discovery. The Minister will be obliged to take reasonable steps to consult with Aboriginals who he considers may have an interest in the remains to try to determine the proper action to be taken in relation to the remains. For example, construction workers at a building site may uncover skeletal remains which are identifiable as Aboriginal remains. Having received a report about them, the Minister may consult with Aboriginal members of the group who are descended from the deceased Aboriginals. The Aboriginals may apply to the Minister for a declaration under clause 12. The Minister may make a declaration which includes a provision that the remains be delivered to him. He will then be obliged to act in accordance with clause 21.

Clause 21: Disposal of Aboriginal remains

27. Where Aboriginal remains are delivered to the Minister he will be obliged to return the remains to Aboriginals entitled to receive the remains or will be obliged to deal with the remains in accordance with any reasonable direction of such Aboriginals. Where there are no such Aboriginals the Minister will be obliged to transfer the remains to a prescribed authority for safekeeping. Aboriginals accepting Aboriginal remains may deal with them in accordance with Aboriginal tradition.

PART III - OFFENCES, PENALTIES AND LEGAL PROCEEDINGSClause 22: Offences and penalties

28. Contravention of a provision of a declaration made under Part II will be an offence punishable on conviction by penalties set out in this clause. Lesser penalties apply to a person convicted of failing to report the discovery by him of something which he suspects to be Aboriginal remains (see sub-clause 20(1), and para 26 above), and to a person who ceases to be an authorized officer and who fails to return his identity card to the Minister (see sub-clause 17(4)).

Clause 23: Indictable offences

29. Contravening a provision of a declaration made under Part II, and aiding and abetting, inciting or attempting any such contravention, will be an indictable offence. Proceedings in respect of such an offence may be heard and determined summarily if the court is satisfied that it is proper to do so and the defendant and the prosecutor consent. In such a case the penalty that the court may impose is lower than if it had been dealt with by way of indictment. The level of penalty which may be imposed on summary conviction is set out in sub-clause 23(3).

Clause 24: Evidence

30. In proceedings for an indictable offence set out in sub-clause 23(1) the proof of a declaration made by the Minister, or an authorized officer, under Part II will be prima facie evidence that the subject of the declaration is a significant Aboriginal area, or a significant Aboriginal object or objects, as the case may be. Proof of a Ministerial declaration may be given by the production of the Gazette containing it. An averment by the prosecutor that the defendant knew, or ought reasonably to have known of the existence of a declaration made under Part II will be prima facie evidence of the fact.

Clause 25: Body corporate responsible for acts, &c., of servants and agents

31. This clause imputes to a body corporate the knowledge or actions of any of its directors, servants or agents.

Clause 26: Injunctions

32. The Minister may apply to the Federal Court of Australia for the grant of an injunction where a person has engaged, or is proposing to engage, in conduct that contravenes a provision of a declaration made under Part II, or is in any way knowingly concerned in or a party to such contravention. The Court may grant an interim injunction, pending the determination of an injunction application. An injunction may be granted to either restrain a person from engaging in conduct or to require a person to do something. The Court may rescind or vary an injunction.

Clause 27: Proceedings in camera

33. In proceedings arising under this Bill, a court will be able to order the exclusion of the public or specified persons from a sitting of the court and prohibit or restrict the disclosure of information concerning the proceedings. Before doing so the court will need to be satisfied that it is in the interests of justice and in the interests of Aboriginal tradition to make such an order. An application for such an order may be made, for example, where it is necessary or desirable that evidence be given of a secret/sacred aspect of Aboriginal tradition and that tradition requires that such matters only be spoken of or shown in the presence of a limited class of people. In such circumstances the benefit to be gained by the Court in having that evidence may outweigh the desirability of the entire proceedings being open to the public. This power will be in addition to the other powers of the Court to regulate its own proceedings (see clause 29, para 35 below).

Clause 28: Compensation for acquisition of property

34. Compensation will be payable by a person acquiring property as a result of the operation of a provision of the Bill or a declaration made under Part II, where such acquisition would have been otherwise than on just terms.

Clause 29: Powers of courts not limited

35. Nothing in this Bill will be taken to limit or restrict any powers conferred on any court by any other law.

Clause 30: Legal Assistance

36. The Attorney-General, or an officer authorized by him, will be able to authorize the grant of legal or financial assistance to a person who has applied for such assistance and who -

- . wishes to apply to the Minister for a declaration in respect of a significant Aboriginal area, object or class of objects (see clauses 9, 10 and 12);
- . considers that his proprietary interests are likely to be adversely affected by a declaration proposed to be made by the Minister or an authorized officer, or those interests are adversely affected by such a declaration (see clauses 9, 10, 12 and 18); or
- . has had proceedings instituted against him for an offence (see sub-clause 23(1)), or for the grant of an injunction (see clause 26).

Before authorizing the grant of assistance the Attorney-General or the authorized officer will need to be satisfied that it would involve hardship to the applicant to refuse the application and that in all the circumstances it is reasonable that the application be granted.

PART IV - MISCELLANEOUS

Clause 31: Regulations

37. The Governor-General will have the usual powers to make regulations for the purposes of the Bill.

Clause 32: Cessation of operation of the Act

38. The Bill will cease to be in force after 2 years from the date of commencement, unless it is repealed before that date. This clause indicates the interim nature of the Bill.