

**GUIDELINE 1** Sections 12, 13 and 23 of the *Aboriginal Heritage Act 1988*

Determination of Aboriginal sites and objects and Authorisation to damage, disturb or interfere with Aboriginal sites, objects or remains



**Government of South Australia**

Department of the Premier and Cabinet

**A person wanting to undertake activities on an area of land may seek a determination from the Minister for Aboriginal Affairs and Reconciliation under section 12 of the Act, as to whether a site or object is an Aboriginal site or object as defined by the Act.**


This section particularly applies to anyone developing a project that will require ground disturbance, for example large or small developments, natural resource management activities and mineral exploration. It may also be used when determining the significance of an object offered for sale pursuant to section 29 of the Act.

Following the application and the necessary consultation process, the Minister is then required to determine whether entries should be made in the Register of Aboriginal sites and objects or not, subject to some limited exceptions.

Section 12 applications should provide the following information:

- Name of applicant or organisation;
- Name of contact person and position, and contact telephone number;
- Name of proposed project/development/activity (for reference purposes);
- Mailing address;
- Email address;
- Website address (if you consider this useful);
- Land area for which you would like to know if there are any Aboriginal sites or objects;
- Relevant Council district;
- A map that clearly shows the nominated area(s) of land, including certificates of title and land ownership;
- If you have undertaken or commissioned any research (eg cultural heritage surveys) it would be useful to attach a copy (at your discretion).

This process generally takes between 4 and 6 months, to allow for adequate consultation. Please indicate if you have a time constraint or imperative.



If an application is submitted, the process outlined below is followed.

### **Cultural heritage surveys**

The Minister will usually obtain expert archaeological and/or anthropological opinion to assist in determining whether the area of the proposed development contains Aboriginal sites or objects that should be entered on the Register of Aboriginal sites and objects. The Aboriginal Heritage Branch engages archaeologists and/or anthropologists to conduct a cultural heritage survey and will manage this process.

### **Consultation with Aboriginal people**

Section 13 of the Act requires the Minister, prior to making a determination under section 12, to take all reasonable steps to consult with:

- the Aboriginal Heritage Committee;
- any Aboriginal organisation that, in the opinion of the Minister, has a particular interest in the matter; and
- any traditional owners and any other Aboriginal persons, who, in the opinion of the Minister, have a particular interest in the matter.



## Minister's determination

At the end of the consultation process, the Aboriginal Heritage Branch assembles all information about any Aboriginal sites located within the development area, all written and oral submissions and minutes from the consultation meeting, and the views of the Aboriginal Heritage Committee. This information is provided to the Minister to assist him to determine whether or not sites or objects should be included on the Register of Aboriginal sites and objects.

Following the Minister's determination, the Aboriginal Heritage Branch will enter any determined sites or objects into the Register of Aboriginal sites and objects. The Minister may also determine that certain sites or objects are not Aboriginal sites or objects and therefore should not be entered on the Register.

The s12 applicant, plus key Aboriginal organisations and individuals who have made oral or written submissions, will be advised of the Minister's determination.


The section 12 process can take between 4 and 6 months to complete.

If sites or objects are present on the land, the applicant must then decide if they wish to apply to the Minister, pursuant to section 23 of the Act, to damage disturb or interfere with Aboriginal sites or objects. Further information on the section 23 process is provided within this Guideline.

**It is strongly recommended that people planning development activities that require ground disturbance submit a section 12 application early in the planning stages of a proposed development or activity, particularly when it is likely that Aboriginal sites, objects or remains may be impacted. This will ensure that adequate time is available for the process to be concluded. Failure to lodge a section 12 application at an early stage may cause delays to the commencement of a project.**

## Section 12 of the *Aboriginal Heritage Act 1988*

12. (1) *If a person proposes to take action in relation to a particular object and that action may constitute an offence against this Act if the object is an Aboriginal object, the person may apply to the Minister under this section.*
- (2) *On an application under subsection (1), the Minister must if the object is entered in the Register of Aboriginal Sites and Objects:*
  - (a) *give the applicant written notice that it is so entered;*
  - (b) *determine whether it should be so entered and give the applicant written notice of the determination.*
- (3) *If a person proposes to take action in relation to a particular area and that action may constitute an offence against this Act if the area is, is part of or includes an Aboriginal site or if an Aboriginal object is located in the area, the person may apply to the Minister under this section.*
- (4) *On an application under subsection (3), the Minister must:*
  - (a) *determine whether any entries should be made in the Register of Aboriginal Sites and Objects in relation to sites or objects in the area that are not so entered and give the applicant written notice of the determination; or*
  - (b) *subject to subsection (5), give the applicant written notice of the location of each Aboriginal site or object in the area that is entered, or that the Minister has determined should be entered, in the Register.*
- (5) *The Minister must not disclose the exact location of a site or object if, in the Minister's opinion, the disclosure is likely to be detrimental to the protection or preservation of the site or object or to be in contravention of Aboriginal tradition.*
- (6) *The Minister may, within 20 working days after receiving an application, require an applicant to provide information in connection with the application or to engage an expert acceptable to the Minister to do so.*
- (7) *Where the Minister requires information to be provided under subsection (6), the Minister must determine the application within 30 working days of receiving that information.*
- (8) *The Minister may refuse to entertain an application under this section on the grounds that the:*
  - (a) *area or object is insufficiently identified; or*
  - (b) *application is not genuine; or*
  - (c) *Minister does not have the resources to determine the application.*



## Section 13 Consultations on determinations, authorisations and regulations

The following groups are required to be consulted by the Minister before making a determination or giving an authorisation:

- the Aboriginal Heritage Committee; and
- any Aboriginal organisation with a particular interest in the matter; and
- any -
  - (i) traditional owners; and
  - (ii) other Aboriginal persons who in the Minister's opinion, have a particular interest in the matter.

Individual meetings or gender-specific meetings may also be held upon request. Proponents (i.e. section 12 applicants) may be invited or requested to attend these meetings.

**Any negotiations conducted independently with Aboriginal heritage committees or native title claimants are not a substitute for the consultation process that the Minister must undertake when considering a section 12 or section 23 application. The Minister must consult, as required by section 13 of the Act. Even if a proponent has worked extensively with local Aboriginal organisations, the Minister must fulfil the statutory requirement for consultation, as set out in section 13 of the Act.**

## Section 13 of the *Aboriginal Heritage Act 1988*

13. (1) *The Minister must:*

- (a) before making a determination under this Act; or*
- (b) before giving an authorisation under this Act; or*
- (c) before a site or object is declared by regulation to be an Aboriginal site or object or is excluded by regulation from the ambit of the definition of Aboriginal site or object, take all reasonable steps to consult with:*
- (d) the Committee; and*
- (e) any Aboriginal organisation that, in the opinion of the Minister, has a particular interest in the matter; and*
- (f) any -*
  - (i) traditional owners; and*
  - (ii) other Aboriginal persons, who, in the opinion of the Minister, have a particular interest in the matter.*

*(2) When determining whether an area of land is an Aboriginal site or an object is an Aboriginal object, the Minister must accept the views of the traditional owners of the land or object on the question of whether the land or object is of significance according to Aboriginal tradition.*

*(3) This section does not apply to:*

- (a) a determination under section 24(8); or*
- (b) an authorisation under section 27 or 36.*

## **Section 23 of the *Aboriginal Heritage Act 1988***

### **This section applies to anyone proposing to disturb, damage or interfere with Aboriginal sites, objects or remains**

It is an offence for **any person**, (including Aboriginal people) to damage, disturb or interfere with sites, objects or remains, or to permit their damage, without Ministerial authorisation.

Following a section 12 determination, a proponent may then seek an authorisation to damage, destroy or interfere with an Aboriginal site or object from the Minister. This process is separate from the processes of determination provided for in section 12.

If a proponent submits an application for authorisation under section 23 of the Act, the Minister must comply with the consultation requirements of section 13 of the Act, prior to making a decision as to whether or not to grant the authorisation. The Minister must therefore consult with Aboriginal organisations and people, including the State Aboriginal Heritage Committee. The Aboriginal Heritage Branch facilitates this process in a manner that is essentially the same as the process outlined for the section 12 process (as above, within this Guideline).

In this instance, the consultation process will seek the views of Aboriginal people as to whether, for example:

1. the proposed development will damage, disturb or interfere with the site, object or remains
2. the damage, disturbance or interference should be authorised, and
3. conditions should be attached to an authorisation with a view to limiting this damage, disturbance or interference.

The views of the State Aboriginal Heritage Committee, Aboriginal people present at community meetings and all other submissions will be put before the Minister.

The applicant, plus Aboriginal organisations and individuals who have made oral or written submissions, will be advised of the Minister's decision.

## Section 23 of the *Aboriginal Heritage Act 1988*

23. A person must not, without the authority of the Minister:


- (a) damage, disturb or interfere with any Aboriginal site; or
- (b) damage any Aboriginal object; or
- (c) where any Aboriginal object or remains are found:
  - (i) disturb or interfere with the object or remains; or
  - (ii) remove the object or remains.

Penalty: (a) in the case of a body corporate - \$50,000;

(b) in any other case - \$10,000 or imprisonment for 6 months.

**If you, as an individual or as a representative of an organisation propose activities on a defined area of land and you would like to have the Minister's authorisation to damage, disturb or interfere with any Aboriginal site, object or remains that are on or within the area (as specified in this application) the Aboriginal Heritage Branch of the Aboriginal Affairs and Reconciliation Division requires the following information to progress your application:**

- Name of applicant or organisation;
- Name of contact person and position, and contact telephone number;
- Name of proposed project/development/activity (for reference purposes);
- Mailing address;
- Email address;
- Website address (if you consider this useful);
- Land area to which your proposed activity relates (full extent, approximate size in square kilometres);
- Outline areas of Aboriginal site likely to be impacted by activities;
- Name of Aboriginal site or object (include registration number if known);
- Relevant Council district;
- A map that clearly shows the nominated area(s) of land, including certificates of title and land ownership;
- If you have undertaken or commissioned any research (eg cultural heritage surveys) you may like to attach a copy (at your discretion).



**Please attach a brief description of the proposed activity and the proposed commencement date.**

In particular, it would be helpful to include a summary of the types of works that might take place on the nominated land area, although this description is not strictly necessary at this stage.

This process generally takes 2-4 months to allow for adequate consultation. Please indicate if you have a time constraint or imperative.

After you submit a section 23 application:

- You will receive an acknowledgement letter that will provide an estimated timeframe for receipt of the Minister's advice on this matter, and the name of the senior project manager who will co-ordinate the section 23 process;
- Aboriginal stakeholders will be consulted by AARD on the Minister's behalf;
- You will receive the Minister's decision as to whether to authorise damage, disturbance or interference with the specified Aboriginal site, object or remains;
- You will also be advised of any conditions that the Minister attaches to an authorisation.



## Who do I contact for further advice?

For assistance or further information regarding these Guidelines please contact:

The Aboriginal Heritage Branch  
Aboriginal Affairs and Reconciliation Division  
Department of the Premier and Cabinet  
PO Box 2343  
ADELAIDE SA 5001  
Phone 08 8226 8900  
Facsimile 08 8226 8999

Cover: Registered Aboriginal Engraving Site, Flinders Ranges [Supplied by Aboriginal Heritage Branch (DPC-AARD)]

Strip: Sedge basket with a netting handle, made in the Coorong area for collecting cockles [Supplied by SA Museum A26238]

Disclaimer: This document is a guide only and should not be relied upon to ensure compliance with the *Aboriginal Heritage Act 1988*. Persons proposing to undertake activities that may damage, disturb or interfere with Aboriginal sites, objects or remains should seek specific advice.