

South Australia

Aboriginal Heritage (Miscellaneous) Amendment Act 2016

An Act to amend the *Aboriginal Heritage Act 1988*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Aboriginal Heritage (Miscellaneous) Amendment Act 2016*.

2—Commencement

- (1) Subject to subsection (2), this Act will come into operation on the day on which it is assented to by the Governor.
- (2) The provisions of Part 2 (other than section 5) will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Aboriginal Heritage Act 1988*

4—Amendment of section 3—Interpretation

- (1) Section 3—before the definition of *Aboriginal object* insert:

Aboriginal Heritage Guidelines or *guidelines* means the guidelines published under Part 2A, as in force from time to time;
- (2) Section 3—after the definition of *local archives* insert:

local heritage agreement means a local heritage agreement under section 19H, as in force from time to time;
- (3) Section 3—after the definition of *private land* insert:

Recognised Aboriginal Representative Body, in respect of an area, or an Aboriginal site, object or remains, means the Recognised Aboriginal Representative Body in respect of the area, site, object or remains determined or appointed in accordance with Part 2B;

5—Amendment of section 6—Delegation

- (1) Section 6(2)—delete subsection (2)
- (2) Section 6(4)—delete subsection (4)

6—Amendment of section 7—Aboriginal Heritage Committee

Section 7(2)—after "Minister to" insert:

perform the functions required under this Act and to

7—Amendment of section 13—Consultation on determinations, authorisations and regulations

Section 13(3)—after paragraph (b) insert:

or

- (c) an authorisation under Part 3 in relation to which a local heritage agreement has been approved under section 19I.

8—Amendment of section 14—Authorisations subject to conditions

Section 14—after its present contents (now to be designated as subsection (1)) insert:

- (2) A person who, without reasonable excuse, contravenes or fails to comply with a condition of an authorisation under this Act is guilty of an offence.

Maximum penalty:

- (a) in the case of a body corporate—\$50 000;
- (b) in any other case—\$10 000 or imprisonment for 6 months.

9—Insertion of Part 2A

After section 19 insert:

Part 2A—Aboriginal Heritage Guidelines

19A—Minister may publish guidelines

- (1) The Minister may, by notice in the Gazette, publish guidelines in relation to the operation of this Act (the *Aboriginal Heritage Guidelines*).
- (2) The Minister may, by subsequent notice in the Gazette, substitute, vary or revoke the guidelines.
- (3) Before publishing the guidelines, or substituting or varying the guidelines, the Minister must consult with the Committee (and may consult with any other person or body the Minister thinks fit).
- (4) The Minister must cause a copy of the guidelines—
 - (a) to be published on a website determined by the Minister;and

- (b) to be kept available for public inspection, without charge and during ordinary office hours, at an office or offices determined by the Minister.

Part 2B—Recognised Aboriginal Representative Bodies

19B—Recognised Aboriginal Representative Bodies

- (1) For the purposes of this Act, the *Recognised Aboriginal Representative Body* for—
 - (a) a specified area; or
 - (b) a specified Aboriginal site or sites; or
 - (c) a specified Aboriginal object or objects; or
 - (d) specified Aboriginal remains,is to be determined in accordance with this Part.
- (2) *Anangu Pitjantjatjara Yankunytjatjara* will be taken to be the Recognised Aboriginal Representative Body in respect of the lands (within the meaning of the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981*).
- (3) *Maralinga Tjarutja* will be taken to be the Recognised Aboriginal Representative Body in respect of the lands (within the meaning of the *Maralinga Tjarutja Land Rights Act 1984*).
- (4) Subject to this Part, a registered native title body corporate (within the meaning of the *Native Title Act 1993* of the Commonwealth) will be taken to be appointed as the Recognised Aboriginal Representative Body in respect of the area that is the subject of the relevant native title determination under that Act (including, to avoid doubt, areas within that area in which native title has been extinguished or suppressed).
- (5) However, an appointment under subsection (4) will only have effect if the appointment is approved by the Committee (and, to avoid doubt, the Committee may refuse to approve an appointment for any reason the Committee thinks fit).
- (6) If the Committee refuses to approve an appointment under subsection (4), that subsection will be taken to no longer apply in respect of the area that is the subject of the relevant native title determination.
- (7) A registered native title body corporate that would, but for this subsection, be taken to be appointed as the Recognised Aboriginal Representative Body in respect of a particular area may, by notice given in a manner and form determined by the Committee, elect not to be the Recognised Aboriginal Representative Body in respect of the area, a specified part of the area or a specified Aboriginal site, object or remains within the area.

- (8) On giving notice under subsection (7)—
- (a) the appointment of the registered native title body corporate as the Recognised Aboriginal Representative Body in respect of the area will be taken to have been revoked; and
 - (b) if the notice relates to a specified part of an area, or a specified Aboriginal site, object or remains within the area—the registered native title body corporate will be taken to be appointed in respect of the remainder of the area; and
 - (c) subsection (4) will be taken to no longer apply in respect of the area, or the specified part of the area or specified Aboriginal site, object or remains (as the case requires).
- (9) The Committee may, on application, appoint the following persons or bodies as the Recognised Aboriginal Representative Body in respect of a specified area:
- (a) in respect of an area that is the subject of a claim to hold native title under the *Native Title Act 1993* of the Commonwealth—the registered native title claimants (within the meaning of that Act) in respect of the claim, or specified members of the registered native title claimants;
 - (b) in respect of an area that is the subject of an indigenous land use agreement under the *Native Title Act 1993* of the Commonwealth and is not an area contemplated by subsection (2), (3) or (4)—an Aboriginal party to that agreement, or specified members of an Aboriginal party to the agreement.
- (10) The Committee may, on application, appoint a person or body as the Recognised Aboriginal Representative Body in respect of a specified area (other than an area in respect of which there is already a Recognised Aboriginal Representative Body pursuant to subsection (2), (3) or (4)) or a specified Aboriginal site, object or remains.
- (11) An application under this section must, if the Committee so requires, be accompanied by—
- (a) if a determination of native title covers all or part of any land to which the application relates—a copy of the determination; and
 - (b) if an indigenous land use agreement has been entered in respect of all or part of any land to which the application relates—a copy of the agreement; and
 - (c) if an agreement under Part 2 Division 3 Subdivision P of the *Native Title Act 1993* of the Commonwealth has been entered in respect of all or part of any land to which the application relates—a copy of the agreement; and

- (d) if a native title mining agreement or native title mining determination under the *Mining Act 1971* or the *Opal Mining Act 1995* applies in respect of all or part of any land to which the application relates—a copy of the agreement or determination (as the case requires); and
 - (e) if the application relates to a particular area—a description and map of the area in a form determined by the Committee; and
 - (f) if the applicant is a registered native title body corporate—a copy of the constitution and rules of the body corporate; and
 - (g) any other document or information that the Committee may reasonably require.
- (12) Before appointing a person or body as a Recognised Aboriginal Representative Body under subsection (9) or (10), the Committee—
- (a) must be satisfied that the person or body—
 - (i) is able to ascertain and represent the views and knowledge of traditional owners of the relevant area in respect of matters relevant to the operation of this Act (including matters that involve gender-specific requirements, or some other qualification, according to the traditions of the traditional owners); and
 - (ii) satisfies any other requirements set out in the regulations or the guidelines for the purposes of this paragraph; and
 - (b) must comply with any requirements set out in the regulations for the purpose of this paragraph.
- (13) The Committee may give written reasons in relation to an appointment or other decision under this section.
- (14) A Recognised Aboriginal Representative Body must be a body corporate that—
- (a) has perpetual succession and a common seal; and
 - (b) can sue and be sued in its corporate name.
- (15) If a document appears to bear the common seal of a Recognised Aboriginal Representative Body, it will be presumed, in the absence of proof to the contrary, that the common seal of the Recognised Aboriginal Representative Body was duly fixed to the document.

19C—Priority where multiple applications

- (1) If there is more than 1 application under section 19B for appointment as a Recognised Aboriginal Representative Body in respect of a particular area, or a particular Aboriginal site, object or remains, the Committee should give priority to the applicant that the available evidence suggests has the strongest affiliation with, and responsibility for, the area, site, object or remains in accordance with Aboriginal tradition.
- (2) Without limiting subsection (1), the Committee may, if it considers it appropriate to do so, attempt to resolve any dispute relating to the applications by mediation between the parties.

19D—Additional functions of Recognised Aboriginal Representative Body

In addition to any function expressly conferred by or under this Act, the functions of a Recognised Aboriginal Representative Body include—

- (a) advising the Minister in relation to matters affecting Aboriginal heritage in respect of the area for which the Recognised Aboriginal Representative Body is appointed; and
- (b) carrying out other functions assigned to the Recognised Aboriginal Representative Body under any other Act or by the Minister.

19E—Revocation and suspension of appointment of Recognised Aboriginal Representative Body by Committee

- (1) The Committee must, by notice in writing, revoke the appointment of a Recognised Aboriginal Representative Body (other than Anangu Pitjantjatjara Yankunytjatjara or Maralinga Tjarutja in their capacity as Recognised Aboriginal Representative Bodies for their respective lands) at the request of the Recognised Aboriginal Representative Body.
- (2) The Committee may, by notice in writing, revoke or suspend the appointment of a Recognised Aboriginal Representative Body appointed under section 19B(9) or (10) if—
 - (a) the Recognised Aboriginal Representative Body no longer satisfies the requirements contemplated by section 19B(12)(a); or
 - (b) the Recognised Aboriginal Representative Body has failed or refused, or is likely to fail or refuse, to perform a function under this Act; or
 - (c) the Recognised Aboriginal Representative Body has acted in a manner that is, in the Committee's opinion, at variance with the objects of this Act.

- (3) The revocation of the appointment of a Recognised Aboriginal Representative Body under this section does not, of itself—
 - (a) affect any right or interest created or exercisable prior to the revocation; or
 - (b) affect any duty, obligation or liability imposed, created or incurred prior to the revocation; or
 - (c) affect any legal proceedings or remedy in respect of any the matters referred to in a previous paragraph.
- (4) A previous act or decision of a Recognised Aboriginal Representative Body is not invalid merely because the appointment of the Recognised Aboriginal Representative Body is revoked under this section.

19F—Revocation of appointment of Recognised Aboriginal Representative Body by Minister

- (1) The Minister may, on application or on his or her own motion, by notice in writing, revoke the appointment of a Recognised Aboriginal Representative Body for any reason he or she thinks fit (including, but not limited to, the reasons set out in section 19E(2)).
- (2) To avoid doubt, subsection (1) does not apply in relation to Anangu Pitjantjatjara Yankunytjatjara or Maralinga Tjarutja in their capacity as Recognised Aboriginal Representative Bodies for their respective lands.
- (3) The Minister may, if he or she revokes the appointment of a Recognised Aboriginal Representative Body under this section, do 1 or more of the following:
 - (a) appoint a specified person or body as the Recognised Aboriginal Representative Body in substitution for that Recognised Aboriginal Representative Body;
 - (b) reappoint the relevant person or body as the Recognised Aboriginal Representative Body in respect of an area (other than a specified part of the area, or specified Aboriginal sites, objects or remains located within the area);
 - (c) give such directions as the Minister thinks fit to the Committee in relation to subsequent appointments of a Recognised Aboriginal Representative Body in respect of the relevant area, or a specified Aboriginal site, object or remains.
- (4) Before revoking the appointment of a Recognised Aboriginal Representative Body under this section, or taking action under subsection (3), the Minister must consult with the Committee (and may consult with any other person or body the Minister thinks fit).

- (5) If—
- (a) the Minister revokes the appointment of a Recognised Aboriginal Representative Body taken to be appointed under section 19B(4); or
 - (b) revokes such an appointment and reappoints the person or body as the Recognised Aboriginal Representative Body in respect of the area (other than a specified part of the area, or specified Aboriginal sites, objects or remains located within the area),
- that subsection will be taken to no longer apply in respect of the area, the specified part of the area or specified Aboriginal site, object or remains located within the area (as the case requires).
- (6) The revocation of the appointment of a Recognised Aboriginal Representative Body under this section does not, of itself—
- (a) affect any right or interest created or exercisable prior to the revocation; or
 - (b) affect any duty, obligation or liability imposed, created or incurred prior to the revocation; or
 - (c) affect any legal proceedings or remedy in respect of any of the matters referred to in a previous paragraph.
- (7) A previous act or decision of a Recognised Aboriginal Representative Body is not invalid merely because the appointment of the Recognised Aboriginal Representative Body is revoked under this section.

19G—Register

- (1) The Committee must establish and maintain a register of Recognised Aboriginal Representative Bodies.
- (2) The register must contain the information required by the regulations in respect of each Recognised Aboriginal Representative Body, and may contain such other information as the Committee thinks fit.
- (3) The register may only be inspected in accordance with the regulations.

10—Insertion of Part 3 Divisions A1, A2 and A3

Part 3—before Division 1 insert:

Division A1—Agreement making with Recognised Aboriginal Representative Bodies

19H—Negotiation of agreement with Recognised Aboriginal Representative Body

- (1) Subject to this Act, an applicant for an authorisation under section 21 or 23 (the *proponent*) may, if there is a Recognised Aboriginal Representative Body in respect of an area, or in respect of an Aboriginal site, object or remains, to which the application relates—
 - (a) negotiate with the Recognised Aboriginal Representative Body; and
 - (b) enter into an agreement (a *local heritage agreement*) with the Recognised Aboriginal Representative Body,
in respect of the area, site, object or remains to which the application relates.
- (2) A Recognised Aboriginal Representative Body may refuse to negotiate or enter an agreement under this section for any reason it thinks fit.
- (3) Each person or body taking part in negotiations under subsection (1) must do so in good faith.
- (4) A local heritage agreement must contain the provisions, and set out the information, required by the regulations and the guidelines (and may contain any other provisions the parties to the agreement think fit).
- (5) Without limiting subsection (4), the regulations may require a local heritage agreement to contain—
 - (a) a provision limiting the costs or charges payable in relation to the agreement (whether by reference to a specified amount, a proportion of the total costs of a specified project or otherwise); or
 - (b) provisions relating to dispute resolution.
- (6) A local heritage agreement does not have effect until it has been approved by the Minister under section 19I, and, following such approval, has effect—
 - (a) if a commencement day that falls earlier than the day on which the authorisation to which the agreement relates takes effect is specified in the agreement—from that day; or
 - (b) in any other case—from the time the authorisation to which the agreement relates takes effect,
and remains in force until—

- (c) if the agreement specifies a day on which it ceases to have effect—that day; or
 - (d) —
 - (i) the authorisation to which the agreement relates ceases to have effect; and
 - (ii) all requirements under the agreement have been satisfied; or
 - (e) the agreement is revoked in accordance with this Act, whichever occurs first.
- (7) A local heritage agreement may, with the written agreement of all parties to the agreement and with the approval of the Minister, be varied or revoked.

19I—Approval of local heritage agreement by Minister

- (1) A local heritage agreement must be submitted to the Minister for approval in a manner and form determined by the Minister.
- (2) The Minister must, as soon as is reasonably practicable after receipt of the agreement, determine whether or not to approve the local heritage agreement.
- (3) The Minister may approve a local heritage agreement if he or she is satisfied that the agreement satisfactorily deals with Aboriginal sites, objects or remains known to be, or that may be, located in the area affected by the application to which the agreement relates.
- (4) The Minister must, in deciding whether or not to approve an agreement, have regard to the matters set out in the regulations and the guidelines for the purposes of this section.
- (5) If the Minister is not satisfied of any matters referred to in this section, the Minister may remit the local heritage agreement to the parties to the agreement for further negotiation and agreement.

19J—Minister to grant certain authorisations where local heritage agreement approved

- (1) The Minister must grant an authorisation under this Part if a local heritage agreement relating to the application has been approved under section 19I (and it is a condition of every authorisation so granted that the person authorised complies with the terms of the local heritage agreement).
- (2) Nothing in this section prevents the Minister from imposing other conditions on an authorisation under section 14 (however, a condition so imposed that is inconsistent with the agreement will, to the extent of the inconsistency, be taken to be void and of no effect).

19K—Enforcement of local heritage agreement

- (1) If—
 - (a) a party to a local heritage agreement fails to comply with the agreement; or
 - (b) there is reason to apprehend that a party to a local heritage agreement may fail to comply with the agreement,any other party to the agreement may apply to the District Court for an order under this section.
- (2) On such an application, the District Court may make such orders as are necessary to secure compliance with the local heritage agreement, or to remedy the default, and to deal with any related or incidental matters.
- (3) However, no order for costs is to be made under subsection (2) unless the District Court considers such an order to be necessary in the interests of justice.

19L—Interaction of Division with other provisions

Nothing in this Division prevents a person from acting in accordance with—

- (a) the authority of the Minister granted under another provision of this Act; or
- (b) an agreement contemplated by Division A2.

Division A2—Agreements affecting Aboriginal heritage under other Acts

19M—Application of Division

This Division applies to—

- (a) an indigenous land use agreement under the *Native Title Act 1993* of the Commonwealth; or
 - (b) an agreement under Part 2 Division 3 Subdivision P of the *Native Title Act 1993* of the Commonwealth; or
 - (c) a native title mining agreement under the *Mining Act 1971* or the *Opal Mining Act 1995*; or
 - (d) an agreement under the *Land Acquisition Act 1969* relating to native title rights and made in relation to a prescribed private acquisition (within the meaning of that Act); or
 - (e) an agreement, or an agreement of a class, declared by the regulations to be included in the ambit of this subsection,
- approved by the Minister under section 19N for the purposes of this Division.

19N—Approval of agreements to which Division applies

- (1) The Minister may, on application or on his or her own motion, by notice in writing, approve an agreement referred to in section 19M for the purposes of this Division.
- (2) An approval may be conditional or unconditional.
- (3) Before approving an agreement, the Minister must consult with the Committee (and may consult with any other person or body the Minister thinks fit).
- (4) The Minister may only approve an agreement if he or she is satisfied that the agreement satisfactorily deals with Aboriginal sites, objects or remains known to be, or that may be, located in the area to which the agreement relates.

19O—Variation, revocation or suspension of approval

- (1) The Minister may, by notice in the Gazette, vary, revoke or suspend an approval under section 19N for any reason he or she thinks fit.
- (2) Before varying, revoking or suspending an approval under this section, the Minister must consult with the Committee (and may consult with any other person or body the Minister thinks fit).

19P—Certain provisions of Part not to apply in relation to acts done under approved agreements

Subject to this Division, sections 21 and 23 do not apply to, or in relation to, an act or omission done in accordance with an agreement to which this Division applies.

Division A3—Register

19Q—Register

- (1) The Minister must establish and maintain a register consisting of—
 - (a) local heritage agreements; and
 - (b) agreements to which Division A2 applies.
- (2) The register must contain the information required by the regulations and may contain such other information as the Committee thinks fit.
- (3) The register may only be inspected in accordance with the regulations.
- (4) The Governor may only make regulations for the purposes of this section on the recommendation of the Minister given after consultation with the Committee.

11—Amendment of section 24—Directions by Minister restricting access to sites, objects or remains

(1) Section 24—after subsection (2) insert:

- (2a) The Minister must, before giving directions under this section, have regard to—
 - (a) any local heritage agreement in respect of the site, object or remains; and
 - (b) any agreement to which Part 3 Division A2 applies that relates to the site, object or remains.

(2) Section 24(4)—after paragraph (a) insert:

- (ab) if there is a Recognised Aboriginal Representative Body in respect of the area in which the Aboriginal site, object or remains are located, or in respect of the Aboriginal site, object or remains—the Recognised Aboriginal Representative Body; and

12—Amendment of section 25—Directions by inspector restricting access to sites, objects or remains

Section 25—after subsection (1) insert:

- (1a) An inspector must, before giving directions under this section, have regard to—
 - (a) any local heritage agreement in respect of the site, object or remains; and
 - (b) any agreement to which Part 3 Division A2 applies that relates to the site, object or remains.

13—Amendment of section 37A—Aboriginal heritage agreements

Section 37A(5)—after paragraph (a) insert:

- (ab) if there is a Recognised Aboriginal Representative Body in respect of the area in which the land is located, or in respect of the Aboriginal site, object or remains—the Recognised Aboriginal Representative Body; and

14—Insertion of section 37E

Before section 38 insert:

37E—Applications under Act

An application under this Act must—

- (a) be made in a manner and form determined by—
 - (i) in the case of an application made to the Committee—the Committee; or
 - (ii) in any other case—the Minister; and

- (b) include such information and documents as the Minister or the Committee (as the case requires) may reasonably require; and
- (c) be accompanied by the prescribed fee.

Schedule 1—Transitional provision

1—Delegations under section 6(2) of the *Aboriginal Heritage Act 1988*

- (1) Despite section 16 of the *Acts Interpretation Act 1915* or a provision of any other Act or law—
 - (a) a request of traditional owners of an Aboriginal site or object made under section 6(2) of the *Aboriginal Heritage Act 1988* (as in force before the commencement of this clause) for the delegation of the Minister's powers but in relation to which a delegation has not yet been made will, by force of this subclause, be taken to be void and of no effect;
 - (b) any right to make a request under section 6(2) of the *Aboriginal Heritage Act 1988* that exists on the commencement of this clause is, by force of this subclause, extinguished.
- (2) Without limiting subclause (1), a delegation under section 6(2) of the *Aboriginal Heritage Act 1988* (whether made before or after the commencement of this clause) will, by force of this subclause, be taken to be revoked.