CLAUSE NOTES

Aboriginal Relics Amendment Bill 2017

Clause 1 — Short Title

Clause 2 — Commencement

This Act will commence on a day to be proclaimed.

Note: it is intended that the Minister will issue the guidelines (see new section 21A) on commencement – ie when the amendments come into force.

Clause 3 — Principal Act

Identifies the *Aboriginal Relics Act 1975* as "the principal Act", which is how it is hereafter referred to.

Clause 4 — Section 1 amended (Short title and commencement)

This clause replaces subsection (1). The effect is to replace "Relics" with "Heritage" in the short title of the principal Act, thus changing it to "*Aboriginal Heritage Act 1975*".

This is all that is required to change the name of the Act.

Clause 5 — Section 2 amended (Interpretation)

Paragraph (a) replaces the definition of "Council" so that it refers to the new Aboriginal Heritage Council established under section 3, rather than to the superseded Aboriginal Relics Advisory Council.

Paragraph (b) inserts a new definition to refer to the current version ("in force") of the new guidelines.

Paragraph (c) inserts a new definition of "small business entity", which is defined by reference to the Commonwealth's income tax legislation (see Note 2 under clause 9 below for explanation).

Paragraphs (d) and (e) amend the definition of "relic" in subsection (3)(a) by inserting ", which is of significance to the Aboriginal people of Tasmania".

Paragraph (f) amends the definition of "relic" in subsection (3)(b) by inserting ", which is of significance to the Aboriginal people of Tasmania".

Paragraph (g) amends the definition of "relic" in subsection (3)(c) by deleting the words "who died before the year 1876".

Paragraph (h) has 2 effects:

- first, it deletes the current subsection (4), which limits the definition of "relic" to anything made or created before 1876; and
- second, it inserts a new subsection (4) that provides the qualification that objects made or likely to have been made for the purposes of sale are not relics. (A provision in similar terms is common in heritage legislation around Australia.)

Paragraph (i) inserts a new subsection (8) that provides two definitions for the purposes of this section:

- "significance", in relation to a relic, is defined to refer to the archaeological, scientific, anthropological or contemporary history of Aboriginal people, or to Aboriginal tradition. (Note also the amendment made in clause 7(b) below.)
- "Aboriginal tradition", which is referred to in paragraph (d) of the definition of "significance" and in new section 2(4), is defined in terms very similar to those found in comparable legislation of the Commonwealth and other jurisdictions.

Clause 6 — Part II heading amended

This clause amends the heading of the Part to refer to the "Aboriginal Heritage Council" rather than the "Aboriginal Relics Advisory Council".

Clause 7 — Section 3 amended (Establishment of Aboriginal Heritage Council)

Paragraph (a) replaces subsection (1) with a provision for the establishment of the Aboriginal Heritage Council.

Paragraph (b) inserts a new paragraph (ab) after paragraph (2)(a), to provide that the Council shall advise the Minister in relation to anything alleged to be a relic. (The Council is thus able to assist in cases where there may be doubt about the application of the Act.)

Paragraph (c) inserts a new subsection (2A) to clarify that, for the purpose of providing the advice referred in new section 3(2)(ab), the Council is to seek relevant information and expert advice.

Paragraph (d) inserts a new subsection (6) that provides that, where appropriate and practicable, the Council is to consult the Aboriginal people of Tasmania.

Clause 8 — Sections 4, 5 & 6 substituted

This clause replaces three lengthy sections with two short ones.

New section 4, "Membership of Council", provides that the Council will consist of not more than 10 members, appointed by the Minister, all of whom are to be Aboriginal persons, and one of whom shall be appointed by the Minister as the Chairperson. The Minister will appoint members on such terms and conditions as he or she considers appropriate.

New section 5, "Powers of Council", provides in the simplest terms that the Council will have the necessary powers to perform its functions, and may regulate its own proceedings.

Clause 9

Section 9 amended (Protection of protected sites)

Note 1: The existing wording of subsections 9 (1) and (2) of the principal Act is not amended, but new subsections are inserted to follow them, which create tiered offences and corresponding tiered penalties. The penalties go up to the highest level set for the amended Act. (See also clause 12 below.)

The practical application of the amendments to section 9 is very limited, however, as this section applies only in declared protected sites. There are three of these: West Point Aboriginal Site (Statutory Rule 1979, No. 217), Sundown Point Aboriginal Site (Statutory Rule 1979, No. 235) and Maxwell River Protected Archaeological Site (Statutory Rule 1986, No. 6). All have in practice been managed as part of the reserves, under the *Nature Conservation Act 2002*, within which they are located.

Note 2: The new penalty amendments in this clause see the first application in the Bill of the term "small business entity", now defined in section 2, which then appears in all remaining penalty provisions. It is used in order to confine the application of the higher penalties that may be imposed on bodies corporate to businesses other than those defined as small business entities. The Commonwealth's *Income Tax Assessment Act 1997* defines a small business entity as a business (including its associated affiliates) that has an aggregated turnover of less than $2 million a year.

This definition is used because it is universally understood, in the sense that all businesses are aware of whether they fall into this category, which has a different tax rate and has access to a number of significant concessions (including some specifically for primary producers). Its use in this context recognises that many small businesses and farms, which are often operated wholly or mainly by one person or a family, would otherwise fall into the same category as the largest businesses simply because they are organised as bodies corporate.

The new penalty provisions all therefore apply the two applicable maximum rates to, respectively, "a body corporate, other than a small business entity" for the higher penalties, and "an individual or a small business entity" for the lower penalties.

Paragraph (a) inserts new subsections (2A) and (2B) after subsection (2). Both create offences and provide penalties for the contravention of the provisions of subsections (1) and (2), in relation to either a relic or object, or a site.

(2A) covers deliberate acts. It provides that contravention "knowing, at the time of the contravention" that the relevant relic, object or site was a "protected object" or "protected site" (defined in section 7 of the principal Act) carries penalties of up to 10,000 penalty units (currently $1.57 million) for a body corporate other than a small business entity or 5,000 penalty units (currently $785,000) for an individual or a small business entity.

(2B) covers acts that are "reckless or negligent" in relation to the same provisions. The penalties are up to 2,000 penalty units ($314,000) for a body corporate other than a small business entity or 1,000 penalty units ($157,000) for an individual or a small business entity.

Paragraph (b) inserts the single word "protected". (This has no substantive effect but is a minor drafting improvement.)

Paragraph (c) inserts a new subsection (4) that allows a court to find a defendant guilty of an offence with a lesser penalty than the one for which the original charge was laid. In effect, this allows a court to find a person guilty of a reckless or negligent offence, should a charge of knowingly offending not be made out. (This is similar to the offence provisions in, eg, the *Environmental Management and Pollution Control Act 1994* at sections 50-53, and avoids the possibility of a person escaping without appropriate penalty only because they are not found guilty of a more serious but closely related charge.)

Clause 10 — Section 10 amended (Duties of persons owning or finding, &c., relics)

This is the first section of the principal Act which becomes subject to the new minor penalty range. The provision of this section that is most significant is 10(3), under which there exists the obligation to report if a relic is found. That provision underpins the operation of the non-statutory Aboriginal Heritage Register.

This clause replaces the current penalty provision at subsection (7) with a new one. The operative words remain the same. It provides for maximum penalties of 100 penalty units ($15,700) for a body corporate other than a small business entity or 50 penalty units ($7,850) for an individual or a small business entity.

Clause 11 — Section 12 amended (Acquisition of relics by the Crown)

This is another case like the amendment in clause 10 above. It is included for consistency. The practical effect is likely to be minimal, as the process outlined in this section has not been used for many years, if ever.

This clause replaces subsection (8) with a new one. The operative words remain the same and the only change lies in the addition of the penalty provision. It provides for maximum penalties of 100 penalty units ($15,700) for a body corporate other than a small

business entity or 50 penalty units ($7,850) for an individual or a small business entity.

Clause 12 Section 14 amended (Protection of relics)

Note: This section is amended in a similar way to section 9 (see clause 9 above). The current subsection 14(1) of the principal Act is not amended but new tiered offences (including the requisite state of mind) and corresponding tiered penalties are set out in new subsections (1A) and (1B), which relate to subsection (1)(a)-(e). A separate new subsection (1C) refers to subsection (1)(f), where the accused's state of mind is not relevant. The penalties go up to the highest level set for the amended Act.

This clause contains the key amendments in terms of penalties. The current administration of the Relics Act revolves mainly around the offences in this section. For instance, permits under the Act are granted in relation to this section and compliance and enforcement efforts are based on it. In relation to harm to Aboriginal heritage, section 14 is therefore the key to providing effective deterrence and proportionate punishment.

Paragraph (a) inserts new subsections (1A), (1B) and (1C) after subsection (1). (1A) and (1B) create tiered offences and provide tiered penalties for the contravention of the provisions of section 14(1)(a)-(e). The separate offence in (1C) is because the act under the specific provision to which it refers (section 14(1)(f)) cannot be undertaken other than deliberately. However, any harm that might result would be covered by other paragraphs of section 14(1) and it is considered disproportionate to impose the top level of penalty for the offence.

(1A) covers deliberate acts. It provides that contravention "in relation to a relic knowing, at the time of the contravention, that it is a relic" carries penalties of up to 10,000 penalty units (currently $1.57 million) for a body corporate other than a small business entity or 5,000 penalty units (currently $785,000) for an individual or a small business entity.

(1B) covers acts that are "reckless or negligent" in relation to the same provisions. The penalties are up to 2,000 penalty units ($314,000) for a body corporate other than a small business entity or 1,000 penalty units ($157,000) for an individual or a small business entity.

(1C) covers contravention of section 14(1)(f), to "cause an excavation to be made or any other work to be carried out on Crown land for the purpose of searching for a relic". The penalties are up to 2,000 penalty units ($314,000) for a body corporate other than a small business entity or 1,000 penalty units ($157,000) for an individual or a small business entity.

Paragraph 9(b) inserts a new subsection 14(6) that allows a court to find a defendant guilty of an offence with a lesser penalty than the one for which the original charge was laid. In effect, this allows a court to find a person guilty of a reckless or negligent offence, should a charge of knowingly offending not be made out. (This is similar to the offence provisions in, eg, the *Environmental Management and Pollution Control Act 1994* at sections 50-53, and avoids the possibility of a person escaping without appropriate penalty only because they are not found guilty of a more serious but closely related charge.)

Clause 13 — Section 15 amended (Wardens)

This clause addresses the fact that section 15 currently includes a reference to a long-repealed Act, and also uses terminology that has been superseded for some time by standard provisions that are consistent with the *State Service Act 2000* and appear in many other Acts.

Paragraph (a) replaces the existing subsections 15(1) and (1A) with provisions drafted in what are now the standard terms for such appointments.

Paragraph (b) rectifies an apparent drafting oversight from when (1A) was inserted, by including a reference to this subsection in section 15(2).

Clause 14 — Section 17 amended (Powers of authorized officers and honorary wardens in respect of offences)

This is another case like the amendment in clause 10 above, inserting the standard lesser penalties. The offences are normal ones in relation to enforcement actions. However, in the process of amending the provisions of subsection (3) it has been considered appropriate to modernise the drafting of the whole section for the purpose of consistent gender neutrality.

Paragraphs (a) – (d) insert "or she" / "or her" where appropriate in subsections (1) and (2).

Paragraph (e) replaces subsection (3). The operative words remain the same, other than the replacement of the archaic "with reasonable expedition", and the only substantive change lies in the addition of the penalty provision. It provides for maximum penalties of 100 penalty units ($15,700) for a body corporate other than a small business entity or 50 penalty units ($7,850) for an individual or a small business entity.

Clause 15

Section 18 amended (Additional powers of authorized officers)

This is another case like the amendment in clause 10 above, inserting the standard lesser penalties. Section 18 creates two offences and, in line with the form used generally in this Bill, the penalty provisions are inserted in the subsections that do so. While expressed in somewhat old-fashioned terms, the offences are again normal ones in relation to enforcement actions.

Paragraph (a) inserts the penalty provision in a replacement subsection (3), leaving unchanged the words creating the offence. It provides for maximum penalties of 100 penalty units ($15,700) for a body corporate other than a small business entity or 50 penalty units ($7,850) for an individual or a small business entity.

Paragraph (b) inserts the penalty provision in a replacement subsection (6). The words creating the offence are slightly modernised (replacing "whereof") and amended to be gender neutral. It provides for maximum penalties of 100 penalty units ($15,700) for a body corporate other than a small business entity or 50 penalty units ($7,850) for an individual or a small business entity.

Clause 16

Sections 20 and 21 substituted

Two sections are to be repealed and four new ones inserted. The sections to be repealed are:

- section 20, which is the current penalty provision that applies to every offence other than that in section 10(7). It sets the maximum penalties at 10 penalty units ($1,570) or 6 months imprisonment; and
- section 21, which includes the so-called "ignorance defence" in subsection (3). Subsection (2) ceased to be relevant in 1979, and the provision in subsection (1) is considered unnecessary in terms of modern enforcement actions, particularly as it is confined to the very limited area of protected sites.

New section 20, "Defence of carrying out emergency work", introduces a new defence. The defence requires the proof (note that this would be to the civil standard of the balance of probabilities) that the alleged offence arose from the act of responding to an emergency. Paragraph (a) refers to the specific work undertaken in relation to electricity supply; the more general (b) refers to "a necessary and proportionate response" to an emergency. (The terms are similar in effect to those in section 35(c) and (e) of the *Historic Cultural Heritage Act 1995*.)

New section 21, "Defence of compliance with the guidelines" introduces a new defence in relation to sections 9 and 14. The key element of the defence in (1)(a) is that it must be proved (again, on the balance of probabilities) that "in so far as is practicable … the

defendant complied with the guidelines", or reasonably relied on another person doing so.

(1)(b) and (c) provide that it is also a defence if it is proved that the offence was committed by another person, or that the defendant reasonably relied on information from another person.

(2) specifies that "another person" cannot be an employee, agent or, in the case of a body corporate, a director of the defendant.

New section 21A, "Guidelines", provides in (1) that the Minister must issue guidelines "specifying the actions to be undertaken … for the purpose of establishing a defence in accordance with section 21".

New subsections (2) – (7) and (12) are largely basic procedural provisions. However (3)(b) provides the important power for the guidelines to "adopt … any standards, rules, codes, guidelines or other documents"; (4) provides that this will apply to future revisions of adopted documents. Under (5) the Minister may consult "with any person he or she considers appropriate" in making the guidelines; and under (12) guidelines are to be published on the website and "made available to the public in any other manner the Minister considers appropriate".

New subsections (8) – (11) outline the processes by which Parliament may disallow the guidelines. They must be laid on the table of each House within 5 sitting days of their making. Within a further 5 sitting days they may be disallowed by motion, or will be taken to be confirmed if there has been no notice of a motion to disallow, or if such a motion has been withdrawn or negatived.

New section 21B, "Time for commencing prosecution", addresses the issue that currently the Relics Act is subject by default to the application of section 26 of the *Justices Act 1959*, which sets a limitation on the commencing of prosecutions of 6 months "from the time that the matter of complaint arose". The new section provides instead that a prosecution must be commenced either within 2 years of when the offence is alleged to have been committed or (ie for cases when that date is impossible to establish) within 2 years of when "the evidence of [the offence] first came to the attention of any authorized officer".

Clause 17 — Section 24 substituted

The section to be repealed is section 24 (Saving of certain provisions), which included reference to a repealed Act. Its substantive provisions are retained in the new Section 24. Section 23 had been repealed in 1990, leaving room to insert a new section 23, as described below.

New section 23, "Review of Act", provides that the Minister is to review the Act within 3 years of commencement. It further provides that a report on the review is to be tabled in both Houses of Parliament within 6 months of that third anniversary.

New section 24, "Act does not affect operation of certain other Acts", replaces, in only slightly different terms, the current section 24. Section 24 currently refers to three Acts, one of which was repealed some years ago. Both the retained references relate to the treatment of human remains. Note that one of them (the *Coroners Act 1995*) provides in practice the processes followed in relation to the finding of Aboriginal human remains.

Clause 18 Repeal of Act

This clause provides, as is standard in amendment Bills, that this Act is repealed 365 days after it commences. The amendments made will be incorporated into the updated amended Act on commencement.