

EXPLANATORY MEMORANDUM
Aboriginal Heritage Amendment Bill 2014

Introduction

The purpose of this Bill is to facilitate improvements to the administration of the *Aboriginal Heritage Act 1972* and the preservation of places to which the Act applies.

Clause 1: Short title

This clause provides for the short title of the Act.

Clause 2: Commencement

This clause provides for the commencement of the Act as follows:

- sections 1 and 2, on the day on which the Bill receives Royal Assent; and
- the rest of the Act on a day fixed by proclamation, and different days may be fixed for different provisions.

Clause 3: Act amended

This clause identifies the Act amended by the Bill.

Clause 4: Section 4 amended

This clause deletes the definition of “Registrar” and inserts new definitions for “ASO register”, “CEO”, “declaration”, “DP register”, “permit”, “prescribed”, “register” and “Registrar”.

Clause 5: Section 5 amended

Subsection 5(c) has been amended to require the opinion of the Chief Executive Officer (CEO) instead of that of the Aboriginal Cultural Material Committee (Committee).

Clause 6: Section 7A inserted

This clause inserts a new section 7A which contains those matters currently addressed in section 39(2) which is deleted. Section 7A(1)(e) is new and allows the prescribing in Regulations of other matters that may be taken into account when evaluating the importance of a place or object.

Clause 7: Sections 11A and 13 replaced

This clause deletes section 11A (Administration) and makes changes to the powers of delegation now in section 13 to allow the CEO to delegate powers.

It inserts new section 12A (Functions of CEO) to provide that the CEO assumes specified functions presently carried out by the Committee under section 39(1).

New section 12 (Designation and functions of Registrar of Aboriginal Sites) replaces section 37 without material amendment.

Clause 8: Section 15 amended

This clause replaces “he” with “the person”.

Clause 9: Sections 17 and 18 replaced

This clause replaces existing sections 17 and 18 with several new sections:

- new section 17 (Offences relating to Aboriginal sites) adds defences for offences relating to Aboriginal sites (Sites) that the accused was acting under a permit or declaration;
- the present section 18 is replaced by new section 18A and now allows any person to apply to the CEO for a permit to do an act that might contravene section 17 of the Act.
- the CEO may now (depending on the circumstances of the application) issue a declaration that there are no Sites on the subject land, issue a permit or refer the application to the Committee;
- new section 18B requires the Committee to consider applications and report to the Minister for Aboriginal Affairs (Minister) on applications referred to it by the CEO;
- new section 18C allows the CEO to make a declaration that there are no Sites on land the subject of an application;
- new section 18 allows the Minister or the CEO to issue a permit to do an act on land subject to an application;
- new section 19A provides for the nature and effect of permits and declarations;
- new section 19B provides for the expiry and cancellation of declarations issued by the CEO;
- new section 19C provides for the expiry, amendment and cancellation of permits issued by the Minister and the CEO; and
- new section 19D provides for the review by the State Administrative Tribunal of certain decisions about declarations and permits.

Clause 10: Section 19 amended

The declaration of protected areas now requires the recommendation of the CEO rather than the Committee

Clause 11: Section 20 amended

The declaration of a temporarily protected area now replaces the recommendation of the Committee with that of the CEO.

Clause 12: Section 21 amended

This clause 21 (Objection to declaration) consequently replaces “Committee” with “CEO”.

- Clause 13: Section 23 amended**
This clause creates a penalty of \$4,000 for offences relating to interfering with the marking of protected areas.
- Clause 14: Section 24 amended**
This clause adds “or she” after “he”, creates a penalty of \$3,000 for failing to notify the Registrar of certain changes.
- Clause 15: Section 25 amended**
This clause amends the provisions relating to Orders in Council for the variation of revocation of protected areas to reflect the revised roles of the CEO and Minister.
- Clause 16: Section 26 amended**
This new rent subsection (26)(2) enables maximum penalties not exceeding \$7,000 (for individuals) and \$35,000 (for bodies corporate) for breaches of Regulations as to protected areas. It also replaces “may in his opinion be” with “are”.
- Clause 17: Section 27 amended**
This clause replaces “his interest enables him” with “that interest enables him or her”, “himself, his” with “the covenantor, the covenantor’s”, and “him” with “the covenantor”.
- Clause 18: Section 28 amended**
This clause removes subsection 28(3) which required a specialist anthropologist on the Committee and makes a minor consequential amendment to section 28(4).
- Clause 19: Section 29 amended**
This clause requires that one of the ex-officio members of the Committee be a person who is a public service officer of the agency principally assisting the Minister administering the *Land Administration Act 1997* in that Act’s administration, rather than an “authorised land officer” under the *Land Administration Act 1997*.
- Clause 20: Section 30 amended**
This clause makes amendments related to the resignation, disqualification and co-option of members of the Committee.
It also adds new subsection 30(4) and subsection 30(5) that allow the Committee to seek the advice of a registered native title body corporate where native title rights and interests may be affected.
- Clause 21: Section 31 amended**
This clause replaces “his” with “the member’s”.
- Clause 22: Section 32 amended**
This clause replaces “him” with “the Chairman”.

- Clause 23: Section 33 amended**
This clause replaces “firstmentioned meeting” with “meeting to which the minutes relate”.
- Clause 24: Section 35 amended**
This clause replaces “him” with “the member” in two places.
- Clause 25: Sections 37 to 39 replaced**
This clause deletes section 37 (Registrar of Aboriginal Sites) (now replaced by section 12) and section 38 (Register of places and objects) (now replaced by section 50A).
Under section 29 (Functions of the Committee) the Committee will now advise the Minister on any question referred to the Committee, generally on any matter related to the objects and purposes of the Act, and to perform the functions allocated to the Committee by the Act.
- Clause 26: Section 39B amended**
This clause adds “or her” after “his”.
- Clause 27: Section 39D deleted**
This clause removes the requirement of the Minister to consult with the Committee in relation the protection of Aboriginal objects under Part VI of the Act.
- Clause 28: Section 40 amended**
This clause requires the advice of the CEO to the Minister instead of that of the Committee for an Aboriginal object or class of object to be declared Aboriginal cultural material.
- Clause 29: Section 41 amended**
This clause replaces the \$100 penalty at section 41(1) with a \$5,000 penalty, and adds a new penalty of \$5,000 in section 41(2) for breaches of section 41 (Notification and production of objects).
- Clause 30: Section 42 amended**
This clause is consequential to the amendment to section 40 and replaces the opinion of the Committee with that of the CEO.
- Clause 31: Section 43 amended**
This clause replaces section 43(7) (creating an offence relating to dealing with Aboriginal cultural material) with new subsection 43(2A) without material amendment .
- Clause 32: Section 45 amended**
This clause replaces “he” with “the Minister”.
- Clause 33: Section 46 amended**
This clause imposes a penalty of \$5,000 for offences against certain provisions related to the vesting of Aboriginal cultural material.

- Clause 34: Section 47 amended**
This clause replaces “his” with “the Minister’s”.
- Clause 35: Section 49 amended**
This clause creates a penalty of \$5,000 for offences against an order for prohibition on publication.
- Clause 36: Part VIIA inserted**
This clause inserts:
- new sections 50A (Register of Aboriginal sites and objects [ASO register]) replacing section 38;
 - new section 50B (CEO decides what goes on or is removed from ASO register);
 - new section 50C (Register of declarations and permits);
 - new section 50D (Publication of information on registers);
 - new section 50E (Further provisions relating to registers);
and
 - new section 50F (Protecting information on register from disclosure).
- Clause 37: Section 50 amended**
This clause adds “or her” after “his” three times.
- Clause 38: Section 51 amended**
This clause deletes the powers of inspection from the role of an honorary warden and deletes section 51(3) which is superfluous as section 54 provides appropriate penalties.
- Clause 39: Section 52 amended**
This clause deletes the power of an honorary warden to represent the Minister in criminal proceedings.
- Clause 40: Section 54 amended**
This clause creates penalties of \$10,000 (for individuals) and \$50,000 (for bodies corporate) for offences involving obstructing person in the execution of the Act.
- Clause 41: Section 55 amended**
This clause amends provisions relating to the breach of conditions attached to any permit, consent or authorisation. It adds the word “permit” which is a new possible outcome resulting from a section 18 application. It also creates penalties for offences for breaches, of a fine of \$50,000 (for individuals) and \$250,000 (for bodies corporate).
- Clause 42: Section 56 amended**
This clause increases the penalty for disclosing trade secrets and certain other information from \$1,000 to \$3,000.

Clause 43: Section 57A inserted

This clause inserts new section 57A which enables the Minister, the CEO or their respective delegates to commence a prosecution for an offence against the Act. The period within which a prosecution may be commenced has been extended from one (1) year to five (5) years.

Clause 44: Section 57 amended

This clause increases penalties for offences under section 17 and section 43.

In the case of an individual, the maximum fine for a first offence increases from \$20,000 to \$100,000 with the maximum term of imprisonment increasing from nine (9) months to twelve (12) months. For a second or subsequent offence the maximum fine rises from \$40,000 to \$200,000 with the maximum term of imprisonment remaining at two (2) years.

In the case of a body corporate the penalties for a first offence rises from \$50,000 to \$500,000 and for a second or subsequent offence from \$100,000 to \$1,000,000.

It also provides that a court may, upon conviction of an offence under section 17 or section 43, make remediation orders.

Clause 45: Section 59A inserted

This clause inserts a new section 59A which applies the provisions of the *Sentencing Act 1995* to remediation orders made under section 57(5).

Clause 46: Section 59 amended

Under this clause forfeited objects will now be for the use of the Minister, instead of the Minister in consultation with the Committee.

Clause 47: Section 60 amended

This clause (relating to evidence in proceedings) amends the present onus of proof in charges of offences under the Act, limiting the presumption that the Act applies to a place or object to those places or objects registered in the ASO register as an Aboriginal Site.

Amendments are also made consequent upon the creation of permits and declarations and the capacity of the CEO to commence proceedings.

Clause 48: Section 61 amended

This clause replaces the existing section 61(c) with updated provisions that reflect the new decision making processes for section 18 applications.

Clause 49: Section 62 amended

This clause adds “or she” after “he”.

Clause 50: Section 63 inserted

This clause inserts new section 63 that requires the Minister to review the Act as soon as practical after every fifth (5th) anniversary of the day section 4 of the *Aboriginal Heritage Amendment Act 2014* comes into operation.

Clause 51: Section 66 amended

This clause amends section 66 in relation to Crown land by deleting reference to section 18 of the Act, reflecting that a person giving notice under section 18 no longer need be technically an owner of land.

Clause 52: Section 67 amended

This clause extends to the CEO the statutory indemnity from suit.

Clause 53: Section 68 amended

This clause amends the provisions relating to the making of Regulations, providing specific heads of power to make Regulations relating to:

- the forms used for the purposes of the Act;
- the processes and procedures for dealing with applications made under section 18A, 19A(4) or 19C(5);
- making decisions under section 18A, 18B, 18C, 18, 19A(4), 19B(2) or 19C(5);
- prescribing the powers that may be exercised by honorary wardens;
- prescribing the fees and charges to be paid for services provided under the Act; and
- creating offences with, unless section 26(2) applies, a maximum penalty not exceeding for an individual a fine of \$5,000 and for a body corporate a fine of \$25,000.

Clause 54: Part IX inserted

This clause inserts new Part IX (consisting of new sections 69-79) which creates transitional, savings and validation provisions relating to:

- the Registrar (section 71), section 18 (section 72), section 19 (section 73), section 20 (section 74), section 21 (section 75), section 25 (section 76); and
- validation of Committee decisions (section 77), section 40 (section 78) and section 42 (section 79).