

## **DRAFT SECOND READING SPEECH**

**HON. MATTHEW GROOM MP**

### ***Aboriginal Relics Amendment Bill 2017***

*\*check Hansard for delivery\**

I move that the Bill now be read a second time.

This Bill seeks to amend the *Aboriginal Relics Act 1975* ("the Act") to change its title, to remove or amend some very outdated or objectionable elements of the Act and to significantly increase the penalties for damage to Aboriginal heritage, bringing them into line with penalties for damage to non-Aboriginal heritage.

New defences will also be included for emergency responses and compliance with guidelines.

These amendments are an interim step to address areas of immediate concern with the Act. The Government recognises there will need to be further ongoing engagement with Tasmanian Aboriginal people and the broader community to resolve remaining issues with the Act.

Accordingly, an important inclusion in this Bill is provision for a statutory review after three years that will allow us to identify, through further community consultation, how best to replace the Act.

A small number of consequential amendments to other legislation, to reflect the Act's new title, are in a separate Bill.

Madam Speaker

The history of Tasmania's Aboriginal people dates back more than 40,000 years. It is an exceptional history, of great significance and importance to Tasmania and the global community.

It is also a history that will continue to be written through the living heritage of the present and future generations of Tasmania's Aboriginal people.

The clear intent of this Bill is to ensure that this extraordinary Aboriginal cultural heritage has the proper recognition and protection it deserves, for present and future generations.

Madam Speaker

A year ago, following consultation with Aboriginal people as well as the broad Tasmanian community, the Government determined that in seeking to address the inadequacies of the current Act, we should not risk the failures of the past by attempting a complete overhaul of the Act.

Instead, the Government is taking steps now to improve the Act by addressing its most serious inadequacies, while paving the way for a full review of the legislation in the coming years.

We set out the proposed changes at the beginning of our public consultation in June 2016, and have discussed them again in a second round of consultations undertaken this year.

The amendments we have set out are few, but important. Once enacted, they will represent the most significant advancements in the protection of Aboriginal heritage in Tasmania in more than 40 years.

Madam Speaker

The key elements of the Bill provide for:

- The change of the title to the *Aboriginal Heritage Act 1975*.
- The removal of references to 1876 as being a cut-off date beyond which relics cannot exist (and thus be protected). Additional criteria will define 'relics' as being of significance to the Aboriginal people of Tasmania. The term 'significance' is further qualified as being in accordance with Tasmanian Aboriginal history and tradition.
- The establishment of a new Aboriginal Heritage Council, replacing a long-defunct Aboriginal Relics Advisory Council. The new Aboriginal Heritage Council consists of Aboriginal people and has broad advisory functions, as well as a specific role to advise in cases of uncertainty about whether something is a relic and thus falls under the scope of the Act. In these rare cases, the Aboriginal Heritage Council is to seek external professional or expert advice to assist in its deliberations.
- The introduction of two new sets of penalty provisions. The first set covers the offences related to harm to relics, in sections 9 and 14. Maximum penalties (for deliberate acts) are 10,000 penalty units (currently \$1.57 million) for bodies corporate other than small business entities and 5,000 penalty units (currently \$785,000) for individuals or small business entities; for reckless or negligent offences, the maximum penalties are 2,000 and 1,000 penalty units respectively (currently \$314,000 and \$157,000 respectively). Bodies corporate that are "small business entities" under Federal income tax legislation are treated as individuals for the purpose of all the penalty provisions in the Bill.
- The second set covers lesser offences, with maximum penalties of 100 penalty units (currently \$15,700) for bodies corporate other than small business entities and 50 penalty units (currently \$7,850) for individuals or small business entities. They apply in sections 10, 12, 17 and 18.
- The creation of two new defences. One is for acts during an emergency response. The other, more general one is a defence of "compliance with the guidelines", specifically for offences under sections 9 and 14. The Minister must issue the guidelines (which are disallowable by the Parliament). The guidelines will provide an opportunity for people and businesses to be pro-active in seeking to minimise the harm they might do, and avoid the chance of their actions being negligent.
- The extension of the time available for commencing prosecutions from 6 months to 2 years.
- The requirement to undertake a review of the Act within 3 years, and to report on it to the Parliament.

Madam Speaker

Before I say a little more about the amendments to the Act, I want to sincerely thank the members of the current Aboriginal Heritage Council for the care and effort they have contributed to advising on the Bill, and to all the Aboriginal people and organisations that engaged with the Department during the consultation process.

There has also been extensive consultation with other key stakeholders, including industry organisations, over more than six months and again the Government genuinely appreciates the level of engagement from all those who have been consulted.

While many people involved in the consultation process expressed an in-principle desire to see more substantial amendments to the Act, based on the feedback we received there appeared to be broad acceptance that the suite of amendments proposed in the Bill were an appropriate interim measure until the Act is fully reviewed. Furthermore, the vast bulk of those who provided feedback supported the Government's proposed two-step approach.

Madam Speaker

I will now speak briefly about the specific provisions of the Bill.

The first substantive provision changes the title of the Act to the *Aboriginal Heritage Act 1975*. This amendment removes the term "relics" from the title, although it remains in the body of the Act.

The second substantive provisions are in clause 5. They amend the interpretation section of the Act, most importantly in relation to the definition of 'relic', arising from the removal of any reference to the year 1876.

That removal requires qualifications to be inserted to avoid the Act applying to anything at all that has been produced by any Aboriginal person, up to the present.

This is done by, first, inserting the phrase "which is of significance to the Aboriginal people of Tasmania", and then defining the term 'significance'.

The definition means that something must be of significance in accordance with the archaeological, scientific, anthropological or contemporary history of Tasmanian Aboriginal people, or with Tasmanian Aboriginal tradition. The term 'Aboriginal tradition' is also defined, consistent with its use in several other jurisdictions.

Also in accordance with practice in modern legislation elsewhere, it is specified that items produced for sale are generally not relics.

In addition, this clause includes a definition of "small business entity", a term that is later applied in all of the offence provisions. I will say more about that in the context of the new penalty provisions.

The new definitions are supplemented by a provision in clause 5, which establishes the new Aboriginal Heritage Council. One of the new functions of the Aboriginal Heritage Council is to "advise, and make written recommendations to, the Minister in relation to any object, site, place or thing alleged to be a relic under this Act".

Importantly, in the event of any dispute regarding the qualification of relics, the Aboriginal Heritage Council will provide advice to the Minister about what is significant, and in doing so, is to seek external professional or expert advice.

Clauses 6, 7 and 8 establish a new Aboriginal Heritage Council to replace the Aboriginal Relics Advisory Council, a body that has not functioned for a quarter of a century.

The Aboriginal Heritage Council is a body of 10 Aboriginal people with broad advisory functions, appointed by the Governor on the recommendation of the Minister.

The internal administrative arrangements of the Aboriginal Heritage Council will be set out in the terms and conditions that the Minister applies to the appointments, under the new section 4(1)(b).

The current offence provisions in the Act clearly set the maximum penalty at 10 penalty units, currently \$1,570. The maximum penalties under the *Historic Cultural Heritage Act 1995* are 1,000 times greater: 10,000 penalty units, currently \$1.57 million. These provisions in the Act are grossly outdated and the difference in penalties is simply indefensible.

Clauses 9, 10, 11, 12, 14 and 15 all deal with the introduction of new penalties. It must be emphasised that only the penalties and definitions of offences are changing: the acts that are forbidden or proscribed in the Act are not.

An additional feature of the penalties, as noted earlier, is the distinction between bodies corporate in general, and those that are “small business entities”. This recognises the fact that many bodies corporate are in fact small businesses and farms that happen to have organised their affairs under a corporate structure.

The Government has determined that it is fairer to say that any small business entity, whatever its formal structure, should be treated as an individual for the purposes of these penalties.

The criterion used references the Commonwealth’s taxation law definition, because it is a threshold that is clear and well known to all businesses. It currently prescribes a threshold of \$2 million a year in aggregated turnover.

The new penalties for offences that involve harm to relics (which are in sections 9 and 14) include the highest in the Bill. Those relating to acts where the offender knows what it is they are harming – in other words, deliberate harm - have maximum levels identical to the most serious penalties under the *Historic Cultural Heritage Act 1995* – 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.

For offences applying to acts that are reckless or negligent, the maximum penalties in sections 9 and 14 are 2,000 and 1,000 penalty units (currently \$314,000 and \$157,000) respectively for a body corporate other than a small business entity or for an individual or a small business entity.

There is provision in relation to the offences under sections 9 and 14 for a court to find a person guilty of the less serious offence, if they are charged with the more serious one and not found guilty. Without this provision, such a not guilty finding would result in no conviction, even if the court believed that carelessness or negligence had been proved.

Lesser offences refer to administrative or minor enforcement issues – that is, acts that do not directly affect Aboriginal heritage - in sections 10, 12, 17 and 18. The maximum penalties for these offences are 100 penalty units (currently \$15,700) for a body corporate other than a small business entity or 50 penalty units (currently \$7,850) for an individual or a small business entity.

Clause 16 introduces two new defences and outlines a process for issuing guidelines that are tied to the more important of these defences. The guidelines are also intended to be an important source of advice to businesses and the community at large.

Clause 16 also repeals two significant sections of the current Act. The first, section 20, is the general penalty provision that sets the maximum fine at 10 penalty units, currently \$1,570. The second, section 21, includes the “ignorance defence”.

The issue of reasonable defences has a heightened importance due to the severity of the penalties introduced in this Bill.

New section 20 introduces the first defence, carrying out of emergency work. It can apply to any offence in the Act. Similar provisions exist in many other pieces of legislation related to heritage nationally, including in the *Historic Cultural Heritage Act 1995*.

Those needing this defence could include the emergency services and electricity supply companies, or people such as farmers or workers in forests and mines who need to respond to emergencies.

An emergency is not an excuse for wanton damage. The key term therefore is “a necessary and proportionate response”. If a defendant cannot prove that their action met that standard, the defence will not apply.

New section 21 introduces the “defence of compliance with the guidelines” and also covers defences related to the actions of other people. This is simpler, but broader than, the “due diligence defence” that was laid out in the draft exposure Bill of November last year.

I have provided a copy of the current draft guidelines. These guidelines have been the subject of consultations with Aboriginal people and other key stakeholder groups.

The most important point about the guidelines is that, although introduced in the context of a defence to prosecutions, their real purpose is to encourage preventive behavior that will avoid any need for prosecutions and so help assist businesses and individuals to minimise their risks.

The provisions for the content and issuing of the guidelines are set out in new section 21A and there are two key points to highlight:

- The first is the ability of the guidelines to adopt a range of documents such as codes and industry standards. The effect is that compliance with an adopted document will be taken to be compliance with the guidelines.
- The second point is that the guidelines will be disallowable by the Parliament, ensuring the Minister cannot make unreasonable changes or introduce unreasonable new guidelines.

Also in clause 16, the Bill introduces new section 21B.

The current Act is subject, by default, to the operation of section 26 of the *Justices Act 1959*. This section sets a limitation on the commencing of prosecutions of 6 months “from the time that the matter of complaint arose”. This provision has always presented practical difficulties because much Aboriginal heritage is remote, and if it is damaged it is often impossible to determine the date that the damage occurred.

A more sensible approach when the date of a damaging action is not known, is to take the starting point from the time of the matter coming to the attention of the authorities. The Government considers that two years is an appropriate limit on the time then available to commence a prosecution.

Clause 17 provides, in new section 23, for the review of the Act within three years of commencement and for the review report to be tabled in both Houses of Parliament within six months of that third anniversary.

Work on the review would be expected to begin well before the three years are up, with the review report provided to Parliament expected to lead to new legislation.

In addition to these significant amendments, the Bill updates two sections that contain outdated references (sections 15 and 24). When sections are being amended for the purpose of inserting the new penalties, the opportunity has been taken to make some minor updates to the drafting (in sections 9, 17 and 18).

Madam Speaker

In conclusion, this Bill introduces a number of significant amendments to the *Aboriginal Relics Act 1975* that remove its most outdated and ineffective elements, while also committing to a full review of the Act within three years.

The key objectives of the Bill have been the subject of extensive consultation with Tasmanian Aboriginal people and other key stakeholders since June 2016. This consultation has reaffirmed strong support for reform of the Act.

The Government acknowledges that these amendments will not satisfy all stakeholders. However, there is agreement that as an interim step these amendments will address areas of immediate concern now, while recognising there will need to be further ongoing engagement with Aboriginal people and the broader community to resolve other outstanding issues with the Act.

Through the passing of this Bill, by the end of this decade the Parliament will have before it a report on a full review of the Act that is expected to lead to new legislation to replace the *Aboriginal Heritage Act 1975*.

This is an important opportunity for all Tasmanians to better acknowledge, recognise and protect Tasmania's extraordinary Aboriginal heritage and to take an important step forward in the legislative arrangements to achieve those ends.

I commend the Bill to the House.