



**Submission in response to the draft South Australia
Aboriginal Heritage Regulations 2016 under the
*Aboriginal Heritage Act 1988***

Uniting Communities – Anungu Lands Paper Tracker

27 February 2017

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1. Uniting Communities – Anangu Lands Paper Tracker

Uniting Communities works with South Australians across metropolitan, regional and remote South Australia through more than 90 community service programs.

We are made up of a team of more than 1,500 staff and volunteers who support and engage with more than 20,000 South Australians each year.

Uniting Communities recognises that people of all ages and backgrounds will come across challenges in their life, and we offer professional and non-judgemental support for individuals and families.

The Anangu Lands Paper Tracker Project, within the Advocacy and Community Relations Unit of Uniting Communities, monitors government commitments to Anangu communities and advocates for the timely and appropriate delivery of key infrastructure, services and policies to improve the lives of people living in remote South Australian Aboriginal communities. To this end, relevant government legislation is monitored for its impact on the rights and interests of remote communities.

2. Introduction and purpose of this submission

Uniting Communities welcomes the opportunity to provide comment to the Department of State Development, Aboriginal Affairs and Reconciliation, on the draft South Australia *Aboriginal Heritage Regulations 2016*, as released in October 2016.

This submission complements earlier commentary provided by the Anangu Lands Paper Tracker on the amendments to the *Aboriginal Heritage Act 1988*, which can be found on its website at <http://www.papertracker.com.au/2016/04/changes-to-the-aboriginal-heritage-act-1988/> and <http://www.papertracker.com.au/radio/the-aboriginal-heritage-miscellaneous-amendment-bill-2016-2/>, amongst others.

Reiterating our earlier commentary, we emphasise concerns regarding the deficits in the consultation process and the resultant amendments to the *Aboriginal Heritage Act 1988* and subsequent draft Regulations, and which are likely to have continuing negative repercussions for the protection of Aboriginal heritage in South Australia.

The key focus of this submission is on the purported devolution of agreement-making, the resourcing of Heritage Groups and their organisations, and the ultimate locus of control and decision-making with regard to heritage protection.

3. Commentary on the Regulations and Guidelines

Uniting Communities notes that:

- the amendments, through the *Aboriginal Heritage (Miscellaneous) Amendment Act 2016*, introduced significant changes to the *Aboriginal Heritage Act 1988 (AHA)*;
- the version of the amendments to the AHA as set out in the amending legislation was different to that provided to communities and organisations during the consultation phase;
- the lack of adequate consultation on the final draft Bill resulted in the amendments set out in the *Aboriginal Heritage (Miscellaneous) Amendment Act 2016* not being subject to contributions from the South Australian Aboriginal community and not being put before Parliament with the support of Aboriginal South Australians;
- the resultant amended *Aboriginal Heritage Act* does not necessarily improve the level of certainty for prospective land developers/proponents or the protection and preservation of Aboriginal Heritage and, in certain respects, significantly reduces the role and authority of Heritage Groups or Traditional Owners in making decisions about the protection of heritage on their land; this is further evidenced by the removal from the Act of the right to delegation on the request of Traditional Owners in Section 6.2;
- the amended legislation creates the potential for there to be confusion or conflict regarding who speaks for Country and whose rights are recognised – for example, between the Recognised Aboriginal Representative Bodies (RARBs), various different groupings who may claim to speak for Country and/or Native Title holders (in the event that these are not one and the same);
- the introduction of an agreement-making arrangement has been presented by the proponents of the amended legislation and draft regulations as a devolved model with increased autonomy at a local level, on the assumption that this model would somehow automatically enable the better protection of heritage;
- the provisions of the AHA need to be aligned with other legislation, in particular, the *Coroners Act 2003*. The lack of alignment and application of appropriate protocols for the protection of Aboriginal heritage and the authorisation to damage/disturb sites, object or remains was evidenced during the recent exhumation of a child's remains from the Anangu Pitjantjatjara Yankunytjatjara (APY) Lands. While reference was made to other legislation (the *Coroners Act 2003*), the explicit protective provisions and protocols set out in the AHA were not applied.

The Uniting Communities' commentary addresses the key issues, as set out in the draft Regulations and Guidelines, with particular emphasis on the new agreement-making process, the resourcing of the proposed heritage protection bodies, and possible implications for the future protection of heritage.

Devolution of agreement-making

The introduction of an agreement-making arrangement has been presented by the proponents of the legislation and draft regulations as providing increased autonomy to Aboriginal Heritage Groups, and is premised on the assumption that this devolved agreement-making process will therefore automatically enable the better protection of heritage. The Act and associated Regulations provide for an agreement-making process

involving Recognised Aboriginal Representative Bodies (RARBs) and prospective land developers/proponents.

A RARB will be the body that enters into a Local Heritage Agreement (under the Act) with prospective land developers/proponents in order to manage the effects of project works that could affect Heritage sites, objects or remains on Aboriginal land. A Local Heritage Agreement between a RARB and a proponent could, for example, be entered into when there is an application for authorisation to damage, disturb or interfere with Aboriginal heritage (under section 23) and/or an application to excavate for the purpose of uncovering an Aboriginal site, object or remains (section 21). Such an Agreement would specify the conditions under which the Aboriginal heritage is to be managed in a culturally appropriate manner.

This agreement-making arrangement serves to redirect the locus of heritage protection from the responsibility of the State to one that is devolved and localised. While an increased level of autonomy for local Heritage Groups or Traditional Owners would usually be welcomed, the danger exists that – in the absence of access to resources and organisational capacity building, and noting the current unequal power relations between Traditional Owners and land developers/proponents – the protection of Aboriginal Heritage could potentially be compromised and/or the negotiating process with prospective land developers/proponents could generate tensions amongst communities or Heritage Groups located in/around the proponent's intended project site. The new arrangement is premised on an assumption that all RARBs will have the authority to speak for all sectors and interests in their geographic location as well as having the organisational capacity and necessary resources to enter into negotiations with proponents on an equal footing, even though it is clear that access to resources remains fundamentally unequal.

Locus of power and decision-making

While the amended legislation and associated regulations are purported to situate agreement-making and decision-making with Heritage Groups or Traditional Owners (established as RARBs) in a particular location, decisions about heritage protection can ultimately be overridden in that the Minister still has the power to authorise the damage, disturbance or interference of Aboriginal sites, objects or remains. Respect for the autonomy and rights of Heritage Groups or Traditional Owners regarding the protection of their heritage under the new Act and draft Regulations remains vulnerable to erosion and contradiction.

Fees, costs and resourcing

It is noted that 19A of the amended legislation provides for the Minister to publish Guidelines in relation to the operation of the Act. However, neither the Act nor its current draft Regulations and Guidelines specifically include information about the resourcing of RARBs, the nature and scope of the costs that they may incur during their establishment and operation, or how these costs and associated funding will be structured.

While the Regulations set out the *fees* to be paid to the government in Schedule One (e.g. for administration, making an application for the appointment of a RARB, approvals for Local Heritage Agreements, searches of the Register of Aboriginal Sites and Objects etc.), the Regulations do not appear to provide details about the nature and degree of the support and resourcing that is to be allocated to RARBs for their establishment and operations (including their start-up, legal and operational costs and the costs of consulting community members and/or employing anthropologists etc.). Furthermore, Schedule One does not specify *who*

is responsible for paying the fees associated with various administrative processes and applications, and in the case of costs incurred by the RARBs, how/where these funds will be sourced.

In the absence of adequate information being provided about the financial and resourcing support to be provided for RARBs, it is very difficult to ascertain how these structures will operate and whether they will be afforded the opportunity to enter into agreement-making processes as well-equipped and equal partners with prospective land developers/proponents.

Reciprocity and broader scope of RARBs

The Act and Regulations emphasise the administrative duties and compliance obligations of RARBs in terms of the role they are required to play and the information they are required to provide to the government. This emphasis would appear to be uni-directional, with very little information provided about the ways in which the RARBs will in turn be supported or resourced by government and/or the availability of other sources of funding and support.

The emphasis in the Act and Regulations is on the narrow role and obligations of RARBs in registering their entities on the State Register and entering into Local Heritage Agreements with proponents – much of which is focused on administrative compliance and a transactional model. It does not appear to include a broader role for RARBs as the custodians and protectors of Aboriginal Heritage in their area on an ongoing and sustained basis, outside of government requirements and proponent-led processes. There does not appear to be any consideration of the necessary support or resourcing that would be necessary for the RARBs to play an ongoing role in protecting heritage in their local area.

Alignment with other legislation

The agreement-making model has the potential to contradict or undermine agreements negotiated under other Acts, such as the *Native Title Act 1993*, the *Mining Act 1971*, or the *Coroners Act 2003* etc. While reference is made to the alignment of legislation in Division A2 of the amended legislation, no mention is specifically made to the *Coroner's Act 2003*. The lack of alignment with this particular legislation recently resulted in a controversial contradiction of Aboriginal heritage protection protocols on the APY Lands and calls for a consideration of the practical ways in which the alignment of various Acts will need to be determined and applied.

4. Recommendations for action

While Uniting Communities recognises that the *Aboriginal Heritage Act 1988* has already been amended through an Act of Parliament, it wishes to register its ongoing concern about the lack of adequate engagement with Aboriginal communities and Heritage Groups regarding their involvement in the protection of their heritage and the introduction of mechanisms for providing this protection, and calls for the following to be addressed in the Regulations associated with the Act:

- A clear schedule indicating the level and scope of the support and ongoing resourcing that will be provided to all RARBs, from the time of their initial establishment and for their ongoing operations;

- The inclusion in the draft Regulations of reciprocity on the part of Government in relation to its role and commitment to supporting and enabling the operationalisation of the RARBs, rather than focusing only on the obligations and compliance of the RARBs with various administrative requirements and operations;
- An alignment of all relevant legislation, with particular reference to those Acts which could impact on the negotiation of agreements and on the cultural and heritage protocols required for the protection of Aboriginal heritage;
- That the final version of the draft Regulations and Guidelines are circulated to all Aboriginal organisations, peak bodies, communities and leaders for proper consultation, prior to being introduced into Parliament.

5. Conclusion

Uniting Communities supports reforming Aboriginal Heritage legislation and its associated regulations in order to increase participation and decision-making by Aboriginal first nations and to achieve improved outcomes for the protection of Aboriginal heritage.

However, the approach adopted in amending the legislation and associated regulations, and the lack of recognition of the uneven playing field and persistent inequity experienced by Heritage Groups and/or Traditional Owners in relation to both the government and proponents/land developers, does not serve to advance the interests of Aboriginal heritage protection. The reality of the existing socio-political and economic inequity is not acknowledged or remedied by an inclusion in the Regulations of additional resourcing and support being provided to the proposed Recognised Aboriginal Representative Bodies.

It would appear that agreement-making is being devolved in the name of increased autonomy and participation, without providing the requisite support and organisational underpinnings for active participation and effective co-ordination to occur. This approach carries inherent dangers for the future protection of Aboriginal heritage and, ultimately, for the rich heritage and cultural diversity of South Australia and the country as a whole.

The reform of Aboriginal heritage protection must include a genuine engagement with Aboriginal Heritage Groups about how they wish to design and proceed with protecting their heritage – to date this has not occurred, as evidenced by the lack of appropriate consultation regarding the amending of the Aboriginal heritage legislation. Such reform would require the devolution of power and decision-making to Heritage Groups in conjunction with the requisite resourcing of identified heritage bodies so that they are equipped to make their own decisions about the protection of their heritage and to carry out the necessary organisation-building and tasks associated with the protection of their heritage.

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