

South Australia

Aboriginal Heritage Regulations 2016

under the *Aboriginal Heritage Act 1988*

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Schedule 1—Fees

1—Short title

These regulations may be cited as the *Aboriginal Heritage Regulations 2016*.

2—Commencement

These regulations will come into operation on the day that section 9 of the *Aboriginal Heritage (Miscellaneous) Amendment Act 2016* comes into operation.

3—Interpretation

In these regulations—

Act means the *Aboriginal Heritage Act 1988*.

4—Information to be contained in register of Recognised Aboriginal Representative Bodies

- (1) For the purposes of section 19G(2) of the Act, the following information is required:
 - (a) the name and address of the body corporate from time to time constituting the Recognised Aboriginal Representative Body;
 - (b) the name of each person who is a director or member of the body corporate from time to time constituting the Recognised Aboriginal Representative Body;
 - (c) the address and contact details of the principal place of business of the Recognised Aboriginal Representative Body;
 - (d) subject to section 10 of the Act, a description of the area, Aboriginal site, Aboriginal object or Aboriginal remains in respect of which the Recognised Aboriginal Representative Body is determined or appointed;

Note—

Section 10 of the Act requires the confidentiality of certain information entered in the central or local archives to be maintained.

- (e) if the Recognised Aboriginal Representative Body was appointed under section 19B(9)—a copy of the relevant native title claim or indigenous land use agreement (as the case requires).
- (2) A Recognised Aboriginal Representative Body must notify the Committee as soon as is reasonably practicable (but in any case within 90 days) if any of the information referred to in subregulation (1) changes.
- (3) For the purposes of section 19G(3) of the Act, the register may only be inspected with the consent of, and in accordance with any requirements specified by, the Committee.
- (4) In determining whether to grant consent to, or to specify requirements for, inspection of the register under subregulation (3), the Committee must have regard to, and seek to protect, information that is confidential (including, to avoid doubt, information that is commercial-in-confidence or otherwise commercially sensitive).

5—Information to be contained in local heritage agreement

For the purposes of section 19H(4) and (5) of the Act, a local heritage agreement must contain the following provisions and information:

- (a) a provision setting out the area to which the agreement relates;
- (b) subject to section 10 of the Act, a provision setting out any Aboriginal site, Aboriginal object or Aboriginal remains that are known to be in the area to which the agreement relates;

Note—

Section 10 of the Act requires the confidentiality of certain information entered in the central or local archives to be maintained.

- (c) a provision setting out the proposed activities to which the agreement relates;
- (d) a provision setting out what steps are to be taken on the discovery of an Aboriginal site, Aboriginal object or Aboriginal remains;
- (e) a provision providing that, subject to the Act, any question arising as to the significance of a particular Aboriginal site or Aboriginal object to Aboriginal tradition, archaeology, anthropology or history is to be decided by the Recognised Aboriginal Representative Body in respect of the area, site, object or remains;

Note—

See the definition of *Aboriginal Object* and *Aboriginal site* in section 3 of the Act.

- (f) a provision limiting the costs or charges payable in relation to the agreement;
- (g) a provision setting out the processes for resolving disputes arising in relation to the agreement;
- (h) information explaining the process by which the agreement was negotiated (including information relating to any consultation undertaken during the negotiation process).

6—Approval of local heritage agreement

For the purposes of section 19I of the Act, the Minister must, in deciding whether or not to approve a local heritage agreement, have regard to the following matters:

- (a) whether the traditional owners of any area, and any Aboriginal site, object or remains, affected by the proposed local heritage agreement were consulted, and agreed to, the agreement being entered into;
- (b) whether any payment that has been, or is to be, made to a Recognised Aboriginal Representative Body, traditional owners or any other person in relation to the agreement is reasonable;
- (c) any relevant information (being information of which the Minister is aware) kept in the central or local archives.

7—Information to be contained in register of agreements

- (1) For the purposes of section 19Q(2) of the Act, the following information is required:
 - (a) in the case of a local heritage agreement—
 - (i) a copy of the application for authority under section 21 or 23 of the Act to which the agreement relates;
 - (ii) details of any variation to the agreement (including the date on which the variation takes effect);
 - (iii) details sufficient to identify any report or survey referred to in the agreement or upon which the agreement is wholly or partly based;
 - (b) in the case of an agreement to which Division A2 of the Act applies—
 - (i) the name, address and contact details of each party to the agreement;
 - (ii) details of any variation to the agreement (including the date on which the variation takes effect);
 - (c) in any case—
 - (i) a copy of the local heritage agreement or agreement to which Division A2 of the Act applies (as the case requires);
 - (ii) the name, address and contact details of the principal place of business of the relevant Recognised Aboriginal Representative Body;
 - (iii) the name and address of each party to the agreement.
- (2) For the purposes of section 19Q(3) of the Act, the register may only be inspected—
 - (a) with the consent of each party to the relevant agreement; and
 - (b) in accordance with any requirements specified by the Committee in relation to the relevant agreement.
- (3) In determining whether to specify requirements for inspection of the register under subregulation (2), the Committee must have regard to, and seek to protect, information that is confidential (including, to avoid doubt, information that is commercial-in-confidence or otherwise commercially sensitive).

8—Application fees

For the purposes of section 37E(c) of the act, the prescribed fees are as set out in Schedule 1.

Schedule 1—Fees

Application for notice under section 12 of Act	\$Nil
Application for appointment as Recognised Aboriginal Representative Body under section 19B of Act	\$Nil
Application for approval of local heritage agreement under section 19I of Act—	
(a) where value of project is not more than \$500 000	\$50
(b) where value of project is more than \$500 000 but not more than \$1 000 000	\$100
(c) where value of project is more than \$1 000 000 but not more than \$2 000 000	\$200
(d) where value of project is more than \$2 000 000 but not more than \$5 000 000	\$300
(e) where value of project is more than \$5 000 000	\$500
Application for approval of agreement under section 19M of Act—	
(a) where value of project is not more than \$500 000	\$50
(b) where value of project is more than \$500 000 but not more than \$1 000 000	\$100
(c) where value of project is more than \$1 000 000 but not more than \$2 000 000	\$200
(d) where value of project is more than \$2 000 000 but not more than \$5 000 000	\$300
(e) where value of project is more than \$5 000 000	\$500
Application for search of Register of Aboriginal Sites and Objects—	
(a) for a basic search	\$25
(b) for an extended search	\$75 per hour or part thereof
Application for authority under section 21 of Act (where accompanying local heritage agreement)	\$Nil
Application for authority under section 21 of Act (where no accompanying local heritage agreement)—	
(a) where value of project is not more than \$500 000	\$50
(b) where value of project is more than \$500 000 but not more than \$1 000 000	\$100
(c) where value of project is more than \$1 000 000 but not more than \$2 000 000	\$200
(d) where value of project is more than \$2 000 000 but not more than \$5 000 000	\$300
(e) where value of project is more than \$5 000 000	\$500
Application for authority under section 23 of Act (where accompanying local heritage agreement)	\$Nil
Application for authority under section 23 of Act (where no accompanying local heritage agreement)—	
(a) where value of project is not more than \$500 000	\$50
(b) where value of project is more than \$500 000 but not more than \$1 000 000	\$100
(c) where value of project is more than \$1 000 000 but not more than \$2 000 000	\$200

(d) where value of project is more than \$2 000 000 but not more than \$5 000 000	\$300
(e) where value of project is more than \$5 000 000	\$500
Application for authority under section 29 of Act	\$150
Application for authority under section 35 of Act	\$Nil

Note—

As required by section 10AA(2) of the *Subordinate Legislation Act 1978*, the Minister has certified that, in the Minister's opinion, it is necessary or appropriate that these regulations come into operation as set out in these regulations.

Made by the Governor

on the recommendation of the Minister made after consultation with the Aboriginal Heritage Committee and with the advice and consent of the Executive Council

on

No of 2016



0 Recognised Aboriginal Representative Bodies

Introduction

The *Aboriginal Heritage Act 1988* (the Act) allows for the appointment of Recognised Aboriginal Representative Bodies (RARBs) to manage the effects of exploration, mining, development and other activities on Aboriginal heritage across South Australia.

A RARB is organisation that can enter into a Local Heritage Agreement (under the Act) with proponents to manage the effects of project works on Aboriginal sites, objects or remains within a project area. A RARB may negotiate a Local Heritage Agreement with a proponent when either an application for authorisation to damage, disturb or interfere with Aboriginal heritage¹, or an application to excavate for the purpose of uncovering of an Aboriginal site, object or remains² is lodged under the Act.

A land use proponent whose activity may damage, disturb or interfere with Aboriginal sites, objects or remains or a person proposing to undertake archaeological research who seeks to excavate land to uncover any Aboriginal site, object or remains and who has made an application to the Minister for Aboriginal Affairs and Reconciliation (the Minister) to be authorised to undertake these activities, may enter into a Local Heritage Agreement with a RARB so that impacts to Aboriginal heritage are managed in culturally appropriate ways and in agreement with the traditional owners.

A Local Heritage Agreement is submitted to the Minister who may approve the agreement, if he or she is satisfied that the agreement deals satisfactorily with any sites, objects or remains that may be located in the relevant area. Once approved, the Minister must grant an authorisation to the proponent to excavate the land or to damage, disturb or interfere with any sites, objects or remains on the condition that the proponent complies with the agreement. Local Heritage Agreements do not displace agreements reached by Registered Native Title bodies under Native Title or other acts. However, agreements made by a Registered Native Title Body Corporate can be lodged for approval under the *Aboriginal Heritage Act 1988*.

To be appointed as a RARB for an area, an Aboriginal site, object or remains, a corporate body must be able to demonstrate to the State Aboriginal Heritage Committee that it is able to ascertain and represent the views and knowledge of the traditional owners of the relevant area. A RARB may be appointed by the State Aboriginal Heritage Committee (the Committee) for:

- a specified area
- a specified Aboriginal site or sites
- a specified Aboriginal object or objects
- specified Aboriginal remains.

RARBs established under the Act

Anangu Pitjantjatjara Yankunytjatjara (APY) is established under the Act as the RARB for the APY Lands as defined by the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981*.

Maralinga Tjarutja (MT) is established under the Act as the RARB for the MT Lands as defined by the *Maralinga Tjarutja Land Rights Act 1984*.

¹ Cf section 23 *Aboriginal Heritage Act 1988*

² Cf section 21 *Aboriginal Heritage Act 1988*

A Registered Native Title Body Corporate (RNTBC) is taken to be the RARB for the area of the relevant Native Title determination under the *Native Title Act 1993*, subject to the approval of the State Aboriginal Heritage Committee.

Registered Native Title Body Corporates

Registered Native Title Body Corporates (RNTBCs) represent traditional owners who have established their connection to country under rigorous legal processes. Under the Act, these organisations are taken to be the RARB in respect of the native title determination area, including areas where native title has been extinguished or suppressed. However, the appointment must be approved by the Committee before the organisation can exercise its functions as a RARB.

Prior to the Committee approving the appointment of an RNTBC as a RARB, the Committee will write to the RNTBC and seek confirmation of details including contact details and the boundary of the area over which the corporation is taken to be the RARB. The RNTBC may elect not to be the RARB for the area or part of the area, or for particular sites within the area, and notify the Committee of this decision.

The Committee's intended decision to approve the appointment of the RNTBC will be published on the DSD-AAR website and in a local newspaper and other interested parties may comment on the Committee's intended decision for up to 60 days before the decision is made. At the end of the 60 days, the Committee will consider any material or comments submitted and the RNTBC will be notified in writing of the decision. The Committee's decision will also be published on the DSD-AAR website and an appointment will be entered on the Register of Recognised Aboriginal Representative Bodies.

Other Aboriginal organisations

In areas outside of the APY and MT Lands and where a RNTBC has not been approved for appointment as the RARB any Aboriginal body can apply to be the RARB. This includes:

- The relative native title claimants (or specified members) for an area
- An Aboriginal party (or specified members) in respect to an area subject to an indigenous land use agreement

Applications

An application should be made using the RARB application form and include:

- Name of body corporate as the applicant
- Address of the body corporate
- The name of each director
- Preferred contact name and address for all correspondence
- Evidence of incorporation
- Evidence that the decision to apply to be a RARB has been passed as a legal decision by the members of the body corporate
- A description of the boundary of the area that is the subject of the application
- If the application is for specified Aboriginal sites, objects or remains, a description of the Aboriginal sites, objects or Aboriginal remains and their locations
- Material to support the claim that the applicant is able to ascertain and represent the views of the traditional owners. This type of evidence may include:
 - A copy of any native title claim for all or part of the land related to the application (if applicable)

- A copy of any indigenous land use agreement (if applicable)
- Land and resource arrangements with Government
- Grants of land
- Details of traditional or familial links to the area, site, object or remains
- A description of how these links are recognised by the traditional owners of the area and by other Aboriginal groups
- Evidence of being the primary Aboriginal party in cultural heritage management plans and agreements in the area
- Any other relevant evidence.

An applicant must be a body corporate that has perpetual succession and a common seal and can sue and be sued in its corporate name.

Multiple Applications

If the Committee receives more than one application for appointment as a RARB 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 affiliations with, and responsibility for, the area, site, object or remains in accordance with Aboriginal tradition. The Committee may ask applicants to submit further information to assist the Committee in making decisions in relation to multiple applications.

Mediation

The Committee may, if it considers appropriate to do so, attempt to resolve any dispute relating to multiple applications by mediation between parties. Where the Committee seeks mediation between parties, the Committee may appoint a suitable person accredited under the National Mediator Accreditation Scheme (NMAS) who has experience in mediating between Aboriginal communities. Mediation should be conducted under the NMAS Practice Standards, which is a process that uses the skills of an accredited mediator to assist the participants to make their own decisions in relation to disputes, conflicts or differences among them.

Mediation should be limited to a reasonable attempt to reach a resolution on the issue of the RARB application and should conclude within a reasonable timeframe and cost.

The outcomes of mediation should be reported to the Committee.

Joint Applications

Individuals or organisations may submit a joint application to be the RARB for a specified area, site, object or remains. A joint application would need to be from a single body corporate that includes membership of all the interested parties. The applicant would need to provide evidence that the organisation can ascertain and represent the knowledge and views of the traditional owners from all the groups relevant to the area, site, object or remains.

Approval of Appointments

Approval for appointment as a RARB is given by the Committee. Prior to approving the appointment of a RNTBC as a RARB, the Committee will notify the RNTBC of its intention to approve their appointment. All other appointments will be considered by the Committee on application.

The Committee's considerations will be published on the DSD-AAR website and a notice published in a relevant local newspaper at least 60 days before a decision on an approval is made. Applicants will be notified in writing of the Committee's decision and all appointments will be recorded on the Register of Recognised Aboriginal Representative Bodies.

Register of Recognised Aboriginal Representative Bodies

Information available to the public from the Register of RARBs includes the corporation's name and number, date of registration, area of appointment and name and address of the contact person. The Register may also show links to key public documents, such as the corporation's rule book, held by the office of the Registrar of Indigenous Corporations.

Any site information submitted with an application will remain held or be put into the central archive and remain confidential and subject to section 10 and section 35 of the *Aboriginal Heritage Act 1988*.

Responsibilities of a RARB

Once appointed, a RARB must conduct itself in a manner consistent with its obligations under the Act in that it must maintain its capacity to ascertain and represent the views and knowledge of the traditional owners for the area, site, object or remains that is the subject of their appointment.

It is expected that where a RARB enters into negotiation for a local heritage agreement, it negotiates in good faith. Should the negotiation fail, the RARB should notify the Minister in writing of the failed negotiation as part of any subsequent consultation processes under section 13 of the Act and provide an indication of the points upon which the negotiation failed. There is no obligation for a RARB to enter into negotiation for a local heritage agreement.

In accordance with regulation 4 of the *Aboriginal Heritage Regulations 2016*, a RARB must notify the Committee within three months of any changes to:

- (a) The name and address of the body corporate constituting the RARB
- (b) The name of each person who is a director or member of the body corporate constituting the RARB
- (c) The address and contact details of the principal place of business of the RARB
- (d) Subject to section 10 of the Act, the description of the area, Aboriginal site, object or remains in respect of which the RARB is determined or appointed
- (e) If appointed under section 19(B), the relevant native title claim or indigenous land use agreement (as the case requires).

Revocation and suspension of a RARB

Under the Act, APY and MT are established as the RARB for their respective lands and there is no provision for these bodies to elect not to be appointed the RARB.

RNTBCs may elect not to be appointed as the RARB for their native title area. If an RNTBC elects not to be appointed, they must notify the Committee in a manner and form determined by the Committee. If this occurs, the area for which the RNTBC elects not to be a RARB will be taken to have been revoked and any other Aboriginal corporation may apply to become the RARB for that area.

RARBs may request that the Committee revokes or suspends their appointment as a RARB. For example, a RARB may request a suspension for a temporary period due to sorry business

or other community issues. In another example, a RARB may request revocation of appointment as a RARB for part of their area to allow specific traditional owners who have cultural authority and responsibility for specific sites to apply to be the RARB for the area including those sites.

Appointment of a RARB may be revoked or suspended by the Committee if:

- The RARB is no longer able to ascertain and represent the views and knowledge of the traditional owners of the relevant area, site, object or remains
- The RARB has failed or refused, or is likely to fail or refuse, to perform a function under the Act
- The RARB has acted in a manner that is, in the Committee's opinion, at variance with the objects of the Act.

The Minister may revoke or suspend the appointment of a RARB for any reason he or she deems appropriate.

Notice will be given in writing of the decision to revoke or suspend appointment as a RARB for a particular area and any decisions related to reappointment. Where the appointment of a RARB has been revoked, the status of that area of South Australia will be noted on the Register of RARBs as vacant.

Further Information

Department of State Development - Aboriginal Affairs and Reconciliation (DSD-AAR)

GPO Box 320, Adelaide SA 5001

Telephone: (08) 8226 8900

Website: www.statedevelopment.sa.gov.au/AHA

Project Planning

Introduction

The *Aboriginal Heritage Act 1988* (the Act) protects all Aboriginal sites, objects and remains throughout South Australia. Aboriginal heritage sites are defined as being an area of land that is of significance according to Aboriginal tradition, or significant to Aboriginal archaeology, anthropology or history. Examples include (but are not limited to) artefact scatters, shell middens, historical campsites, song lines, ceremonial grounds or landscape features of spiritual significance. It is an offence under the Act to damage, disturb or interfere with any Aboriginal sites, objects or remains without the authorisation of the Minister for Aboriginal Affairs and Reconciliation.

Risk assessment and the *Aboriginal Heritage Act 1988*

When projects are planned to take place in areas where known Aboriginal heritage exists, there is a risk that project activities may damage, disturb or interfere with those Aboriginal sites, objects or remains. In project areas where the heritage is unknown or may be subsurface, there is still a risk of damage to Aboriginal heritage which is discovered during the project works.

In either case, the risk can be mitigated by implementing a program of identification, consultation and assessment during your project planning phase followed by controls implemented during the project works. This approach may mitigate any risk of damage, disturbance or interference with any Aboriginal sites, objects or remains either known or uncovered during project works.

Identification of Aboriginal heritage in your project area

Prior to commencing development, exploration, mining or other ground disturbing operations, a proponent should gather as much information as possible about the known Aboriginal heritage in the project area. Ways of collecting heritage information include:

- Requesting a search of the Register of Aboriginal Sites and Objects and the Central Archive maintained by the Minister for Aboriginal Affairs and Reconciliation
- Search the Register of Recognised Aboriginal Representative Bodies (RARBs) to identify the relevant RARB
- Talk to the relevant RARB, or where there is no RARB appointed in relation to the project area, the local Aboriginal heritage organisations, or the Native Title body about the risk of damage to heritage in the project area.

To identify any unknown heritage or assess the possibility of subsurface heritage, talk to the relevant local RARB, or where there is no RARB appointed, the local Aboriginal heritage organisations or native title body, in conjunction with a suitably qualified archaeologist and/or anthropologist who may advise the conduct of an Aboriginal cultural heritage survey. See *further information about heritage surveys*.

REGISTER SEARCH

Register of Aboriginal Sites and Objects and the Central Archive

The Central Archive, which includes the Register of Aboriginal Sites and Objects, is maintained by the Minister for Aboriginal Affairs and Reconciliation and contains confidential and non-

confidential information about Aboriginal sites, objects and ancestral remains (burials) across South Australia.

Divulging confidential information from the Central Archive and divulging information in contravention of Aboriginal tradition each have serious penalties under the Act. The Department therefore strictly follows a process to manage all requests for information from the Central Archive and Register of Aboriginal Sites and Objects.

You can make enquiries about the presence of Aboriginal sites in a specified area by requesting a search of the Register. You will receive a yes or no answer and a basic map showing the approximate location of sites. For more detailed information, including map coordinates, permission is required from the traditional owners of the site. It is important to remember that the central archive is not an exhaustive record, and the Act protects all Aboriginal sites, objects and remains regardless of whether they are recorded in the central archive.

To access information from the central archive visit the Department of State Development, Aboriginal Affairs and Reconciliation Heritage website and request a search of the Register or email your project details, including lot/plan details, certificate of title numbers, tenement number, map and shape-file or grid references to dsdaarheritagesites1@sa.gov.au.

Searches of the central archive should always be complemented with consultation with the relevant local Recognised Aboriginal Representative Body (RARB), or where there is no appointed RARB for the relevant area, with recognised representatives of the relevant Aboriginal communities. The RARB or other representatives may hold information about Aboriginal heritage that is not recorded on the central archive, but which is important for you to know.

CONSULTATION

Recognised Aboriginal Representative Bodies

A Recognised Aboriginal Representative Body (RARB) is the organisation that can enter into a Local Heritage Agreement (under the Act) with proponents to manage the effects of project works on Aboriginal sites, objects or remains within a project area. A RARB may negotiate a Local Heritage Agreement with a proponent when either an application for authorisation to damage, disturb or interfere¹ with Aboriginal heritage, or an application to excavate for the purpose of uncovering of an Aboriginal site, object or remains² is lodged under the Act. A Local Heritage Agreement with a RARB can specify the conditions under which the Aboriginal heritage in the project area is managed in culturally appropriate ways. Before entering into a Local Heritage Agreement, a RARB may need to consult a particular family group or individual who holds traditional knowledge about Aboriginal sites in the project area.

Outside of the APY and MT Lands, RARBs are appointed by the State Aboriginal Heritage Committee. All appointments are listed on the Register of RARBs and contact details for each RARB are published on the DSD-AAR website. If there is no RARB appointed in relation to the project area, the proponent should contact the local heritage organisation or native title body.

Other Aboriginal organisations

In areas where there is no appointed RARB the proponent can consult with the relevant Aboriginal heritage or native title organisation or committee who may wish to provide information in relation to the Aboriginal heritage in the project area. These organisations cannot enter into

¹ Cf section 23 *Aboriginal Heritage Act 1988*

Local Heritage Agreements but any discussions or agreements with these groups can form a part of a proponent's strategy for managing the risk of breach of the Act.

ASSESSMENT

Aboriginal cultural heritage surveys

Professional archaeologists and anthropologists, in consultation with relevant Aboriginal parties, are qualified to undertake surface heritage surveys which can identify Aboriginal sites significant according to Aboriginal tradition, or to Aboriginal archaeology, anthropology or history. Briefs for the engagement of consultant archaeologists and/ or anthropologists should include details of:

- engagement with the relevant RARB, or where there is no RARB appointed in relation to the project area, Aboriginal parties who have a traditional connection with the area and who are authorised by the relevant Aboriginal community to provide information about sites, objects or remains.
- arrangements for the statutory reporting of any newly identified sites, objects or remains to the Minister for Aboriginal Affairs and Reconciliation in accordance with section 20 of the Act and the administrative requirements for lodging reports and site cards with DSD-AAR.
- identification of 'go' and 'no go' zones within the project area from the perspective of protection of Aboriginal heritage. The significance of the areas to be avoided should be clearly explained.
- identification of mitigation, risk management and protective measures to secure or protect the reported Aboriginal heritage.
- assessment of the risk if development, exploration or mining activity occurs without seeking a section 23 authorisation under the Act.
- acknowledgement that only the Minister can authorise damage, disturbance or interference to Aboriginal sites, and objects or remains and a proponent cannot avoid seeking an authorisation solely through agreement making with a RARB or Aboriginal people.

Surface heritage surveys usually only give an indication of what may be present on the ground. Even when there is no heritage located on the surface, there may still be a risk of subsurface discoveries when the ground disturbing works commence. For further information about planning and conducting an Aboriginal cultural heritage survey, see the DSD-AAR Information Sheet: *Aboriginal Cultural Heritage Surveys*.

CONTROLS

Cultural Heritage Management Plans

In consultation with the RARB, or if there is no appointed RARB, the relevant Aboriginal parties, the proponent may wish to develop a cultural heritage management plan (CHMP) to specify the culturally appropriate protection and management of Aboriginal heritage in the project area. A CHMP is normally drafted as an outcome of a heritage assessment or survey and should detail the nature, extent and significance of any Aboriginal cultural heritage sites identified in the project area and specify recommendations or measures to be taken before, during and after project activities to manage the protection of the heritage site/s, objects or remains.

Local Heritage Agreements

A local heritage agreement is an agreement between a land use proponent (e.g. a miner, developer or government agency) and a Registered Aboriginal Representative Body (RARB)

² Cf section 21 *Aboriginal Heritage Act 1988*

that deals with the impact of the proponent's activities on any Aboriginal sites, object or remains (Aboriginal heritage) in the area covered by the agreement.

A local heritage agreement can be submitted to the Minister who may, if he or she is satisfied that the agreement deals satisfactorily with any sites, objects or remains that may be located in the relevant area, approve the agreement. Once approved, the Minister must grant an authorisation to the proponent to excavate the land or to damage, disturb or interfere with any sites, objects or the remains on the condition that the proponent complies with the agreement. For more information about Local Heritage Agreements, see the Aboriginal Heritage Guideline *Local Heritage Agreements*.

Agreements under the Native Title Act and other acts

Agreements that deal with Aboriginal heritage but have been made under other legislation can be approved by the Minister for Aboriginal Affairs and Reconciliation (the Minister) under the *Aboriginal Heritage Act 1988* providing they sufficiently deal with the impact of a land use proponent's (e.g. a miner, developer or government agency) activities on Aboriginal sites, objects or remains (Aboriginal heritage) in the area covered by the agreement. Agreements made under other legislation that currently have effect under the (the Act) are:

- (a) an indigenous land use agreement under the *Native Title Act 1993* of the Commonwealth (NTA);
- (b) an agreement under Part 2 Division 3 Subdivision P of the NTA;
- (c) a native title mining agreement under the *Mining Act 1971* or the *Opal Mining Act 1995*; and
- (d) an agreement made 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).

Monitoring

Where an Aboriginal heritage survey has identified that areas of potential archaeological significance and/or burials may exist subsurface, a risk management option is to consider employing suitably qualified archaeologists and Aboriginal monitors to undertake specified tasks in relation to ground disturbing works in those areas. The terms of Aboriginal monitoring arrangements may be defined in a local heritage agreement with the relevant RARB, or where there is no appointed RARB, a CHMP or a formal agreement between the proponent and the relevant Aboriginal heritage organisation or native title body.

Discovery plan

In areas where there is a high risk of a subsurface discovery, it is recommended that prior to ground disturbing works, proponents work with the relevant RARB, or where there is no appointed RARB, the relevant local Aboriginal organisation, and plan for the event of a subsurface discovery. A discovery plan must be included in a local heritage agreement, or may be included in a CHMP or any other agreement. A discovery plan should be developed in consultation with the Aboriginal party and may specify:

- Aboriginal contact person/s for any discoveries
- A preferred archaeologist/anthropologist to be called in the event of a discovery
- A preferred approach for the preservation in situ of any Aboriginal sites or objects discovered
- A preferred approach to the preservation in situ or recovery of any ancestral remains discovered
- A secure location for the storage of any recovered ancestral remains prior to a reburial
- Arrangements for the reporting of the discovery to the Minister, in compliance with section 20 of the Act.

A discovery plan does not authorise damage, disturbance or interference with an Aboriginal site, object or remains; authorisation from the Minister under section 23 of the Act is required for any damage, disturbance or interference with Aboriginal sites, objects or remains.

Discovery of ancestral remains

In the event of the discovery of bones which are suspected to be human, all works should immediately stop in the discovery area and the discovery must be reported to the South Australian Police (SAPOL). If SAPOL confirms the discovery as ancestral Aboriginal remains, the proponent may reach agreement under section 37 of the Act with the RARB, or where there is no appointed RARB, with the relevant local Aboriginal parties regarding the management of the discovery, including recovery, reburial and any associated ceremony.

In consultation with the State Aboriginal Heritage Committee, DSD-AAR has prepared a *Discovery Protocol for Ancestral Remains* which should be implemented immediately whenever skeletal remains are discovered during project works. The Protocol is based on proponents' responsibilities under the *Coroner's Act 2003* and the *Aboriginal Heritage Act 1988*.

Legislative Awareness Induction

All construction and site staff working on a project should be inducted as to their legal obligations should they discover an Aboriginal site, object or remains. To assist with the administration of the Act and the protection and preservation of Aboriginal sites, objects and remains, DSD-AAR provides information and legislative awareness workshops that may assist proponents and their contractors to understand obligations under the Act. For more information or to request a workshop visit the DSD-AAR website and submit a *Request a Workshop* form or call DSD-AAR on (08) 8226 8900.

Authorisation under section 23 of the *Aboriginal Heritage Act 1988*

Proponents who are unable to mitigate their risk of damage, disturbance or inference of Aboriginal heritage, or who wish to uncover a site, object or remains, are required to seek an authorisation under either section 21 or section 23 of the Act from the Minister for Aboriginal Affairs and Reconciliation.

For proponents who have opted to enter in a Local Heritage Agreement with a RARB, once the agreement is approved by the Minister, the section 21 or section 23 application will be approved concurrently.

For proponents who prefer not to enter a Local Heritage Agreement, a section 23 application will be processed in accordance with the consultation provisions in the Act and the Minister will decide whether or not to grant the authorisation.

Further Information

Department of State Development - Aboriginal Affairs and Reconciliation (DSD-AAR)

GPO Box 320, Adelaide SA 5001

Telephone: (08) 8226 8900

Website: www.statedevelopment.sa.gov.au/AHA



Local Heritage Agreements

What is a local heritage agreement?

A local heritage agreement is an agreement between a land use proponent (e.g. a miner, developer or government agency) and a Registered Aboriginal Representative Body (RARB) that deals with the impact of the proponent's activities on any Aboriginal sites, object or remains (Aboriginal heritage) in the area covered by the agreement.

What is the purpose of a local heritage agreement?

A land use proponent or a qualified archaeologist who seeks to excavate land to uncover any Aboriginal heritage¹ or whose activity may damage, disturb or interfere with Aboriginal heritage² may enter into a local heritage agreement with a RARB so that impacts to Aboriginal heritage are managed in culturally appropriate ways and in agreement with the traditional owners. The agreement must be submitted to the Minister for Aboriginal Affairs and Reconciliation (the Minister) for approval, accompanied by the relevant application to the Minister for authorisation to undertake these activities.³

The Minister may, if he or she is satisfied that the agreement deals satisfactorily with any sites, objects or remains that may be located in the relevant area, approve the agreement. Once approved, the Minister must grant an authorisation to the proponent to excavate the land or to damage, disturb or interfere with any sites, objects or the remains on the condition that the proponent complies with the agreement. A proponent who undertakes such activities and damages, disturbs or interferes with Aboriginal heritage without the Minister's authorisation may be liable for criminal prosecution under the *Aboriginal Heritage Act 1988* (the Act).

A local heritage agreement is an optional arrangement for the parties

A local heritage agreement is made between a land use proponent and a RARB. When a proponent's activities require authorisation under the Act, there are two options available to them to gain the authorisation:

- Once parties have entered into a local heritage agreement about the proposed impact on Aboriginal heritage, the proponent then submits this agreement with the application to the Minister for authorisation. If the Minister approves the agreement, he or she must then grant the requested authorisation; or
- When a Local Heritage Agreement between a RARB and proponent cannot be achieved, the application for authorisation will be processed in accordance with the consultation provisions in the Act and the Minister will consult with all the relevant Aboriginal stakeholders and the State Aboriginal Heritage Committee before deciding whether or not to grant the authorisation requested.

¹ Cf section 21 *Aboriginal Heritage Act 1988*

² Cf section 23 *Aboriginal Heritage Act 1988*

³ See Information sheets: *How to apply under section 21 of the Aboriginal Heritage Act 1988* and *How to apply under section 23 of the Aboriginal Heritage Act 1988* respectively.

The maximum penalties for damaging, disturbing or interfering with Aboriginal sites, objects or remains without the authorisation of the Minister for Aboriginal Affairs and Reconciliation is \$50,000 for a body corporate and in any other case \$10,000 or six months' imprisonment.

A RARB is a person or organisation appointed under the Act that can ascertain and represent the views of the relevant traditional owners in relation to a specific area, Aboriginal site, object or remains. The RARB may elect not to enter into a local heritage agreement for any reason it deems appropriate. In this case the proponent will need to seek authorisation directly from the Minister as described above. Also, there may be Aboriginal sites, object or remains or specific areas for which no RARB has yet been appointed. In this case the proponent will need to seek authorisation directly from the Minister.

What terms and conditions must go into a local heritage agreement?

A local heritage agreement must contain the provisions, and set out the information, required by the regulations and these guidelines. An agreement may also contain any other provisions that the parties deem necessary.

Regulation 5 of the *Aboriginal Heritage Regulations 2016* sets out the following provisions and information that must be included in a local heritage agreement:

- (a) a provision setting out the area to which the agreement relates;
- (b) subject to the confidentiality of information required under the Act,⁴ a provision setting out any Aboriginal site, Aboriginal object or Aboriginal remains that are known to be in the area to which the agreement relates;
- (c) a provision setting out the proposed activities to which the agreement relates;
- (d) a provision setting out what steps are to be taken in the event of the discovery of an Aboriginal site, Aboriginal object or Aboriginal remains;⁵
- (e) a provision providing that, subject to the Act, any question arising as to the significance of a particular Aboriginal site or Aboriginal object to Aboriginal tradition, archaeology, anthropology or history is to be decided by the RARB in respect of the area, site, object or remains;
- (f) a provision limiting the costs or charges payable by all parties in relation to the agreement;
- (g) a provision setting out the processes for resolving disputes arising in relation to the agreement;
- (h) information explaining the process by which the agreement was negotiated (including information relating to any consultation undertaken during the negotiation process).

Approval of a local heritage agreement by the Minister

A local heritage agreement must be submitted to the Minister in the prescribed manner and form.⁶ 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 where the proposed activities are to take place.

⁴ Cf section 10 and section 35 of the *Aboriginal Heritage Act 1988*

⁵ See Information Sheet x

⁶ See xxxxx

When deciding whether or not to approve an agreement, the Minister must have regard to the matters set out in the regulations. These are:

- (a) whether the traditional owners of any area, Aboriginal site, Aboriginal object or Aboriginal remains affected by the proposed local heritage agreement were consulted, and agreed to, the agreement being entered into;
- (b) whether the terms of any payment that has been, or is to be paid, to a RARB, traditional owner or any other person in relation to the agreement is reasonable;
- (c) any relevant information (being information of which the Minister is aware) kept in the central archive or local archives.⁷

If the Minister is not satisfied with any relevant matters, he or she may send the local heritage agreement back to the parties for further negotiation and agreement.

Authorisation granted after agreement is approved

The Minister must grant an authorisation after he or she has approved an agreement. As indicated above, it is a condition of every authorisation that the person authorised complies with the terms of the local heritage agreement. If the authorised person fails to comply with the terms of the agreement, the authorisation will be voided.

Additionally, the Minister may impose other conditions on an authorisation but such conditions cannot be inconsistent with the terms of the agreement. If they are inconsistent they will be taken to be void and of no effect.

When does a local heritage agreement commence and terminate under the Act?

An approved local heritage agreement comes into effect on the date the associated authorisation is granted by the Minister unless a commencement date that falls earlier than that date is specified in the agreement, but never earlier than the agreement is approved by the Minister.

An agreement terminates on whichever of the following event occurs first:

- (a) a date specified in the agreement; or
- (b) the authorisation ceases to have effect and all requirements under the agreement have been satisfied; or
- (c) the agreement is revoked in accordance with the Act.

Variation and revocation of agreements

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

Enforcement of a local heritage agreement

If a party fails to comply with the agreement, or it appears that they may do so, any other party may apply to the District Court for any orders necessary to secure compliance with the local heritage agreement, or to remedy the default, and to deal with any related or incidental matters.

⁷ Central and local archives for the storing of heritage information have been established under the Act.

Further Information

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Agreements under Division A2 of the *Aboriginal Heritage Act 1988*

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What is a Division A2 agreement?

A Division A2 agreement is an agreement made under legislation other than the *Aboriginal Heritage Act 1988*, but that is approved by the Minister for Aboriginal Affairs and Reconciliation (the Minister) and which deals with the impact of a land use proponent's (e.g. a miner, developer or government agency) activities on Aboriginal sites, objects or remains (Aboriginal heritage) in the area covered by the agreement.

Agreements made under other legislation that currently have effect under the *Aboriginal Heritage Act 1988* (the Act) are:

- (a) an indigenous land use agreement under the *Native Title Act 1993* of the Commonwealth (NTA);
- (b) an agreement under Part 2 Division 3 Subdivision P of the NTA;
- (c) a native title mining agreement under the *Mining Act 1971* or the *Opal Mining Act 1995*; and
- (d) an agreement made 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).

Further agreements may be included in Division A2 by a declaration made in the regulations.

What effect does a Division A2 agreement have under the *Aboriginal Heritage Act 1988*?

It is accepted practice for Division A2 agreements to deal with the possibility of prosecution under section 23 of the Act (for damage, disturbance or interference with Aboriginal heritage) by way of avoidance of known Aboriginal sites. Therefore, section 21 (which deals with excavations undertaken to uncover Aboriginal heritage) and section 23 do not apply in relation to activities done in accordance with the agreement, where that agreement has been approved by the Minister (see below).

This means, in effect, that a party who has made a Division A2 agreement that is subsequently approved by the Minister need not take any further measures (other than conducting their activities in accordance with the agreement) to avoid prosecution under sections 21 or 23 of the Act.

The Minister must approve a Division A2 agreement before it takes effect

The Minister may approve a Division A2 agreement on application or on his or her own motion. The approval may be conditional or unconditional. Before approving an agreement, the Minister must consult with the State Aboriginal Heritage Committee (the Committee) and may consult with others if he or she thinks fit.

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.

Variation, revocation or suspension of approval

The Minister may vary, revoke or suspend an approval of a Division A2 agreement for any reason he or she deems appropriate. Before doing so, the Minister must consult with the Committee and may consult with others if he or she deems necessary.

Register of Agreements

The Minister has established a register consisting of Division A2 agreements and local heritage agreements.¹ The register contains information required by the regulations and may contain other such information as the Committee deems relevant.

The register may only be inspected in accordance with the regulations² and the Governor may only make regulations on the recommendation of the Minister given after consultation with the Committee.

Further Information

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¹ Cf Guideline *Local Heritage Agreements*

² Cf section x of the AHA Regulations and Guideline No. x



Aboriginal Heritage Registers

Introduction

The *Aboriginal Heritage Act 1988* (the Act) prescribes the establishment of three registers that contain information about Aboriginal heritage and heritage management processes under the Act:

- The Register of Recognised Aboriginal Representative Bodies
- The Register of Agreements
- The Register of Aboriginal Sites and Objects

The Department of State Development, Aboriginal Affairs and Reconciliation (DSD-AAR) maintains each register on behalf of the Minister for Aboriginal Affairs and Reconciliation (the Minister) and in the case of the Register of Recognised Aboriginal Representative Bodies (RARBs), the State Aboriginal Heritage Committee (the Committee).

DSD-AAR recognises its responsibility to collect, manage, use and disclose information in accordance with legislative requirements and prevailing community expectations of best practice. Maintaining the privacy of information is a vital part of government's relationship with Aboriginal communities and other stakeholders. DSD-AAR has a range of legislative and common law responsibilities related to maintaining confidentiality of information.

The Register of Recognised Aboriginal Representative Bodies

The Committee must establish a register of Recognised Aboriginal Representative Bodies. DSD-AAR maintains the Register of RARBs on behalf of the Committee. The *Aboriginal Heritage Regulations 2016* requires the register to include:

- the name and address of the body corporate constituting the RARB
- the name of each person who is a director or member of the body corporate constituting the RARB
- the address and contact details of the principal place of business of the RARB
- subject to section 10¹ of the Act, a description of the area, Aboriginal site, Aboriginal object or Aboriginal remains in respect of which the RARB is appointed.
- If the RARB was appointed under section 19B(9) of the Act – a copy of the relevant Native Title claim or Indigenous Land Use Agreement (as the case requires)
- The Register of RARBs may also contain other information as required by the Committee from time to time.

Information on the Register of RARBs would normally be collected as part of an application to become a RARB process and prior to an organisation's approval of appointment as a RARB. RARBs are required to notify the Committee of any changes to this information within three months.

Access

Information available to the public from the Register of RARBs is determined by the Committee and may include the corporation's name and number, date of registration, the boundary and description of the area of appointment and the name and address of a contact person. The

¹ Section 10 of the Act requires the confidentiality of certain information entered into the central or local archives to be maintained.

Register may also show links to key public documents, such as the corporation's rule book, held by the Office of the Registrar of Indigenous Corporations.

Register of Agreements

The Minister must establish and maintain a register consisting of –

- (a) local heritage agreements; and
- (b) agreements to which Division A2 applies.

DSD-AAR maintains the Register of Agreements on behalf of the Minister. The *Aboriginal Heritage Regulations 2016* set out the following provisions and information that must be included on the Register of Agreements:

- (a) in the case of a local heritage agreement –
 - the name, address and contact details of the RARB that is a party to the agreement;
 - the name, address and contact details of the proponent of the agreement;
 - a copy of the application for authority under section 21 or 23 of the Act to which the agreement relates;
 - details of any variations to the agreement (including the date on which the variation takes effect);
 - details sufficient to identify any report or survey referred to in the agreement or upon which the agreement is wholly or partly based;
- (b) in the case of an agreement to which Division A2 of the Act applies
 - the name, address and contact details of each party to the agreement;
 - details of any variations to the agreement (including the date on which the variation takes effect);
- (c) in any case –
 - a copy of the local heritage agreement or agreement to which Division A2 of the Act applies (as the case requires);
 - the address and contact details of the principal place of business of the Recognised Aboriginal Representative Body;
 - the name and address of each party to the agreement.

The Register of Agreements may also contain other information determined by the Committee from time to time. Agreements are placed on the Register once approved by the Minister.

Access

As specified by the *Aboriginal Heritage Regulations 2016*, information held in the Register of Agreements may only be inspected with the consent of each of the parties to the relevant agreement, and in accordance with any requirements specified by the Committee.

Register of Aboriginal Sites and Objects

The Minister must keep central archives relating to Aboriginal heritage. Part of the central archives is the Register of Aboriginal Sites and Objects, which must contain entries described with sufficient particularity to enable them to be readily identified sites or objects determined by the Minister to be Aboriginal sites or objects.

The central archive and the Register of Aboriginal Sites and Objects contain confidential and non-confidential information, including site cards, cultural heritage reports and other records of Aboriginal heritage. Information is held both electronically and in hard copy.

The Central Archive, which includes the Register of Aboriginal Sites and Objects, is maintained by the Minister for Aboriginal Affairs and Reconciliation and contains confidential and non-confidential information about Aboriginal sites, objects and ancestral remains (burials) across South Australia.

Divulging confidential information from the Central Archive and divulging information in contravention of Aboriginal tradition each have serious penalties under the Act. The Department therefore strictly follows a process to manage all requests for information from the Central Archive and Register of Aboriginal Sites and Objects.

The Central Archive is not an exhaustive record of all Aboriginal heritage sites in South Australia. RARBs, local heritage committees and other Aboriginal organisations may maintain their own local archives of Aboriginal heritage. It is recommended that proponents seeking information about Aboriginal heritage in a project area deal directly with the relevant RARB (if appointed).

Access

Applications for access to information are made in writing and can be lodged via the DSD-AAR Heritage website or email to dsdaarheritagesites1@sa.gov.au. An application should include:

- a clearly defined and described area of interest
- lot/plan details, certificate of title number, tenement number, map, shapefile and/or grid references
- a reason for the request and a description of how the information will be used.

Release of information

Two levels of information are released, depending upon the requirements: basic or extended.

Basic – This is the standard basic level of information released.

If you are seeking information about the location of Aboriginal heritage so that you can avoid, as far as possible, damage, disturbance or interference to Aboriginal heritage during development activities, please request a basic search. You will receive a letter identifying whether there is an entry on the Central Archive or Register of Aboriginal Sites and Objects within your interest area. If there are records of Aboriginal sites or objects, you will be given a basic map that indicates approximate locations.

Extended – If you require a more detailed understanding of the potential interaction between Aboriginal heritage and development, you will need to seek the authority of the traditional owners and/or original informants of the site information. This is done using the *Access to Central Archive* form available on the DSD-AAR website. The form will prompt you to include evidence of permission from the relevant traditional owner and/or original informant of the site information to release the information to you. Access to site cards and cultural heritage reports is dependent on whether information is confidential and if the relevant individuals and/or informants have endorsed the release of confidential information.

Recognised Aboriginal Representative Bodies

Subject to section 10 and section 35 of the Act, Central Archive information may be released to a RARB for the area, site, object or remains of which their appointment has been approved.

Please allow up to 21 days for response to basic site search request and up to 28 days for the release of information from site cards and/or cultural heritage reports.

Further Information

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GPO Box 320, Adelaide SA 5001

Telephone: (08) 8226 8900

Website: www.statedevelopment.sa.gov.au/AHA

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Negotiating in Good Faith

Parties to a local heritage agreement must negotiate in good faith

The *Aboriginal Heritage Act 1988* (the Act) requires that a person or body taking part in negotiations to enter into a local heritage agreement¹ must do so in good faith.

What does it mean to negotiate in good faith?

There is no settled legal definition of good faith negotiations nor does the Act provide a definition. There have however been several court cases where the requirement to negotiate in good faith has been an issue and certain criteria of expected behaviour in good faith negotiations have therefore been developed.

What constitutes good faith negotiations depends on the legislative and factual context and must be considered in the unique circumstances of Aboriginal heritage and negotiations to enter into a local heritage agreement. Therefore, the individual criteria set out below cannot be seen as rigid requirements whose breach will necessarily indicate that a party is not negotiating in good faith. The relative weight of any individual element of conduct in the overall assessment of whether a party has not been negotiating in good faith depends upon the circumstances.

Definitions of 'negotiate' and 'good faith'

Negotiation involves communicating, having discussions or conferring with a view to reaching an agreement. The dictionary definitions of the word 'negotiate' include discussions or communications towards a compromise or an agreement.

'Good faith' is defined as honesty of intention and sincerity in stating a position. However, besides having honest and sincere intentions, it is necessary to consider whether what is done by the parties is reasonable in the circumstances. Some preparedness to shift position or make concessions in order to achieve agreement appears to be an important part of good faith negotiations in its ordinary meaning.

Negotiation in good faith does not mean that a party has an obligation to capitulate or to accept the other side's position. Nor does it mean that a negotiated agreement must be reached between the parties.

What may amount to negotiating in good faith?

Subject to a disclaimer that this guide does not constitute legal advice, the following criteria² may be useful indicators of whether a party has failed to negotiate in good faith. Such a list cannot be prescriptive or exhaustive and the weight given to any item must depend upon the circumstances of the matter:

- (i) unreasonable delay in initiating communications in the first instance;
- (ii) failure to make proposals in the first place;
- (iii) the unexplained failure to communicate with the other parties within a reasonable time;
- (iv) failure to contact one or more of the other parties;

¹ See Guideline no.xx *Local Heritage Agreements*

² Taken from *Re Minister for Lands, State of Western Australia and Marjorie Strickland & Ors* (1997) 3 AILR 260 (at 224-225).

- (v) failure to follow up a lack of response from the other parties;
- (vi) failing to respond to reasonable requests for relevant information within a reasonable time;
- (vii) stalling negotiations by unexplained delays in responding to correspondence or telephone calls;
- (viii) unnecessary postponement of meetings;
- (ix) sending negotiators without authority to do more than argue or listen;
- (x) refusing to agree on trivial matters, for example, a refusal to incorporate statutory provisions into an agreement;
- (xi) shifting position just as agreement seems in sight;
- (xii) adopting a rigid non-negotiable position;
- (xiii) failure to make counter proposals;
- (xiv) unilateral conduct which harms the negotiating process (for example, issuing inappropriate press releases);
- (xv) refusal to sign a written agreement in respect of the negotiation process or otherwise;
- (xvi) failure to do what a reasonable person would do in the circumstances.

Further Information

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