

# CHAPTER 6: SOCIAL AND COMMUNITY CONSENT

## CONSENT

- 95. Both broad social consent and specific community consent must be obtained for any new nuclear activity to commence in South Australia.**
- 96. Social consent means obtaining broad public support culminating in legislative endorsement of an activity by the relevant parliament, and maintaining that support for the life of the project.**

Social consent is the ongoing public support that is necessary for an activity to be undertaken in a society. It is contingent on confidence that the activity is, or will be, performed consistent with the community's expectations, standards and values.

Social consent is something that is commonly taken into account as part of a political process. It is not given once for the life of an activity. In the past, social consent has been held and later lost for activities across many industries, whether because community attitudes, standards and expectations have shifted or confidence in the activity has weakened. Settled community opinions against an activity also can be reversed with technological advances, as in fields such as genetic medicine.

Because of these shifts, a public vote on a proposal is not a reliable indicator of ongoing social consent: A vote for or against a proposal one day may not result in the same level of social consent one month later.

Social consent is fundamental to the feasibility of a new or expanded nuclear development in South Australia. In such cases, which often involve decades of project development and significant capital expenditure, all stakeholders would need to be confident that social consent was not only gained, but also could reasonably be expected to be sustained through both the development and life of the project.

To facilitate nuclear activities, it will be necessary to amend existing laws that prohibit the establishment of types of nuclear facilities and pass laws to regulate their conduct. This approval would hinge on a political judgement as to whether there is sustainable public confidence that the activity can be safely and securely undertaken. Further, major projects are, by nature, transgenerational, and require bipartisan and continuing political support that does not fall prey to the caprice of election cycles.

Chapter 10: Recommendations and next steps, identifies aspects of this process (respecting that it is in part political) that would be necessary to determine whether there is social consent for an activity.

- 97. Community consent, being informed agreement from an affected community, would be required for a specific proposal.**

For any nuclear project to proceed successfully and sustainably, it must have the informed consent of the community in the project's location, in addition to that of rights holders who may be affected, including landowners or leaseholders, and native title holders or claimants. Community consent, as distinct from the broader concept of social consent, must be measured on a more localised basis.

To achieve this, the membership of the community would need to be defined.<sup>1</sup> This would require consideration of the potential impacts of the proposal and its associated infrastructure on, for example, the geographical area, proximity to residents and land users, other local industries, and the expected project life. The more far-reaching the proposal, the broader the extent of the community whose collective consent must be measured.<sup>2</sup>

There is no universally applicable definition of 'community' for the purpose of identifying whose consent would be required before a nuclear development could proceed. This is reflected in the various approaches taken by countries in siting nuclear facilities (see Appendix H: Siting significant facilities—case studies).<sup>3</sup> Some communities have been well defined and organised, with existing decision-making structures. This was the case in Belgium, Finland and France, where governments and proponents embarking on nuclear developments proceeded on the basis that the existing municipal boundaries determined the scope of the relevant community.<sup>4</sup> Where such clear definitions and structures do not exist, it may be necessary to create new structures that develop community capacity.

The threshold for consent will differ for each community according to its concerns, rights and values. It does not require unanimity. There is no universally accepted understanding of how consent for nuclear projects may be gained and measured.<sup>5</sup> Because of this, any project proponent should adopt a consultative approach to defining 'community' and 'consent' and encourage early community agreement on how decisions are to be made and who has the right to make and communicate decisions (including consent) in relation to a proposed development.<sup>6</sup> This might involve the proponent developing, in close consultation with the community, a 'consent plan' that is flexible and inclusive rather than prescriptive.<sup>7</sup>

**98. With respect to new uranium mining projects, no measures to further regulate community consent or community engagement appear required.**

Historically the subject of extensive public and political debate<sup>9</sup>, today uranium mining in South Australia is a lawful activity that has bipartisan political support. Although a proposal for a new uranium mine would be opposed by some, uranium mining now has broad public acceptance.<sup>9</sup>

The uranium mining industry in Australia well understands the importance of having community support.<sup>10</sup> Genuine community engagement on a proposed development followed by obtaining the community's consent are widely accepted as critical to project success and sustainability.<sup>11</sup> Any project proponent should be able to provide evidence of engagement in accordance with the principles set out at Finding 100.<sup>12</sup>

**99. Efforts over recent decades internationally to develop nuclear projects by focusing on technical considerations without an equal or even greater emphasis on systematic engagement with the community have commonly failed.**

South Australia can learn valuable lessons on the importance of obtaining community consent from the numerous international attempts, both failed and successful, to site new nuclear facilities. In a number of cases from the 1970s to the 1990s, the process considered only site technical characteristics, including geology, seismology and safety. Communities were not consulted, nor did they provide consent. Where proponents and governments pushed ahead without community consent, developments failed.<sup>13</sup>

Since the mid-1990s, most governments and proponents have adopted a new approach that involved communities in siting decisions. For example, by volunteering to be involved in a phased and adaptive learning and decision-making process, communities' receptiveness to hosting a nuclear facility have improved.<sup>14</sup> South Australia can learn from these more recent experiences, particularly in Belgium, Canada (which shares many political and physical characteristics with South Australia), France, Germany and South Korea. Appendix H: Siting significant facilities—case studies provides details on some of these experiences.

**100. Successful processes for engaging with a community to seek consent for a new type of nuclear facility have a range of key characteristics, such as:**

**a. transparency of the decision-making framework and requirements for licensing and approval, and a willingness to adapt that framework as necessary to meet new or unforeseen developments**

Transparency requires that factual and timely information on a proposal is made available to the affected community.<sup>15</sup> Proponents, local governments, regulators and parliaments play significant roles in ensuring that communities understand what is being proposed and the requirements for licensing and approval.<sup>16</sup> Transparency among and from these agents helps to build trust in the regulatory oversight and safety of any activity.

Adaptability and flexibility have been key features of successful engagement processes in a number of countries including Canada and the United Kingdom. This has enabled participating communities to slow or accelerate their engagement based on their particular needs. The engagement processes have been flexible enough to evolve based on experience.<sup>17</sup>

**b. willingness to accept longer community engagement timeframes than usual for typical developments and avoid fixing arbitrary interim deadlines**

The technical and complex nature of nuclear activities and the timeframes required to effectively build community understanding about a proposal, means that the community engagement process would take longer than for other industrial developments. Deadlines set primarily for commercial and technical reasons, without considering the community's need to consider and digest information, can undermine community confidence and its willingness to ultimately provide consent. Setting arbitrary timeframes at the start of a process can undermine public confidence in the community engagement approach.

**c. early and deep engagement with local communities to build their knowledge and understanding using a partnership model between the proponent and the community**

International experience in siting nuclear facilities shows that involving communities in early decisionmaking can improve project outcomes.<sup>18</sup> Building community capacity to participate in or engage with developments can improve, for example, facility design or environmental monitoring by harnessing local knowledge.<sup>19</sup> At the same time, the community gains greater knowledge and understanding of the project.

Successful means of engagement and knowledge building used by nuclear project proponents include: site tours of similar developments or facilities, community meetings, visitor centres, newsletters, websites, and community shopfronts or reading rooms.<sup>20</sup> A partnership model for engagement, used successfully overseas, creates a forum in which stakeholders work together to develop conceptual designs for nuclear facilities, build knowledge and share information.<sup>21</sup> Such a model could also be the vehicle through which the threshold for community consent is defined and consent provided.<sup>22</sup> Members of partnerships may include the project proponent, affected communities, experts, the regulator and local government. The partnership model developed in Belgium for a nuclear waste management facility was particularly successful and could be adapted to suit the South Australian context. The precise model and membership structure would need to be developed in close consultation with any affected communities.

**d. an ability for local communities to engage in a learning process about hosting a facility without being required to commit to the facility**

Any siting process would need to allow interested volunteer communities to learn about a proposal and what would be involved in hosting a facility.<sup>23</sup> It would need to be clearly and broadly communicated that volunteering to participate in this learning process would not amount to consent for a siting decision. The process would need to enable communities to decide for themselves whether they wanted to progress to more detailed discussions regarding a proposal.<sup>24</sup> It is critical, drawing from the United Kingdom experience, that there is no threshold for decision-points to participating in the learning process. For local communities and their leadership bodies there are no small decisions on nuclear matters.

**THE BELGIAN PARTNERSHIP MODEL**



Figure 6.1: A site visit held as part of the Belgian partnership model. Image courtesy of ONDRAF/NIRAS.

**The partnership model developed in Belgium successfully facilitated engagement between the country's nuclear waste management agency, ONDRAF/NIRAS, and three potential host communities that expressed willingness to receive information about a proposal for a low and intermediate level radioactive waste disposal facility.<sup>1</sup>**

Partnerships were established to address both the technical and socioeconomic aspects of the proposal, including facility design, safety and health, research and information dissemination, and community development.<sup>2</sup> The partnerships were provided with resources to fund their own research into the proposal. They were conduits of information to and from the wider community.<sup>3</sup> The successful partnership in the municipality of Dessel worked with ONDRAF/NIRAS to modify the proposal design to incorporate additional monitoring mechanisms and to develop a benefits package that was important to the community.<sup>4</sup> See Appendix H for more details.

<sup>1</sup> IPPA Project, *Case study: Site selection of final disposal of LLW and ILW Belgium (local partnership)*, Implementing Public Participation Approaches in Radioactive Waste Disposal, Seventh Euratom Research and Training Framework Programme on Nuclear Energy, European Commission, 2013, p. 1, [http://toolbox.ippaproject.eu/files/LocalPartnership\\_CaseStudy\\_Site-selection-LILW-Belgium\\_20130312.pdf](http://toolbox.ippaproject.eu/files/LocalPartnership_CaseStudy_Site-selection-LILW-Belgium_20130312.pdf).

<sup>2</sup> *ibid.*, p. 2.

<sup>3</sup> STOLA-Dessel, *Belgian low-level and short-lived waste: Does it belong in Dessel?*, STOLA-Dessel, Dessel, 2004, p. 8.

<sup>4</sup> IPPA Project, *Case study: Site selection*, p. 2; ONDRAF/NIRAS, *The cAt project in Dessel: A long-term solution for Belgian category A waste*, Brussels, 2010, [http://www.niras-cat.be/downloads/cAt\\_brochureENG.pdf](http://www.niras-cat.be/downloads/cAt_brochureENG.pdf).

It would become apparent at particular points in the learning process when a community needs the resources to engage more fully and deeply on a proposal. In this respect, the learning process is two-way: the proponent in turn should be able and willing to learn about the community and its needs, concerns and interests, and be prepared to respond accordingly. Such a continuous loop has been adopted and used successfully in Belgium, Canada and, in a revised process, the United Kingdom.

**e. resourcing of a community organisation to:**

**i. deliberate and meet in relation to the proposal**

**ii. engage independent scientific advisors to assist it in relation to issues of importance and to review scientific information**

Resources might include funds for communities to employ independent expert advisers, hold meetings and employ staff to manage the engagement and learning process; or to otherwise allow them to participate on equal terms in proposal deliberations without incurring expenses.<sup>25</sup> Examples of community resourcing include the funding of the Belgian partnerships by the proponent, ONDRAF/NIRAS, and of the Maralinga Tjarutja people in South Australia, where independent scientific advice on the land clean-up was funded by the Australian Government.<sup>26</sup> The level and purpose of community resourcing, including funding, would depend on the community's needs, the degree to which the community engaged with the proposal, and the aspects of the proposal being considered.

**f. the presence of a regulator that is:**

**i. trusted and experienced**

**ii. accessible to the community and willing to provide information on both the regulatory process and its decision making, the proposal and its views on that proposal**

A regulator that is trusted by and accountable and accessible to the community is fundamental to confidence in the proposed activity and, ultimately, to community consent and project success.<sup>27</sup> Public confidence is assisted by an independent and capable regulator that is able to independently verify assessments made by a proponent and willing to communicate its views and assessments to the community.

A function of the Australian Government's nuclear safety regulator, the Australian Radiation Protection and Nuclear Safety Agency, is to engage and provide information to the public.<sup>28</sup> Were a new nuclear activity proposed for South

Australia, it would be important to have a regulator that performed that general role in addition to providing specific information and assessments and analysis of a proposal.

**g. the availability of scientific evidence and, where necessary, multiple, corroborating bodies of evidence to demonstrate the effectiveness of steps taken to address risks**

For communities to have trust in the environmental and public safety of nuclear activities or developments, scientific evidence needs to demonstrate that the risks of any proposal are adequately addressed. Accordingly, community members must have confidence in the accuracy of proponent data and modelling, and the measures proposed to address risks. Data collection processes must be transparent and made available to the public. Scientific evidence needs to be assessed and verified by independent experts and trusted regulators. At all times, steps should be taken to ensure that the information provided to communities is objective and intelligible.<sup>29</sup> Communities may want to engage independent expert advisers to satisfy themselves they clearly understand the risks and how they are to be managed.<sup>30</sup>

**h. provision of a range of benefits, identified as important by the community, for the service it provides to the wider society for hosting that facility**

South Australians can take advantage of opportunities and wisely manage any associated risks to create a positive sustainable legacy for the state, as well as for the local, affected communities. Should a nuclear development proposal receive social consent, the state government would need to lead community discussion to identify principles that would underpin decisions about the investment and distribution of benefits. Rarely have projects succeeded unless they have significant community benefits, and those benefits have been determined in conjunction with the community.

Care should be taken to ensure that any benefits would be sustainable and align with the particular community's goals. There should also be specific regard and planning for the long-term social and economic development of the community.<sup>31</sup> It would be important that benefits are applied broadly across local communities, and specified in advance where possible, to avoid the perception of bribes.<sup>32</sup> Benefits would need to be tangible, significant and negotiated, as with other elements of the proposal.<sup>33</sup> Money should not be paid to communities upfront. Instead, it should be received based on the phased development of the project.

Internationally, public support for siting radioactive waste management facilities has been shown to increase when the benefits are broadened, for example, by collocating such facilities with research institutions that are tasked with investigating disposal techniques, radiation safety and potential future uses of spent fuel.<sup>34</sup> This experience could be considered in South Australia. Research and development into new technologies, and health, social and cultural innovation, could also be supported.

**i. consistency of individuals involved in the development and delivery of those projects.**

The successful development and delivery of a nuclear project requires a long-term personal commitment from stakeholders to see that project through to fruition. Maintaining continuity of stakeholders over time allows relationships to be built and, accordingly, trust and understanding to develop. This is especially important for Aboriginal communities.<sup>35</sup> Engagement with Aboriginal South Australians requires relationships to be built on trust and integrity, viewed as a sustained relationship in which stakeholders work together to achieve shared goals.<sup>36</sup>

Stakeholders will change, and these transitions require planning and management. Efforts should be made to record and effectively transfer knowledge about the processes used to build relationships and any agreements that have been reached.<sup>37</sup>

**101. Any engagement process with a potentially affected community needs to be designed with an understanding of and respect for the way in which that community has formed its views in the past.**

South Australians' attitudes toward nuclear activities have been shaped by historical events in our lifetimes both in and outside the state. These include the British nuclear weapons testing at Maralinga in South Australia in the 1950s and 1960s, and nuclear reactor accidents at Three Mile Island in 1979, Chernobyl in 1986 and Fukushima in 2011.<sup>38</sup> Attitudes also have been influenced by broader cultural and political factors, the media, international influences and education.<sup>39</sup>

A project proponent would have to be able to demonstrate to the South Australian public and all affected or interested communities, how and why the proposed activity would be different to these significant historical events that have contributed to the formation of their attitudes. This reinforces the need for community engagement processes to be flexible and allow access to comprehensive information about a nuclear proposal, as well as to provide sufficient time to absorb and debate the proposal.

Site tours can be useful to show communities exactly what a proposed development would entail.<sup>40</sup> Site tours in this context should be differentiated from those used by industries or organisations as an element of public relations. Their focus must be on supporting informed consent through an opportunity to consider and relate a similar development to the particular circumstances of the interested community. Participants should include respected and trusted opinion leaders in their communities who are able to effectively report what they have seen.<sup>41</sup> Opinion leaders shape debates, and aid community understanding and acceptance of matters of public policy.<sup>42</sup> Therefore, engagement with such leaders would be central to general public and local community understanding of any proposal for a new nuclear development in South Australia.

**102. Applied to the South Australian context, the impact of atomic weapons testing at Maralinga in the 1950s and 1960s remains very significant to Aboriginal people. Those tests, and subsequent actions, have left many Aboriginal people with a deep scepticism about the ability of government to ensure that any new nuclear activities would be undertaken safely.**

The damage caused by the atomic tests carried out by the British Government is still felt profoundly by many Aboriginal South Australians, particularly those from communities that were directly affected. In these communities, nuclear activities in general are often associated with the detrimental effects of the events at Maralinga.<sup>43</sup> This sentiment was reflected in many submissions from Aboriginal individuals and groups received by the Commission.<sup>44</sup> In its submission, the Alinytjara Wilurara Natural Resources Management Board stated:

*It must be remembered that the people of our region suffered significant personal, cultural and social harm as a result of the testing of nuclear weapons. The living memory of this phase of our shared history casts a long shadow over any contemporary conversation regarding the nuclear fuel cycle.<sup>45</sup>*

The 1985 report of the Royal Commission into British Nuclear Tests in Australia (the McClelland Royal Commission) recognised the harm that the testing caused Aboriginal people. It found that Aboriginal people in the Wallatinna area experienced radioactive fallout in the form of a mist or cloud, and that they suffered vomiting or temporary illness as a result of either radiation exposure or a 'psychogenic reaction', or both. On the evidence available, the McClelland Royal Commission could not reach conclusions on whether other illnesses suffered by Aboriginal individuals were caused by fallout from the tests.<sup>46</sup>

While the Nuclear Fuel Cycle Royal Commission is not tasked with examining the many far-reaching impacts of the atomic tests nor the acts of previous governments on this matter, aspects of the Maralinga legacy are relevant to the consideration of any future nuclear activity in the state. It would be important for any government and project proponent to understand the way historical events have shaped the attitudes of South Australians, particularly Aboriginal South Australians, towards nuclear activities.<sup>47</sup> Acknowledging the impacts of the past and enduring concerns would be fundamental to respectful communication and engagement with Aboriginal communities on nuclear issues.<sup>48</sup>

For a specific proposal on land in which there are Aboriginal rights and interests, it would be necessary to demonstrate to Aboriginal communities' satisfaction how the development would be different to the atomic testing and how lessons had been learned from the past.<sup>49</sup> A fundamental lesson, which should be applied from now, is that any new nuclear activity should not proceed unless and until the health and environmental risks are fully understood by the affected community.<sup>50</sup> To this end, a sustained, respectful and inclusive process for educating communities about health and environmental risks, adhering to the principles discussed at Findings 100 and 104, would be essential. Depending on the location and nature of the activity, this may need to address whether any particular risks arise for Aboriginal traditional and contemporary lifestyles.<sup>51</sup>

Another theme that has emerged throughout the Commission's inquiry is scepticism among some Aboriginal South Australians about the ability of government and industry to deliver on future commitments. This concern is founded on past failures.<sup>52</sup> For any engagement process to achieve a fair result, the government and project proponent must ensure that any discussions regarding risks and opportunities are realistic and that commitments made are kept, through, for example, binding agreements with appropriate mechanisms to address ongoing compliance and deal with disputes.<sup>53</sup>

**103. As part of a community engagement process, there are established and sophisticated frameworks that have supported deliberation on complex issues in the past, through which Aboriginal communities in South Australia should be approached.**

South Australia has 20 years' experience with the native title framework, which has been used successfully by communities and proponents to facilitate negotiation and decision-making processes about developments.<sup>54</sup>

Structures in this framework include native title representative organisations, prescribed bodies corporate, Indigenous land use agreements and native title management committees. These structures have processes through which information is presented to and discussed and debated in Aboriginal communities.

Regional authorities are an emerging representative structure for Aboriginal nations<sup>55</sup> and South Australia's natural resources management boards are an additional mechanism through which Aboriginal communities could be engaged. The Alinytjara Wilurara Natural Resources Management Board, for example, has developed successful engagement programs and partnerships between development proponents and communities that have recognised, respected and enhanced the interests and values of all parties to an agreement within the native title framework.<sup>56</sup>

Numerous organisations represent South Australia's Aboriginal communities across a range of functions and interests. A project proponent should take care that, if an organisation has been given responsibility for making a decision in a community, it is the one that the community views as legitimate to make such a decision relevant to that particular issue. Depending on the location, an appropriate combination of mechanisms for engagement with land- and rights-holding structures may be required.

**104. Principles for engagement with Aboriginal communities in many cases apply equally to the urban, regional and remote communities of which they are an integral part. In addition to principles for community engagement set out at Finding 100, the Commission recommends, based on feedback from Aboriginal communities, that the following principles apply:**

**a. any progress towards an activity is based on a principle of negotiation in good faith and on equal terms**

It is essential that the process of engagement with Aboriginal communities empowers people to participate on equal terms in discussions about a proposal.<sup>57</sup> This would require appropriate resourcing of communities, including providing information, expert advice, translation services and staff to manage the learning and engagement process, as discussed at Finding 100.<sup>58</sup> The process would need to allow sufficient time to ensure that Aboriginal people understand the full extent of any potential impacts that may result from the proposed activity and reach informed decisions according to their own processes.<sup>59</sup>

**b. there is a common and realistic understanding as to both the risks and opportunities of the proposed activity—it is essential that benefits are not oversold and risks are not underestimated**

Aboriginal communities would need to be provided with transparent and objective information about the risks and opportunities that may arise from an activity over time.<sup>60</sup> This may include providing some information in graphics<sup>61</sup>, using appropriately trained translators<sup>62</sup>, providing funding for independent expert advisors<sup>63</sup>, or taking community representatives on tours of similar sites.<sup>64</sup> The communities would also need to understand and agree to the distribution and future use of any benefits arising from the project. It should also be acknowledged that for Aboriginal communities, cultural values will underpin the balancing and weighting of risk against benefit and guide decisions on 'acceptable risk'.

**c. there is early engagement with representative organisations and the local community about a proposed activity, including preparing a framework for further engagement**

Taking time to establish relationships with community members and their representatives at the outset of a proposal can deliver better outcomes in the later phase of the process.<sup>65</sup> Early and sustained engagement with Aboriginal communities should start with developing an agreed approach to consultation, with the nature of the engagement process to be determined by the participating communities.<sup>66</sup> Given community willingness to recognise and respect traditional knowledge in South Australia<sup>67</sup>, a project proponent should be open to using such local knowledge to inform facility designs and make siting decisions, as has occurred overseas.<sup>68</sup> A genuine recognition of cultural knowledge and an opportunity for knowledge sharing with other aspects of project planning and design have the potential to enhance overall project outcomes.

**d. the proposals place particular emphasis on long-term risks and opportunities**

Many community groups and individuals have expressed concerns about long-term risks of nuclear development and their potential effect on future generations.<sup>69</sup> If specific nuclear facilities were to be proposed for South Australia, the long-term social, environmental, cultural and economic risks and opportunities and how they would be managed would need to be clearly addressed.<sup>70</sup> It would be important for the project proponent to be able to demonstrate there would be a net positive impact arising from the proposed activity.<sup>71</sup>

**e. the communication process is practical, genuine and agreed by the community**

Communication between stakeholders should be face-to-face where possible<sup>72</sup>, conducted in accordance with a process devised by the community<sup>73</sup>, and continuous.<sup>74</sup> Resources should be allocated so that stakeholders can meet face-to-face.<sup>75</sup> This will be understood by a community to be genuine if the proponent and other stakeholders do what they say they will do. That process is assisted if outcomes are agreed and can then be seen to be implemented.

**f. realistic, and potentially longer than usual, timeframes are set for the community engagement process and decision making**

Engagement and decision-making processes will need to proceed at a pace that is acceptable to the affected community so that it can receive, learn about, assess and act on information according to its own needs, values and interests.<sup>76</sup> Accordingly, longer timeframes may be required for free and informed decisions to be reached collectively by communities.<sup>77</sup> Any requirement to build additional community capacity so that it could participate in the learning and decision-making processes on equal terms would need to be factored into the timeframe.<sup>78</sup>

**g. the community is supported to make its own decision, whether yes or no, free from the influence or pressure of the proponent or lobby groups with their own agendas**

Communities participating in discussions about a proposal must be able to learn, deliberate and make decisions free from external pressure, influence, coercion, intimidation or manipulation.<sup>79</sup> Care should be taken to ensure that any misinformation is quickly corrected and that information provided is objective and independently verified.<sup>80</sup>

Aboriginal communities in particular can be vulnerable to criticism from external sources if they engage in a process to learn about a nuclear activity. This has occurred in the Northern Territory and Western Australia.<sup>81</sup> Communities that volunteer to partake in a process would need to be supported to cope with such criticism.<sup>82</sup> It would also be important that those communities and individuals who do not support a particular proposal are treated with respect.<sup>83</sup>

Success should not be measured in terms of a community providing consent to a particular activity or development.<sup>84</sup> Instead, it should be measured by a community making a free and informed decision—regardless of whether that is yes or no. Communicating this at the outset of a proposal would increase the legitimacy of the community engagement processes.<sup>85</sup>

## LAND, HERITAGE AND RESPECTING RIGHTS

**105. To the extent that any project would be proposed on land in which there are Aboriginal rights and interests, including native title rights and interests, they must be respected.**

While suggesting suitable sites for any new facility is beyond the scope of the Commission's inquiry, it also must be acknowledged that the range of Aboriginal rights and interests in South Australian land is widespread and diverse. These include those recognised and protected under the *Native Title Act 1993* (Cth) and the *Aboriginal Heritage Act 1988* (SA), through mechanisms such as the right to negotiate and Indigenous land use agreements<sup>86</sup>, as well as rights and interests in Aboriginal freehold land established under specific legislation.<sup>87</sup> A proponent of a nuclear development would need to understand and adhere to the frameworks that protect Aboriginal rights and interests.

While existing legal and regulatory regimes provide some protection and guidance, more than bare observance of legal requirements would be required. Early and meaningful engagement by a proponent would be fundamental to demonstrating genuine respect for rights and interest holders.<sup>88</sup>

**106. The deep connection that Aboriginal people have with the land and their responsibility for its care must be understood and respected by any nuclear project proponent.**

For many Aboriginal people, identities are defined in terms of their relationship to their lands, as the following quotation attests:

*Native title rights and interests are integrally linked to the health of country, with rights and interests including the right to hunt, gather, camp, conduct ceremonies, teach younger generations and conduct cultural activities. These depend on a healthy environment, and without a healthy environment, cultural practices are put at risk.*<sup>89</sup>

As evidenced by submissions to the Commission, many Aboriginal people view nuclear activities as dangerous acts that bring harm to the land and, therefore, harm to themselves, their ancestors and their descendants.<sup>90</sup> This extends to a belief in the need to proactively protect land and heritage. These views reinforce the need for a project proponent to exercise great care and consideration in the way it engages with and seeks to inform a community about any proposal to avoid social harm. In demonstrating

understanding of and respect for Aboriginal people's connection to the land and their desire to continue to practise their living tradition, proponents would need to engage with Aboriginal communities according to the principles outlined at Finding 100, ensuring that cultural and land rights and interests are respected and protected.

**107. There are existing regulatory mechanisms for the protection and preservation of Aboriginal heritage, which would, with some qualifications, apply to any future nuclear developments in South Australia.**

The Aboriginal Heritage Act establishes the key framework for protecting Aboriginal heritage in South Australia. Under this Act, it would be an offence for a proponent embarking on a new nuclear development to damage, disturb or interfere with Aboriginal sites, objects and remains.<sup>91</sup> Under this framework, proponents should gather as much information as possible about heritage sites by working closely with local Aboriginal groups.<sup>92</sup> Proponents may apply to the Minister for Aboriginal Affairs and Reconciliation for authorisation to undertake an activity that would disturb a heritage site.<sup>93</sup> In determining whether to authorise such an activity, the Minister is required by the Aboriginal Heritage Act to consult with interested Aboriginal organisations and individuals, and traditional owners.<sup>94</sup> Aboriginal heritage can also be protected through binding agreements and Aboriginal cultural heritage management plans.<sup>95</sup>

The exception to this framework is the Olympic Dam mine. In the event of expanded operations as a result of the *Roxby Downs (Indenture Ratification) Act 1982* (SA), the predecessor to the Aboriginal Heritage Act, the *Aboriginal Heritage Act 1979* (SA) applies with some qualification.<sup>96</sup> However, heritage issues are addressed under the Olympic Dam Agreement between the mine owner BHP Billiton and the Barngarla, Kokatha and Kuyani Aboriginal groups. This agreement contains a Heritage Management Protocol that places further obligations on BHP Billiton for Aboriginal heritage protection and management.<sup>97</sup>

Although a systematic analysis was beyond the scope of the Commission, it has heard criticisms of the heritage protection framework, particularly the consultative provisions.<sup>98</sup> It has also heard of both positive and negative experiences concerning respect for the views of Aboriginal communities. A consistent theme is that it is critical to the satisfaction of a community that a project proponent does not seek to aggressively pursue a minimum legal compliance approach to Aboriginal heritage management.

Additional mechanisms for protecting Aboriginal heritage exist within the native title framework. Aboriginal heritage is among the wide range of matters that can be addressed in binding Indigenous land use agreements and in agreements made under the *Mining Act 1971 (SA)*.<sup>99</sup>

In relation to exploration and mining, specific regulatory requirements including programs for environment protection and rehabilitation (PEPRs) and conditions imposed on mining licences are to ensure that the protection and management of Aboriginal heritage is addressed before the start and during operation of a mine.<sup>100</sup>

The Aboriginal Heritage Act has recently been amended to clarify and preserve the rights and interests of a 'Recognised Aboriginal Representative Body', which may correspond with the registered native title body corporate in respect of any area.<sup>101</sup> The amendments recognise that it is desirable for a project proponent to negotiate a local heritage agreement with such a representative body before seeking the Minister's authorisation. Assuming these amendments will enter into effect, a proponent should ensure that it plans and implements any project by working closely and genuinely with the relevant Aboriginal communities and in accordance with the practical guidance set out in this chapter.

**108. From a practical standpoint, bearing in mind the concerns expressed in many submissions about potential risks to heritage and culture posed by developments, there are important principles that any nuclear proponent should observe.**

While compliance with regulatory frameworks is essential for any proponent wanting to progress a proposal, it is equally critical that a proponent ensures that:

- a. those with knowledge and responsibility for heritage in a community clearly understand the nature and extent of a proposal
- b. processes are established that exhaustively identify what must be protected
- c. negotiations about proposals accommodate concerns about heritage
- d. what is agreed as a result of negotiation is legally binding
- e. mechanisms exist to monitor ongoing compliance with agreed commitments and address disputes arising between parties.

Early engagement with a community about these protections would be essential to building the type of trusting and sustainable relationship required for any project to progress.

## NOTES

- 1 Transcripts: Company, p. 1091–1092; Ellis, p. 1449; Jenkins-Smith p. 1078. Nuclear Waste Management Organisation (NWMO), *Moving forward together: process for selecting a site for Canada's deep geological repository for used nuclear fuel*, NWMO, Canada, 2010, p. 19.
- 2 NWMO, *Moving forward together*, p. 19.
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