

## STATE ABORIGINAL HERITAGE COMMITTEE

### RNTBC RARB Policies – Model Principles

Under section 19B(4) of the *Aboriginal Heritage Act 1988* (SA) (Act), Registered Native Title Bodies Corporate (RNTBCs) are “taken to be appointed” as Recognised Aboriginal Representative Bodies (RARBs) for their native title lands.

However, under section 19B(5) of the Act, appointments only become effective if approved by the State Aboriginal Heritage Committee (Committee).

Before it will approve a RARB, the Committee requires those seeking appointment to provide it with a “RARB Policy” setting out a satisfactory description of how they intend to operate as a RARB.

Given the requirements of the Act, the Committee considers that, at minimum, RNTBC RARB Policies should contain provisions addressing three key areas of RARB responsibility:

- consultation
- dispute management
- heritage management.

RNTBC RARB Policies may also address any other relevant matters.

Listed below are the principles that the Committee considers best practice for RNTBC RARBs in respect of consultation, dispute management and heritage management. The principles relating to each of these areas should be read and considered together, as they inform each other.

It is not sufficient for RNTBCs to rely solely on their Rule Books to address their responsibilities as RARBs. A key reason for this is that RNTBC RARBs are obligated to ascertain and represent the views of “Traditional Owners” (TOs) as defined in the Act, which may include non-RNTBC members. RNTBC RARB Policies may reference and/or expand upon existing provisions within RNTBC Rule Books.

A TO of an Aboriginal site or object is defined by the Act 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.*

RNTBC RARB Policies must therefore contemplate and enfranchise non-RNTBC members who may nonetheless be TOs of heritage within an RNTBC RARB’s appointment area.

The Committee expects that if an RNTBC is approved as a RARB, it will incorporate its endorsed RARB Policy into its Rule Book, and that its RARB Policy will be made readily available to RNTBC members, TOs, the Committee and potential land use proponents.

Terms used in this document that are defined in the Act, have the equivalent meaning when used here.

## **Model Consultation Principles**

The Committee considers that best practice RNTBC RARB Policies will incorporate the following consultation principles:

1. acknowledge and undertake to make known that the RNTBC has been appointed as a RARB
2. acknowledge and undertake to make known that the RARB represents all TOs of heritage within its appointment area, even if some TOs are not members of the RNTBC
3. undertake to consult widely amongst all TOs with an interest in heritage within the RARB's appointment area
4. create a contact list, based on central and local archives information and the RARB's own knowledge, of all TOs of heritage within the RARB's appointment area (TO Contact List)
5. invite TOs or their representatives to nominate heritage for which they speak, or are interested in, and the manner in which they would like to be contacted where that heritage may be affected
6. record this information on the TO Contact List
7. undertake to contact relevant TOs about proposals, activities, events or decisions that may affect heritage for which they have nominated an interest, in the manner they have requested
8. advertise<sup>1</sup> generally any proposal to consider negotiating a heritage agreement
9. nominate an individual(s) to perform consultation on behalf of the RARB from time to time, allowing for both cultural and gender restrictions
10. consult directly with all potentially affected TOs in their chosen manner, or as otherwise possible, when considering entering into a heritage agreement
11. make available written information about proposals that make clear potential impacts to heritage, for provision to TOs
12. make available known information relating to heritage that may be affected within a proposal area, sourced from the central and local archives information and the RARB's own knowledge, for provision to TOs. Where disclosure of the information is prohibited under section 10 of the Act, the permission of the relevant TOs of the heritage must be sought. The divulging of information contrary to Aboriginal tradition, without the authority of the Minister, is an offence under section 35 of the Act
13. afford reasonable time for TOs to consider and respond to proposals
14. request that the proponent arrange a heritage survey over the proposal area where reasonable, if requested by TOs or required by the RARB, to understand the heritage in the proposal area
15. conduct consultations in a culturally-appropriate manner, including offering translation services if possible
16. advise those wishing to provide their views that these views will be recorded and provided to the proponent, whether for or against a proposal
17. where a TO's views may contain culturally sensitive information, afford the opportunity, where possible, for the TO to directly present their views to the proponent, or else provide the TO with the opportunity to vet what information is put forward
18. ascertain and record the views of TOs (including the TO's name and the date of the consultation), the reasons for their views, and any conditions they may recommend should be imposed on proposed activities and/or a heritage agreement
19. offer to facilitate meetings between TOs, the proponent and/or the RARB, where sought

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<sup>1</sup> AAR will place such details on its website free of charge upon request.

20. discuss with the proponent possible measures to avoid or mitigate damage to heritage within the proposal area, in light of known heritage and TO views
21. undertake to incorporate the wishes of TOs into any heritage agreement, to the maximum extent reasonably possible
22. retain a record of consultation outcomes in respect of proposals, activities or heritage agreements
23. present all outcomes of consultations, including any proposals to avoid or mitigate damage to heritage, to common law holders prior to deciding whether to enter a heritage agreement
24. advise TOs of the outcomes of any negotiations with the proponent
25. agree generally to provide TOs with non-commercially sensitive information about proposals, negotiations, projects, decisions and heritage at any reasonable time
26. provide an opportunity for TOs to provide feedback on the RARB's consultation process
27. make available an annual report of RARB activities to all TOs, which should include details of all decisions made and all heritage agreements considered, negotiated and entered into over the preceding twelve months.

### **Model Dispute Resolution Principles**

RNTBC RARB disputes may arise either within the RARB and those it represents (including non-RNTBC member TOs), or between the RARB and a proponent. RNTBC RARB Policies may deal with these scenarios separately.

Dispute resolution provisions within RNTBC RARB Policies may draw upon RNTBC Rule Book dispute provisions, but these provisions will generally need to be broadened to enfranchise non-member TOs.

It is strongly recommended that dispute resolution provisions in RNTBC RARB Policies define what matters may be the subject of dispute resolution.

Matters that may benefit from dispute resolution may include:

1. who is, or who is not, a TO<sup>2</sup>
2. compliance with the RNTBC's RARB Policy
3. the composition of heritage survey, clearance and monitoring teams
4. payment arrangements for heritage survey, clearance and monitoring work
5. compliance with a heritage agreement.

Dispute resolution may not be appropriate in every circumstance, for example in relation to:

1. payment of moneys under a heritage agreement unrelated to heritage survey, clearance and monitoring work, meeting payments, heritage inductions or similar payments to individual TOs
2. a decision to negotiate or enter a heritage agreement, or impact heritage under a heritage agreement, after the RARB has consulted with TOs in good faith in accordance with its RARB Policy
3. the expression of a dissenting view during or after the RARB has consulted with TOs in good faith in accordance with its RARB Policy.

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<sup>2</sup> AAR is willing to participate in a dispute resolution process about who is a TO within the meaning of the Act, including by paying for and engaging an appropriate independent heritage expert to decide the matter. Being declared a TO does not grant that person any right of veto, only rights to consultation and to have their views represented by the RARB.

The Committee considers that best practice RNTBC RARB Policies will incorporate the following dispute resolution principles:

1. be in plain English and understandable by people with basic literacy
2. be culturally appropriate
3. define what is, or is not, a dispute
4. acknowledge that an alternative view may not always be a dispute requiring resolution
5. allow for resolution by an independent party where possible and appropriate
6. be incorporated into all heritage agreements to the extent relevant
7. contain reasonable timeframes for the resolution of disputes
8. be flexible, and allow for different dispute resolution procedures depending upon the circumstances (e.g. internal RARB disputes v disputes between the RARB and a proponent)
9. require that records are kept of all consultations, meetings and communications relating to a dispute
10. afford procedural fairness to all parties to disputes
11. require all parties to act in good faith
12. observe any confidentiality requirements agreed to during the dispute resolution process
13. provide for outcomes of the dispute resolution being made available to the parties involved.

### **Model Heritage Management Principles**

The Committee considers that best practice RNTBC RARB Policies will contain the following heritage management principles:

1. undertake to protect and preserve Aboriginal heritage to the extent reasonably possible
2. seek to minimise or mitigate against impacts to heritage where impacts are unavoidable
3. nominate an individual(s) to be the RARB's first point of contact for heritage management matters, allowing for cultural and gender restrictions
4. ensure a section 21 authorisation is obtained under the Act where the excavation of land to uncover heritage is contemplated, including where a heritage agreement exists
5. ensure a section 23 authorisation is obtained under the Act where damage, disturbance or interference with heritage is contemplated, including where a heritage agreement exists
6. ensure a section 29 authorisation is obtained where the sale or removal of Aboriginal objects or remains from the state (e.g. for scientific testing or loan) is contemplated, including where a heritage agreement exists
7. acknowledge that the significance of heritage will be determined by the RARB in consultation with TOs, with input from heritage professionals (e.g. archaeologists and anthropologists) where appropriate
8. be incorporated into all heritage agreements to the extent relevant
9. identify what heritage exists within a proposal area based on searches of the central archives<sup>3</sup> and local archives, from the RARB's own knowledge, and through consulting with TOs for that area
10. consider commissioning desktop assessments and reports, and undertaking heritage surveys or inspections where appropriate, to better understand what heritage exists in a proposal area, and to identify areas of high-risk

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<sup>3</sup> AAR will perform central archives searches for RARBs free of charge.

11. consider, and where practicable facilitate, on-site meetings to view a proposal area or heritage, and to ascertain the views of TOs
12. not constrain TOs from speaking publicly about their own heritage
13. clearly describe the roles and responsibilities of the RARB, TOs, the proponent and any staff, contractors and consultants under any heritage agreement (flowcharts may be useful)
14. consider the circumstances in which TOs will be engaged to conduct heritage monitoring work, and the nature and scope of their involvement
15. outline measures to avoid damage to known heritage before and during project works where possible, including:
  - sites being flagged-off with bunting prior to works commencing, where appropriate
  - avoidance zones being uploaded to GPS units for staff, vehicles and machinery
  - toolbox talks detailing specific heritage avoidance areas where required
  - arranging inductions for on-ground staff prior to works commencing to ensure they are aware of where they can and cannot go, and what their obligations are under any heritage agreement, cultural considerations and any relevant legislation
16. outline measures for dealing with new heritage discoveries, including:
  - involvement of TOs in assessing and managing the discovery
  - provisions for reporting heritage discoveries to AAR in accordance with section 20 of the Act
  - provisions for reporting discoveries of all potential human remains to SAPOL in accordance with the *Coroners Act 2003 (SA)*
  - a communication strategy for notifying the RARB, TOs and the proponent of discoveries
  - how different heritage discoveries will be managed and protected (e.g. exclusion zones and stop-work orders)
  - where, and how, any disturbed objects or remains will be kept, and any provisions for storage or repatriation
  - recording and reporting requirements for the RARB to ensure information about heritage discovered during project works is established and maintained
17. outline preferred measures to mitigate and minimise damage to heritage where impacts to either discovered or known heritage are unavoidable, including:
  - involvement of TOs
  - retrieval and salvage procedures for specific heritage site types, for example, artefact assemblages/campsites, isolated objects or ancestral remains
  - provisions for the short to long-term storage and curation of heritage retrieved
  - arrangements for relocation, reburial or repatriation of heritage in consultation with TOs
  - recording and reporting requirements for the RARB to ensure information about heritage discovered during project works is established and maintained
  - where known heritage is damaged and it is listed on the central archives, arrange for a site condition report to be prepared and submitted to AAR so that the central archives record may be updated.
18. describe the circumstances in which heritage professionals may be engaged
19. incorporate processes to determine TO support for the sale or removal of objects and remains from the state
20. incorporate processes to determine TO support for destructive and non-destructive scientific analysis on objects and remains

21. consider arrangements for Aboriginal heritage survey, clearance and monitoring team composition, prioritising involvement of TOs with the closest connection to potentially affected heritage
22. consider arrangements for cultural and/or heritage inductions for on-ground staff prior to works commencing, prioritising involvement of TOs with the closest connection to potentially affected heritage
23. consider arrangements for TO training for heritage identification, legislative awareness, heritage monitoring<sup>4</sup> and any other certifications (e.g. 'White Card' and first aid training)
24. incorporate processes defining how TOs will be selected to deliver heritage inductions and participate in heritage surveys, clearances and monitoring work etc
25. define payment rates
26. define disbursement rates for heritage-related expenses (e.g. mileage and meeting attendance rates).

RNTBC RARB Policies should be reviewed regularly and provided to the Committee for information after amendment from time to time.

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<sup>4</sup> AAR can provide heritage, legislative awareness and monitoring training sessions to TOs and land use proponents free of charge, subject to staff availability.