



## Local Heritage Agreements

### Introduction

The *Aboriginal Heritage Act 1988* (**Heritage Act**) protects Aboriginal heritage in South Australia, including from the impacts of excavation, damage, disturbance or interference. It was recently changed to recognise Aboriginal people as primary decision makers about their own heritage. This includes the creation of Recognised Aboriginal Representative Bodies (**RARBs**), bodies empowered to represent Traditional Owners and to make decisions and agreements about their heritage. RARBs can either speak for Traditional Owners of heritage within a broad specified area, or specific sites, objects or remains (collectively, **heritage**).

Before, if a land use proponent (eg a miner, researcher or a government department) wanted to do something that might impact heritage, the Minister for Aboriginal Affairs and Reconciliation (**Minister**) ran a formal consultation process to consider the idea with Traditional Owners and others prior to deciding whether to grant an authorisation.

Now, RARBs can make agreements about heritage directly with land use proponents. When such agreements are made in accordance with the Heritage Act, they are known as 'local heritage agreements'.

#### What is a local heritage agreement?

A local heritage agreement is a contract about heritage made between a RARB and a land use proponent in accordance with the Heritage Act.

#### Who can make a local heritage agreement?

Only a RARB can make a local heritage agreement. It can make one with any person or body proposing to take an action that may impact heritage in South Australia, but only after consulting with and getting the views of Traditional Owners of that heritage.

#### Alternatives to local heritage agreements

If heritage is not represented by a RARB, certain agreements with Traditional Owners (mostly native title agreements) setting out how the heritage may be impacted can also be approved under the Heritage Act. This is called a Division A2 agreement – see Guideline 2 for more information.

If there is no RARB and no approvable Division A2 agreement, a proponent may instead apply directly to the Minister to impact heritage. In this instance, the Minister will consult with Traditional Owners (amongst others) before deciding the application.

#### Why make a local heritage agreement?

Local heritage agreements act to ensure that heritage is managed in culturally appropriate ways agreed to by Traditional Owners. They allow proponents to negotiate the treatment of heritage directly with Traditional Owners, rather than asking the Minister to run a consultation process with the same people.

Where accompanied by an authorisation from the Minister under section 23 of the Heritage Act, local heritage agreements protect proponents from prosecution under the Heritage Act for impacting heritage to the extent authorised.

## **Negotiating a local heritage agreement**

Making local heritage agreements is entirely optional. A RARB may refuse to negotiate or enter a local heritage agreement for any reason it thinks fit.

If a RARB does decide to start discussions about a local heritage agreement, all parties to those discussions must negotiate in good faith. Essentially this means communicating with honesty and sincerity and working genuinely towards mutually acceptable outcomes, whether an agreement is eventually reached or not.

At a minimum, local heritage agreements must include provisions showing the parties' agreement about the following matters:

- the area to which the agreement relates
- the relevant heritage
- the proposed activities
- proposed procedures in the event of the discovery, excavation, damage, disturbance or interference of heritage, whether known or unknown
- that questions of the significance of sites or objects to Aboriginal tradition, archaeology, anthropology or history will be solely decided by the RARB
- limits to costs or charges payable under the agreement
- dispute resolution processes
- a description of the process by which the agreement was negotiated.

The Heritage Act requires the Minister to protect and preserve heritage, and RARBs to know and represent the views of Traditional Owners. To ensure these obligations are met, the description of the process by which a local heritage agreement was negotiated is particularly important. Without limiting what such a description might include, the following matters should be addressed:

- which Traditional Owners were spoken to
- how they were made aware of the proposal
- the level of support the proposal received
- the availability of independent advice for Traditional Owners
- negotiation timeframes
- opportunities for Traditional Owners to comment upon, review and approve the agreement during its development and finalisation.

A separate schedule to a local heritage agreement is a convenient way for parties to describe the nature and extent of consultation that led to it. The more detailed information that is given, the more it will assist the Minister to make his or her decision.

## **Approval of a local heritage agreement by the Minister**

An agreement made with a RARB covering the above matters may be submitted to the Minister for approval. An application form is available on the DSD-AAR website, and this must be submitted with the agreement. The proposed agreement must be in a form approved by the Minister from time to time. This form is also available from the website.

When deciding whether to approve local heritage agreements, the Minister may consider several matters, including:

- whether the proposed agreement has been submitted in a form and manner approved by the Minister

- the contents of the proposed agreement
- this Guideline
- the Regulations
- whether the proposed agreement satisfactorily deals with relevant heritage, both known and unknown
- whether the views of Traditional Owners affected by the proposed agreement were obtained, and if so, what those views were
- whether Traditional Owners potentially affected by the proposed agreement were otherwise adequately consulted
- whether provisions limiting costs or charges paid or payable under the proposed agreement are in the Minister's view reasonable in the circumstances
- any information kept in the Central Archive or any local archives
- any advice sought from the State Aboriginal Heritage Committee
- any other matters the Minister considers relevant.

The Minister may ask the parties for more information to help make the decision. In this case, the Minister does not have to decide until he or she has all the information thought reasonably necessary in the circumstances.

It is open to the Minister to return a local heritage agreement to the parties to further negotiation until they agree a document the Minister can approve. For example, the Minister may think the proposed agreement is not in an approved form, does not satisfactorily deal with heritage or does not otherwise satisfy the Heritage Act.

Where an approved local heritage agreement is given to the Minister with a request for formal authorisation under the Heritage Act to impact heritage, the Minister must grant an authorisation for impacts as described in the agreement.

### **Approval v Authorisation**

An approved local heritage agreement by itself does not allow proponents to impact heritage as described in the agreement. This requires additional authorisation from the Minister. An application form is available on the DSD-AAR website.

Although this is an additional step, if an approved local heritage agreement is submitted with a request for authorisation, the Minister must grant authorisation for the activities described in the agreement.

A local heritage agreement may, but does not have to, submit a local heritage agreement for approval at the same time as a request for an authorisation to impact heritage.

The Minister may impose conditions on an authorisation that are not inconsistent with the approved agreement.

If an authorisation is revoked, so too is the approval of any related local heritage agreement.

### **Varying and revoking local heritage agreements**

A local heritage agreement may be varied or revoked with the written agreement of all the parties to it and with the written approval of the Minister.

### **Enforcing local heritage agreements**

If a party fails to comply with a local heritage agreement, or it appears that they might, any other party to the agreement may apply to the District Court for a remedy.

Acts or omissions made outside of the terms of an approved local heritage agreement or an authorisation remain liable to prosecution under the Heritage Act.

Penalties include up to six months' jail and a \$50,000 fine.

**Further Information**

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