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Repository Citation
Alex Wawryk, Mining and the Protection of Aboriginal Heritage in South Australia, 47 Wm. & Mary Envtl. L. & Pol'y Rev. 749 (2023), https://scholarship.law.wm.edu/wmelpr/vol47/iss3/6

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MINING AND THE PROTECTION OF ABORIGINAL HERITAGE IN SOUTH AUSTRALIA

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In 2020, the multinational mining company Rio Tinto destroyed 46,000-year-old Aboriginal rock paintings in Juukan Gorge, Western Australia, to national and international outrage. The incident led to an explosion of concern in Australia regarding the adequacy of domestic laws that aim to protect Aboriginal cultural heritage from the impacts of resource exploitation. This Article explains and critically analyzes the legislative and regulatory framework for the protection of Aboriginal heritage in relation to mining in South Australia. It demonstrates the complexity of the legal and regulatory regime, identifies a number of significant flaws in the key act designed to protect Aboriginal cultural heritage—the *Aboriginal Heritage Act 1988 (SA)*—and discusses options for, and barriers to, legal reform.

**INTRODUCTION**

Mining is a major source of income for the South Australian economy,1 and minerals are the foundation of the modern way of life. However, mining negatively impacts the physical environment and may lead to the destruction or damage of Aboriginal heritage.2 The pressing imperative to decarbonize economies to mitigate climate change, and the forecasted staggering increase in demand for minerals to achieve the transition to “net zero” economies,3 will offer future economic opportunities

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3 UNECE & UK MISSION GENEVA, FUTURE-PROOFING SUPPLY OF CRITICAL MINERALS FOR
to Aboriginal people.\textsuperscript{4} It is also likely to place further pressure on the ability of Aboriginal people to protect their cultural heritage.

In 2020, when Rio Tinto blasted caves and destroyed 46,000-year-old Aboriginal rock paintings in Juukan Gorge, Western Australia,\textsuperscript{5} the consequential condemnation from Aboriginal people and the broader Australian and international communities led to a Commonwealth Parliamentary Inquiry into the protection of Aboriginal heritage in Western Australia and the adequacy of the Commonwealth \textit{Aboriginal and Torres Strait Islander Heritage Protection Act 1984} (Cth) ("ATSIHPA").\textsuperscript{6} Other

\textsuperscript{4} Many Aboriginal people in South Australia identify as a member of their nation or language group, for example, Arabana, Kokatha, Ngarrindjeri, etc. See, e.g., \textit{Languages}, \textit{MOBILE LANGUAGE TEAM}, \url{https://mobilelanguageteam.com.au/languages/} (last visited Apr. 12, 2023). Collectively, Aboriginal and Torres Strait Islander peoples may refer to themselves in a number of ways, such as Aboriginal people or First Nations. \textit{Indigenous Australians: Aboriginal and Torres Strait Islander People}, \textit{AIATSIS}, \url{https://aiatsis.gov.au/explore/indigenous-australians-aboriginal-and-torres-strait-islander-people} (Dec. 7, 2020). There is no one preferred or accepted term. \textit{Id.} This Article will use the collective term "Aboriginal people," acknowledging that this will not be the preferred term of all people or peoples. "In South Australia, the term ‘Aboriginal’ is preferred over the term ‘Indigenous’ when referring to Aboriginal peoples." DEP’T FOR ENERGY & MINING, \textit{GUIDELINES FOR EXPLORERS ON ABORIGINAL ENGAGEMENT, GOOD FAITH NEGOTIATION AND AGREEMENT MAKING} 9 (2019) [hereinafter \textit{GUIDELINES FOR EXPLORERS}].


states have or are reviewing their heritage legislation, and in South Australia (“SA”), a Parliamentary Standing Committee established an Inquiry into the adequacy of the *Aboriginal Heritage Act 1988* (SA) (“AHA” or the “Act”), the main statute for the protection of Aboriginal cultural heritage in the state. As of November 30, 2022, the Inquiry had not published its report, but submissions to the Inquiry reveal serious concerns in relation to the adequacy of the AHA.

The purpose of this Article is to explain and critically analyze the legislative and regulatory framework for the protection of Aboriginal heritage in relation to mining in South Australia. This framework developed in the context of British colonization of Australia, which involved the dispossession and removal of Aboriginal people from their lands. It reflects the gradual, fitful, and uncoordinated efforts of successive governments and the courts to address some of the injustices inflicted on First Nations since colonization, whilst maintaining government control over the development of mineral resources.

The legal framework is complex. First, the AHA exists as a specific statute for the protection of Aboriginal heritage. Secondly, land rights legislation—the *Aboriginal Lands Trust Act 2013* (SA), the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA), and the *Maralinga Tjarutja Land Rights Act 1984* (SA)—enshrined freehold tenure for Aboriginal people who are the Traditional Owners of the areas of land covered by these Acts, and introduced provisions relevant to mining on these lands. Thirdly, in 1992, the common law of Australia recognized the existence of native title in *Mabo No 2*. Native title claims and determinations are regulated through the *Native Title Act 1993* (Cth) (“NTA”), which also sets out laws for determining when or how “future acts” such as mining may take place on native title land.

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8 See discussion infra Part IV.
11 *Mabo v Queensland (No 2) (Mabo No 2)* (1992) 175 CLR 1 (Austl.).
12 This is defined in the *Native Title (South Australia) Act 1994* as “land in respect of
This legislation developed alongside natural resources and environmental law. In South Australia, mining is generally regulated by the *Mining Act 1971* (SA) (“Mining Act”). Under this act, mining is prohibited in South Australia without an authorization or tenement (a lease or license), and mining operations, including exploration for and/or production of minerals, cannot take place unless the tenement holder has an approved Program for Environment Protection and Rehabilitation (“PEPR”). The legal framework treats the potential for damage to Aboriginal heritage as an environmental risk to be addressed through the risk management processes of mining proponents who seek approval to conduct mining operations. The legal framework is complicated by the fact that not all best practices regarding heritage protection are referred to in legislation but rather in non-binding government guidelines and policy and contractual agreements between Aboriginal people and mining proponents.

The structure of this Article is as follows: Part I of this Article briefly explains the concept of Aboriginal cultural heritage and the ways in which mining activities may adversely affect cultural heritage. Part II explains the way in which the provisions of the AHA, land rights legislation, and native title law are relevant to the protection of Aboriginal heritage. However, it is beyond the scope of this Article to address Commonwealth legislation, such as the ATSIHPA, and environmental legislation that is relevant to the protection and management of Aboriginal places, such as the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). These acts have been criticized elsewhere.

which native title exists or might exist.” *Native Title (South Australia) Act 1994* (SA) s 3(1) (definition of “native title land”).


14 *Mining Act 1971* (SA) ss 70A–70B(1), 70HC (Austl.) [hereinafter Mining Act].

15 See id. ss 6(4), 8A; see discussion infra Part III.

Part III describes the statutory framework for mining and heritage protection established by the Mining Act and subordinate legislation under that act. It will also provide brief comments on the provisions of the *Roxby Downs (Indenture Ratification) Act 1982* (SA) (“Indenture Act”), which governs the Olympic Dam Mine, the largest mine in the state. Part IV critiques the current law, followed by the Conclusion. The critical analysis in this Article is informed by the (sometimes conflicting) views expressed by Aboriginal people, such as in submissions to the SA Aboriginal Heritage Inquiry. However, the critique in this Article is of the legal framework as it exists and operates within Australia’s current legal system. This Article does not engage with the extensive body of Indigenous Critical Literature regarding colonization and critique of the imposition of the Australian legal system on First Nations peoples, nor does it engage with literature regarding A Voice in the Commonwealth Constitution, nor the need for a treaty and how or whether a treaty would improve Aboriginal cultural heritage protection. These issues are beyond the scope of this Article.

I. Aboriginal Cultural Heritage and Impacts of Mining

Aboriginal culture is one of the world’s oldest living continuous cultures. Aboriginal people have been present in South Australia for at least the past 45,000 years. There are over thirty Aboriginal language groups in South Australia, “each with distinct beliefs, cultural practices and languages.”

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17 See *supra* note 13 and accompanying text.
22 *Id.*
Aboriginal creation ancestor stories explain how natural elements in the landscape were formed or how certain species came to be.

The stories describe how creation ancestors:

- shaped and shifted the landscape;
- crafted its beauty and natural resources; and
- then entrusted these places to specific groups of people across South Australia.

The stories inform cultural practices, which govern how Aboriginal communities live with each other and maintain the land, plants and animals of their country, and are also a way of passing information to younger generations.23

The Dreaming is also present, being a way of life, a guide to the living world and integral to the relationship of Aboriginal people with the land and landscape.24 Therefore, although “Aboriginal sites and the stories associated with them often originate from the very distant past” they “contribute to the living belief systems and customs of contemporary Aboriginal people.”25 Aboriginal people living today have a responsibility to themselves and to their communities to protect and keep their cultural heritage alive.26

A historical feature of the statutory approach to Aboriginal heritage protection has been to define Aboriginal heritage in terms of tangible heritage27—that is, heritage which can be touched and seen, and which is manifested in the landscape as discrete Aboriginal sites, objects, and remains. However, Aboriginal heritage also consists of intangible heritage: the “practices, representations, expressions, knowledge, skills—as

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23 Id.
25 About Aboriginal Heritage in South Australia, supra note 21.
well as the instruments, objects, artefacts and cultural spaces associated therewith—that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. Intangible cultural heritage encompasses all the ways Aboriginal people are connected to the landscape, including personal identity, history, language, tradition and belief, law, cultural and traditional ecological knowledge, as well as the knowledge, Country, and identity that each generation receives and passes on.

An Aboriginal cultural landscape is “a place valued by an Aboriginal group (or groups) because of their long and complex relationship with that land. It expresses their unity with the natural and spiritual environment. It embodies their traditional knowledge of spirits, places, land uses, and ecology.” Cultural landscapes are “characterized by the intangible values that Indigenous peoples attach to landscape.” While anthropologists and archaeologists can be trained to identify tangible manifestations of Aboriginal heritage, only Aboriginal people can identify and explain the significance of cultural landscapes. “Country is the term often used by Aboriginal peoples to describe the lands, waterways and seas to which they are connected. The term contains complex ideas about law, place, custom, language, spiritual belief, cultural practice, material sustenance, family and identity.”

There are many ways in which Aboriginal heritage may be negatively affected by mineral exploration and/or production. Those activities may affect the physical environment in a significant way. For example, major ground-disturbing works, such as the construction of mines, roads, and electricity infrastructure, may damage or disturb objects, sites, and cultural landscapes. Tangible and intangible heritage may be adversely affected by activities that involve temporary or minimal physical impacts, such as the unwanted presence of company personnel or equipment.

30 SUSAN BUGGEY, HISTORIC SITES & MONUMENTS BD. OF CAN., AN APPROACH TO ABORIGINAL CULTURAL LANDSCAPES 30 (1999).
31 Id. at 18.
34 See, e.g., Victorian Civil & Administrative Tribunal, Practice Note Reference No P1020/20: Significant Ground Disturbance, 2021, 1–2 (discussing ground disturbance in the context of the legal regime for Aboriginal heritage protection in the state of Victoria).
(including drones) in areas of cultural and spiritual significance from which people are prohibited according to Aboriginal tradition; obtaining (and making public) information that is secret; restricting the access of Traditional Owners to Country and thereby preventing them from carrying out traditional activities; by visual intrusion into a landscape; and by noise.\(^{35}\)

Aboriginal people have expressed the grief, distress, anger, and feelings of loss, devastation, and powerlessness that they experience when mining causes unwanted impacts on Country.\(^{36}\) Where heritage is destroyed, this has irreparable impacts on current and future generations: The destruction of the caves at Juukan Gorge was described by Traditional Owners as leaving “a gaping hole in our ability to pass on our heritage to our children and grandchildren.”\(^{37}\) Despite decades of law that is supposed to enable the protection of Aboriginal heritage, there is significant and ongoing criticism of the statutory frameworks.\(^{38}\)

II. **Legal Framework: Aboriginal Land Rights, Native Title and Heritage Laws**

A. **Freehold Tenure**

The *Aboriginal Lands Trust Act 1966*, which was repealed and replaced by the *Aboriginal Lands Trust Act 2013* ("ALT Act") was the first land rights legislation in South Australia.\(^{39}\) It was followed by the

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\(^{36}\) See, e.g., *Juukan Gorge Final Report*, supra note 6, at xi, 40.


The ALT Act established a body corporate, the Aboriginal Lands Trust (“ALT”), to hold land titles on behalf of South Australia’s Aboriginal people. The ALT holds the titles to sixty-five properties covering an area of 5,383 km². The Anangu Pitjantjatjara Yankunytjatjara Lands (“APY Lands”) cover an area of 102,630 km², in the northwest corner of South Australia. All Pitjantjatjara, Yankunytjatjara, and Ngaanyatjarra people who are Traditional Owners of any part of the APY Lands are members of Anangu Pitjantjatjara Yankunytjatjara (“APY”), the body corporate in whom the APY Lands have been vested in fee simple. The Maralinga Tjarutja Lands cover an area of 80,764 km² in the west of South Australia, to the south of the APY Lands, and have been vested in a body corporate, Maralinga Tjarutja (“MT”), in fee simple.

The land rights legislation empowers the ALT, the Executive Board of APY, and the MT Council to exercise the functions and powers of the relevant body corporate, including managing and dealing with land. Each lands right act contains provisions regarding access to land and mining. Although these are not identical, there are some similar key features.
First, it is an offence to enter the lands to carry out mining operations without the permission of the ALT, APY, or MT. The ALT, APY, and MT may refuse an application to enter land, but that decision may be referred to an arbitrator, who may reverse it, or, where no decision has been made, determine the application as the arbitrator thinks fit.

When making a decision, the arbitrator must have regards to certain matters, requiring them to balance the preservation of the culture, tradition, and way of life of the Traditional Owners and the preservation of the environment with “the economic and other significance” of the mining operations “to the State and Australia.”

Secondly, a mining tenement cannot be granted under the Mining Act in respect of Trust Land, APY land, or MT land except to a person who has obtained permission by agreement with the body corporate (or through arbitration) to carry out mining operations. Before granting or renewing a tenement, the Mining Minister must allow the Trust, APY, or MT a reasonable opportunity to make submissions “relating to the conditions subject to which the tenement should be granted.” Once permission has been granted to enter land, a tenement holder may enter the land, subject to any conditions upon which permission was granted by the body corporate and any provision of the Mining Act. Therefore the ALT, APY, and MT do not hold a right of veto over proposed mining developments.

Thirdly, the lands rights legislation places a very strong emphasis on the importance of heritage and powers and duties to consult. The legislation requires the ALT, APY, and MT, when making decisions regarding

the Mamungari Conservation Park and the Maralinga nuclear test site. See MTLR Act (n 44) s 20A.

48 ALT Act (n 45) s 53(1); APYLR Act (n 43) s 20(1)(a); MTLR Act (n 44) s 21(1). Also, with certain exceptions, access to APY and MT lands is generally prohibited. APYLR Act (n 43) s 19; MTLR Act (n 44) s 18.

49 ALT Act (n 45) s 53(5); APYLR Act (n 43) s 20(6); MTLR Act (n 44) s 21(6).

50 ALT Act (n 45) s 54(1); APYLR Act (n 43) s 20(8); MTLR Act (n 44) s 21(10). Although the provisions differ, these acts specify who may be an arbitrator, such as a judge of the High Court, the Federal Court, or the Supreme Court of an Australian State or Territory, or a legal practitioner of a certain minimum years standing. See ALT Act (n 45) s 54(4); APYLR Act (n 43) s 20(11); MTLR Act (n 44) s 21(13). In relation to the MT lands, where a mining applicant applies for referral to arbitration, the Minister must first consult with the parties with a view to resolution by conciliation. MTLR Act (n 44) s 21(11).

51 ALT Act (n 45) s 54(5); APYLR Act (n 43) s 20(14); MTLR Act (n 44) s 21(16).

52 ALT Act (n 45) s 54(8); APYLR Act (n 43) s 20(15); MTLR Act (n 44) s 21(19).

53 ALT Act (n 45) s 52(1); APYLR Act (n 43) s 21(2); MTLR Act (n 44) s 23(2).

54 ALT Act (n 45) s 52(2); APYLR Act (n 43) s 21(3); MTLR Act (n 44) s 23(3).

55 ALT Act (n 45) s 52(3); APYLR Act (n 43) s 21(1); MTLR Act (n 44) s 23(1).
the lands, to consult with and consider the views of the “Traditional Owners”—that is, Aboriginal people who, “in accordance with Aboriginal tradition, have social, economic and spiritual affiliations with, and responsibilities for, the Trust Land or any part of it.”56

Section 7 of the APYLR Act also requires that APY obtain the consent of Traditional Owners.57 APY must not authorize or permit a proposal to be carried out, unless the Traditional Owners understand the nature and purpose of the proposal, have had the opportunity to express their views to APY, and consent to the proposal.58 APY have developed “long standing and rigorous consultation procedures” which are “robust and reliable,” including a series of forms for proponents to ensure consultation is carried out effectively.59 Neither MT nor the ALT are required to obtain consent of Traditional Owners.60

Finally, the land rights acts do not regulate the mining operations of mining companies on the lands nor set out a statutory framework for the protection of cultural heritage.61 This is done by the Mining Act and the AHA, both of which apply to ALT, APY, and MT lands.62

B. Native Title

Native title is described as a “bundle of rights,” deriving from traditional Aboriginal laws and customs which existed prior to the time of European colonization.63 The existence of native title was first recognized by the common law in Mabo (No 2)64 and native rights are given

56 ALT Act (n 45) s 8; see also ALT Act (n 45) ss 5(e), 6, 17; MTLR Act (n 44) s 3; APYLR Act (n 43) ss 3(1), 7, 9B(1), 6(1)(a)–(b).
57 APYLR Act (n 43) s 7.
58 Id.
60 See MTLR Act (n 44) s 17; ALT Act (n 45) s 53.
61 See ALT Act (n 45) s 53; APYLR Act (n 43) s 52; MTLR Act (n 44) s 17.
62 Mining Act (n 14) (flush language); see Aboriginal Heritage Act 1988 (SA) (Austl.) (flush language) [hereinafter AHA].
64 Mabo No 2 (n 11) [2].
statutory recognition and protection under the NTA. The types of rights which have been recognized as native title rights include rights to perform traditional ceremonies and hold meetings; to engage and participate in cultural activities; to teach on the native title land the physical and spiritual attributes of locations and sites; and to visit, maintain, and protect sites and places of cultural significance to the native titleholders under their traditional laws and customs. Native title determinations may recognize exclusive rights to the area within the determination or may recognize non-exclusive native title rights. In most cases, native title coexists with other rights to land.

South Australia’s first determination of native title was the De Rose Hill claim lodged in 1994. The claimants successfully established their native title rights in 2005 after long and costly litigation. The government then introduced the South Australian Native Title Resolution process, a “coordinated, whole of state, inclusive approach to negotiating Native Title” outcomes through the use of Indigenous Land Use Agreements (“ILUAs”) and consent determinations.

As of March 28, 2022, there were thirty-seven native title determinations in South Australia, and of those, thirty-five determinations where native title rights have been found to exist in part or over the entire area of the claim. All determinations recognize the right to look after cultural
heritage. Across Australia, Registered Native Title Body Corporates ("RNTBCs") (also referred to as Prescribed Bodies Corporate) have been established to hold and manage native title rights. These bodies exercise decision-making powers and responsibilities with respect to cultural heritage within the area of the respective native title determination.

Under the NTA, native titleholders and registered native title claimants (collectively referred to here as “native title parties”) have a right to negotiate with mining companies under the “Right to Negotiate” procedures that relate to the grant of certain mining rights and other “future acts.” Alternatively, native title parties may voluntarily enter an ILUA with mining companies. In South Australia, Part 9B of the Mining Act addresses how mining operations can be undertaken on native land. Part 9B establishes a regime for the negotiation of native title mining agreements (“Part 9B mining agreements”) that operates as an alternative to the “Right to Negotiate” scheme in the NTA. The Mining Act Part 9B alternative Right to Negotiate schemes means that there are no mining agreements for the exploration or production of minerals made under the NTA Right to Negotiate procedures.
As with the NTA, the Mining Act also provides for an expedited procedure, which is “a fast-tracking process for future acts (usually the grant of an exploration . . . licence) that the government agency responsible for the act considers will have minimal impact on native title,” although this has very rarely been used to date and there is little interest in using the expedited procedure.

Part 9B allows mining companies to obtain an exploration license before an agreement is required. However, no advanced exploration activities may occur until an agreement has been entered into with the relevant native title group, either voluntarily, or as determined by the Environment, Resources and Development (“ERD”) Court, and without an approved PEPR. Unlike an exploration authority, a production tenement cannot be granted or registered over native title land unless the mining operations to be carried out under the tenement are authorized by a Part 9B mining agreement, an ILUA, or the ERD Court. This mirrors the NTA Right to Negotiate scheme.


“Advanced exploration” activities include all activities requiring the use of declared equipment, including drilling equipment—i.e., “any mechanically driven machinery capable of drilling to depths greater than 2.5 metres below the ground’ in order to recover subsurface geological samples or information[,] costeans and trenches[,] any type of seismic survey (excluding passive seismic)[;] any camp site outside of the scope documented [as covered by the Generic Program for Environment Protection and Rehabilitation (“PEPR”);] and] airborne surveys.” The South Australian Government Gazette in South Australia, No 97, 17 December 2020, 5984 [hereinafter Adopted Program 001]. See also Mining Act (n 14) s 6(1a)(b) (definition of “advanced exploration operations”); Mining Regulations 2020 (SA) reg 3.

Id. s 63H.

See NTA (n 75) s 25.
As of March 28, 2022, there were 113 ILUAs in existence in South Australia of which thirteen specifically described “mining” as a subject matter of the ILUA.88 South Australia has also developed four standard-form ILUAs for Mineral Exploration under the NTA—the Adnyamathanha Body Corporate ILUA, the Gawler Ranges Minerals Exploration ILUA, the Arabunna Area ILUA, and the Antakirinja Land Management Corporation ILUA.89 These ILUAs are between the State of South Australia, the Mining Minister, the Aboriginal Legal Rights Movement (now South Australian Native Title Services (“SANTS”)), the relevant native title party, and the South Australian Chamber of Mines and Energy (“SACOME”).90

Part 9B mining agreements are contractual arrangements. An agreement must deal with notices to be given or other conditions to be met before the land is entered for the purpose of carrying out exploration or mining operations, and it must deal with principles governing rehabilitation of the land on the completion of operations.91 An agreement may otherwise include any matters the parties would like it to cover, including provisions to protect cultural heritage, and provisions regarding for employment and other benefits.92 However, if no agreement is reached, then a company has recourse to the ERD Court to determine the terms upon which access to land is granted.93 Native title parties do not have

89 For a brief history of the ILUA process in SA, see AUSTRALIAN HUM. RTS. COMM’N, South Australia’s State-Wide Indigenous Land Use Agreement (ILUA) Framework, in NATIVE REPORT TITLE 2006, at 113 (2007). The Gawler Ranges Minerals Exploration ILUA was terminated, effective February 2017, ASS’N OF MINING & EXPLORATION COS., SOUTH AUSTRALIA 2022 ELECTION POLICY PLATFORM 13 (2021), and the Arabunna Area ILUA was terminated, effective December 1, 2014, although both continue to apply to tenements existing at the date of termination. Native Title and Aboriginal Land, supra note 78.
90 See Native Title and Aboriginal Land, supra note 78; ASS’N OF MINING & EXPLORATION COS., supra note 89, at 13.
91 Mining Act (n 14) s 63Q.
92 It is beyond the scope of this Article to critically examine the content of mining agreements as these are generally confidential, but other authors have critiqued the content of mining agreements in other Australian jurisdictions and found a significant variation in the extent to which these advance the interests of the Aboriginal parties to them. See, e.g., O’Faircheallaigh, supra note 35, at 17.
93 Mining Act (n 14) s 63S(1).
the right to veto, or refuse consent to, developments under the Mining Act or NTA.

C. **Aboriginal Heritage Act 1998**

The land rights legislation and native title laws provide an avenue for Aboriginal people to protect cultural heritage by controlling access to land and making contractual agreements with mining companies seeking to operate on the land either vested in Aboriginal people through the land rights legislation, or over which they hold native title rights.94 However, Aboriginal heritage is also protected separately through the AHA.95 The AHA was preceded by the *Aboriginal and Historic Relics Preservation Act 1965* (SA) and the *Aboriginal Heritage Act 1979* (SA), both of which were repealed by the 1988 AHA.96 The AHA applies to all land in South Australia, whether or not native title exists or has been extinguished.97 However, it does not apply to the Roxby Downs Indenture area which is exempt from the operation of the AHA by virtue of the Indenture Act, which governs the Olympic Dam mine.

A primary purpose of the AHA is to provide for the protection and preservation of the Aboriginal heritage.98 Specifically, it is intended to protect Aboriginal remains; Aboriginal objects of significance either according to Aboriginal tradition or to Aboriginal archaeology, anthropology, or history; and Aboriginal sites, defined as an area of land (including land beneath inland waters or the sea) that is of significance according to Aboriginal tradition or to Aboriginal archaeology, anthropology, or history.99 The Act does not define “significance.”100

“Aboriginal tradition means traditions, observances, customs or beliefs of the people who inhabited Australia before European colonisation and includes traditions, observances, customs and beliefs that have

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94 See generally *Mining Act* (n 14); *ALT Act* (n 45); *MTLR Act* (n 44); *APYL Act* (n 43); *NTA* (n 75).
95 *AHA* (n 62) (flush language).
97 See generally *AHA* (n 62).
98 See *AHA* (n 62) s 5. The Long Title reads that the AHA “provide[s] for the protection and preservation of the Aboriginal heritage.” *Id.* (flush language).
99 *AHA* (n 62) s 3.
100 *Id.*
evolved or developed from that tradition since European colonisation.”

“Aboriginal archaeology” means the physical remains of the pre-contact life ways of Aboriginal people. “Aboriginal anthropology” refers to objects or sites which demonstrate Aboriginal culture and behavior. “Aboriginal history” refers to objects or sites related to first contact, settlement, missions and the expansion of pastoralism and agriculture onto Aboriginal land.

The Act does not define “heritage” to include intangible heritage such as personal identity, language, law, art, ceremonies, song lines, traditional ecological knowledge, plants, or animals. These are not protected under the Act, unless they are incidentally protected because, for example, they are from part of a protected site or sites.

1. Central Archive and Register of Aboriginal Sites and Objects

The Act establishes a Central Archive which contains a Register of Aboriginal Sites and Objects. It is maintained by the Minister for Aboriginal Affairs (“Minister for AAR”). The Central Archive contains records of registered and reported sites, objects and remains, reports, theses, photographs, and articles. Reported sites are those that are awaiting registration. Section 12 allows for a determination of whether objects or sites are significant and should be registered. However, all sites of significance—registered, reported, or unreported—are protected by the

101 Id.
103 See id. at 29.
104 Id. at 31.
105 See AHA (n 62) s 3.
106 One songline has been recorded in the Register, by determining thirty-eight individually recorded sites with its own sites card, and by a notation, the determination instrument references that “the identified sites exist in a complementary relationship one to another and that for purposes of enquiry all 38 sites are considered to form the songline.” Department of the Premier and Cabinet, Submission No 33 to Aboriginal Lands Parliamentary Standing Committee, Parliament of South Australia, Aboriginal Heritage Inquiry 4 [hereinafter DPC Submission]; see also State Aboriginal Heritage Committee, Submission No 21 to Aboriginal Lands Parliamentary Standing Committee, Parliament of South Australia, Aboriginal Heritage Inquiry (31 March 2021) 8–10 [hereinafter SAHC Submission].
107 AHA (n 62) s 9.
108 Id.
110 See AHA (n 62) s 20(1).
111 Id. s 12.
In fact, the Central Archive records only a fraction of Aboriginal sites and objects, and there are many areas where sites are known to Traditional Owners but remain unrecorded. Site cards and survey reports date from the 1970s and are of varying quality and reliability according to the technology used to record them, and the information held within the Register is only indicative of the location and range of sites on Country.

2. Administration of the Act

The Act is administered by the Minister for AAR, currently the Attorney General, the Honorable Kyam Maher, with ministerial functions delegated to Aboriginal Affairs and Reconciliation (“AAR”) within the Department of the Premier and Cabinet. The functions of the Minister are set out in section 5 of the Act. The Minister must, carrying out his or her functions, consider any relevant recommendations of the State Aboriginal Heritage Committee (“SAHC”), established under section 7 of the Act. “The Committee consists of Aboriginal persons appointed, as far as is practicable, from all parts of the State . . . .” Its functions are set out in section 8 of the Act. Inspectors assist with enforcement of the Act: Their powers are set out in section 17.

3. Ministerial Authorizations

The AHA implements a “prohibit and authorize” scheme. One of the central provisions of the Act is section 23, which prohibits a person, without an authority granted by the Minister, from: damaging, disturbing, or interfering with any Aboriginal site; damaging any Aboriginal site.
object; or, where any Aboriginal object or remains are found, disturbing, interfering, or removing the object or remains.\textsuperscript{123} Crucially, sites do not have to be listed on the Central Archive to be covered by section 23.\textsuperscript{124} An authorization or approval granted by the Minister which permits one or more of these actions is generally known as a “section 23 authorisation.”\textsuperscript{125} To conduct any activities that might disturb or damage Aboriginal heritage, mining companies will require Ministerial authorization under section 23.\textsuperscript{126} The Minister for AAR may place conditions on such an authorization.\textsuperscript{127}

Section 13 of the Act requires that the Minister for AAR, before making a determination or giving an authorization under the Act, “take all reasonable steps” to consult with various persons and bodies.\textsuperscript{128} These include the SAHC; any Aboriginal organization that, in the opinion of the Minister for AAR, has a particular interest in the matter; and any Traditional Owners, and other Aboriginal persons, who, in the opinion of the Minister, have a particular interest in the matter.\textsuperscript{129} The Act defines “a traditional owner” of an Aboriginal site or object to mean an “Aboriginal person who, in accordance with Aboriginal tradition, has social, economic or spiritual affiliations with, and responsibilities for, the site or object.”\textsuperscript{130}

A fundamental feature of section 13 is that the ministerial duty to consult is not expressed as a requirement to consult with native title parties.\textsuperscript{131} It is broader than this. Heritage legislation predates native title, and Aboriginal people have listed sites of significance under heritage legislation and advanced their interests in protecting heritage decades before native title was recognized.\textsuperscript{132} The AHA applies to native title land and land where there is no native title or native title has been extinguished (apart from the Roxby Downs Indenture area).\textsuperscript{133} Native title parties will, of course, need to be consulted if a mining project affects

\begin{itemize}
\item \textsuperscript{123} AHA (n 62) s 23.
\item \textsuperscript{124} Report Book No 2017/00035, \textit{supra} note 26, at 9.
\item \textsuperscript{125} See id. at 11.
\item \textsuperscript{126} Id.; see also AHA (n 62) s 23.
\item \textsuperscript{127} AHA (n 62) s 24(1).
\item \textsuperscript{128} Id. s 13(1).
\item \textsuperscript{129} This does not apply to: (a) a determination under section 24(8); (b) an authorization under section 27 or 36; or (c) an authorization under Part 3 in relation to which a local heritage agreement has been approved under section 19I. AHA (n 62) s 13(3).
\item \textsuperscript{130} Id. s 3 (definition of “traditional owner”).
\item \textsuperscript{131} See id. s 13.
\item \textsuperscript{132} See generally id. (passed in 1988); \textit{Native Title (South Australia) Act 1994} (SA) (Austl.) (passed in 1994).
\item \textsuperscript{133} \textit{Native Title and Aboriginal Land}, \textit{supra} note 78.
\end{itemize}
their native title rights that encompass culture or heritage, as they will be Aboriginal persons or organizations with a particular interest in a development matter.\textsuperscript{134} The duty to consult in section 13 includes Aboriginal heritage organizations—which were established following the passage of the AHA or its predecessors—and which may have a particular interest in a mining development.\textsuperscript{135} It also includes Traditional Owners, the individual Aboriginal persons with responsibilities for heritage, arising from the tradition of their people.\textsuperscript{136} Where a mining proposal may affect the responsibilities of a Traditional Owner for a site or object, then the Traditional Owner will have a particular interest in the mining development and a right to be consulted by the Minister in relation to an application for a section 23 authorization.\textsuperscript{137} The Act therefore also protects what the Federal Court in *Croft on behalf of the Barngarla Native Title Claim Group v South Australia (Port Augusta Proceeding)* ("*Croft v South Australia*") described as "non-native title interest[s]" in heritage.\textsuperscript{138} Although the Act requires the Minister for AAR to consult with Traditional Owners before granting a section 23 authorization, Traditional Owners do not have the right to veto developments.\textsuperscript{139} There is no merits review of the Minister’s decision to grant section 23 authorization, nor the conditions upon which such activities will be approved.\textsuperscript{140} The only right is that of judicial review of the legality of the decision-making process.\textsuperscript{141}

4. Obligation to Report

Subsection 20(1) of the Act sets out an obligation to report the discovery of heritage to the Minister as soon as is practicable.\textsuperscript{142} A mining company that discovers heritage must stop work and report the discovery.\textsuperscript{143}

\textsuperscript{134} See AHA (n 62) s 23.
\textsuperscript{135} Id. s 13.
\textsuperscript{136} The AHA does not use the word “custodial,” although it is a generally accepted term. See AHA (n 62) s 3.
\textsuperscript{137} AHA (n 62) s 13.
\textsuperscript{138} *Croft on behalf of the Barngarla Native Title Claim Group v South Australia (Port Augusta Proceeding)* ("*Croft v South Australia*") [2020] FCA 888 [96]–[97] (Charlesworth J) (AustL).
\textsuperscript{139} See AHA (n 62) s 13.
\textsuperscript{140} See id. ss 13, 23.
\textsuperscript{141} For a recent application for judicial review, see *Dare v Kelaray Pty Ltd* [2022] SASC 91 [1] (AustL).
\textsuperscript{142} AHA (n 62) s 20(1).
\textsuperscript{143} Id.
However, the company does not have to apply for a determination under section 12 to establish that a site or object is one of significance.\textsuperscript{144} Such a determination can be a long process, and Traditional Owners may not want sites or objects to be reported.\textsuperscript{145} However, the company must avoid committing an offence under section 23.\textsuperscript{146} In the case of mineral exploration, it may be often easier to adjust work to avoid damage or disturbance to heritage rather than seek a section 23 authorization.

5. Heritage Agreements

Prior to amendments to the Act in 2017, under subsection 6(2), Traditional Owners could request that the Minister delegate his or her power to authorize damage to heritage.\textsuperscript{147} This provision was repealed in 2017.\textsuperscript{148} Instead, the Act now envisages Aboriginal people will control activities in relation to heritage through heritage agreements,\textsuperscript{149} of which there are three types: Aboriginal Heritage Agreements (made under Part 3, Division 6);\textsuperscript{150} Local Heritage Agreements (made under Part 3, Division A1);\textsuperscript{151} and Division A2 Agreements (made under Part 3, Division A2).\textsuperscript{152}

Aboriginal heritage agreements may be entered into by the Minister and the owner of land on which any Aboriginal site, object, or remains is situated.\textsuperscript{153} An Aboriginal Heritage Agreement may contain any provision for the protection or preservation of Aboriginal heritage.\textsuperscript{154} As far as the author is aware, there are no heritage agreements in existence. Division A2 Agreements are agreements affecting Aboriginal heritage under other acts.\textsuperscript{155} This Division allows the ratification of

\textsuperscript{144} Starkey v South Australia [2011] SASC 34 [121] (Sulan J) (Austl.).
\textsuperscript{145} Report Book No 2017/00035, supra note 26, at 11.
\textsuperscript{146} AHA (n 62) s 20.
\textsuperscript{147} AHA (n 62) s 6(2).
\textsuperscript{148} Governor of South Australia, ‘Aboriginal Heritage (Miscellaneous) Amendment Act (Commencement) Proclamation 2017’ in South Australia, The South Australian Government Gazette, No 72, 17 October 2017, 4281, 4336.
\textsuperscript{149} See AHA (n 62) div 6.
\textsuperscript{150} Id. div 6.
\textsuperscript{151} Id. div A1.
\textsuperscript{152} Id. div A2.
\textsuperscript{153} Id. s 37A(1).
\textsuperscript{154} Id. s 37B(1).
agreements addressing the management of heritage made under another act, for example, the management of heritage within a native title agreement under the NTA (such as an ILUA) or Part 9B of the Mining Act. 156

First introduced in 2017, a local heritage agreement (“LHA”) is an agreement, made under the AHA, which deals with the impact of a proponent’s activities on any Aboriginal heritage in the area covered by the agreement. 157 These agreements are between Recognised Aboriginal Representative Bodies (“RARBs”) and land-use proponents. 158 An LHA must be submitted to the Minister for AAR for approval. 159 The Minister may approve the agreement if it satisfactorily deals with any heritage that may be in the relevant area. 160 Local heritage agreements are submitted to the Minister for AAR with a request for authorization under section 23 of the AHA for approval. 161 Once an agreement has been approved, the Minister must grant an authorization to affect heritage as contemplated in the agreement. 162

Part 2B of the AHA deals with the establishment of RARBs. 163 A RARB is an incorporated body that can enter into LHAs with proponents to manage impacts on Aboriginal heritage. 164 A RARB may be appointed for a specified area of land, a specified Aboriginal site or sites, a specified Aboriginal object or objects, or specified Aboriginal remains. 165

APY and MT were granted RARB status at proclamation of the 2017 amending legislation. 166 The Act provides that RNTBCs are taken to be the RARB in respect of the native title determination area, including areas where native title has been extinguished or suppressed. 167

156 Id.
157 AHA (n 62) s 19H.
158 Id.
159 Id. s 19I.
160 Id. s 19I(3).
161 Id. s 19J.
163 AHA (n 62) pt 2B.
164 Id. s 19H(1)(b).
165 Id. s 19B(1).
166 Id. s 19B(2)—(3).
167 Id. s 19B(4).
However, all RARB appointments must be approved by the SAHC, including RNTBCs.\textsuperscript{168} The SAHC may also appoint any person or body claiming native title as a RARB for the area they are claiming, or any Aboriginal person or party to an ILUA as the RARB for the area to which the ILUA applies.\textsuperscript{169} Finally, “[i]f the above categories of people or groups do not have priority to become the RARB for specific heritage” the SAHC may appoint “any body corporate applicant capable of knowing and representing the views of Traditional Owners about that heritage as its RARB.”\textsuperscript{170}

To date, the provisions regarding LHAs have not been widely used. Other than APY and MT, the Kokatha Aboriginal Corporation, a RNTBC, was the only other RARB in existence as of January 1, 2022.\textsuperscript{171} Before appointing a person or body as a RARB, the SAHC must be satisfied that the person or body “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).”\textsuperscript{172} In order to discharge this statutory obligation, the SAHC requires a RNTBC to make an application demonstrating that the RNTBC has effective procedures in place to ensure it will be able to consult with all Traditional Owners and take their views into consideration before entering into LHAs.\textsuperscript{173} Some RNTBCs have had difficulties satisfying the application requirements.\textsuperscript{174}

Aboriginal Affairs and Reconciliation has prepared non-binding guidelines that provide guidance on the minimum content that will be required for approval of a Local Heritage Agreement by the Minister.\textsuperscript{175} These guidelines also emphasize the statutory obligations of the Minister to protect heritage when approving agreements, and of RARBs to know

\begin{thebibliography}{9}
\bibitem{168}
Id. s 19B(5).
\bibitem{169}
\textit{AHA} (n 62) s 19B(9).
\bibitem{170}
\bibitem{171}
\bibitem{172}
\textit{AHA} (n 62) s 19B(12)(a).
\bibitem{173}
\textit{RARBS GUIDELINE 1}, supra note 170, at P4.
\bibitem{174}
\bibitem{175}
\textit{LHA GUIDELINE 3}, supra note 162, at P2–P3.
\end{thebibliography}
and represent the view of Traditional Owners when negotiating local heritage agreements.\footnote{176}

6. Consultation and Engagement Between Project Proponents and Aboriginal People

The AHA does not contain a statutory provision requiring project proponents to consult with Aboriginal people.\footnote{177} AAR will hold public consultation sessions so that the Minister’s duty to consult under section 13 is discharged;\footnote{178} however, project proponents are not legally obliged by the AHA to consult with Traditional Owners, Aboriginal organizations, or native title parties either before or after a section 23 authorization is issued.\footnote{179}

Under the AHA, the identification and assessment of heritage, and the avoidance, minimization, and management of impacts on cultural heritage take place through the use of cultural heritage surveys (“CHSs”), Work Area Clearances (“WACs”), and Cultural Heritage Management Plans (“CHMPs”).\footnote{180} These are commonly used in the mining industry and are viewed as “best practice” by AAR.\footnote{181} Arrangements for archaeologists or Aboriginal monitors to monitor work that may disturb or damage heritage is also part of best practice.\footnote{182}

Under the WAC process, senior Aboriginal men and women with knowledge of Country and who can speak for Country, accompanied by anthropologists and/or archaeologists, will drive and walk land identified by a mining proponent to identify where the proponent cannot travel or undertake exploration for the sake of heritage protection in certain areas.\footnote{183} A WAC “is usually undertaken for small projects where the

\begin{footnotes}
\item[176] Id. at P2.
\item[177] See AHA (n 62) s 19H.
\item[178] See AHA (n 62) s 13 (requiring the Minister to consult with groups but not requiring mining proponents to engage in consultation).
\item[179] See AHA (n 62) s 13 (requiring the Minister to consult with groups but not requiring mining proponents to engage in consultation).
\item[180] South Australian Chamber of Mines and Energy (“SACOME”), Submission No 3 to Aboriginal Lands Parliamentary Standing Committee, Parliament of South Australia, Aboriginal Heritage Inquiry (April 2021) 5–6 [hereinafter SACOME Submission].
\item[181] ABORIGINAL HERITAGE FACT SHEET, supra note 112, at 2–3.
\item[182] Id. at 4; Report Book No 2017/00035, supra note 26, at 24.
\item[183] For a discussion of the process, see SACOME Submission, supra note 180, at 5–6.
\end{footnotes}
operation is low risk and has short timeframes . . . where the precise
depositions of on-ground work areas have not been determined and the
proposed footprint for ground disturbing activities is flexible and can be
modified to avoid Aboriginal sites.184

A CHS is a surface heritage survey undertaken by archaeologists
and anthropologists in consultation with Aboriginal people to identify or
assess Aboriginal sites of significance.185 It is “recommended for projects
which are intended to have a significant impact over a fixed area and
heritage values must be clearly defined for consultation or conservation
purposes.”186

For the management of Aboriginal heritage discovered during
exploration and mineral production, leading practice requires a mining
leaseholder to operate in accordance with a CHMP, developed in consul-
tation with Aboriginal groups as an outcome of a CHS.187 The CHMP will
“provide for the long-term protection and management of Aboriginal
heritage particularly during the construction of production facilities and
infrastructure, through to the decommissioning process.”188

There is no statutory requirement in the AHA that a proponent
must undertake a WAC or CHS or prepare a CHMP.189 They are not
described in the AHA or any subordinate legislation under the AHA.190
The obligation to conduct a WAC or CHS, prepare and operate in accor-
dance with a CHMP, or to undertake monitoring is a contractual obliga-
tion negotiated as part of an agreement between a mining proponent and
a native title party under the NTA (such as an ILUA) or Part 9B of the
Mining Act.191

This means that—aside from a contractual arrangement—the only
way in which a requirement that proponents consult with Traditional
Owners, prepare and operate in accordance with a CHMP, or undertake
monitoring could currently have legal force under the AHA is if the
Minister for AAR places conditions on a section 23 authorization requir-
ing this to be done.192 However, the Minister for AAR has a very broad
discretion as to whether and which conditions to place on an approval, if

185 SACOME Submission, supra note 180, at 5.
186 Id.; see also ABORIGINAL HERITAGE FACT SHEET, supra note 112, at 2.
187 ABORIGINAL HERITAGE FACT SHEET, supra note 112, at 4.
189 See generally AHA (n 62).
190 See generally id. See also SACOME Submission, supra note 180, at 6.
191 Mining Act (n 14) pt 9B.
192 See AHA (n 62) ss 14, 23.
any, and there are no statutory criteria to which the Minister must have regard that require the Minister to place such conditions on a section 23 authorization.\textsuperscript{193} There is no guarantee the Minister will do this.

7. Compliance and Enforcement

The AHA has a number of compliance and enforcement mechanisms. The Act sets out offenses for which criminal penalties are prescribed.\textsuperscript{194} For example, the maximum penalty for breaching section 23 is 50,000 Australian dollars for a body corporate, or in any other case, 10,000 Australian dollars or imprisonment for six months.\textsuperscript{195}

The AHA empowers the Minister for AAR to give administrative directions to protect or preserve Aboriginal sites, objects, or remains.\textsuperscript{196} For example, the Minister may give directions prohibiting or restricting access to—or activities on or in relation to—sites, objects, or remains.\textsuperscript{197} Inspectors are also empowered to give directions restricting access to sites, objects, or remains.\textsuperscript{198} The Minister may acquire land for the purposes of protecting or preserving Aboriginal sites, objects, or remains, or purchase or compulsorily acquire objects or records, and place them in the custody of an Aboriginal person or organization.\textsuperscript{199} The Minister may also require the surrender of objects and records.\textsuperscript{200}

The Minister may authorize an Aboriginal person or group of Aboriginal persons to enter any land (including private land) for the purpose of gaining access to Aboriginal sites, objects, or remains.\textsuperscript{201} Section 37 provides that nothing in the AHA prevents Aboriginal people from doing anything in relation to Aboriginal sites, objects, or remains in accordance with Aboriginal tradition.\textsuperscript{202} However, Traditional Owners do not have a right per se to enforce the Act. There are no provisions

\textsuperscript{193} As to cases where the Minister did not place conditions on an authorization, see \textit{Newchurch v Minister for Aboriginal Affairs and Reconciliation} [2011] SASC 29[104]–[106] (Austl.) and \textit{Dare v Kelaray Pty Ltd} (n 141) [25].

\textsuperscript{194} \textit{AHA} (n 62) ss 14(2), 18, 20(1), 20(4), 21, 22(5), 23, 24(10), 26, 28–29, 32–33, 35(1), 36(4), 38, 41.

\textsuperscript{195} \textit{Id.} s 23.

\textsuperscript{196} \textit{Id.} s 24.

\textsuperscript{197} \textit{Id.} s 24(1).

\textsuperscript{198} \textit{Id.} s 25.

\textsuperscript{199} \textit{Id.} ss 30–31, 34.

\textsuperscript{200} \textit{AHA} (n 62) s 32.

\textsuperscript{201} \textit{Id.} s 36(1).

\textsuperscript{202} \textit{Id.} s 37.
regarding civil remedies, such as a right to seek compensation for harm, or exemplary damages, nor are there provisions to seek an order to “re-
store” heritage (where that is possible) and recover the costs of so doing.

III. LEGAL FRAMEWORK: MINING LAW

Most mining in South Australia is regulated by the Mining Act, Mining Regulations 2020, and a type of statutory instrument or subordinate legislation known as Ministerial Determinations. The Mining Act has been through major reviews in the past decade or so: first in 2010 to 2011, then from 2016 to 2020 with the Leading Practice Mining Acts Review. The latter culminated in the enactment of the Statutes Amendment (Mineral Resources) Act 2019 (SA) (“2019 Amendment Act”), revision of the 2011 Mining Regulations and subsequent proclamation of the Mining Regulations 2020, and a number of revised Ministerial Determinations, all of which came into force on January 1, 2021.

Part 9B of the Mining Act was not reviewed as part of the Leading Practice Mining Acts Review. From 2016 to 2020, the government engaged in the separate Stronger Partners, Stronger Futures (“SPSF”) program, which sought to identify problems faced by mineral explorers and native title groups and to address issues with the Part 9B provisions.

Various Discussion Papers were released, a Final Report was published

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206 The Ministerial Determinations were published in the South Australian Government Gazette. Adopted Program 001, supra note 84, at 5871–6010.
209 See, e.g., Report Book No 2018/00035, supra note 82, at 1; Department for Energy and
in 2020, and changes were made by amendments to the Mining Act through the 2019 Amendment Act, Mining Regulations 2020, and the revised Ministerial Determinations. Although the Discussion Papers identified issues of concern regarding the mineral exploration process and the protection of Aboriginal heritage, it is not within the jurisdiction of the Department for Energy and Mining (“DEM”) to resolve issues by amendment to the AHA, and the SPSF program did not therefore result in changes to that Act.

The 2019 Amendment Act did not fundamentally change the nature of the regulatory scheme governing mining. A key feature of the regime is that minerals are owned by the Crown on behalf of the people of South Australia. Royalties are payable to the Crown for the right to produce minerals. The Mining Act prohibits mining activities unless the appropriate authorization (or tenement) is obtained from the Minister administering the Act. As of November 30, 2022, the Minister administering the Act is the Minister for Energy and Mining (the “Mining Minister”). The Minister is empowered to delegate his or her functions to the relevant department, which is currently the DEM.
There are different types of tenements under the Act. Broadly speaking, a mineral claim provides a form of tenure over land, allowing the holder to prospect or explore for minerals and to apply for a mining lease or retention lease. An exploration license (“EL”) authorizes exploration for minerals. A mining lease (“ML”) is required to produce/extract minerals. A miscellaneous purposes license (“MPL”) authorizes non-mining activities such as the construction of supporting infrastructure on the tenement area. A retention lease (“RL”) allows companies to hold land to either conduct certain activities to determine if mining is feasible or to hold land where mining is currently uneconomic. The Mining Minister may place conditions on tenements, including conditions to protect the environment and Aboriginal heritage.

Under the Mining Act regime, the protection of Aboriginal heritage is treated as an aspect of the regulatory system for environmental protection. The potential impacts on Aboriginal heritage will be identified and assessed by proponents as part of the process of conducting Environmental Impact Assessment (“EIA”) and managed through an environmental plan called a PEPR. Aboriginal heritage is treated as an issue of environmental and social risk management by proponents of mining projects, whereby “Aboriginal heritage must be integrated into a project assessment process and management system throughout the life of the project to identify and preserve Aboriginal sites, objects and remains.”

In the case of an EL, a company need not conduct EIA before applying for and being granted an EL. However, once the license is granted, the company cannot conduct certain exploration activities until a PEPR has been approved by the Mining Minister—that is, until an “operational approval” has been obtained. The assessment of impacts, and strategies for the management of impacts for exploration, thus takes place through the PEPR only.

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219 Id. s 21.
220 Id. s 29.
221 Id. s 35(1).
222 Id. s 48(1).
223 Id. s 43.
224 Mining Act (n 14) ss 30(1)(b), 35(3), 43(3), 48(3), 56I(2).
225 Id. s 6(4).
226 See id. ss 36(1)(c)(ii), 44(1)(c)(ii), 49(1)(c)(ii), 70A.
228 Mining Act (n 14) s 29A.
229 Id. s 70B.
230 See id. ss 29A, 70B.
For a ML, RL, and MPL, there is a two-step process. A company wishing to apply for a ML, RL, or MPL must conduct a prior EIA before applying for the tenement. The applicant must attach a mining proposal to the application for a ML, a retention proposal to the application for a RL, and a proposal to an application for a MPL. These proposals contain the EIA and provide the Mining Minister with information to determine whether to approve the tenement and, if so, which conditions to place on the tenement. After the ML/RL/MPL is granted, a PEPR must be prepared. This also requires an EIA, which in practice will be heavily informed by the mining proposal. No mining activities under a ML/RL/MPL can begin until the PEPR is approved.

The Mining Act, Regulations, and Ministerial Determinations together employ a system of objectives-based environmental regulation. In their PEPR, a proponent of mining activities must set their environmental objectives and specify how their environmental outcomes will be measured and achieved. Aboriginal heritage is treated as an “environmental outcome” to be achieved by proponents. The Act, Regulations, and Ministerial Determinations together set out the matters that must be addressed in tenement applications and in PEPRs, as well as requirements to ensure a minimum level of quality and transparency in PEPRs. However, the Act, Regulations, and Ministerial Determinations do not specify the means by which a company’s environmental outcomes must be achieved. The role of the regulator is to assess and approve tenement

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231 AHA (n 62) ss 36(1)(c)(ii), 44(1)(c)(ii), 49(1)(c)(ii).
232 Id.
233 Id. s 56I.
234 See id. s 70B.
235 Id. at 13.
236 Id. at 70DC (making it an offense to operate without a PEPR).
237 AHA (n 62) s 70B(2).
240 See Compton Limestone Quarry ML 6534, supra note 238, at 27.
applications and PEPRs and to monitor and ensure compliance with the PEPR, tenement conditions, and the Act more generally.\textsuperscript{241}

The way in which the legislative and regulatory scheme protects Aboriginal heritage is detailed and complex, as it seeks to give effect to the provisions of the land rights legislation, native title law, and the AHA, whilst also providing some flexibility in terms of the obligations relevant to different types of mining activity according to the scale of impacts and potential for harm.\textsuperscript{242} It is difficult to summarize these features succintly, but the following section of this Article explains some of the key ways in which the Mining Act, Regulations, and Ministerial Determinations operate to protect Aboriginal heritage.

A. Access to Land

A person must hold an EL before they are entitled to enter land to conduct exploration activities authorized by the license.\textsuperscript{243} An EL holder cannot access land to conduct the operations authorized by the license otherwise than in accordance with Part 9 or Part 9B of the Mining Act.\textsuperscript{244} Part 9 sets out provisions regarding general access to land,\textsuperscript{245} whereas Part 9B sets out a specific procedure for agreements to access native title land.\textsuperscript{246} A landowner includes a person who holds native title in the land.\textsuperscript{247}

If the authorized operations will not affect native title, an exploration license holder may enter native title land either by serving a “notice of entry” upon the landowner giving forty-two days’ notice of their intention to enter land, or pursuant to an agreement with the landowner authorizing entry to land (such as Part 9B mining agreement or an ILUA).\textsuperscript{248} Where authorized exploration operations may affect native title, to enter land, the Mining Act requires an agreement with the landowner or a determination by the ERD Court.\textsuperscript{249}

\begin{itemize}
\item[241] Id. at 50.
\item[242] See generally Mining Act (n 14).
\item[243] Id. s 57.
\item[244] Id. pts 9, 9B.
\item[245] Id. pt 9.
\item[246] Id. pt 9B.
\item[247] Id. s 6.
\item[248] Id. s 58.
\item[249] Id. s 58.
\end{itemize}
To enter the APY, MT, or ALT lands to conduct authorized exploratory operations, a proponent must have the permission of or an agreement with APY, MT, or the ALT, or a determination by an arbitrator permitting access to the land. A Part 9B mining agreement is not required in addition to this.

As a result of the SFSP program from 2021, after a company has applied for and been awarded an EL on native title land, the DEM will notify the relevant native title group that an EL has been granted. The native title group and explorer can then discuss the preferred agreement making approach. While this may resolve issues with early engagement with native title groups, it needs to be remembered that native title parties are not equivalent to Traditional Owners under the AHA. Native title rights are not the same as the interests of Traditional Owners in heritage and which are protected under the AHA. In some cases, consultation with the native title parties may not encompass all persons with interests in the area. Thus, explorers may need to conduct due diligence to ensure they consult with Traditional Owners and observe their legal obligations under the AHA. As the DEM does not administer the AHA, the legal regime concerning native title land (Part 9B of the Mining Act) and the regime concerning the protection of Traditional Owners’ interests in heritage (under the AHA) remain separate, and sit somewhat uneasily alongside each other.

Access to native title land for mineral production may be authorized through a Part 9B mining agreement, a determination of the ERD Court, or an ILUA. To enter the APY, MT, or ALT lands to conduct authorized production operations, a proponent must have the permission of APY, MT, or the ALT, or a determination by an arbitrator permitting access

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250 As per the land rights legislation explained in this Article, see discussion supra Part II. See also Native Title and Aboriginal Land, supra note 78.
251 See Native Title and Aboriginal Land, supra note 78.
253 Id. at 9.
254 Croft v South Australia (n 138) [96]–[97]. See also GUIDELINES FOR EXPLORERS, supra note 4, at 10–12.
255 See AHA (n 62) s 3 (“Traditional owner”).
257 See infra Section III.C.
258 Mining Act (n 14) s 63F.
to the land. On the APY and MT lands, a Part 9B mining agreement is not required in addition to this.

B. Environmental Impact Assessment: Mining Production

A prospective miner for minerals must apply for a mineral lease, attaching a mining proposal to the application. The construction of ancillary infrastructure requires an application for a MPL to which a proposal must also be attached. These proposals contain an EIA, which will include an assessment of impacts on Aboriginal heritage. The Act, Regulations, and Ministerial Determinations together set out requirements for the information to be included in a mining proposal/EIA.

The Minister will not grant a ML or MPL until consultation and negotiation with all stakeholders has occurred. A right to consultation is not explicitly set out in a section of the Act. However, a requirement to consult is established by the Regulations and Ministerial Determinations which require proponents to provide information regarding consultation to the DEM. For example, Ministerial Determination Terms of Reference TOR006 Mineral mine lease/licence applications, which applies to an application for a ML and MPL for the recovery of metallic and industrial minerals, requires an applicant to provide a description of any Part 9B native title mining agreements or ILUAs they have obtained.

The applicant must provide information regarding impacts on Aboriginal heritage. The proposal must contain a description of the environment, including Aboriginal heritage; “detail and show on a map” any “registered heritage sites in or adjacent to the application areas that

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259 See supra notes 48–52 and accompanying text.
260 See supra notes 48–52 and accompanying text; see also Native Title and Aboriginal Land, supra note 78.
261 Mining Act (n 14) ss 34(1), 35(1), 36(1).
262 Id. ss 47(1), 48(1), 49(1)(c).
263 Id. ss 36(1)(c), 49(1)(c); see also id. s 6 (definition of “environment”).
264 Note that the Ministerial Determinations for MLs and MPLs are the same document.
265 See infra notes 266–74 and accompanying text.
266 See generally Mining Act (n 14).
268 Id.
269 Id. at 1015.
270 See id. at 1004.
are protected under legislation”; and “include a statement concerning whether or not an Aboriginal cultural heritage survey has been conducted by the proponent and if so, the results of the survey.”271 The applicant must also provide a statement of the proposed environmental outcomes, including in relation to Aboriginal heritage; information to demonstrate it will meet its stated environmental outcomes; information on control and management strategies to manage, limit, or remedy environmental impacts so that it meets its environmental outcomes; and provide draft measurement criteria it will use to measure achievement of the environmental outcomes.272

Once the prospective miner has consulted with the community and applied for a lease, the DEM will assess the application to ensure it meets all legislative requirements.273 The Minister will publicly advertise the application for the lease as required by the Mining Act and grant the opportunity for submissions to be made.274

C. Operations Approval (PEPRs)

1. Mineral Exploration

It is only after an EL has been granted that the legislative framework requires negotiation and consultation regarding Aboriginal heritage as part of the risk management process enshrined in the use of PEPRs.275 Explorers cannot undertake exploration activities unless they operate in accordance with either (a) Ministerial Determination 001; Generic Program

271 Id.
272 Id. at 1012.
274 Mining Act (n 14) s 56H.
275 On APY, ML, or ALT land, an EL can only be granted after permission to enter land is given, and a PEPR is then required to identify and manage risks to heritage before any exploration activities commence. See Aboriginal Lands Parliamentary Standing Committee, Parliament of South Australia, ‘Report on the Key Issues Raised During Its Visit to the Anangu Pitjantjatjara Yankunytjatjara Lands’ (7–9 May 2019) 9. This is potentially problematical because detailed work plans are not provided at the time of seeking permission to enter APY, ML, or ALT land but are provided later in the PEPR. See id. Traditional Owners will not necessarily have sufficient information to be confident that heritage will be protected and therefore provide permission to enter. Id. This has led to a backlog of applications and little mining activity on APY Lands. Id.
for Environment Protection and Rehabilitation—Low Impact Mineral Exploration in South Australia (the “Generic Low Impact Exploration PEPR”); or (b) for activities that do not fall within the scope of the Generic Low Impact Exploration PEPR, in accordance with an individual PEPR prepared by a proponent and approved by the DEM consistently with Ministerial Determination Terms of Reference 013 Mineral Exploration PEPRs (“TOR 013”). Very generally speaking, low impact activities are those which are not reasonably expected to have any significant adverse impact on the environment.

Establishing the presence or absence of Aboriginal heritage in a given area can only be achieved through consultation with Aboriginal people. The Act itself does not explicitly require EL holders to consult with Aboriginal people. Rather, regulation 64 of the Mining Regulations 2020 requires that a PEPR must set out the result of any consultation conducted. The Generic Low Impact Exploration PEPR and TOR 013 contain further details on the information that must be provided to the DEM for operations approval. These requirements are the means by which the DEM may ensure explorers will operate consistently with the AHA.

For example, in the Generic Low Impact Exploration PEPR, the DEM has identified the potential impacts of low impact exploration and drafted standardized environmental outcomes that must be adopted by explorers when undertaking low impact exploration operations, except in certain protected areas such as conservation parks, where the explorer

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276 Adopted Program 001, supra note 84, at 5984; TOR 013, supra note 239, at 5944.
277 Mining Act (n 14) ss 6(1)–(1a). Low impact exploration activities that are covered by the Adopted Program 001 include the following activities: reconnaissance; cultural clearance surveys; soil sampling; geological mapping; geochemical surveys—surface sampling; all geophysical surveys including passive seismic—excludes all other types of seismic surveys; biochemical sampling; rock-chip sampling; sampling using hand held augers; fly camps comprising tents or swags for short periods of time (days); small, short term camp sites; use of 4WD vehicles off existing tracks required to conduct the above-listed activities; and environmental studies required to support the development of a RL or ML application and a PEPR submission, which are not reasonably expected to have any significant adverse impacts on the environment. See Adopted Program 001, supra note 84, at 5984. For advanced activities, see supra note 84 and accompanying text.
279 See generally Mining Act (n 14).
280 See Mining Regulations 2020 (SA) reg 64.
281 See Adopted Program 001, supra note 84, at 5984–88; TOR 013, supra note 239, at 5944–50.
282 TOR 013, supra note 239, at 5944–50.
must prepare an individual PEPR for approval. One of the environmental outcomes is that there be no disturbance to Aboriginal heritage unless approval is obtained under the relevant legislation—that is, the AHA. The DEM has also prepared generic control strategies for meeting the environmental outcomes and outcome measurement criteria. These strategies include: identifying any known Aboriginal sites, objects, and remains listed on the Central Archive under the AHA; liaising with native groups and Traditional Owners and conducting a risk assessment to identify if a work area clearance of equivalent process is required to manage areas of Aboriginal heritage; and ensuring all work activities avoid known Aboriginal sites, objects, and remains.

For exploration activities that are not within the scope of the Generic Low Impact Exploration PEPR, TOR 013 requires the EL holder to develop a statement of environmental outcomes and demonstrate how they will achieve these outcomes. One of the environmental outcomes required is that there be no disturbance to Aboriginal heritage unless approval is obtained under the AHA. The EL must also identify and consult with Aboriginal individuals or groups; identify and assess any impacts of exploration on Aboriginal heritage; and put in place control strategies to ensure that the environmental outcome is achieved, namely, that Aboriginal heritage is not disturbed unless prior legislative approval is obtained (that is, approval under the AHA).

2. Mining Production

Once a mining lease and/or MPL has been granted, a company cannot undertake authorized activities under the tenement until it has an approved PEPR. The Regulations and Ministerial Determinations together set out requirements for information to be included in a PEPR. Ministerial Determination Terms of Reference 005 (“TOR005”) sets out the information that must be provided for the DEM to approve a PEPR for the recovery of metallic and industrial minerals. Because

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283 Adopted Program 001, supra note 84, at 5985–88.
284 Id. at 5987.
285 Id.
286 Id. at 5945.
287 Mineral exploration PEPRs and compliance, supra note 256, at 22.
288 TOR 013, supra note 239, at 5945.
289 Mining Act (n 14) ss 70B, 70DC.
290 Mining Regulations 202, regs 63–64; see, e.g., TOR 005, supra note 239, at 990.
291 TOR 005, supra note 239, at 990.
the proponent will already have conducted a detailed EIA in the mining proposal, the mining leaseholder will not be required to establish all baseline environmental data anew. Rather, the information provided in the proposal will be used in the PEPR, except that new data must be provided where there are changes to the environment since the proposal was submitted.

For a PEPR to be approved, the mining proponent will need to demonstrate it has consulted with Aboriginal people. The PEPR must include a map of any existing heritage sites. The mining leaseholder must also set out its environmental outcomes in the PEPR, including in relation to Aboriginal heritage, demonstrate the control and management strategies it will employ to meet its environment outcomes, and the criteria it will use to measure that the outcomes have been achieved. These criteria are used for monitoring compliance by the DEM.

3. Tenement Conditions

An explorer must hold a tenement to conduct exploration activities. The Mining Act requires the Mining Minister, in considering the terms and conditions subject to which an EL, ML, RL, and MPL is to be granted, to consider “any Aboriginal sites or objects within the meaning of the Aboriginal Heritage Act 1988 that may be affected by those authorized operations.”

Most EL conditions are standardized and are set out in a Schedule to an EL. These standard conditions include the following: the licensee

292 TOR 013, supra note 239, at 5944.
293 Id.
294 A PEPR is required to set out set the results of the consultation undertaken with stakeholders, including: the persons consulted; any concerns/issues raised; the response and steps (if any) taken or proposed to address those concerns; if any individual or group were not able to be consulted and what steps were taken to consult with them; and any additional land access approvals and/or permits required. Id. at 5945.
295 Id. at 997–98.
296 TOR 005, supra note 239, at 999.
297 Id. at 997–98.
299 Mining Act (n 14) ss 29, 70HC.
300 Id. ss 30(2), 56I(1).
301 Department for Energy and Mining, South Australia, Mineral Exploration Licenses (Guideline No MG33, April 2022) 13, app B.
must comply with the AHA;\footnote{See \textit{id.} at 43 (general condition 3).} low impact exploration activities must be undertaken in accordance with the Generic Low Impact Exploration PEPR,\footnote{See \textit{id.} at 43–44 (general condition 5).} and for mining exploration activities that fall outside the scope of the Generic Low Impact Exploration PEPR, the proponent must not undertake activities unless they have prepared an individual PEPR that has been approved by the Minister.\footnote{Id.}

It is a standard condition of an EL that failure to comply with an approved PEPR constitutes a failure to comply with the conditions of the license,\footnote{Id.} which will expose the tenement holder to compliance and enforcement action under the Act, including administrative directions and criminal penalties.\footnote{See, e.g., \textit{Mining Act} (n 14) ss 56L, 70DC, 70E, 70F, 70FA.} This is a key aspect of the regulatory regime because it is the PEPRs that sets out the outcomes related to the protection and management of Aboriginal heritage to be achieved by the license holder.\footnote{See Mineral exploration PEPRs and compliance, supra note 256, at 22.}

Likewise, once a mining lease is approved, the company must abide by any tenement conditions, including conditions regarding the protection of Aboriginal heritage and compliance with legislation.\footnote{\textit{Mining Act} (n 14) ss 29, 70HC.}


CHSs, WACs, and CHMPs are standard mechanisms used by the mining industry and viewed by the DEM as part of best practice.\footnote{See also \textit{ABORIGINAL HERITAGE FACT SHEET}, \textit{supra} note 112, at 2–4; Report Book No 2017/00035, \textit{supra} note 26, at 19, 24; SACOME Submission, \textit{supra} note 180, at 5.} As with the AHA, the Mining Act and Mining Regulations do not contain a statutory requirement that the holder of an exploration license must conduct a WAC or CHS or manage heritage according to a CHMP.\footnote{\textit{See generally Mining Act} (n 14).}

However, the requirement to conduct a WAC or CHS is implicitly incorporated into the regulatory regime under the Mining Act by a requirement in Ministerial Determinations that an exploration license holder must provide information to the DEM about risk management strategies,
including liaising with native title groups and Traditional Owners regarding the need for a WAC,\(^\text{310}\) and whether a CHS has been undertaken,\(^\text{311}\) in an application for an approved PEPR. Therefore, failing to undertake or provide information about a WAC or CHS is a barrier to obtaining the DEM’s approval of a PEPR.\(^\text{312}\)

There is no statutory requirement for a CHMP in the Mining Act or Regulations,\(^\text{313}\) nor is the CHMP mentioned in Ministerial Determinations.\(^\text{314}\) It is therefore a matter of best practice that is only referred to and recommended in non-binding government guidelines.\(^\text{315}\)

The contractual obligation to conduct a WAC, CHS, or CHMP or to undertake monitoring will be negotiated as part of a mining agreement between an Aboriginal people and mining proponent.\(^\text{316}\) The DEM’s “Aboriginal Heritage Guidelines for Resource Projects in South Australia” describes CHSs, WACs, and CHMPs and set out minimum standards to guide project proponents, but these guidelines are not legally binding.\(^\text{317}\)

5. Compliance and Enforcement Under the Mining Act

Tenement holders must abide by PEPRs and tenement conditions, including those that deal with the protection and management of Aboriginal heritage.\(^\text{318}\) Failure to do so may result in criminal prosecution or other enforcement action by the DEM under the Mining Act, such as environmental or compliance directions, or the suspension or cancellation of a tenement.\(^\text{319}\) However, there is no merits review of the Minister’s decision to grant a license or lease under the Mining Act, nor is there a right of civil enforcement for Aboriginal people under the Mining Act empowering them to seek a remedy where an operator has breached the terms of its license or lease.\(^\text{320}\)

\(^{310}\) Adopted Program 001, \textit{supra} note 84, at 5987.
\(^{311}\) TOR 013, \textit{supra} note 239, at 5946.
\(^{312}\) Adopted Program 001, \textit{supra} note 84, at 5885.
\(^{313}\) \textit{See generally} Mining Act (n 14).
\(^{314}\) \textit{See generally} TOR 005, \textit{supra} note 239.
\(^{315}\) Report Book No 2017/00035, \textit{supra} note 26, at 20; ABORIGINAL HERITAGE FACT SHEET, \textit{supra} note 112, at 3.
\(^{317}\) \textit{See generally} id.
\(^{318}\) Mining Act (n 14) ss 70DC, 56L.
\(^{319}\) \textit{Id.} ss 70E, 70F, 70FA, 70DB, 56W.
\(^{320}\) \textit{See, e.g.}, \textit{id.} s 74 (application to the ERD Court for a civil remedy by the Minister or Director of Mines).

Olympic Dam is one of the world’s most significant resources of copper, gold, silver, and uranium. Western Mining Corporation was the original owner of the mine but sold the operation to BHP Billiton in 2005. BHP Billiton Olympic Dam Corporation Pty Ltd (“BHP”) is the current operator of Olympic Dam. The operation consists of an underground mine, milling, mineral processing plant, copper smelter and refinery, and associated infrastructure to produce copper, gold, silver, and uranium.

The Olympic Dam mine was originally setup pursuant to an indenture agreement (the Olympic Dam and Stuart Shelf Indenture) between the Government of South Australia and Western Mining Corporation. The Indenture Act was enacted to fast track the development of the mine. This act, and the indenture in particular, establishes the legal framework for existing and future operations at Olympic Dam, and defines the roles and responsibilities of the South Australian government and BHP. The indenture is attached in a schedule to the act.

Operations at the mine began in 1988 pursuant to an Environmental Impact Statement (“EIS”) completed in 1983 in relation to mining and production of up to 150,000 tons per annum (“tpa”) of copper and associated products. In 1997, BHP proposed to increase mining and

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323 Olympic Dam, supra note 321.
324 Id.
325 Id. See also Indenture Act (n 13) sch 1.
327 See Indenture Act (n 13) s 9.
328 Olympic Dam, supra note 321.
production of up to 350,000 tpa of copper. This expansion was proposed to be completed in two phases—first, an increase in mining and production up to 200,000 tpa of copper (and associated products), and secondly, an increase from 200,000 tpa up to approximately 350,000 tpa of copper (and associated products). A proposal to extract additional water from the Great Artesian Basin—up to an extraction rate of approximately forty-two megaliters (“ML”) per day free of charge—was assessed and approved. The first phase of the 1997 expansion has been implemented, but the second phase of the expansion has not gone ahead.

Clause 19 of the indenture provides for the granting of a Special Mining Lease (“SML”) for mining operations under the indenture. The SML exists under the indenture, rather than under the Mining Act 1971; therefore, much of the Mining Act does not apply to the Olympic Dam operations, including the obligation to prepare and operate according to an approved PEPR. The Indenture Act also takes precedence over any other state government environmental legislation. However, the indenture sets up its own set of rules in clause 11 for the “Protection and Management of the Environment.” These provisions require BHP to submit a program for the protection, management, and rehabilitation of the environment every three years. The Minister has the sole power to approve or refuse the programs, and there is no independent assessment provided for in either the Act or the Indenture.
It is beyond the scope of this Article to critique the ratification act and the indenture, but a few salient points will be highlighted for the purposes of this Article. The first of these is that under section 9 of the Indenture Act, BHP is not obliged to observe the 1988 AHA in the area of the SML, only the provisions of the inferior Aboriginal Heritage Act 1979. Until the events at Juukan Gorge and the resulting public outrage at the destruction of heritage—leading to the resignation of two of Rio Tinto’s directors because of investor and shareholder pressure—BHP had consistently refused to agree to amend the Indenture Act to impose a requirement to observe the 1988 AHA.

The company’s public rationale for this refusal was that its practices in relation to heritage under the Olympic Dam Agreement (“ODA”) negotiated with the Kokatha, Barngarla and Kuyani peoples, and the Cultural Heritage Management Protocol which forms part of the ODA, have gone beyond the legislative requirements of the 1979 AHA. Following the events at Juukan Gorge, BHP finally stated it would agree to an amendment to the Indenture Act that would require the company to observe the provisions of the AHA 1988. Notwithstanding this, there is a very real question as to whether any one company should ever have the power to choose which legislation for the protection of Indigenous or human rights it is willing to observe.

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342 For example, when the Indenture Act was amended in 2011, Parliament refused to delete section 9 of the Indenture Act because “BHP insisted that the current arrangements continue and they were not prepared to consider changes to that.” South Australia, Parliamentary Debates, Legislative Council, 24 November 2011, 4707 (G.E. Gago, Minister for Agriculture, Food and Fisheries, Minister for Regional Development, Minister for Tourism, Minister for the Status of Women). It is well beyond the scope of this Article to discuss state agreements and/or whether to what extent future Parliaments are bound by the provisions of a state agreement.


344 BHP, Submission No 32 to Aboriginal Lands Parliamentary Standing Committee, Parliament of South Australia, Aboriginal Heritage Inquiry (2 June 2021) 6 [hereinafter BHP Submission].
Secondly, BHP negotiated and entered into the ODA before the Kokatha, Barngarla and Kuyani native title determinations were concluded, with only the Kokatha holding native title rights in the indenture area. The Kokatha Aboriginal Corporation (“KAC”) is now seeking to renegotiate the ODA on terms more favorable to the Kokatha people. As a RNTBC that is also a RARB, KAC is empowered to enter into LHAs with BHP. Should this occur, then the obligation to consult with Traditional Owners in relation to heritage located in the area covered by a LHA will then be placed on KAC as the RARB.

Thirdly, BHP is authorized to extract forty-two ML of water per day from the Great Artesian Basin free of charge, although currently it is drawing around thirty-four ML per day. This massive underground water resource underlies parts of South Australia, Queensland, New South Wales, and the Northern Territory. Petroleum companies and pastoralists also extract water from the Great Artesian Basin, and water is lost due to evaporation of uncapped bores. In South Australia, the Arabana People have reported that considerable damage has occurred to mound springs situated on their land, through the destruction of many and reduced flow in others. These springs are of great cultural significance to the Arabana People and their disappearance will result in the Arabana People losing their stories and heritage.

While the Arabana People submitted to the SA Aboriginal Heritage Inquiry that BHP have breached the Indenture Act by not limiting

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345 Starkey v State of South Australia (n 65) [5]; Croft v State of South Australia (No 2) [2016] FCA 724; Croft v State of South Australia (Port Augusta Proceeding) (No 5) [2021] FCA 1132 [13].
346 Starkey v State of South Australia (n 65) [1].
349 Baker, supra note 341.
350 Id.
351 See Mitchell, supra note 347.
352 Baker, supra note 341.
353 Arabana Aboriginal Corporation, supra note 18, at 3, 4.
damage to the mound springs, the problem stems beyond BHP: It concerns the cumulative impact of South Australian and interstate industries on the Great Artesian Basin. The AHA, which regulates individual or ad hoc development proposals, is not designed to be able to deal with cumulative environmental impacts on this important water resource and certainly cannot operate across state borders. While BHP’s role in the destruction of the mound springs has been criticized, and the amount of water the company is permitted to extract free of charge is astronomical. Protecting the Great Artesian Basin and thereby the cultural heritage of numerous Aboriginal Peoples will require intergovernmental cooperation as well as the effective regulation of water rights and environmental health for the entire basin.

IV. Critique

The complexity of the law governing mining and Aboriginal heritage protection means the regime is open to a range of critique covering each act—that is, the land rights legislation, native title law, the AHA, and the Mining Act. It is well beyond the scope of this Article to engage in a critique of all this legislation. Rather, this Article will focus on the AHA, as well as the difficulties arising from the interplay between the AHA, native title, and mining law. The submissions to the current Senate Inquiry into the AHA in South Australia contain a raft of criticisms of the Act, many of which have been raised by Aboriginal people for decades. While some flaws may be comparatively simple to fix, other issues have no simple solutions.

A. Definitions of Heritage

A key criticism of the Act is the definition of “heritage,” which does not extend to intangible heritage, and therefore does not allow the registration of song lines and other manifestations of intangible heritage to be directly recorded in the Archive and thereby protected in their own right. Moreover, the definition and division of Aboriginal heritage into

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354 Id. at 4.
355 Id.
357 See, e.g., The Law Society of South Australia, Submission No 11 to Aboriginal Lands
objects, sites, and remains does not reflect Aboriginal perspectives—for example, on the interconnectedness of country and heritage. Many submissions to the SA Heritage Inquiry suggested including intangible heritage in the definition.

B. Ministerial Authorizations and No Right of Veto over Development

1. No Right of Veto

A major criticism of the legislative regime is that Aboriginal people do not have power to refuse developments. This fundamentally undermines the ability of Aboriginal people to protect their heritage. Although the Minister for AAR must consult with Traditional owners and consider any relevant views of the SAHC, he or she may grant a section 23 authorization despite the opposition of the Traditional Owners and against the advice of the SAHC. Similarly, Traditional Owners do not have a right of veto under the Mining Act.

A number of submissions to the SA Heritage Inquiry stated that authorizations are nearly always approved: that the economic benefits of mining will always outweigh the value of heritage to Traditional Owners, and that authorizations to conduct mining activities are virtually guaranteed under the current law. The SAHC, for example, stated that


358 See, e.g., *id.* at 3.


360 SANTS Submission, *supra* note 65, at 3, 5.


“[i]n weighing up the perceived value of Aboriginal heritage as opposed to the economic value of development . . . it is not the irreplaceable value of the heritage to its Traditional Owners that will ever triumph.”363 This causes particular distress when authorizations are granted against advice of the SAHC and the wishes of Aboriginal Traditional Owners, for example, when Kelaray was granted authorization to explore Lake Torrens against the advice of Aboriginal Affairs and Reconciliation, the SAHC and the Aboriginal people groups with heritage interests in the area.364

Aboriginal people feel they are under pressure to approve actions that will damage or destroy heritage.365 Mining companies operate from a position of strength in relation to resourcing; law and policy favors the benefits of mining over heritage protection. When an agreement to access land cannot be reached, the law allows companies to apply to access land through courts or arbitration, where the probability is that a decision will be made to allow developments to proceed.366 The law has thus “normalised [the granting of] authorisations within a risk management framework implemented by proponents to provide ‘certainty.’”367

One solution is to remove the power to grant authorizations to disturb or damage heritage from the Minister and give it to Traditional Owners and custodians,368 although as will be discussed later, it may not be easy or obvious to determine which Aboriginal persons or bodies should have that power.369 Other submissions to the Heritage Inquiry suggest that the Ministerial power should be retained but should be limited.370 Thus, for example, APY suggested that the Minister’s power to authorize damage, disturbance, or interference to Aboriginal cultural heritage

363 SAHC Submission, supra note 106, at 13.
365 See, e.g., SAHC Submission, supra note 106, at 5.
366 See, e.g., id. at 5.
367 SANTS Submission, supra note 65, at 3.
368 See APY Submission, supra note 18, at 6; Campbell Law Submission, supra note 359, at 4, 6; Arabana Aboriginal Corporation, supra note 18, at 3; SANTS Submission, supra note 65, at 7.
369 See SANTS Submission, supra note 65, at 7.
370 See id.
“should be confined to narrow and specific circumstances as a last resort only in matters of national significance and should negotiations for agreement or endorsement from Traditional Owners fail.”

Another submission suggested the Ministerial power should be retained but there needs to be improved transparency in relation to Ministerial decisions: the Minister should act on the advice of the SAHC and publish detailed decisions, including details of consultation with Traditional Owners (presumably excising secret information).

The Final Report of the Juukan Gorge Inquiry recommended consideration be given to introducing an “ability of traditional owners to withhold consent to the destruction of cultural heritage.” However, other bodies have not supported a right of veto. For example, the Productivity Commission recently stated that the right to free, prior, and informed consent does not equate to a right to veto developments, and that “[w]here, after genuine engagement with traditional owners, government deems other interests to be more important than heritage protection, development may go ahead,” subject to requirement that reasons for the decision should be explicit, transparent, and made public. During the review of the Mining Act over 2016 to 2020, the issue of a right of veto for farmers was a contentious issue, and the South Australian government made it clear it would not accept a general right of veto over the development of the State’s mineral resources.

2. No Merits Review of Ministerial Decisions

There is no merits appeal or review for Aboriginal people of a decision to grant a section 23 authorization under the AHA, nor does the Mining Act permit merits review of the decision of the Mining Minister.

371 APY Submission, supra note 18, at 5.
372 Maurice Blackburn Lawyers, Submission No 14 to Aboriginal Lands Parliamentary Standing Committee, Aboriginal Heritage Inquiry (31 March 2021) 6 [hereinafter Maurice Blackburn Lawyers Submission]. Further submissions suggested a need for improved transparency. Campbell Law Submission, supra note 359, at 7; EDO Submission, supra note 359, at 14; Adnyamathanha Yura Language & Heritage Association Inc, Submission No 12 to Aboriginal Lands Parliamentary Standing Committee, Aboriginal Heritage Inquiry (30 March 2021) 3 [hereinafter AYLHA Submission].
373 Australian Government Response, supra note 6, at 6.
to grant a tenement, place certain conditions on a tenement, or approve a PEPR under the Mining Act. Many submissions to the SA Aboriginal Heritage Inquiry supported the introduction of merits review of the Ministerial decisions made under the AHA.376 This is consistent with recommendations from other bodies. The Final Report of the Juukan Gorge Inquiry recommended the introduction of merits review, stating that “appropriate review mechanisms should be a key element of improved cultural heritage laws.”377 The Productivity Commission also identified ineffective dispute resolution and appeal mechanisms as a “major shortcoming” of legislative approaches to Aboriginal heritage protection, and that best practice is to allow Aboriginal people and proponents to seek review/appeals on the merits of the Minister’s decision to permit the disturbance or destruction of Aboriginal heritage.378

South Australia could introduce merits review of the decision of the Minister for AAR to grant section 23 AHA authorization and/or of the decision of the Mining Minister to grant a mining tenement or approve a PEPR. However, the South Australian Parliament has long resisted efforts to introduce rights of merits review of the Mining Minister’s decisions on environmental grounds.379 Proposed amendments to the Mining Act suggested by the Greens in 2010 and 2019 were rejected by the South Australian Parliament on the grounds that there is no evidence merits review would be in the public interest; merits review would create significant risks of increased administrative costs, delay, and “vexatious proceedings by third parties with ulterior purposes”; and merits review would “increase time and cost uncertainty for proponents looking at South Australia without delivering, in the government’s view, public value.”380

This suggests the government may resist introducing a rights of merit review under the Mining Act. However, it is possible that the

376 APY Submission, supra note 18, at 7; Barngarla Determination Aboriginal Corporation, Submission No 18 to Aboriginal Lands Parliamentary Standing Committee, Aboriginal Heritage Inquiry (31 March 2021) 2 [hereinafter BDAC Submission]; SANTS Submission, supra note 65, at 6; Maurice Blackburn Lawyers Submission, supra note 372, at 6; Campbell Law Submission, supra note 359, at 7; BHP Submission, supra note 344, at 5. BHP also suggested merits review should be introduced for proponents regarding the Minister’s decision to refuse authorizations or the approval of local heritage agreements under the AHA. BHP Submission, supra note 344, at 5.

377 Juukan Gorge Final Report, supra note 6, at 197.

378 Australian Government Productivity Commission, supra note 374, at 250.

379 See id. at 186.

government’s position may change in relation to merits review of a
decision made under the AHA to grant section 23 authorization, depend-
ing on the response of the Australian federal government to the Juukan
Gorge Final Report.

3. Judicial Review

The only option for Aboriginal people to challenge a decision of the
Minister for AAR under the AHA is to undertake an action for judicial
review.381 There are a number of limits to judicial review, not the least of
which is that judicial review challenges the legality of the procedure by
which a decision was made and does not involve a review of a decision on
its merits.382 Even where a case is successful, the decision will be sent back
to the decision maker to be made again, but in accordance with the proper
procedure.383 The decision maker may then arrive at the same decision.

Whether it is merits review or judicial review, the costs of legal
action remain a barrier to justice for Aboriginal people.384 As well as a
number of submissions raising the ongoing issue that Aboriginal groups
require better resourcing and funding to manage their responsibilities,
submissions to the SA Heritage Inquiry have suggested that review for
error of law should take place in a less expensive forum than the Supreme
Court, for example, in the Administrative Appeals Tribunal, or through
an Ombudsman.385

C. Inadequate Compliance and Enforcement Mechanisms

There is near-universal agreement that the provisions in the AHA
regarding compliance and enforcement are vastly inadequate. First, the
maximum criminal penalties imposed by the Act are inadequate.386
Currently, the largest fine that can be imposed under the AHA is only

381 See AHA (n 62) s 42.
383 Id.
384 SAHC Submission, supra note 106, at 14.
385 BDAC Submission, supra note 376, at 3; SAHC Submission, supra note 106, at 4–5, 14.
386 SAHC Submission, supra note 106, at 18; APY Submission, supra note 18, at 5; Campbell Law Submission, supra note 359, at 7; DPC Submission, supra note 106, at 6; AAA Submission, supra note 359, at 3; BHP Submission, supra note 344, at 5.
$50,000 for offences by a body corporate.\textsuperscript{387} Secondly, prosecution is rare and difficult, and there have been no successful prosecutions since the Act was enacted in 1988.\textsuperscript{388} This is because the significant burden of proof required (to prove intent or willful disregard beyond reasonable doubt) poses a barrier to securing a prosecution.\textsuperscript{389} Many people cannot recognize sites and objects and it can be very difficult to prove the relevant mental element.\textsuperscript{390}

Thirdly, the AHA does not contain the range of compliance and enforcement mechanisms found in most modern environmental legislation. For example, there are no continuing penalties, no civil penalties, no expiation offences, no enforceable undertakings, and no additional court orders upon conviction. Suggested options for reform include:

\begin{itemize}
\item increasing maximum criminal penalties and introducing other types of penalties such as expiation fees and civil penalties;\textsuperscript{391}
\item introducing strict liability offences;\textsuperscript{392}
\item introducing additional court orders upon conviction, such as adverse publicity orders, remediation orders (undertaken by Traditional Owners, or by the offender in consultation with Traditional Owners, at the offender’s cost) and compensation for harm;\textsuperscript{393}
\item introducing “restorative justice” and “culturally appropriate remedies” for Traditional Owners, for example, apologies to Traditional Owners (face-to-face and on country) where appropriate;\textsuperscript{394} and
\end{itemize}

\textsuperscript{387} DPC Submission, supra note 106, at 6.
\textsuperscript{388} Id. at 5; SAHC Submission, supra note 106, at 17; AYLHA Submission, supra note 372, at 2; Campbell Law Submission, supra note 359, at 1; Maurice Blackburn Lawyers Submission, supra note 372, at 3.
\textsuperscript{389} DPC Submission, supra note 106, at 5; APY Submission, supra note 18, at 10.
\textsuperscript{390} SAHC Submission, supra note 106, at 8.
\textsuperscript{391} SAHC Submission, supra note 106, at 18; APY Submission, supra note 18, at 11–12; Campbell Law Submission, supra note 359, at 7; DPC Submission, supra note 106, at 5–6; AAA Submission, supra note 359, at 3; BHP Submission, supra note 344, at 5. See also Juukan Gorge Final Report, supra note 6, at 198.
\textsuperscript{392} AAA Submission, supra note 359, at 3.
\textsuperscript{393} SAHC Submission, supra note 106, at 6, 12; see also Juukan Gorge Final Report, supra note 6, at 198.
\textsuperscript{394} Juukan Gorge Final Report, supra note 6, at 198, 200. On restorative justice in the context of breaches of environment law and Aboriginal heritage protection, see Mark Hamilton, Restorative Justice Intervention in an Aboriginal Cultural Heritage Protection
introducing a cultural heritage duty of care, requiring developers to show the duty has been complied with through consultation with Traditional Owners who have the authority and expertise to conduct consultation.395

The compliance and enforcement provisions in the AHA can be contrasted with the Mining Act, where tenement holders that do not operate in accordance with a PEPR and/or breach a tenement condition face a maximum penalty of $250,000 and from 2021, a range of additional orders upon conviction.396 The Mining Act permits the Minister to issue environmental, compliance or rehabilitation directions for certain breaches of the Act or a PEPR, or in the most severe cases of non-compliance, to cancel or suspend a tenement.397 To the extent that the protection of Aboriginal heritage is incorporated within a PEPR and provisions to protect heritage are tenement conditions, any breach will expose a tenement holder to penalties and administrative directions under the Mining Act, and requesting the DEM to take enforcement offers additional options that are not available under the AHA.398

Under section 45 of the AHA, MT, APY, and the Traditional Owners of land vested in the ALT are empowered to prosecute an offence against the AHA conducted on the land vested in them.399 However, prosecution must not be commenced except by a person authorized by the Minister with the approval of the relevant Aboriginal community; by the relevant community; or by a person authorized by that community.400 With the exception of these provisions, enforcement of both the AHA and the Mining Act relies on the compliance and enforcement policies of the government.

If a mining company proposed to take an action that would damage heritage in breach of the AHA or Mining Act, for example, without the necessary authorization, it may be possible for Traditional Owners to seek an injunction, with standing to do so based on a “special interest”

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395 APY Submission, supra note 18, at 9–10.

396 *Mining Act* (n 14) ss 70DC, 70HF. At parts 10B and 10C, a range of compliance and enforcement mechanisms are set out. See id. pts 10B, 10C.

397 *Id.* s 56W.

398 Compare *Mining Act* (n 14) pt 10B, with *AHA* (n 62) s 45.

399 *AHA* (n 62) s 45(1)(a)–(b).

400 *Id.* s 45(1)(c)–(d).
that they hold in protecting heritage, which is over and above the interest of the public at large.\footnote{Onus v Alcoa of Australia Ltd (1981) 149 CLR 27, 73 (Austl.).} However, injunctions are limited remedies, and in practice the major issues of concern to Aboriginal peoples are not companies operating without consent, but the issue of Ministerial authorizations to damage heritage and the quality of consultation and engagement in relation to proposed operations.

Fourthly, the Juukan Gorge Inquiry brought to light on the use of “gag clauses” in mining agreements.\footnote{Joint Standing Committee on Northern Australia, Parliament of Australia, \textit{Never Again: Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia} (Interim Report, December 2020) 7; \textit{Juukan Gorge Final Report}, supra note 6, at 29–30.} Gag clauses, or “non-objection clauses,” in native title mining agreements prevent the members of a native title group who are party to the agreement from criticizing the operations of the company and/or restricting their right to reporting breaches of the legislation to the state regulator, or seek a remedy under the federal ATISPHA, without first obtaining the company’s consent.\footnote{\textit{Id.} at 194–95.} The Final Report recommended that gag clauses should be prohibited at the Commonwealth, State, and Territory level.\footnote{\textit{Id.} at 194–95.}

Finally, neither the AHA not the Mining Act contain provisions regarding civil enforcement by Aboriginal peoples or the general public.\footnote{See generally AHA (n 62); \textit{Mining Act} (n 14).} This can be contrasted with the Environment Protection Act 1993 (“EP Act”), where section 104 permits parties with a special interest, or parties with the permission of the ERD Court, to seek a range of orders or civil remedies, including orders to prevent environmental harm and/or a breach of the EP Act to make good environmental harm and compensation.\footnote{Environment Protection Act 1993 (SA) s 104.} Civil enforcement is a fundamental part of public participation in environmental decision-making, providing the community with the right to ensure compliance with environmental law if the regulator fails to act. Although rarely used, civil enforcement provisions are “powerful,” acting as a “silent sentinel” and ensuring the accountability of regulators in their role of compliance and enforcement.\footnote{South Australia, \textit{Parliamentary Debates}, Legislative Council, 17 October 2019, 4655 (Mark Parnell).}

In 2010 and 2019, the South Australian Parliament rejected proposals to insert similar provisions regarding a general right of civil...
enforcement into the Mining Act. Following the recent Review of the Mining Act, the Act was amended to empower the Minister or the Director of Mines to apply to the ERD Court for a range of orders of a type identical to section 104 of the EP Act. However, Parliament omitted to insert the equivalent of subsections 104(7) and (8) of the EP Act, which grant standing to interested persons, or persons with the permission of the Court, to seek civil remedies. The reasons given by the Honorable RI Lucas were as follows:

Such rights will undermine confidence in the regulator and deter investment from the sector due to risk of activism, legal costs and significant delays. The nature of the evidence required to prove a breach, the cost of taking action (financial and emotional) and the possibility of vexatious litigation for commercial or personal gain are all reasons why the clause, in the government’s view, is not only unnecessary but also ill-advised.

These objections include a repetition of the discredited “floodgates” argument, and a misconceived argument that because barriers to justice exist, such as difficulties in collecting evidence and financial costs, there should be no right to seek justice through the courts. The statement that individuals should not have a right to apply for civil remedies because it is “emotionally costly” is a ludicrous argument, not least because the inability to access justice through the courts may cause far greater emotional distress to Traditional Owners where heritage is destroyed. These specious arguments simply reinforce a perception held by some parts of the community that South Australian governments have been captured by the interests of the mining industry.

The Final Report of the Juukan Gorge Inquiry recognized that the lack of merits review of Ministerial decisions in relation to heritage,
combined with the lack of Traditional Owners powers to undertake enforcement, “unfairly weights legislative frameworks towards the destruction of cultural heritage.”414 Given that APY, MT, and the ALT have power to initiate criminal proceedings; given the recommendations of the Report of the Juukan Gorge Inquiry; and depending on the reform of heritage law at the Commonwealth level, the South Australian Parliament may be willing to introduce a right of civil enforcement for Traditional Owners under the AHA, if not the Mining Act. An advantage of inserting a right in the AHA is that it will apply beyond the mining industry.415 Inserting a right of civil enforcement in the Mining Act would enable Aboriginal peoples to undertake action where there has been a breach of the Mining Act, for example, through a failure to abide by a PEPR and/or a breach of tenement conditions.

D. Inadequate Consultation and Engagement

Under the Mining Act, consultation with Traditional Owners, native title parties, and heritage organizations is part of the process of obtaining the necessary environmental approval. Within this framework, it is very difficult, if not impossible, to legally mandate the quality of consultation and engagement by all mining proponents. Government and industry guidelines may assist developers in understanding their legal obligations and how to engage meaningfully with Aboriginal people, but these are usually non-binding.416

The DEM’s SPSF Program highlighted that native title groups require “certainty, trust, respect, recognition, accountability and engagement” and “want to see their rights and interests in country recognized and respected with an open, ongoing dialogue about what is happening on country.”417 The program also highlighted that both explorers and native title groups want more support from government with the native title agreement-making process; clear guidance on effective engagement and consultation, including cultural awareness and cultural competency;

414 Juukan Gorge Final Report, supra note 6, at 198.
415 See Mining Act (n 14) s 70HE.
better communication between industry, government, and native title
groups; and more openness, transparency, and information-sharing by
all parties.\footnote{Id. at 7.}

Following the amendments to the Mining Act that came into force
in 2021, the DEM updated existing guidelines and released new guidelines,
to assist mining companies and Aboriginal peoples.\footnote{Report Book No 2017/00035, supra note 26; DEPT FOR ENERGY & MINING, LAND
RIGHTS, ACCESS AND ENGAGEMENT 5 (2021); GUIDELINES FOR EXPLORERS, supra note 4, at 8; DEPT FOR ENERGY & MINING, COMMUNITY GUIDE TO EARLY AND ADVANCED EXPLORATION ACTIVITIES IN SOUTH AUSTRALIA 1 (2020); DEPT FOR ENERGY & MINING, ENGAGEMENT, NEGOTIATION AND AGREEMENT-MAKING 2 (2021); DEPT FOR ENERGY & MINING, PREPARING A COMMUNITY ENGAGEMENT PLAN 5 (2021).} These guidelines,
along with those published by a number of nongovernment organizations
and other bodies, provide information on best practices in agreement-
making, engaging, and consultation for companies that are committed to
leading practice.\footnote{See, e.g., RESPONSIBLE INV. ASS’N AUSTRALASIA, INVESTOR TOOLKIT: AN INVESTOR FOCUS ON INDIGENOUS PEOPLES’ RIGHTS AND CULTURAL HERITAGE PROTECTION 1–8 (2021). As well as identifying leading practice, this source usefully sets out “red flags” that signify poor engagement practices. Id. at 13.}

In practice, the quality of consultation and engagement that takes
place between proponents and Aboriginal communities differs between
developers. Some submissions to the SA Heritage Inquiry stated that
consultation is treated as a “tick box” exercise, that is, a regulatory
hurdle to be overcome as part of the process of obtaining an authorization,
and there is a lack of meaningful engagement.\footnote{APY Submission, supra note 18, at 4, 7; Maurice Blackburn Lawyers Submission, supra note 372, at 2; SAHC Submission, supra note 106, at 4; SANTS Submission, supra note 65, at 3.} The SAHC has
stated that applicants—usually miners or explorers but at times government
departments—appear to place “less priority on the matter of
achieving authorization than putting in place all the other requirements
to “green-light” their project.”\footnote{SAHC Submission, supra note 106, at 4.} Other submissions reported that consultation
does not always take place with appropriate Traditional Owners.\footnote{APY Submission, supra note 18, at 10.} For example, some proponents speak with male community members
about women’s cultural heritage issues or engage with individuals
that do not represent the community at large.\footnote{Id. at 8; Maurice Blackburn Lawyers Submission, supra note 372, at 5; Campbell Law Submission, supra note 359, at 4; Geraldine “Thathy” Anderson, Submission No 26 to Aboriginal Lands Parliamentary Standing Committee, Parliament of South Australia,}
issues have been “missed” or excluded, and in some cases, their secret stories misappropriated and shared publicly.\(^{425}\)

However, other companies have developed and engage in excellent consultation practices and have developed relationships of trust and confidence with Aboriginal communities over many years. Aboriginal people have reported they have good relationships and working arrangements with mining companies, and that WACs, CHS and CHMPs are advantageous and work well.\(^{426}\) For example, the Arabana Aboriginal Corporation stated that

> the Arabana have several agreements with mining companies for exploration work on Arabana land. These agreements are not unreasonable and allow the Arabana People to undertake clearance work before any ground disturbing works are undertaken. The current process works well and to date, there has not been a conflict with a mining exploration company.\(^{427}\)

The SANTS suggested that there is a far stronger emphasis on Aboriginal heritage protection in the mining industry compared to the pastoral industry, where there is “a long history of pastoral occupation and self-management with minimal consideration to AHA requirements in developing the pastoral business” and “little oversight or regulation” of impacts on Aboriginal heritage.\(^{428}\) The Arabana Submission to the SA Heritage Inquiry suggested that it should also be mandatory for pastoralists to undertake WACs.\(^{429}\) The SANTS stated that while there are still areas of concern,

> the majority of operators under the Mining Act engage with native title groups, enter into agreements and implement heritage avoidance and protection measures. Similarly, with public works the notification requirements to

\(^{425}\) APY Submission, supra note 18, at 7–8.

\(^{426}\) Arabana Aboriginal Corporation, supra note 18, at 3.

\(^{427}\) See id.

\(^{428}\) SANTS Submission, supra note 65, at 6.

\(^{429}\) Arabana Aboriginal Corporation, supra note 18, at 2–3.
native title groups and follow up heritage measures provide a reasonable level of heritage protection.430

Thus, there is some evidence that the DEM’s policy of requiring WACs or heritage surveys before approving mineral exploration PEPRs, now formalized in the 2021 Ministerial Determinations relating to PEPRs, has been more effective in bringing these practices into implementation by mining proponents than has happened in other industries where the AHA is the primary or only statutory safeguard.431

E. Who Speaks for Country?

One of the enduring difficulties and areas of potential conflict in South Australia and other States concerns the issue of which Aboriginal people are the “right” people to speak for Country.432 This is a crucial issue for mining proponents and Aboriginal people. Mining proponents seek to access land in a timely manner, minimizing delays and costs, while complying with native title and heritage law. They seek to reduce and manage commercial, legal, and “environmental and social” risks. Knowing who to consult and negotiate with is paramount to ensuring successful relationships with Aboriginal people and avoiding potential claims, delays, and negative publicity once mining activities commence.

Aboriginal people may have a range of interests to consider in relation to mining proposals, including economic benefits such as financial payments and employment, as well as the negative impacts on the environment and heritage. Thus, identifying who may speak for Country and negotiate with mining companies is an incredibly important question.

The controversy over who speaks for Country “arises out of the potential conflict between Aboriginal laws and customs of different groups as to what may be done at a place (and by whom) and what may be said at a place (and by whom).”433 For thousands of years prior to colonization and the recognition of native title, Aboriginal peoples held custodial responsibilities according to their own people’s tradition in regard of land and waters.434 The complex reality of the interactions and relationships between different Aboriginal peoples and their custodianship of land and

430 SANTS Submission, supra note 65, at 6.
431 Id.
432 Croft v Australia (n 138) [96]–[97].
433 Id. at [97].
434 Id. at [121].
waters do not fit neatly into the system of native title. Under native title law, only one people may hold native title rights in relation to certain lands or waters, which has led to competing native title claims.\textsuperscript{435} Alongside this, the development of separate, parallel statutory frameworks for heritage protection under the AHA and native title under the NTA has led to competing and conflicting interactions between individuals and groups, both within and between different language groups.\textsuperscript{436}

The statutory framework for the protection of Aboriginal heritage under the AHA predates the recognition of native title.\textsuperscript{437} The AHA recognizes the rights of “traditional owners,” where a Traditional Owner is defined as an “Aboriginal person who, in accordance with Aboriginal tradition, has social, economic or spiritual affiliations with, and responsibilities for, the site or object.”\textsuperscript{438} The introduction of Aboriginal heritage legislation led to the formation of many Aboriginal heritage organizations and committees to engage in regional heritage matters, and individual Traditional Owners with custodial responsibilities had been listing sites under the AHA (and its predecessors) years before the recognition of native title.\textsuperscript{439} The Federal Court in \textit{Croft v South Australia} referred to the custodial responsibilities of Traditional Owners in relation to cultural heritage, which derive from Aboriginal tradition, and which are given (albeit imperfect) statutory protection through the AHA, as “non-native title interests.”\textsuperscript{440}

The recognition of native title in \textit{Mabo (No 2)}\textsuperscript{441} and the passage of the NTA in 1993 brought new groups into existence—“native title groups”—with new rights and responsibilities, managed through RNTBC’s.\textsuperscript{442} With the advent of native title law, Aboriginal people came together to form native title claim groups, and although in some cases “there was close alignment between heritage and native title group . . . more often that was not the case.”\textsuperscript{443} In \textit{Croft v South Australia}, the Federal Court made it clear that native title rights, including rights to practice culture and heritage, and which are recognized by the common law and given statutory protection under the NTA, are not the same as

\textsuperscript{435} See \textit{id.} at [4].
\textsuperscript{436} \textit{Id.} at [97].
\textsuperscript{437} \textit{Id.} at [96].
\textsuperscript{438} AHA (n 62) s 3.
\textsuperscript{439} \textit{Croft v Australia} (n 138) [96].
\textsuperscript{440} \textit{Id.} at [110].
\textsuperscript{441} Mabo No 2 (n 11) [2].
\textsuperscript{442} See generally NTA (n 75).
\textsuperscript{443} SANTS Submission, \textit{supra} note 65, at 3.
the non-native title interests in heritage protection recognized and protected under the AHA.\textsuperscript{444}

Since the recognition of native title, there have been not only competing native title claims between different Aboriginal peoples but conflicts between the RNTBC and Traditional Owners within a language group, where the RNTBC sees itself as the only appropriate body with which developers should engage, but Traditional Owners do not see themselves as being adequately represented by the RNTBC.\textsuperscript{445} Lucas and Fergie have stated:

The native title process has resulted in claimant (and later corporate) groups that have recognised rights and responsibilities that might include heritage protection, but the AHA (SA) itself employs an older trope of “traditional owner.” Groups and individuals may not automatically align neatly under these labels. Traditional owners may include individuals who are not members of a PBC or a claimant group, may not be in accord with members of such bodies or for some other reason are not aligned with the appropriate organisation but are still recognised as having authoritative heritage knowledge. Alternatively, individuals may make assertions of heritage value that are not afforded credence or precedence by Aboriginal organisations. The ‘doubling’ of native title and heritage domains—and the potential gaps between them—has the power to generate much conflict and hurt, dividing communities as much as native title forces them together.\textsuperscript{446}

There is also potential conflict between the RNTBC/native title claimants of one language group and Traditional Owners of a different language group.\textsuperscript{447} This is because Traditional Owners may hold non-native title interests in heritage located in land over which another Aboriginal people holds native title rights.\textsuperscript{448} This was the case in \textit{Croft v South Australia}, where Mr. Andrew Starkey, a senior lawman according to Kokatha tradition, and a Traditional Owner under the AHA, sought

\textsuperscript{444} \textit{Croft v Australia} (n 138) [78], [96], [97].
\textsuperscript{445} See Lucas & Fergie, supra note 96, at 213–18.
\textsuperscript{446} Id. at 216.
\textsuperscript{447} Id. at 213–18.
\textsuperscript{448} See \textit{Croft v Australia} (n 138) [110].
to be joined to the Nukunu and Barngarla native title consent determinations, to make representations to the Court regarding the protection of sites of significance to the Kokatha, listed under the AHA, and located in the area of the native title consent determinations.\textsuperscript{449} The Kokatha had previously and unsuccessfully claimed native title rights in relation to cultural heritage in an area of land over which both the Nukunu and Barngarla peoples also claimed native title rights.\textsuperscript{450} In \textit{Croft v South Australia} the Federal Court found Mr. Starkey had custodial responsibilities towards, and a non-native title interest in, protecting sites of significance to him located in the area of the Nukunu native title claim, and joined him to the claim.\textsuperscript{451}

Lucas and Fergie have stated that the conflicts over “who speaks for Country” are “intrinsic to the heritage domain post-native title” and that there is no straightforward reconciliation between native title holders who quite rightly claim that they have responsibility for the entirety of a determined area and its heritage and those individuals who might be identified as traditional owners for a specific site. The disparity between collectivity and individualism between the AHA (SA) and the NTA has significant implications for their continuing operation. In particular, it has been a source of conflict within Aboriginal communities.\textsuperscript{452}

South Australia has long sought to reconcile the legislative frameworks of the AHA and NTA. A major review of the AHA in 2008 led to inclusion of the RARB and LHA provisions in 2017.\textsuperscript{453} These provisions seek to reconcile the separate statutory frameworks under the AHA and NTA, and simplify negotiations between developers and Aboriginal groups, by recognizing the primacy of RNTBCs in managing heritage protection through their appointment as RARBs and power to enter into LHAs with developers.\textsuperscript{454} Mining companies desire “timeliness, certainty, clarity and consistency, along with predictable regulation, security of tenure and procedures for access to land.”\textsuperscript{455} They are corporate bodies answerable to

\textsuperscript{449} Id. at [58].
\textsuperscript{450} See id.
\textsuperscript{451} Id. at [65]–[66].
\textsuperscript{452} Lucas & Fergie, \textit{supra} note 96, at 217.
\textsuperscript{453} See id.
\textsuperscript{454} See id.
\textsuperscript{455} Report Book No 2020/00019, \textit{supra} note 79, at 8.
shareholders and investors. They generally wish to engage with as few groups or Traditional Owners as possible, requiring certainty regarding who they need to negotiate and consult with, to reduce delays and costs, and the legal risks of non-compliance. The RARB/LHA provisions offer these benefits to companies. They also provide potential benefits to Aboriginal peoples by empowering them to determine how their heritage will be protected and managed, rather than the Minister making these decisions. It has been argued that the process of entering into ILUAs has allowed native title parties to better protect and advance their interests by placing decisions in the hands of Aboriginal peoples and companies.

However, these provisions have not resolved the potential for conflict, with submissions to the AHA revealing a continuing difference in point of view regarding the role of RNTBCs and RARBs and their right to speak and negotiate in relation to heritage matters. Native title bodies, the SANTS and industry have emphasized the intent of the RARB and LHA provisions to give primacy to native title holders in heritage matters by empowering native groups to enter into LHAs, and criticized the SAHC’s onerous appointment procedures for RARBs, arguing the delay in approving the appointment of RNTBCs as RARBs has undermined the intention of the legislation. In contrast, submissions from other Aboriginal people to the SA Heritage Inquiry have argued that native title bodies cannot represent Traditional Owners in heritage matters.

456 Id.
457 NEW SOUTH WALES ABORIGINAL LAND COUNCIL, Caring For Culture Perspectives on the Effectiveness of Aboriginal Cultural Heritage Legislation in Victoria, Queensland and South Australia 36 (2010).
458 Id.
459 Lucas & Fergie, supra note 96, at 60–61.
460 Id.
461 Id.
462 APY also argued that consultation with traditional owners should be with APY only, not individuals. APY Submission, supra note 18, at 5; SACOME Submission, supra note 180, at 7; BHP Submission, supra note 344, at 3–4. The SAHC has defended its appointment process, stating that the AHA “does not define ‘traditional owners’ in native title terms,” and that the appointment process is a way by which the Committee ensures Recognised Aboriginal Representative Bodies “undertake wide consultation amongst Traditional Owners before deciding to impact heritage” consistently with requirements of the AHA. SAHC Submission, supra note 106, at 33–37.
463 Geraldine Submission, supra note 424, at 2; AYLHA Submission, supra note 372, at 2; Campbell Law Submission, supra note 359, at 6. This point was made in various submissions to the Juukan Gorge Inquiry. See, e.g., Chuulangun Aboriginal Corporation, Submission No 167 to Joint Standing Committee on Northern Australia, Inquiry into the Destruction of 46,000-Year-Old Caves at the Juukan Gorge in the Pilbara Region of Western Australia (9 July 2021) 3.
title rights are not the same as non-native title interests in heritage and native titleholders may not hold the custodial responsibility or authority to speak for sites.

These concerns are supported by *Croft v South Australia*. As stated above, the Federal Court found Mr. Starkey had custodial responsibilities towards, and hence an interest in, protecting sites of significance to him located in the area of the Nukunu native title claims. Judge Charlesworth stated that “[i]t is not to be supposed that he may discharge that cultural responsibility by accepting a sincere assurance from the Nukunu people that they will assume responsibility for the protection of the sites.” Even if it were willing to do so, a native title body established to manage the native title rights of one Aboriginal people is unable to assume responsibility for discharging the custodial responsibilities of a Traditional Owner that arises under another Aboriginal people’s traditions. These custodial responsibilities cannot be exercised by anyone other than the Traditional Owner. Moreover, a non-binding promise by a native title representative body that it will protect a Traditional Owner’s non-native title interests in heritage is not sufficient.

Under the RARB/RNTBC and LHA framework, the requirement to consult with Traditional Owners is removed from the Minister and mining proponents and is placed in the hands of RARBs/RNTBCs. This arguably places RARBs/RNTBCs in the position of wielding the same power over Traditional Owners in relation to the protection of their non-native title interests in heritage that have been and are exercised by the government. However, RNTBCs are not established for the purpose of advancing the non-native title interests of Traditional Owners in heritage, but to manage native title rights. In many circumstances these interests and rights may coincide. However, RNTBCs do not have the incentive to protect the heritage interests of other Aboriginal peoples, and it must be questioned whether they should be expected to do so if this conflicts with the interests of the people on whose behalf they act.

Traditional Owners have argued that native titleholders cannot speak to cultural heritage alone, as native title was never designed to be an “all-purpose panacea to colonialism . . . , [it] wasn’t designed as a

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463 *Croft v Australia* (n 138) [37].
464 *Id.* at [65]–[66].
465 *Id.* at [88].
466 *Id.* at [94].
468 See NAT’L INDIGENOUS AUSTRALIANS AGENCY, *supra* note 73, at 1.
cultural heritage reference point and . . . is not fit for purpose in determining who speaks for cultural heritage . . . [i]t’s just been linked up that way by white bureaucrats.”

Further, native title law has divided Indigenous families, excluded “those with cultural knowledge and authority” from protecting their cultural heritage and “is a mechanism that is set up to actually just to get the clearances done.”

Some submissions to the SA Heritage Inquiry argued that RNTBCs cannot represent Traditional Owners in heritage matters because of their conflict of interest between the protection of heritage and pressure to approve work clearances to obtain mining payments.

The same criticisms relevant to ministerial decision-making pertain to RARBs/RNTBCs. There is no obligation on RARBs to come to a decision that will protect the interests of Traditional Owners and little to no statutory protection for Traditional Owners whose views are not represented by a RARB. Traditional Owners have a right to be consulted by a RARB but no right of veto over developments. The main control over the quality of consultation by RARBs is through the SAHC’s requirements in relation to the appointment of RARBs, but these are not statutory requirements and are not, for example, equivalent to the objects, duties, and functions of MT, APY, and the ALT set out in land rights legislation. Moreover, rights of consultation are only as good as the quality of engagement in practice. Just as the practices of some companies are excellent and others are poor, and just as sometimes the Minister has consulted adequately and other times does not, so too is it likely that the quality of engagement with Traditional Owners by RARBs will vary.

Should a RARB permit the destruction of a Traditional Owner’s non-native interests in heritage protection, then provided there has been consultation, it appears there will be little recourse for the Traditional

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470 See id. (quoting Adrian Burragubba). Adrian Burragubba is a Wangan and Jagalingou man. Id.
471 See Geraldine Submission, supra note 424, at 2; AYLHA Submission, supra note 372, at 2; Campbell Law Submission, supra note 359, at 6.
472 See AHA (n 62) pt 2B.
473 See id. ss 19D, 19H.
474 See id. s 19B(12).
475 See, e.g., Newchurch v Minister for Aboriginal Affairs and Reconciliation [2011] SASC 29.
Owner. The AHA does not provide redress for Traditional Owners, in the form of merits review of the content of a LHA, nor for the payment of compensation, nor could Traditional Owners seek judicial review of the decision of a RARB.\textsuperscript{476}

Any review of the AHA needs to be clear about the potential impacts of transferring the responsibility for consulting with Traditional Owners from the government and placing it in the hands of RARBs/RNTBCs. RARBs will have significant powers and responsibilities. Consultation, done properly, is not a light matter. Meaningful consultation and engagement require significant time and resources, to locate Traditional Owners, and hold meetings and discussions. Many RNTBCs do not have adequate resourcing and funding and are stretched for time.\textsuperscript{477} There needs to be further consideration in relation to the financial resources that should be made available to RARBs, given they will be exercising responsibilities for consultation and potentially exposed to legal liability that would otherwise be incurred by proponents and the state. There is also a need for clarity around the legal avenues for redress, if any, that are or should be available to Traditional Owners whose non-native title interests in heritage are extinguished by a LHA/contract between a RARB/RNTBC and mining company.

South Australia is not the only jurisdiction struggling with these issues. The Final Report of the Juukan Gorge Inquiry found that “no heritage framework successfully grapples with how to identify the correct Aboriginal and Torres Strait Islander group/s to speak with about heritage sites.”\textsuperscript{478} The Report noted that although the Victorian system of appointing Registered Aboriginal Parties (“RAPs”) has been suggested as a model for the recognition of Traditional Owner groups, “even this has raised concerns as entities seeking registration as a RAP do not need to satisfy that they are the only, or the most representative, body for traditional custodians of the relevant area.”\textsuperscript{479} Giving RAPs “the sole responsibility for evaluating projects that may impact cultural heritage sites” was described as an “unrepresentative approach”; multiple groups may claim cultural connection to sites or objects, but only one of those groups is responsible (or empowered) to evaluate a development proposal and consent to destroy heritage.\textsuperscript{480}

\textsuperscript{476} See DELOITTE, supra note 74, at 21–22, 120.
\textsuperscript{477} See Juukan Gorge Final Report, supra note 6, at 192.
\textsuperscript{478} Id.
\textsuperscript{479} Id. at 192–93.
\textsuperscript{480} Id.
A submission to the Review of the Heritage Act in Queensland argued that Traditional Owners “with knowledge and authority” about cultural heritage should be actively engaged “regardless of whether there is already a native title party recognised for that area.” Similarly, in South Australia, it has been submitted that either: (1) consultation with Traditional Owners under the AHA should be required even whether there is a LHA, to provide an avenue for Traditional Owners to express their approval or disapproval for a project; or (2) the Act should include consultation with Traditional Owners as part of the Ministerial approval of a local heritage agreement under section 19I. The process for entering LHAs must be transparent and allow Traditional Owners an opportunity to object to an agreement pursuant to traditional laws that can be enforced though legal avenues.

These submissions are arguably supported by dicta of Judge Charlesworth in *Croft v South Australia*. In that case, the Federal Court found it was in the interests of justice that Mr. Starkey be joined as a party to the Nukunu Claim, “for the purpose of protecting his interest in accessing sites in the claim area in respect of which he claims to have custodial responsibilities in his capacity as a senior law man under the traditional laws and customs of the Kokatha people.” This suggests that it is in the interests of justice for Traditional Owners to be present at the negotiation of a LHA and be able to make representations to the RARB and the mining proponent. This is even more so given the lack of a right of merits review or way of challenging the content of a LHA.

This Article suggests that in reviewing the AHA, further explicit consideration needs to be given to the following questions: (1) who (if anyone) has the legal right to approve damage to, or the destruction of, a Traditional Owner’s non-native interests in practicing and protecting cultural heritage, thereby extinguishing those interests, and why; and (2) should there be legal consequences (such as payment of compensation) for exercising a right to approve damage to, or the destruction of, cultural heritage and/or extinguish non-native interests to protect and practice cultural heritage, and if so, what should these be? Consideration should be given to the provision of adequate resources for RARBs and Traditional

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481 Suzanne Thompson is the Managing Director for the Yumbangku Aboriginal Culture Heritage and Tourism Development Aboriginal Corporation in Queensland. Hinchcliffe, *supra* note 469.

482 See Campbell Law Submission, *supra* note 359, at 5.

483 See *Croft v Australia* (n 138) [94], [96], [121].

484 See *id.* at [121].
Owners to engage in meaningful consultation, to ensure inclusivity and due diligence in identifying Traditional Owners and in obtaining their free, prior, and informed consent to developments that impact custodial responsibilities, and to providing low-cost avenues for advice and for the early resolution of disputes.

F. Disconnect Between Best Practice and Legislation

The lack of formal regulatory connection and the disconnect between native title, the AHA, and the Mining Act has been criticized by SACOME. SACOME has argued that the protection of Aboriginal heritage is “complicated by a lack of clarity in the AHA and its misalignment with other legislation, including the Mining Act.” In particular, the organization has suggested that the “disconnect” between the accepted practice of using WACs and CHSs to facilitate access to land and protect heritage, and their lack of legal or statutory basis in the AHA, is a “notable flaw” in the AHA, because it fails to provide legal protection for proponents who often incur significant costs in undertaking these activities.

SACOME submits that ambiguity regarding the legal status of CHSs and WACs should be addressed to provide greater certainty to the agreement making process under the Mining Act. SACOME members also suggested WACs performed by Native Title Organisations on their land and conducted under the authority of the Mining Act could be given clear recognition under the AHA. For example, WACs could be recognized as Heritage Agreements under the AHA. However, if the government were to adopt this suggestion, RNTBCs should be aware that the onus to consult with Traditional Owners, and conduct due diligence in this regard, as well as the legal risk of a failure to adequately consult with Traditional Owners, will arguably shift from mining companies to native titleholders/RARBs.

It has also been argued that CHMPs should be a precondition for any activity that may affect Aboriginal heritage. The SAHC suggested that authorization to disturb or damage Aboriginal heritage should not be able to be given under agreements such as LHAs “in the absence of

485 See SACOME Submission, supra note 180, at 4.
486 Id.
487 Id. at 4, 6.
488 Id. at 6.
489 Id. at 4, 6.
490 SAHC Submission, supra note 106, at 11.
best-practice CHMPs, whose processes and outcomes are capable of being monitored by interested Aboriginal parties.” BHP suggested introducing specific statutory provisions requiring land users and Traditional Owners to “prepare and seek to agree to CHMPs that identify the risks of disturbing cultural heritage, and how activities can be managed to mitigate those risks,” including processes to ensure a CHMP is “prepared with full information about proposed activity and its potential impacts on Aboriginal heritage values” and “standards and procedures applicable to the preparation of a CHMP.”

G. The Failure of Regulation: Kelaray and Exploratory Drilling in Lake Torrens

Some of the failings of the AHA from the perspective of Aboriginal people are demonstrated by Kelaray’s exploration program in relation to Lake Torrens. In February 2020, Kelaray applied for an authorization under section 23 of the AHA to disturb or interfere with any Aboriginal sites, objects, or remains it discovered in relation to proposed exploration activities on Lake Torrens, including a 500m-wide area inland from its shoreline. Lake Torrens is recorded in the Central Archive as a site of significance and the Adnyamathana, Anangu Pitjantjatjara Yankunytjatjara, Arabana, Barngarla, Kokatha and Kuyani peoples “all attest to the spiritual importance and archaeological significance” of the lake. There are no native titleholders over Lake Torrens, although Aboriginal people hold native title in respect of land adjacent to the Lake.

In June 2020, the DPC began a public consultation process, and invited various stakeholders to participate in the process. Because of “overwhelming opposition” to the exploration program and concerns over the adverse impacts to heritage and culture as Lake Torrens is a “key Aboriginal site of great importance to many Aboriginal language groups,” both the SAHC and AAR recommended that a section 23 authorization should not be granted. Despite this, on December 29, 2020, the Premier...
the Honorable Mr. Steve Marshall, in his capacity as the Minister for AAR, issued an authorization. Mr. Dare, an elder of the Barngarla people, Mr. Bilney, a member of the Barngarla Determination Aboriginal Corporation (“BDAC”), and BDAC applied for judicial review of the Minister’s decision.

The Supreme Court allowed the application on only one of seven grounds argued by the applicants and set aside the Minister’s Determination granting the authorization, finding the authorization was inconsistent with section 20 of the AHA. Section 20 requires a discovery of Aboriginal heritage to be reported to the Minister “as soon as practicable.”

Kelaray had a CHMP, which included a “Chance Find Protocol” setting out the company’s internal procedures for managing a discovery of objects or remains. When a find was made, the CFP allowed for assessment of the heritage by anthropologists or Aboriginal representatives of Kelaray’s choice before Kelaray notified the Minister. The section 23 authorization did not have a condition requiring Kelaray to comply with section 20. Thus, a site or object could be interfered with or disturbed before Kelaray reported a discovery to the Minister. This denied the Minister “the opportunity to determine whether the item is one of Aboriginal heritage and give directions as to the protection and preservation of the heritage before the applicant interferes with or damages the heritage” thereby “substantially diminishes the power of oversight and review by the Minister and puts items of Aboriginal heritage at risk.” The Court found that “the terms of the authorisation thereby substantially detract from the efficacy of the obligation imposed by [section] 20 of the Aboriginal Heritage Act” and that the authorization was “inconsistent with [section] 20 because it detracts from the practical legal operation of that section.”

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500 Id. at [4].
501 Id. at [38].
503 Dare v Kelaray Pty Ltd (n 141) [12]. See also Welsh, supra note 502.
504 Dare v Kelaray Pty Ltd (n 141) [12].
505 Id. at [102].
506 Id. at [103].
507 Id. at [59], [109].
508 Id. at [12].
Although the application for judicial review succeeded, the proposal to explore for minerals on Lake Torrens demonstrates several criticisms of the AHA. First, the authorization was issued despite evidence as to the cultural significance of Lake Torrens, the advice from AAR and the SAHC, and the overwhelming opposition from Aboriginal people, showing why many Aboriginal people believe mining will always trump heritage protection.

Secondly, in the absence of an ability to seek merits review of the Minister’s decision, the Barngarla people had few options under domestic law except to seek an action for judicial review. However, an action for judicial review is limited as a means of ultimately preventing development or ensuring development is carried out in a certain way. Although the Court set aside the Minister’s determination, Kelaray could redraft its CFP to be consistent with the statutory scheme in the AHA, apply for a new section 23 authorization and then resume drilling.

Thirdly, there is no statutory requirement in the AHA requiring a proponent to consult with Traditional Owners. Kelaray’s heritage application provided information concerning heritage surveys and consultation with Aboriginal people. The AAR prepared a “long and extensive report” on the application which recorded Kelaray’s “commitment” to consult with the Kokatha Aboriginal Corporation, which holds the native title rights on land adjacent to Lake Torrens in the area of the application. However, Kelaray did not consult with the Kokatha Traditional Owners who were the only custodians who held site cards for Lake Torrens under the AHA, despite repeated written requests by the lawyer for the Kokatha Traditional Owners, nor did Kelaray consult with the Barngarla people.

Next, the Minister for AAR is not obliged to place conditions on a section 23 authorization requiring an applicant to consult with Traditional Owners, and the Premier chose not to place such a condition on Kelaray’s authorization. However, the Premier sent a cover letter to Kelaray with the authorization, in which the Minister set out certain

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509 Id. at [45].
510 Dare v Kelaray Pty Ltd (n 141) [1], [4].
511 See generally AHA (n 62).
512 Dare v Kelaray Pty Ltd (n 141) [37].
513 Id. at [42], [43].
514 Personal communication with Mr. John Podgorelec, lawyer for the Kokatha Lake Torrens site card holders and Traditional Owners (on file with author).
515 Dare v Kelaray Pty Ltd (n 141) [37].
516 Id. at [46]–[50].
“expectations” of the company.517 For example, the letter stated: “I expect Kelaray to make reasonable efforts to engage and consult with the Aboriginal Parties, and any other relevant Traditional Owners, regarding approaches to minimising damage and disturbance to Aboriginal heritage that may be located within the authorisation area.”518 There was no condition requiring Kelaray to prepare or operate consistently with a CHMP; rather, this was also set out as an “expectation” of the company.519

These “expectations” are not enforceable and are devoid of legal content and meaning. The Court addressed the question as to whether the Minister’s failure to incorporate the expectations set out in the cover letter into conditions of the authorization was manifestly unreasonable, and concluded that on the facts, it was not.520 The Court also rejected an argument by the applicants that the grant of the authorization was manifestly unreasonable because it failed to include various conditions, including conditions requiring Kelaray to consult with the Barngarla people and take their views into account and undertake heritage surveys by Barngarla persons approved by BDAC.521

Whether or not the grant of the authorization was manifestly unreasonable, sending a letter with non-binding “expectations” of a proponent is an extremely poor regulatory practice, providing neither regulatory certainty, stability, nor transparency. As described by Chief Judge Kourakis, it is “at the very least, unorthodox and, generally, inutile”:

If the Minister’s expectation that Kelaray would do as he asked had played a material part in his decision to authorise conduct which would otherwise be an offence, then, in the ordinary course, the standards he expected Kelaray to observe should have been imposed as conditions on the grant of authority. If the expectations were no more than a hope that Kelaray would exceed the minimum standards the reference to them in the letter in which the authorisation is given is, at best, surplusage and probably confusing.522

To summarize, Kelaray’s section 23 authorization was granted against the wishes of the Aboriginal people, and the advice of SAHC and

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517 Id. at [60].
518 Id. at [54], [60].
519 Id.
520 Id. at [62].
521 Dare v Kelaray Pty Ltd (n 141) [87]–[89].
522 Id. at [6].
AAR. With no statutory duty requiring Kelaray to consult with Traditional Owners in relation to avoiding, minimizing the impacts on, and managing heritage, and no conditions placed on Kelaray’s authorization requiring consultation, the company chose not to engage with Traditional Owners. There was no ability to seek merits review of the Minister’s decision to issue an authorization nor, in an action for judicial review, could the Court substitute its decision for the Minister and place conditions on the authorization. There were no other means by which the Traditional Owners could take legal action under the AHA. Where there is a lack of political and corporate interest in ensuring that corporations engage effectively with Traditional Owners, there is little assistance that the domestic courts can offer Aboriginal people.

H. Principle of Free, Prior, and Informed Consent (“FPIC”)

It is not within the aim or scope of this Article to identify and discuss principles of international human rights law that are relevant to the protection of Aboriginal heritage. Nonetheless, the many shortcomings identified and discussed in relation to the AHA in this Article together raise a serious question as to the extent to which the legislative framework in South Australia gives effect to the right of self-determination and the principle of FPIC enshrined in the United Nations Declaration on the Rights of Indigenous Peoples. The principle of FPIC in relation to development projects within the lands and waters of Aboriginal peoples aims to ensure that they are not coerced or intimidated, that their consent is sought and freely given prior to the authorisation or start of any activities, that they have full information about the scope and impacts of any proposed developments, and that ultimately their choices to give or withhold consent are respected.

While it is beyond the scope of this Article to engage in a discussion of the meaning and scope of the principle of FPIC, various submissions to the AHA Inquiry certainly suggest that the regime does not comply

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523 Id.
with this principle, at the same time that nationally Aboriginal and Torres Strait Islander peoples are emphasizing the fundamental importance of the principle in protecting Country and heritage. 526 If international standards in relation to FPIC are not met, or even engaged, then native titleholders, Traditional Owners under the AHA, and the general community cannot have confidence that risks to cultural have been properly identified, explained, and addressed by legislative procedures. Neither can they be assured that consent to projects, if obtained, is informed and genuine. 527

Moreover, unless consent procedures comply with the principle of FPIC, international finance may be increasingly difficult to obtain. International lending institutions, institutional investors and shareholders have become increasingly concerned with the behavior of corporations in their interactions with First Nations people, and the consequences of natural resource developments on cultural heritage. 528 This is evidenced by the adverse publicity for Rio Tinto when the company—with all necessary regulatory approvals—destroyed the caves in Juukan Gorge in 2020. 529 That incident eventually led to the resignation of four senior executives of the corporation. 530


527 The arguments in this section have been presented as submissions to South Australia by the author and her colleagues. See Alex Wawryk, Alex Reilly, John Podgorelec & Philippa McCormack, Submission in Relation to the Proposed Amendments to the Petroleum and Geothermal Energy Act 2000 (SA), 2 (Environmental and Natural Resources Law Research Unit (ENREL) and the Public Law and Policy Research Unit (PLPRU), Adelaide Law School, November 2022) [hereinafter PGEA Submission] (on file with author); John Podgorelec, Peter Burdon & Alex Wawryk, Submission to the Nuclear Fuel Cycle Royal Commission (SA) (PLPRU, Adelaide Law School, 2015) (on file with author).


530 Nick Toscano, ‘I Am Ultimately Accountable’: Rio Tinto Chairman to Stand Down After
Furthermore, any project, even if approved by state and/or federal governments, may be open to action under international complaints procedures, such as those of the United Nations Commission on Human Rights and the OECD Guidelines for Multinational Enterprises.\footnote{PGEA Submission, supra note 527, at 2–3. See also OECD, OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 53–54 (2011).} This can lead to project delays, negative publicity, and reputational damage for companies and the government. Recent failures in due diligence on the part of Saab and ElectraNet respectively in relation to (non-mining) activities affecting Aboriginal cultural heritage in South Australia resulted in complaints under the OECD Guidelines for Multinational Enterprises procedures,\footnote{AUSTRALIAN NATIONAL CONTACT POINT FOR THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, INITIAL ASSESSMENT: COMPLAINT SUBMITTED BY ANDREW AND ROBERT STARKEY REGARDING SAAB AUSTRALIA AND SAAB GROUP, SWEDEN 4 (2022); AUSTRALIAN NATIONAL CONTACT POINT FOR THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, FINAL STATEMENT: COMPLAINT SUBMITTED BY ANDREW AND ROBERT STARKEY REGARDING ELECTRA NET PTY LTD 4 (2021); AUSTRALIAN NATIONAL CONTACT POINT FOR THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, FOLLOW UP STATEMENT IN RELATION TO THE COMPLAINT SUBMITTED BY ANDREW AND ROBERT STARKEY REGARDING ELECTRA NET PTY LTD 3 (2022).} with the findings of the Australian National Contact Point resulting in ongoing adverse publicity for these companies.\footnote{Peta Doherty, The Company That Bulldozed This Sacred Aboriginal Site Had a Year to Apologise. It Didn’t, SBS NEWS (Apr. 5, 2022, 6:51 AM), https://www.sbs.com.au/news/article/the-company-that-bulldozed-this-sacred-aboriginal-site-had-a-year-to-apologise-it-didnt/joe6tzfr0 [https://perma.cc/NC5N-V8EQ]; Michelle Fahy, Unexplained Ordnance: A Missile on Aboriginal Land and a Breakthrough Legal Complaint, ARENA (Feb. 21, 2022), https://arena.org.au/unexplained-ordnance-a-lost-missiles-on-aboriginal-land-and-a-landmark-legal-decisions/ [https://perma.cc/YE67-KWH9]; Steven Trask, Investigation Into Missile Found at Aboriginal Heritage Site ‘Could Lead to International Scrutiny’, SBS NEWS (Apr. 5, 2022, 7:06 AM), https://www.sbs.com.au/news/article/investigation-into-missile-found-at-aboriginal-heritage-site-could-lead-to-international-scrutiny/pkam3ns5f [https://perma.cc/YU74-WAQK].}

If proponents do not meet the principle of FPIC and the needs of Aboriginal people in relation to the protection of heritage, then projects are more likely to be met with delays and increasing exposure to the censure of the international community. At a minimum, corporations must engage in good faith consultations with Aboriginal people prior to undertaking
projects within their land. However, if risk mitigation is a priority, the minimum may not be enough to ensure a successful project.\textsuperscript{534} Gaining actual consent from Aboriginal people will align a project with evolving international human rights jurisprudence regarding the principle of FPIC and in turn with the lending policies of a growing number of international financial institutions. Unless the State adequately addresses international obligations in relation to FPIC, investing in SA will become increasingly risky and this will deter international investors.\textsuperscript{535}

This Article suggests that it is time that the South Australian government consider introducing explicit provisions implementing a right of FPIC in the AHA and natural resources legislation.\textsuperscript{536} The most controversial would be a right of veto over development. Even without such a right, the principle of FPIC could be explicitly incorporated through various means such as an “objects” section in the Act; a principle to which the Minister must have regard in administering the Act; a prohibition on the issue of approvals unless the Minister is satisfied that an applicant has observed the principle of FPIC; the introduction of an explicit right to consultation for Aboriginal organizations and Traditional Owners; the requirement of certain conditions to be placed on approvals under the AHA; and by a requirement that the board of directors of RNTBCs/RARBs adhere to the principle of FPIC.\textsuperscript{537}

CONCLUSION

This Article has identified various shortcomings with the AHA. A number of criticisms of the regime remain unchanged from 2008, when Wiltshire and Wallis wrote that

\begin{quote}
[f]our decades of on-the-ground experience and repeated consultation with Aboriginal communities reveal the same concerns regardless of the specifics of the actual Act, that is in effect: insufficient Aboriginal involvement; inadequate funding and resourcing; a lack of dedicated and
\end{quote}

\textsuperscript{535} PGEA Submission, supra note 527, at 3.
\textsuperscript{536} Id. at 10.
\textsuperscript{537} As to the suggestion that the board of directors of Aboriginal corporations adhere to the principle of FPIC, see SAHC Submission, supra note 106, at 16.
committed staff; continual restructuring; a failure by white “experts” to understand the holistic nature of Aboriginal heritage; short-sighted “quick-fix” approaches; and ultimate control being vested in a government Minister whose interests lie firmly with developers and re-election rather than heritage protection and Aboriginal people.538

The submissions to the SA Aboriginal Heritage Inquiry suggest that there are numerous ways in which the legislative framework could be improved, some of which will be easier and less controversial to implement than others.539 Any changes to South Australia’s regime for the protection of Aboriginal heritage should take place as part of a broader national conversation, informed by the recommendations of the Juukan Gorge Final Report and the federal government’s review of heritage legislation. The Juukan Gorge Final Report was critical of both federal and state Aboriginal heritage protection legislation and made many recommendations for reform, including the establishment of minimum standards for heritage protection in Commonwealth and state/territory legislation.540 Some of the recommendations will be more controversial than others—for example, the recommendation that consideration be given to introducing a right for Traditional Owners to veto projects that will destroy heritage.541

The Juukan Gorge Final Report also mentioned the importance of identifying and consulting with Aboriginal people who have the right to speak for Country and recommended that there be “clear processes for identifying who speaks for country,” although the Report offered little concrete suggestions as to how this might be done.542 Rather, it noted the complexity and difficulty of the issue, and that Traditional Owners should determine who speaks for them, which may or may not be Native Title Representative Bodies.543 Other recommendations include: (1) protecting intangible heritage and (2) introducing merits review of government decisions, rights of civil enforcement for Traditional Owners, adequate

538 Wiltshire & Wallis, supra note 27, at 114.
539 See id.
540 Juukan Gorge Final Report, supra note 6, at 199.
542 Id.
543 Juukan Gorge Final Report, supra note 6, at 192–93, 199.
penalties, and processes by which decisions can be reconsidered if and when new information becomes available.544

In November 2021, the Federal Government entered into an agreement with the First Nations Heritage Protection Alliance (“FNHPA”) to consider the recommendations of the Final Report into Juukan Gorge and establish a joint working group to offer advice on how to modernise Australia’s Aboriginal heritage laws.545 A two-stage process was planned. Stage 1 includes engagement and consultation from March to May 2022 in relation to a Discussion Paper Modernisation of Aboriginal and Torres Strait Islander Cultural Heritage Protection released by the FNHPA and the (then) Department of Agriculture, Water and the Environment (“DAWE”) in March 2022.546 Stage 1 consultations will be with First Nations people and organizations, State and territory governments, and industry, to a detailed Policy Options Paper for reform.547 Stage 2 involves national engagement, with consultation on the Policy Options Paper taking place from June to September 2022.548 An Implementation Working Group would then prepare an Options Report for Ministerial consideration.549

With the change of government following the election, the timetable has not been followed.550 However, after the release of the 2021 State of Environment Report on July 19, 2022, which documented the ongoing destruction of Aboriginal heritage across Australia,551 the incumbent Federal Labor Government committed to establishing stand-alone Aboriginal cultural heritage legislation, co-designed with Australia’s First Nations.552 On November 24, 2022, the Government tabled its response to the Juukan Gorge Inquiry Report, accepting in principle seven of the

544 See id. at 199.
547 Id.
549 Id. ¶¶ 27–28.
550 Flynn & Lawrence, supra note 541.
551 See Cresswell et al., supra note 27.
eight recommendations and reiterating its commitment to reforming the national legislation in partnership with Aboriginal people. The earliest date legislative reform will come into effect is in 2023.

As a final point, this Article has focused on the South Australian mining and heritage regime as it applies to and regulates individual development proposals. However, major current and future threats to Aboriginal culture do not now merely arise from individual development proposals, but from major environmental problems such as climate change, the destruction of biological diversity, and impacts on water resources. For example, rising sea levels threaten Aboriginal heritage particularly in coastal areas, as does the increasing occurrence and severity of natural hazards such as floods and bush-fires. Clearly the AHA and Mining Act alone cannot address these problems. A discussion of these issues is beyond this Article as it involves the adequacy of Australia’s environmental laws and underlying environmental philosophy.

However, the participation of Aboriginal people in managing and conserving the environment is essential, not only for the betterment of the environment through the application of traditional knowledge and practices, but to avoid imposing solutions on Aboriginal people in relation to addressing environmental problems that Western law and culture have created.

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553 Australian Government Response, supra note 6, at 20.
554 Id. at 19–20.