

Resources and Native Title

January 2012

Clarification of the role of delegation in the *Aboriginal Heritage Act 1988* (SA)

The *Aboriginal Heritage Act 1988* (SA) (“the Act”) allows the Minister for Aboriginal Affairs and Reconciliation to grant an authorisation to a party, such as a mineral exploration company, to damage, disturb or interfere with any Aboriginal site, object or remains. The Act also provides that the Minister is required to delegate his/her powers in this regard to the relevant traditional owners if requested to do so by them.

The recent appeal decision of the Full Court of the South Australian Supreme Court *Starkey & Ors v State of South Australia* confirmed that the Minister must delegate his/her power to grant an authorisation if requested to do so. It also clarified that the Minister does not retain any power to grant authorisations where a delegation has been made to traditional owners and cannot revoke the delegation except with their consent.

South Australia is the only jurisdiction which has such a mandatory delegation requirement.

Once a delegation is made the traditional owners will “step into the shoes” of the Minister. They will thus be required to apply the principles of administrative law in reviewing applications for authorisations. In our view this places both resources companies and traditional owners in a difficult position. It also rules out the Minister assessing an application with the broader interests of the State in mind.

Resources companies should also be aware that if the Minister does not delegate to the traditional owners when requested and grants an authorisation, it is likely to be open to judicial review and consequently be found to be invalid.

In the reasons for judgment, Justice Stanley made some interesting additional observations about the grounds raised in the *Starkey* appeal:

1. An application for a determination whether an area contains a site or object that is an Aboriginal site or object under section 12(3) of the Act is independent to an authorisation to damage, disturb or interfere with

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any Aboriginal site, object or remains granted under section 23 of the Act. A section 12(3) determination is not required as a prerequisite to a section 23 authorisation. A section 12(3) determination provides a mechanism whereby a party may gain some clarity and certainty from the Minister that an area does not contain any Aboriginal sites or objects before proceeding with an exploration activity. If it is determined that there are no Aboriginal sites or objects in the application area, the party may proceed with the activity and is not able to be found guilty of damaging, disturbing or interfering with any site or object even if it subsequently transpires that the area does contain an Aboriginal site or object.

2. There is nothing in the Act which prohibits the Minister from granting an authorisation in terms applying to the authorised company's 'partners, staff, contractors and subcontractors'. These were deemed sufficiently recognisable categories of persons identified by their relationship to the authorised company.
3. There is nothing in the Act which requires the Minister to be satisfied as to the existence or otherwise of an Aboriginal site, object or remains before giving an authorisation to damage, disturb or destroy. Such an authorisation contemplates 'a situation in which there is a risk of damage to or disturbance of Aboriginal objects and remains, it being uncertain whether or not this will occur because of uncertainty as to whether or not Aboriginal objects or remains are present'¹.

Contacts:

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¹ *Newchurch v Minister for Aboriginal Affairs and Reconciliation* [2101] SASC 29 at [138]