

# **It gets pretty hot out in the desert: The challenge of protecting intangible Aboriginal heritage in South Australia**

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### **A very old peoples in a very old place**

Australia has a long and, despite an interruption by colonisation, enduring Aboriginal history and ever evolving Aboriginal traditions. It is home to many Aboriginal groups, each with distinct cultural practices, beliefs and languages. Cultural practices are deeply spiritual and involve a deep understanding of the environment. They govern how Aboriginal communities live with each other and maintain the land, plants and animals of their country.

Aboriginal dreamtime stories often talk about creation and explain how natural elements in the landscape were formed or how certain species came to be. Stories are linked with culture as a way of passing information to younger generations. The stories can be windows into Australia's geological past and the longevity of the oral tradition can be astounding. For example, a story from the Bibbulum people of southwest Western Australia has been tracked back over time and linked into evidence of the last ice age – some 20,000 years ago (BOM 2014).

Unsurprisingly, South Australia is archaeologically rich (Flood 2001). In terms of antiquity, South Australia contains some of the most significant archaeological sites in the country. A very brief assessment of the archaeological record reveals evidence of Aboriginal people present in South Australia at a conservatively estimated 45 000 years before present (YBP) (Cane 2013, Hiscock & Wallis 2005, Williams *et al* 2014). Some of the significant archaeologically recorded and dated Aboriginal sites in South Australia include (Map 1):

- Hawker Lagoon, Flinders Ranges, dated to 15 000 YBP.
- Hookina Creek, Flinders Ranges, dated to 27 000 YBP.
- Allens Cave, Nullarbor Plain, dated to 40 – 43000 YPB.

(Cane 2013, Hiscock 2008, Hiscock & Wallis 2005, Williams *et al* 2014, Flood 2001).



**Map 1:** Some of the Key Pleistocene sites in South Australia.

Academics acknowledge and expect that as dating techniques and technologies are refined, these dates will be pushed back even further in time (Hiscock 2008, Hiscock & Wallis 2005, Williams *et al* 2014). There are also many significant areas of traditional Aboriginal land use and occupation in South Australia that have never been archaeologically or anthropologically surveyed.

Archaeologists are trained to identify cultural heritage, forensically examine a landscape, study the environment, know the vast corpus of items that comprise Aboriginal cultural heritage and document these items. Recording intangible heritage is a great deal more complex than other archaeological recordings. Aboriginal ceremonial sites, song lines, increase sites and dreaming stories are places on the landscape which often include an archaeological component, but equally often do not. These sites and the traditions and knowledge associated with them often originate from the very distant past and, importantly, contribute to the modern living belief systems and customs of contemporary Aboriginal people. Aboriginal stories of how creation ancestors shaped and shifted the landscape, how they crafted its beauty and natural resources and then gifted these places to specific groups of people are present across South Australia. Aboriginal groups and Traditional Owners consider these stories hold strong significance for them. Because of their evolution into the contemporary belief systems, in some cases, Traditional Owners consider the sites with intangible heritage values are more important than sites littered with the thousands of artefacts; sites that archaeologists would consider scientifically important. Good archaeologists in Australia are faced with the challenge of developing the capacity to understand and record both tangible and intangible Aboriginal heritage. That is why it is essential that archaeological work undertaken in Australia is done hand in hand with Aboriginal people.

Australian Aboriginal traditional knowledge passed down through generations has informed unique methods of living and has enabled life and community to endure and flourish, even in the harshest environments. Despite the adversities of climate and social change, traditional knowledge has sustained Australian Aboriginal culture; arguably the world's oldest continuing culture. Sites of significance according to Aboriginal tradition and sites significant to Aboriginal archaeology are protected in South Australia by the *Aboriginal Heritage Act 1988* (AHA).

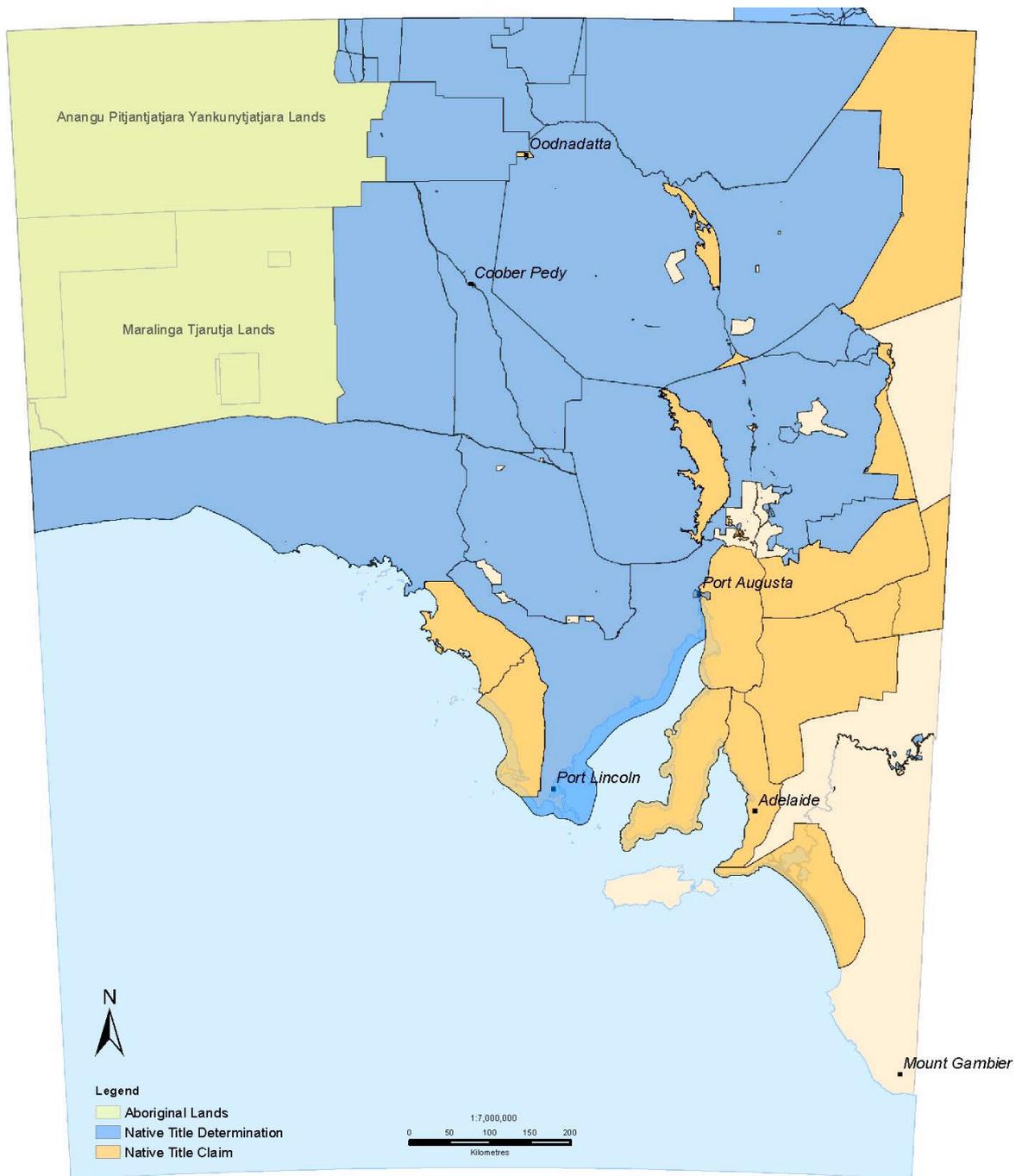
## **Native Title and Aboriginal Heritage Protection**

The Australian federal government recognises Australian Aboriginal peoples' continuous connection to country through the exercise of traditional laws and customs specific to land. The continued practice of traditional law gives rise to the recognition of native title rights and interests through the *Native Title Act 1993* (Cwth). In South Australia 24 Native Title applications have been resolved through court or consent determination and 19 claims are in progress. The determinations and claims reflect the cultural connections of 27 distinct Aboriginal cultural and language groups (Map 2).

Native Title has been determined over a significant portion of the South Australian pastoral lands. Although there are only a few areas, mostly in the South East region, over which native title is either yet to be determined or a claim registered, there is likely to be widespread extinguishment of native title in the non-pastoral lands due to grants of inconsistent land tenure.

The Act preserves Native Title holders' or claimants' right to negotiate about the effect that mining in particular will have on Native Title rights.

Under the *Native Title Act 1993*, Native Title holders must organise themselves into corporate structures that ensure representation of the native title holders in any negotiations that affect native title interests. Some developments, and all mining and exploration on native title land, are activities which require agreement with the traditional owners to ensure that all native title rights and in particular those that are concerned with Aboriginal sites are not affected by the proposed activities.



**Map 2:** Native Title Claims and Determinations in South Australia (as at November 2015).

In South Australia all Aboriginal sites, objects and ancestral remains (Aboriginal heritage) are also protected under the *Aboriginal Heritage Act 1988*. It is an offence to damage, disturb or interfere with Aboriginal heritage without the authority of the Minister for Aboriginal Affairs and Reconciliation. This legislation applies to all land whether or not native title exists or may exist.

Under the *Aboriginal Heritage Act 1988*, an Aboriginal site is defined as an area of land that is of significance according to Aboriginal tradition, or of significance to Aboriginal archaeology, anthropology or history.

Aboriginal tradition is defined as the traditions, observances, customs or beliefs of the people who inhabited Australia before European colonisation and includes traditions, observances, customs or beliefs that have evolved or developed from that tradition since European colonisation.

Sites important to Aboriginal tradition and subject to the practice of native title rights are therefore usually aligned and where native title exists, both the Native Title Act and the Aboriginal Heritage Act will apply. However, the application of both acts creates limitations on the opportunity for agreement making. If an Aboriginal site is protected under the Aboriginal Heritage Act an agreement to damage it cannot be made as part of a native title agreement. Native title agreements cannot override the requirement for Ministerial authorisation to damage the site under the Aboriginal Heritage Act.

As much of the Aboriginal heritage in South Australia is not recorded, what happens in practice is that native title agreements will require Aboriginal site surveys to be carried out that lead to measures to avoid any significant Aboriginal sites, object or remains; thereby ensuring that the Aboriginal Heritage Act is not invoked. If site avoidance cannot be managed by agreement then an application to damage, disturb or interfere with a site must be made under the State's Aboriginal Heritage Act to the Minister for Aboriginal Affairs and Reconciliation. The Minister must consult with Traditional Owners before considering whether an authorisation is granted to damage, disturb and interfere with any Aboriginal sites, objects or remains. Although the Minister must consult with Traditional Owners, he or she is

not in any way required to form the view that is recommended by the Traditional Owners. So where an authorisation is required under the Aboriginal Heritage Act, the decision making power is taken away from the Traditional Owners and whilst the Minister must take such measures as are practicable to protect and preserve the Aboriginal heritage the Minister must balance this consideration against the requirement to consider the public interest in the project proceeding.

Additionally, where there is no requirement to consider native title, proponents will often erroneously self-assess the impact of their project on the heritage values to fit existing project and budget parameters. In these situations discussions between Traditional Owners and proponents often take place late in the project planning process, if at all, and at a point when site avoidance is not possible.

The Aboriginal Heritage Act was enacted in 1988. Since that time Traditional Owners have become increasingly frustrated with a system that ultimately removes them from the decision making process about their own heritage; decisions about Aboriginal sites that are significant to the living Aboriginal culture and belief system.

This current method of dealing with Aboriginal sites by Ministerial authorisation is out of step with the *United Nations Declaration on the Rights of Indigenous Peoples 2007*, adopted by Australia in 2009. Article 11 in particular provides for the right to practice cultural traditions and customs and requires free prior and informed consent of indigenous people to any dealing with these traditions and customs. Whilst the Declaration is not legally binding and does not compel governments to certain actions it is an aspirational human rights instrument that explicitly encourages harmonious and cooperative relations between governments and Indigenous peoples.

Aboriginal people are also concerned about a legislative system that requires details about sacred knowledge to be revealed in order for protection measures to be implemented.

Traditional law often requires the restriction of knowledge to senior people and under gender restriction. Disclosing sacred traditional knowledge may offend traditional law and have consequences under the belief system. It is a concern that the gradual erosion of the authority of this knowledge by requirements for disclosure under the legal system may well serve to undermine Aboriginal cultural authority over significant Aboriginal sites. In these circumstances it is not surprising that there is a reluctance to divulge cultural information.

As a result, many development, exploration and mining transactions about Aboriginal heritage first occur outside of the strict parameters of the Aboriginal Heritage Act through site avoidance agreements. This could be extended to deal with decisions about damage to sites if recognition of agreement making was to occur under the Aboriginal Heritage Act. Agreement making has considerable merit because it enables the Traditional Owners and the developer/miner to manage their respective interests in a consultative way and enables Traditional Owners to retain control of their cultural knowledge and the level at which it is disclosed.

Currently South Australia is looking at reform of the *Aboriginal Heritage Act 1988* and is considering a number of options including a regulated scheme of agreement making. This would align with the Native Title system, where agreement making is the mandated method of dealing with the legal effects of development on Native Title, and would recognise and respect Traditional Owners' knowledge and culture.

## **Complex Values**

South Australia has world class deposits of zircon, iron oxide, copper and gold, and is emerging in the graphite, manganese, tin, silver, lead and zinc markets. It contains around 80% of Australia's uranium deposits, 69% of the nation's copper deposits, 28% of the nation's gold deposits and has an estimated 14 billion tonnes of iron ore. It is currently Australia's second largest producer of iron ore (GSA 2014a). The resources sector contributes to nearly 40% of the State's exports, with mining currently contributing approximately 6% of the gross state product.

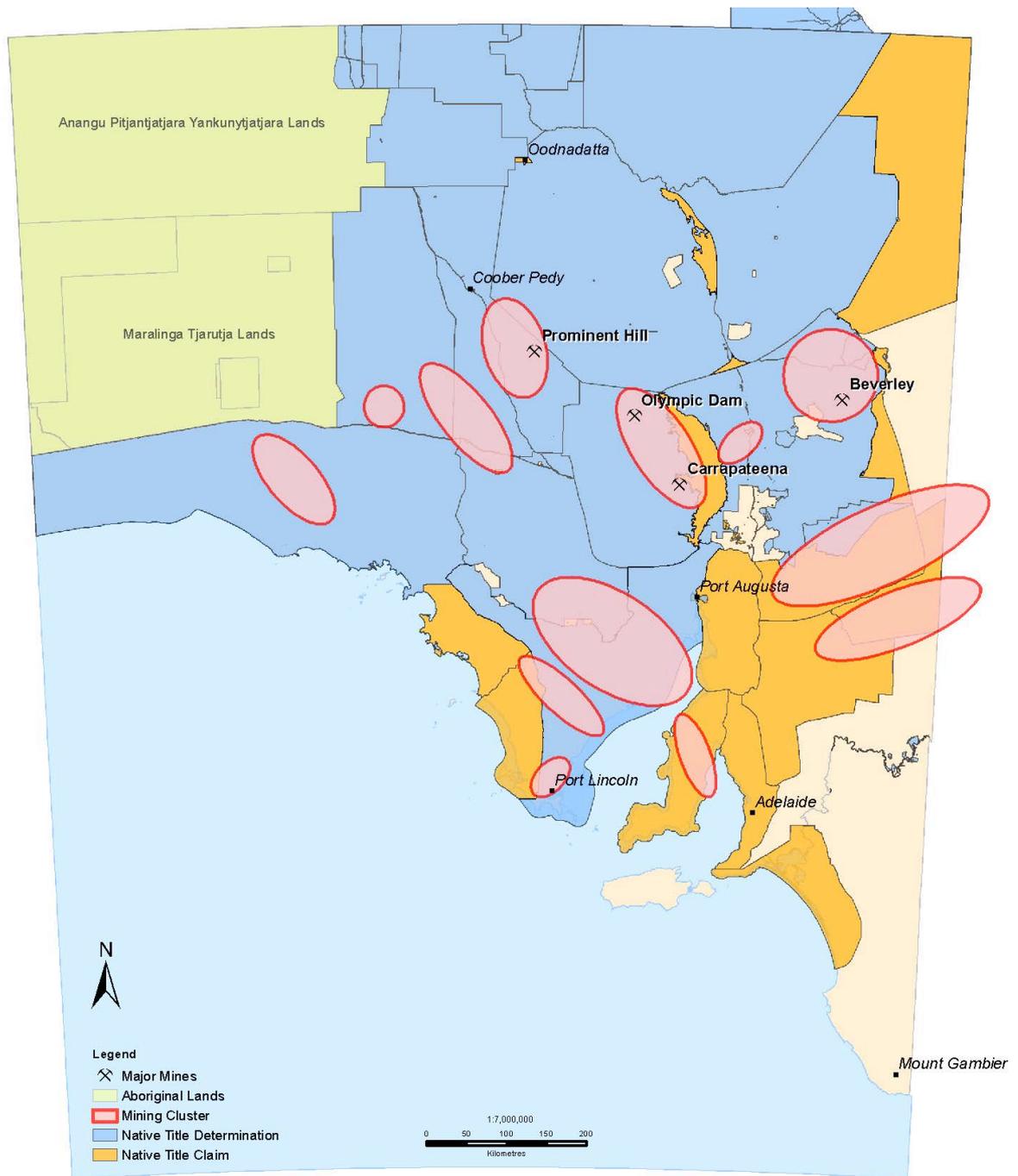
The South Australian government is committed to the resources and energy industry as a significant contributor to the State's economy and prospectivity and the mining sector is expected to grow in the future. The State Government has projected that mining in South Australia could add an additional \$22.5 billion to the gross state product over the next 20 years, producing over 95 million tonnes per annum in mineral production and creating over 5700 jobs (GSA 2014b & 2014c).

The geology of much of Australia is such that mineral deposits lie beneath a veneer of regolith or sediments, some of which is a few hundred metres thick. Penetration of this veneer is required for mineral exploration and major excavation is required to reach and release the minerals. Exploring and mining in this type of environment can be expensive, invasive and highly speculative. However, the financial returns can be significant. The State has used geological surveying to identify areas of potential mining growth and grouped these into thirteen regional clusters (Map 3).



**Map 3:** Major mining growth areas in South Australia, clustered into 13 regions. (2014b: 21).

An overlay the State’s 13 regions targeted for mining growth with the Native Title determination and claim areas reveals overlaps with a number of Aboriginal language groups and nations and a clear picture of the complexity of interests in each region (Map 4).



**Map 4:** Overlay of the 13 mining growth cluster regions and the Native Title map.

In this scenario of highly prized commodities, a landscape infused with connections to living belief systems; and where the general understanding of intangible heritage values is low, swells a perfect storm of opportunity for the values of the mining industry and Aboriginal Traditional Owners to collide. Many Aboriginal communities are not averse to mining, providing there is early engagement and room to negotiate measures that maintain Traditional

Owners' integrity and cultural obligations. Unfortunately, some of these discussions in South Australia have occurred very late in the project, limiting the opportunity for successful measures to be negotiated and decisions have been challenged and resulted in court proceedings.

### **Shared understandings**

Government is in an awkward position as it tries, through the Aboriginal Heritage Act reform, to reign in activity so that practice of all parties conforms with the legal obligations. At the centre of the discussion is a demand by stakeholders for certainty. Usually, a key indicator of certainty is the robustness and integrity of the information which informs decision making. In this case, the information is traditional knowledge held by the traditional owners.

Knowledge transmission systems developed by Aboriginal people over thousands of years, which have sustained life and humanity over that time, are alive and strong in many parts of South Australia. The number and reach of Native Title determinations demonstrate the scale of continuity of connection to country and the belief systems that underpin those connections. How then does a government convince industry and others to operate in ways that ensure the protection of Aboriginal heritage, when in fact the government and others have little to no control of the baseline information that informs decisions?

The challenges presented in this paper are well exemplified in an experience relayed by Professor Roger Thomas. The following description is his experience, as a Kokatha man, of the Olympic Dam mine expansion proposed by BHP Billiton at Roxby Downs, South Australia. In sharing his experience, Professor Thomas describes principles of early engagement and negotiation to ensure a shared understanding of an appropriate level traditional knowledge is respected and good relationships are developed. The result is a

process that allows mine expansion to occur whilst respecting the intangible values of the country and the cultural authority and responsibilities of its Traditional Owners.

## **Developing Good Relationships with Traditional Owners**

### **Professor Roger Thomas: A Case Study from Kokatha Country**

To set the scene for this part of the paper allow me provide you with a context of the experience and situation. The Traditional Owners are the Kokatha Native Title Peoples of Northern South Australia.

BHP Billiton was the Proponent who applied to the Minister for Aboriginal Affairs and Reconciliation to damage and disturb and interfere with Aboriginal Heritage Sites on Kokatha Country.

In 2006 the Kokatha People were given a Draft Proposal by BHP Billiton which proposed to significantly expand the mining operations at the Olympic Dam mine. The proposed expansion would mean that the underground mining activities for extracting the ore would be reviewed and a new open cut approach was being considered.

If this new approach of open cut mining eventuated there would be major implications to the Traditional laws, Customs and Cultural Heritage of the Kokatha People as the Original Custodians and Traditional Owners of this land.

The Company (BHP Billiton) had to manage the asserted interest of two other Native Title Groups who had a claim over the same area. This paper will not address their interests.

In 2009, the Company released an Environmental Impact Statement (EIS) which provided the Kokatha with the best opportunity to respond in a strategic manner and to have the Cultural Heritage issues directly addressed. The results of these high level negotiations between the Traditional Owners and the Company resulted in a request by Kokatha that the “whole of the proposed impact area” of the impending open cut mine be fully surveyed and all sites of significance to the Kokatha be reviewed. Where appropriate, the Kokatha would request that sites be salvaged and removed, to be rehabilitated to other parts of the landscape which would not be impacted by the open cut mine. This clearly proved problematic with sites like song lines and dreaming trails.

The Kokatha were adamant that the Company should respect that they were damaging our country, because of that, we should be afforded the Cultural opportunity to hold a “Sorry Ceremony” in recognition of the loss our people were going to experience because of this massive hole they were going to create in the ground on our country.

The company agreed to pay for what they referred to as a “Mitigation ceremony”, we called it “Our Sorry Ceremony for Country”. The Kokatha commenced the planning for the ceremony and included the following important elements to be a prominent part of the activities:

- There should be a sharing of the rich Kokatha Culture and Heritage particularly with the young members of the Kokatha Community and the broader public, particularly including the Company.
- There should also be opportunity for sharing the richness of the Culture, including training and awareness provided to both men and women of the Kokatha Community.
- That the training and awareness be about the Heritage of the area that was to be part of the new expansion.
- That the Kokatha use the Ceremony as a way forward to plan and consider improved ways to work with the company and in particular rehabilitate their Cultural Heritage.

And so, during the June long week-end in 2011 the Kokatha held a “Sorry camp Ceremony“ on country near Olympic Dam and also at Andamooka Station.

Some folk call it “Early Intervention”, I prefer to call it “developing respectful conversations in a respectful, meaningful and timely manner”.

I am presenting this case, as it provides an excellent example of all of the elements, including the issues and challenges previously raised, and gives an insight into some of the other principals we should all be mindful of.

These are what I believe are some of the key principals for achieving good relationships with Traditional Owners from my experience through this case and all of my life experiences working for my people. What the case study highlights for me is as follows:

- Relationship building is the foundation block for effective long term interaction and successful outcomes for all parties, particularly for the Traditional Owners.
- Through good relationships comes a stronger chance of establishing Trust. If you don't have trust of the Traditional Owner group, particularly the leadership group, you will always struggle. They will be selective and guarded in their interaction with you and will not take you into their confidence or speak openly with you. Most importantly they will not welcome you into their community or country.
- Always know that there are different members of the Traditional Owner group who have different roles they must play, whether formal or assumed. Make sure you know who the leaders are, find out who they are before you approach.
- Be aware that many of us have had bad experiences over many years with non-Aboriginal policies, practices, interferences and “white fulla ” laws that have not been culturally

considerate of our culture or our heritage. We often retain strong feelings of suspicion when non-Aboriginal people want to deal particularly with our culture and our heritage.

- Always make the interaction with Traditional Owners meaningful for them. This does not mean that you are buying their friendship or their consideration; it is so that they understand why you want to talk with them so that they open up to you. Demonstrate to them the real benefits they will achieve from what you are offering. Ensure you build this up over longer periods of time so that the Traditional Owners do not see it as a quick demand or quick fix it and then you are gone.
- Ultimately you should leave the Traditional Owner group with not only a sense of achievement, but also a tangible benefit towards their ongoing heritage, culture and most importantly the whole community. This will foster good long term friendships.
- Be Respectful.
- Be aware and familiarise yourself with various Traditional Owners cultural protocols, such as avoidance rules and sorry time protocols.

## **Conclusion**

Decisions regarding Aboriginal heritage are often made in the momentum of project works, where time pressures and funding constraints can make finding satisfactory outcomes for all parties difficult. This paper argues that the “interface” that brings Aboriginal people and industry to a conversation about intangible Aboriginal heritage needs to change. It focuses on the notion of free, informed, and prior consent, and reflects upon its place in the national ambition of shared understandings – commonly described as ‘Reconciliation’.

Reconciliation is based on Aboriginal and non-Aboriginal Australians coming to an honest understanding of our shared history, a commitment to building cooperative partnerships based on trust and respect and recognition of the distinctive rights of Aboriginal peoples.

The *Aboriginal Heritage Act 1988* provides for the protection and preservation of Aboriginal sites, objects and remains. Administering Aboriginal heritage protection legislation, particularly when the heritage is the belief system, is complex and challenging. The case study provides an insight into how, in one situation, a relationship developed early enough in a proposed mining expansion project that acknowledged traditional owners and respected them in making the decisions that affected their cultural responsibilities.

Implementing actions that contribute to improved opportunities for Aboriginal and Torres Strait Islanders to manage their heritage is a shared responsibility for all Australian organisations, businesses, institutions and individuals. Key principles of good engagement such as respect and understanding are the basis of any good relationship. Good relationships usually lead to good outcomes. In the case highlighted in this paper, a relationship between the Kokatha Peoples and BHP Billiton grew to accommodate shared understandings, developed well before (and away from the heat of) the proposed mining activity. Early engagement meant Traditional Owners had time to plan and implement a series of cultural ceremonies that allowed them to deal with a mining expansion that would have major implications to the traditional laws, customs and cultural heritage of the Traditional Owners of the land.

Importantly, the experience demonstrates that by following principles of early and meaningful engagement it is possible for mining proponents and Traditional Owners to develop an appropriate level of mutual respect and shared understandings. Decision about mining expansion can be approved under legislative frameworks such as the Aboriginal Heritage Act and Native Title Act without assumptions about or unnecessary disclosure of Aboriginal traditional knowledge. Early and meaningful engagement means Traditional Owners can make decisions that maintain cultural integrity and exercise cultural obligations; strengthening Aboriginal culture and protecting it for future generations

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## **Legislation**

Native Title Act 1993 (Cwth)

Aboriginal Heritage Act (SA) 1988

United Nations Declaration on the Rights of Indigenous Peoples 2007