

# Aboriginal and Torres Strait Islander Heritage Protection Regulations

Statutory Rules 1984 No. 176 as amended

made under the

*Aboriginal and Torres Strait Islander Heritage Protection Act 1984*

## **4 Prescribed authority**

For the purposes of paragraph 21(1)(c) of the Act, the Museum of Australia is an authority for safekeeping.

The web site where the regs can be found is <http://scaleplus.law.gov.au/>

## Part IIA—Victorian Aboriginal cultural heritage

### Division 1—Preliminary

#### 21A Interpretation

(1) In this Part:

*Aboriginal cultural heritage agreement* means an agreement made in accordance with section 21K.

*Aboriginal cultural property* means Aboriginal places, Aboriginal objects and Aboriginal folklore.

*Aboriginal folklore* means traditions or oral histories that are or have been part of, or connected with, the cultural life of Aboriginals (including songs, rituals, ceremonies, dances, art, customs and spiritual beliefs) and that are of particular significance to Aboriginals in accordance with Aboriginal tradition.

*Aboriginal object* means an object (including Aboriginal remains) that is in Victoria and is of particular significance to Aboriginals in accordance with Aboriginal tradition.

*Aboriginal place* means an area in Victoria that is of particular significance to Aboriginals in accordance with Aboriginal tradition.

*community area*, in relation to a local Aboriginal community, means the area in Victoria declared by the regulations to be the area of that community for the purposes of this Part.

*local Aboriginal community* means an organisation that is specified in the Schedule.

*magistrate* means a magistrate of the State of Victoria.

*police officer* means:

- (a) a member or special member of the Australian Federal Police; or
- (b) a member of the Police Force of the State of Victoria.

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*State Minister* means a Minister of the Crown of the State of Victoria.

- (2) The regulations may amend the Schedule by adding, omitting or varying the name of an organisation that is incorporated in, or carries on business in, Victoria.

**21B Delegation**

- (1) The Minister may, either generally or as otherwise provided by the instrument of delegation, by writing signed by the Minister, delegate all or any powers that are conferred on the Minister by or under this Part to:
- (a) a State Minister;
  - (b) an officer of the Department; or
  - (c) the Chief Executive Officer of, or a member of the staff of, the Aboriginal and Torres Strait Islander Commission.
- (2) A State Minister to whom a power has been delegated under subsection (1) may, by writing signed by that Minister, authorise another person to exercise the power so delegated.
- (3) An authority under subsection (2) may be given to:
- (a) a specified person; or
  - (b) the person for the time being occupying or performing the duties of a position in the public service of the State of Victoria, being a position specified in the instrument by which the authority is given.
- (4) Any act or thing done in the exercise of a power by a person to whom that power has been delegated by the Minister under subsection (1) or by a person authorised by a delegate of the Minister under subsection (2) to exercise that power has the same force and effect as if it had been done by the Minister.
- (5) Where the exercise of a power by the Minister is dependent upon the opinion, belief or state of mind of the Minister in relation to a matter and that power has been delegated under subsection (1), that power may be performed or exercised by the delegate or by a person authorised by the delegate under subsection (2) upon the

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opinion, belief or state of mind of the delegate or of the authorised person, as the case may be, in relation to that matter.

- (6) A delegation under subsection (1) does not prevent the exercise of a power by the Minister.
- (7) The giving of an authority under subsection (2) does not prevent the exercise of a power by the person by whom the authority was given.
- (8) Where a person purports to exercise a power conferred or expressed to be conferred on the Minister by this Act, it shall be presumed, unless the contrary is established, that the person is duly authorised by a delegation under subsection (1), or by an authority under subsection (2) given pursuant to such a delegation, to exercise the power.

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**Division 2—Preservation of Victorian Aboriginal cultural property**

**21C Emergency declaration of preservation**

- (1) An emergency declaration in the prescribed form may be made in relation to an Aboriginal place or Aboriginal object:
  - (a) by:
    - (i) an inspector appointed under section 21R; or
    - (ii) the Minister;whether after an application is made to him or her by a local Aboriginal community or any person or on his or her own motion; or
  - (b) by a magistrate on an application by a local Aboriginal community;if the inspector, Minister or magistrate has reasonable grounds for believing that the place or object is under threat of injury or desecration of such a nature that it could not properly be protected unless an emergency declaration is made.
- (2) An emergency declaration ceases to be in force at the end of 30 days after it is made or such longer period, not exceeding 44 days, after it is made as the Minister fixes in any case unless it is sooner revoked or replaced by a temporary declaration under section 21D or a declaration under section 21E.
- (3) An emergency declaration may be varied or revoked:
  - (a) if made by an inspector—by the inspector;
  - (b) if made by the Minister—by the Minister; or
  - (c) if made by a magistrate—by the magistrate on the application of the local Aboriginal community.
- (4) If an emergency declaration is made, varied or revoked by an inspector or the Minister, the inspector or Minister shall, without delay, notify:
  - (a) the local Aboriginal community (if any) of the area where the Aboriginal place or Aboriginal object is found; and

- (b) in the case of an emergency declaration made by an inspector—the Minister;  
and shall take all reasonable steps to notify any person who is likely to be affected.
- (5) If an emergency declaration is made by a magistrate on the application of a local Aboriginal community, the community shall, without delay, take all reasonable steps to notify any person who is likely to be affected.

### **21D Temporary declaration of preservation**

- (1) If a local Aboriginal community decides, whether after an application is made to it or on its own motion, that:
  - (a) a place or object in the community area is an Aboriginal place or Aboriginal object; and
  - (b) that place or object is under threat of injury or desecration;  
the community may advise the Minister that it considers a temporary declaration of preservation should be made.
- (2) On receiving advice under subsection (1) or determining on his or her own motion that a temporary declaration of preservation should be made, the Minister:
  - (a) shall, within 14 days, cause notice of the advice or determination to be given to any person who is likely to be affected by the making of a declaration; and
  - (b) shall give any such person an opportunity to be heard.
- (3) After notice is given under subsection (2) and any objections are heard and the Minister has consulted with any State Minister whose responsibility may be affected by the making of a declaration, the Minister shall:
  - (a) if the Minister considers that, in all the circumstances of the case, it is reasonable and appropriate that a temporary declaration be made for the preservation of the place or object—make the declaration in writing, and, in the declaration, specify the terms of the declaration and the manner of preservation to be adopted in relation to the place or object, including prohibition of access to, or interference with, the place or object; or

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- (b) refuse to make the declaration.
- (4) The Minister may, at any time, on the application of the local Aboriginal community or on his or her own motion, vary or revoke a temporary declaration or any matters specified in it.
- (5) The Minister shall cause appropriate notice to be given of the making, variation or revocation of a temporary declaration.
- (6) A person affected or likely to be affected by the making, variation or revocation of a temporary declaration of preservation may request the Minister to appoint an arbitrator to review the Minister's decision.
- (7) If the Minister refuses to make, or revokes, a temporary declaration of preservation or makes or varies a declaration, the local Aboriginal community may request the Minister to appoint an arbitrator to review the Minister's decision.
- (8) The Minister shall, after receiving a request under subsection (6) or (7), appoint an arbitrator, being a person whom the Minister considers to be in a position to deal with the matter impartially.
- (9) Subject to section 21F, a temporary declaration of preservation ceases to be in force at the end of 60 days after it is made, or such longer period, not exceeding 120 days, after it is made as the Minister, on the advice of the local Aboriginal community, fixes unless it is sooner revoked or replaced by a declaration under section 21E.

**21E Declaration of preservation**

- (1) If a local Aboriginal community decides, whether after an application is made to it or on its own motion, that:
  - (a) a place or object in the community area is an Aboriginal place or Aboriginal object; and
  - (b) it is appropriate, having regard to the importance of maintaining the relationship between Aboriginals and that place or object, that a declaration of preservation should be made in relation to that place or object;the community may advise the Minister that it considers a declaration of preservation should be made.

- (2) On receiving advice under subsection (1) or determining on his or her own motion that a declaration of preservation should be made, the Minister:
  - (a) shall within 14 days cause notice of the advice or determination to be given to any person who is likely to be affected by the making of a declaration; and
  - (b) shall give any such person an opportunity to be heard.
- (3) After notice is given under subsection (2) and any objections are heard and the Minister has consulted with any State Minister whose responsibility may be affected by the making of a declaration, the Minister shall:
  - (a) if the Minister considers that, in all the circumstances of the case, it is reasonable and appropriate that a declaration be made for the preservation of the place or object—make the declaration and, in the declaration, specify the terms of the declaration and the manner of preservation to be adopted in relation to the place or object, including prohibition of access to, or interference with, the place or object; or
  - (b) refuse to make the declaration.
- (4) The Minister may, at any time, on the application of the local Aboriginal community or on his or her own motion, vary or revoke a declaration or any matters specified in it.
- (5) A person likely to be affected by the making, variation or revocation of a declaration of preservation may request the Minister to appoint an arbitrator to review the Minister's decision.
- (6) If the Minister refuses to make, or revokes, a declaration of preservation or makes or varies a declaration, the local Aboriginal community may request the Minister to appoint an arbitrator to review the Minister's decision.
- (7) The Minister shall, after receiving a request under subsection (5) or (6), appoint an arbitrator, being a person whom the Minister considers to be in a position to deal with the matter impartially.
- (8) The making, variation or revocation of a declaration under this section:
  - (a) shall be done by notice published in the *Gazette*; and

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- (b) comes into operation on the date of publication or such later date as is specified in the notice.

**21F Arbitration**

- (1) An arbitrator appointed under section 21D or 21E to review a decision of the Minister shall make a decision:
- (a) confirming the decision of the Minister;
  - (b) varying the decision of the Minister; or
  - (c) setting aside the decision of the Minister and making a decision (being a decision that the Minister could have made under section 21D or 21E, as the case requires) in substitution for the decision of the Minister.
- (2) Subject to subsection (3), a decision of the Minister as varied by an arbitrator, or a decision made by an arbitrator in substitution for a decision of the Minister, shall, except for the purposes of subsection 21D(7) or 21E(6), be deemed to be a decision of the Minister and has effect, unless the arbitrator otherwise determines, on and from the day on which the decision of the Minister had effect.
- (3) Where the decision of an arbitrator results in the making of a declaration under section 21D or 21E, or the variation of a declaration made by the Minister under one of those sections, the declaration or variation, as the case may be, has effect on and from the day on which the decision of the arbitrator is made.

**21G Notices**

- (1) A local Aboriginal community may cause notices to be placed on or near an Aboriginal place or Aboriginal object in the community area that is the subject of a declaration indicating that the place or object is subject to a declaration of preservation.
- (2) A person authorised in writing by the relevant Aboriginal community may at all reasonable times enter upon any land for the purpose of placing a notice under subsection (1).
- (3) A person is guilty of an offence if:
- (a) the person engages in conduct; and

- (b) the conduct:
  - (i) destroys or causes damage to a notice placed under this section; or
  - (ii) causes interference with or the removal of a notice placed under this section.

**Penalty:**

- (a) if the person is a natural person—\$500; or
  - (b) if the person is a body corporate—\$2,500.
- (4) In subsection (3):

***engage in conduct*** means:

- (a) do an act; or
- (b) omit to perform an act.

**21H Offence to contravene declaration**

- (1) A person is guilty of an offence if:
- (a) the person engages in conduct; and
  - (b) the conduct contravenes the terms of a declaration under this Part relating to an Aboriginal place.

**Penalty:**

- (a) if the person is a natural person—\$10,000 or imprisonment for 5 years, or both; or
  - (b) if the person is a body corporate—\$50,000.
- (2) A person is guilty of an offence if:
- (a) the person engages in conduct; and
  - (b) the conduct contravenes the terms of a declaration under this Part relating to an Aboriginal object.

**Penalty:**

- (a) if the person is a natural person—\$5,000 or imprisonment for 2 years, or both; or
  - (b) if the person is a body corporate—\$25,000.
- (3) In this section:

***engage in conduct*** means:

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- (a) do an act; or
- (b) omit to perform an act.

**21J Obligation to protect land**

The making of a declaration relating to an Aboriginal place does not affect any obligation under any Act or law relating to the protection or conservation of land unless the obligation is inconsistent with the declaration.

**21K Aboriginal Cultural Heritage Agreements**

- (1) A local Aboriginal community may enter into an Aboriginal Cultural Heritage Agreement with a person who owns or possesses any Aboriginal cultural property in Victoria.
- (2) An agreement may cover the preservation, maintenance, exhibition, sale or use of the property and the rights, needs and wishes of the person and of the Aboriginal and general communities.
- (3) Subsection (1) does not apply to any Aboriginal cultural property in the possession of an Aboriginal if the property has been handed down from generation to generation to that person unless that person expressly agrees that the property should be the subject of an agreement under this section.
- (4) If an agreement under this section relating to land contains a provision requiring its registration under this section, the local Aboriginal community shall without delay:
  - (a) if the land is under the operation of the *Transfer of Land Act* 1958 of Victoria—lodge with the Registrar of Titles under that Act a notice of the agreement in the prescribed form; or
  - (b) in the case of other land—lodge with the Registrar-General under the *Property Law Act* 1958 of Victoria a notice of the agreement in the prescribed form.
- (5) If the Registrar of Titles receives a notice of an agreement, the Registrar may make such entries in the Register Book as the Registrar thinks appropriate for the purposes of this section.

**21L Compulsory acquisition**

- (1) The Minister may, in accordance with the regulations, compulsorily acquire any Aboriginal cultural property if the Minister is satisfied, whether on the advice of a local Aboriginal community or otherwise, that:
  - (a) the property is of such religious, historical or cultural significance that it is irreplaceable; and
  - (b) no other arrangements can be made to ensure its proper continuing preservation and maintenance.
- (2) Property acquired under this section is, upon acquisition, vested in the local Aboriginal community of the area where the property is found to be held on trust for it or, if there is no such community, in the Minister on trust for Aboriginals in Victoria.

**21M Compensation for acquisition of property**

- (1) Where, but for this section, the operation of this Part would result in the acquisition of property from a person otherwise than on just terms, there is payable to the person by the Commonwealth such reasonable amount of compensation as is agreed upon between the person and the Commonwealth or, failing agreement, as is determined by the Federal Court.
- (2) In subsection (1), *acquisition of property* and *just terms* have the same respective meanings as in paragraph 51(xxxi) of the Constitution.

**21N Compensation may be paid in certain circumstances**

- (1) The Minister may, from moneys appropriated by the Parliament for the purpose, pay compensation to a person who is or is likely to be affected by a declaration of preservation under section 21E.
- (2) The amount of compensation payable is such amount as is agreed upon between the Minister and the person or, failing agreement, as is determined by an arbitrator appointed by the Minister.

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**Division 3—Discovery and disposal of Aboriginal remains**

**21P Discovery of Aboriginal remains**

- (1) A person who, in Victoria, discovers anything that he or she has reasonable grounds to suspect to be Aboriginal remains shall report the discovery to the Minister, giving particulars of the remains and of their location.

Penalty: \$500.

- (2) Where the Minister receives a report made under subsection (1) and is satisfied that the report relates to Aboriginal remains, the Minister shall take reasonable steps to consult with any local Aboriginal community that he or she considers may have an interest in the remains, with a view to determining the proper action to be taken in relation to the remains.

**21Q Disposal of Aboriginal remains**

- (1) Where Aboriginal remains discovered in Victoria are delivered to the Minister, he or she shall:
  - (a) return the remains to a local Aboriginal community entitled to, and willing to accept, possession, custody or control of the remains in accordance with Aboriginal tradition;
  - (b) otherwise deal with the remains in accordance with any reasonable directions of a local Aboriginal community referred to in paragraph (a); or
  - (c) if there is or are no such community or communities—transfer the remains to a prescribed authority for safekeeping.
- (2) Nothing in this section shall be taken to derogate from the right of any local Aboriginal community, Aboriginal or Aborigines accepting possession, custody or control of any Aboriginal remains pursuant to this section to deal with the remains in accordance with Aboriginal tradition.

## **Division 4—Miscellaneous**

### **21R Inspectors**

- (1) The Minister may, in writing, appoint any person after consultation with a local Aboriginal community to be an inspector for the purposes of this Part if the Minister is satisfied that the person has knowledge and expertise in the identification and preservation of Aboriginal cultural property and is able to undertake the duties of an inspector under this Part.
- (2) The Minister shall cause to be issued to each inspector an identity card in the form prescribed, containing a photograph of the inspector.
- (3) An inspector who notifies a person of a declaration made by the inspector under section 21C shall:
  - (a) if it is reasonably practicable to do so—produce his or her identity card for inspection by that person; or
  - (b) in any other case—give that person such particulars of his or her identity card as are prescribed.
- (4) A person who ceases to be an inspector shall forthwith return his or her identity card to the Minister.

Penalty: \$100.

### **21S Power to enter, search etc.**

- (1) If a Magistrate is satisfied, on information on oath by a police officer, that there are reasonable grounds for suspecting that any Aboriginal objects on or in any land, premises or vehicle are under threat of injury or desecration, the Magistrate may issue a warrant authorising any police officer together with the inspector named in the warrant, by such force as is necessary and reasonable:
  - (a) to enter the land, premises or vehicle;
  - (b) to search the land, premises or vehicle;
  - (c) to take possession of, or secure against desecration, any Aboriginal objects that appear to the inspector to be under threat of injury or desecration; and

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- (d) to deliver any objects possession of which is so taken into the possession of a person authorised by the Minister to receive them.
- (2) A police officer, together with an inspector, may:
- (a) enter upon land, or upon or into premises;
  - (b) search the land or premises for Aboriginal objects; and
  - (c) seize or secure against desecration any property found in the course of the search that the inspector believes, on reasonable grounds, to be an Aboriginal object;
- but only if acting:
- (d) with the consent of the occupier of the land or premises; or
  - (e) under a warrant issued under this section.
- (3) There shall be stated in a warrant issued under this section:
- (a) a statement of the purpose for which the warrant is issued;
  - (b) a description of the kind of property authorised to be seized; and
  - (c) a date (not being later than 7 days after the issue of the warrant) upon which the warrant ceases to have effect.
- (4) It shall also be stated in a warrant issued under this section whether entry is authorised to be made at any time of the day or night or during specified hours of the day or night.
- (5) If possession is taken of an object under this section:
- (a) the inspector shall forthwith inform the local Aboriginal community (if any) of the area where the object is found; and
  - (b) the object shall be returned to the owner within 60 days after the possession was taken (or such longer period, not exceeding 120 days, after possession was taken as the Minister authorises) unless it is compulsorily acquired under section 21M or otherwise becomes the property of the local Aboriginal community.
- (6) If:
- (a) an object is taken into possession under this section;
  - (b) the object is required to be returned to the owner under paragraph (5)(b); and

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- (c) the whereabouts of the owner cannot be ascertained after careful inquiry;  
the object is vested in the Minister on trust for Aboriginals in Victoria.
- (7) The powers conferred by this section are in addition to any other powers conferred by law.

**21T Honorary keepers or wardens**

- (1) A local Aboriginal community may, in writing, appoint honorary keepers or wardens for that community.
- (2) The function of an honorary keeper or warden is to record and maintain Aboriginal cultural property, either generally or as specified by the local Aboriginal community from time to time.
- (3) If an honorary keeper or warden is an Aboriginal who has the responsibility of being custodian for any Aboriginal cultural property, the local Aboriginal community shall not require the honorary keeper or warden to carry out any function that is inconsistent with the duties of the keeper or warden as the custodian.

**21U Defacing property**

- (1) A person is guilty of an offence if:
- (a) the person:
- (i) does an act; and
- (ii) the act causes damage to, the defacing of, or interference with, an Aboriginal object or an Aboriginal place; or
- (b) the person does an act likely to endanger an Aboriginal object or Aboriginal place.

Penalty:

- (a) if the person is a natural person—\$10,000 or imprisonment for 5 years, or both; or
- (b) if the person is a body corporate—\$50,000.

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- (2) Subsection (1) does not prevent an Aboriginal from entering on or interfering with an Aboriginal place or Aboriginal object in accordance with Aboriginal tradition.
- (3) A person may apply to a local Aboriginal community for consent for the excavation of any Aboriginal place or Aboriginal object in a community area of that community or for the carrying out of scientific research on Aboriginal objects in that area.
- (4) A local Aboriginal community may consent, in writing, to the doing of an act referred to in subsection (1) or (3) in its community area and may, in the consent, specify terms and conditions subject to which the consent is given.
- (5) If:
  - (a) a local Aboriginal community does not, within 30 days after receiving an application for consent under subsection (4), either grant consent or refuse consent; or
  - (b) an application is made to the Minister for consent to the doing of an act referred to in subsection (1) in an area in relation to which there is no local Aboriginal community;the Minister may consent, in writing, to the doing of an act referred to in subsection (1) in the community area or other area, as the case may be, and may, in the consent, specify terms and conditions subject to which the consent is given.
- (6) The Minister shall not grant consent under subsection (5) unless:
  - (a) the Minister has sought a recommendation on the matter from any person or body that in the Minister's opinion should consider the matter; and
  - (b) the Minister has considered any recommendations made and is of the opinion that, in all the circumstances of the case, consent should be granted.
- (7) A person is not guilty of an offence if the person does an act referred to in subsection (1) in accordance with consent given under subsection (4) or (5).

### **21V Register**

- (1) The Minister shall cause to be kept a register containing a summary of particulars of declarations of preservation made under this Part.
- (2) The register shall not be open for inspection except by prescribed persons or in prescribed circumstances.

### **21W General meetings of local Aboriginal communities**

There may be convened, in accordance with the regulations, general meetings of representatives of each local Aboriginal community and of prescribed Aboriginal organisations in Victoria for the purpose of:

- (a) providing advice to the Minister on issues relating to Aboriginal cultural property in Victoria; or
- (b) making recommendations to the Minister on the operation of this Part, including recommendations for its review or amendment.

### **21X Negotiation for return of Aboriginal remains**

If a local Aboriginal community has reason to believe that any Aboriginal remains held by a university, museum or other institution were found or came from its community area, the local Aboriginal community may request the Minister to negotiate with the university, museum or institution for the return of the remains to the community.

### **21Y Indictable offences**

- (1) Subject to subsection (2), the following offences are indictable offences:
  - (a) an offence against section 21H or 21U; or
  - (b) an offence against:
    - (i) section 6 of the *Crimes Act 1914*; or
    - (ii) section 11.1, 11.4 or 11.5 of the *Criminal Code*;in relation to an offence referred to in paragraph (a) of this subsection.

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- (2) A court of summary jurisdiction may hear and determine proceedings in respect of an offence referred to in subsection (1) if the court is satisfied that it is proper to do so and the defendant and the prosecutor consent.
- (3) Where, in accordance with subsection (2), a court of summary jurisdiction convicts a person of an offence referred to in that subsection, the penalty that the court may impose is:
  - (a) if the person is a natural person—a fine not exceeding \$2,000 or imprisonment for a period not exceeding 12 months, or both; or
  - (b) if the person is a body corporate—a fine not exceeding \$10,000.

**21Z Evidence**

- (1) In any proceedings for an offence against section 21H in relation to a declaration under this Part, the proof of the declaration is *prima facie* evidence that the place or object concerned is an Aboriginal place or Aboriginal object, as the case may be.
- (2) For the purposes of subsection (1), a declaration made under section 21E may be proved by the production of the *Gazette* purporting to contain it.
- (3) In proceedings for an offence against section 21H or 21U, where there is evidence that, at the relevant time, the defendant neither knew, nor had reasonable grounds for knowing:
  - (a) in the case of an offence against section 21H—of the existence of the declaration alleged to have been contravened; or
  - (b) in the case of an offence against section 21U—that the object or place concerned was an Aboriginal object or an Aboriginal place, as the case may be;the defendant shall not be committed for trial or convicted unless the prosecution proves that, at the time, the defendant knew, or ought reasonably to have known, of that fact.

**21ZA Alcoa smelter site exempted**

This Part does not apply to any site, land, act or activity to which section 13 of the *Alcoa (Portland Aluminium Smelter) Act 1980* of Victoria applies.