

Legal Alert

Resources & Native Title

February 2016

Changes to Aboriginal Heritage Act Introduced into State Parliament

Apart from some specific issues of detail and concern, the proposed changes to the *Aboriginal Heritage Act 1988*, reflected in the *Aboriginal Heritage (Miscellaneous) Amendment Bill 2016*, are positive.

Yesterday the State Government introduced a Bill proposing far reaching changes to the *Aboriginal Heritage Act 1988*.

The main features of the Bill are:

- the requirement for the Minister to delegate to traditional owners his functions to give authorisations under the Act, if requested by the traditional owners, is to be deleted. Under the transitional provisions any pending delegation request will be void and any existing delegation taken to be revoked;
- provisions for the Minister to establish guidelines in relation to the operation of the Act (subject to prior consultation with the Heritage Committee). No detail is provided in the Bill as to the content of the proposed guidelines;
- the creation of Recognised Aboriginal Bodies (*RABs*) for specific areas or specific Aboriginal site(s), object(s) or remains. *RABs* are to be appointed in the following way:
 - a *RAB* must be a body corporate (although there are some references in the Bill which suggest individuals could be);
 - Anangu Pitjantjatjara Yankunytjatjara and Maralinga Tjarutja are the automatic *RABs* for the APY and MT lands;
 - in principle, a registered native title body corporate will be the *RAB* for the area of the native title determination (including land in that area where native title has been extinguished). However, such an appointment must be approved by the Heritage Committee who "may refuse to approve an appointment for any reason the Committee thinks fit".

It is accepted that Aboriginal groups may have separate bodies representing them in relation to heritage and native title matters which may mean that a registered native title body corporate is not the appropriate *RAB* for a native title determination area. Having said that, the Heritage Committee's discretion in this regard appears to be unduly broad.

- A registered native title body corporate may also elect not to be the *RAB* for the whole or part of a determination area, or specified sites, objects or remains within the area. In this case it would assist if the registered native title body corporate's right in this regard were conditional on it nominating a replacement *RAB* for approval by the Committee;
- the Committee may on application appoint registered native title claimants or an Aboriginal party to an ILUA as *RAB* for the relevant claim or ILUA area. The Committee also has a more general right to appoint anybody as *RAB* for specific areas or specific Aboriginal site(s), object(s) or remains. In this case and that of an ILUA the relevant area must not be within the APY or MT lands nor be an area in respect of which a registered native title body corporate has already been appointed as the *RAB*;
- where the Committee receives more than one application for appointment as a *RAB*, it must give priority to the applicant that "the evidence suggests has the strongest affiliation with, and responsibility for, the relevant area, site, object or remains, in accordance with Aboriginal tradition".

The Committee must revoke the appointment of a *RAB* (other than Anangu Pitjantjatjara Yankunytjatjara and

Maralinga Tjarutja) if requested by the RAB and has the right to revoke or suspend an appointment in certain circumstances. The Minister has a similar right of revocation "for any reason he or she thinks fit" and may then reappoint the RAB or appoint a substitute RAB.

It follows from these provisions that there will not always necessarily be a RAB for any particular area or specified site, object or remains.

Two categories of agreement are given potential statutory effect and, importantly, if they are, they override sections 21 and 23 of the Act:

- an applicant for an authorisation under section 21 or 23 may negotiate and enter into an agreement with the RAB for the relevant area or Aboriginal site, object or remains. An application for authorisation and the existence of a RAB both appear to be prerequisites to the operation of these provisions. A RAB is under no obligation to negotiate or enter into an agreement. The agreement must contain provisions and information as required by the regulations and guidelines. Whilst these requirements will only be known once the regulations and guidelines are published, the Bill specifically provides that an agreement must contain provisions limiting the costs or charges payable in relation to the agreement. If the Minister approves the agreement the authorisation under section 21 or 23 of the Act to which the agreement relates must be granted by the Minister. The Minister may 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 affected by the application to which the agreement relates". In making a decision the Minister must also have regard to the matters set out in the regulations and guidelines. The agreement does not have effect until approved by the Minister. It is not clear why the agreement should not have effect in accordance with its terms, other than for the Ministerial authorisation which only takes effect on Ministerial approval;
- the second category of agreements applies to ILUAs, right to negotiate agreements under the *Native Title Act*, native title mining agreements under the *Mining Act* or the *Opal Mining Act*, agreements under the *Land Acquisition Act* relating to native title rights and prescribed private acquisitions and agreements included under the regulations, but only if they have been approved by the Minister. The Bill does not appear to distinguish between agreements entered into before or after the enactment of the Bill. The Minister may approve an agreement on application or on the Minister's own motion, but must consult with the Committee (and may consult with anyone else) before doing so. The Minister may only approve the 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". Most importantly sections 21 and 23 do not apply to, or in relation to, an act or omission done in accordance with an approved agreement.

In our view, subject to some limited concerns and issues, the Bill reflects a positive set of proposals for amendment of the *Aboriginal Heritage Act 1988*.

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