

We would be very happy for the secretariat to use the submission to the previous enquiry and we would ask you to confirm that Kokatha Uwankara's previous proposal will be considered by the committee in relation to the new Bill.

Regards

Osker W Linde
Deputy Principal Legal Officer

SUBMISSION TO SENATE INQUIRY INTO DEFENCE LEGISLATION AMENDMENT

(WOOMERA PROHIBITED AREA)

FROM KOKATHA UWANKARA NATIVE TITLE CLAIM GROUP

FEDERAL COURT PROCEEDING SAD 90 of 2009

- This submission is directed to the Committee Secretary, Senate Foreign Affairs, Defence and Trade References Committee, for and on behalf of the Kokatha Uwankara native title claimants, upon written invitation received 5 July 2013. It is noted that the time frame allowed by the Committee in which to assemble submissions is prohibitive of a complete submission addressing all issues of concern to the Kokatha Uwankara native title claimants.
- The Kokatha Uwankara native title claim group is currently the registered native title claimant in respect of vast areas encompassed within the Woomera Prohibited Area including the Woomera Township and the range-head facility.
- The occurrence of Aboriginal sites of significance to the Kokatha people in the area is prolific. They occur within the township of Woomera, on the range-head itself, and all over the pastoral leases situated within the Woomera prohibited area. Many of these sites have been recorded by members of the Kokatha Uwankara native title claim group, many of the sites are known to the Kokatha people but have not been recorded on the Central Archive or Register of Aboriginal sites and objects maintained by the Department of Premier and Cabinet of South Australia, Aboriginal Affairs and Reconciliation Division. Indeed, the very location of many sites is confidential according to the traditional laws and customs of the Kokatha, and divulgence of information to persons who are not entitled to know that location may constitute a contravention of Aboriginal tradition in the sense contemplated by section 35 of the *Aboriginal Heritage Act 1988 (SA)*.
- Sites

are extremely important to the

Kokatha people and to their continued acknowledge and observance of traditional law and custom. Regardless of the status of such sites as registered or recorded, they are in theory afforded protection through the heritage legislation and any damage, disturbance or interference is against the law without authority from the Minister for Aboriginal Affairs through section 23 of the State Act.
- The area claimed by Kokatha Uwankara which the WPA covers is currently used by members of the native title claim group for the following activities:
 - a. Living, camping and erecting temporary shelters
 - b. Collection and hunting of natural resources including water, timber, plants and animals
 - c. Access to significant sites in accordance with relevant traditional law and custom

- d. Engaging in cultural activities including those relating to traditional ceremonies
 - e. Teaching Kokatha Uwankara claim members and others about the traditional significance of the area.
- We refer to the Final Report of the Hawke Review dated 4 February 2011, Executive Summary paragraph 4, which represents the antithesis of the desire of the Kokatha people and encapsulates the reason for their grave fears in relation to increased threat by mineral explorers and users to their sacred sites:

Another important judgment is that the WPA has significant resources potential. Exploiting this potential is likely to bring significant economic benefit to South Australia and the nation more broadly. This means the WPA should be opened up to resources exploration to the maximum extent possible given the requirement for governments at all levels to understand the nation's resource wealth. To facilitate this, Defence should set restrictions on access by reference to its testing and evaluation activity in the WPA. Industry should then make commercial decisions based on the restrictions set by Defence. This has implications for the handling of foreign investment in companies operating or wishing to operate in the WPA, and means Defence should mitigate the security risks associated with foreign ownership on the ground in the WPA.

- While Defence may set restrictions on access to the increased occurrence of mineral exploration within the Woomera Prohibited Area (WPA), Defence will not set restrictions on the practices of mineral explorers operating on the WPA, as this is seen as (and by legislative implication, is) the responsibility of the Government of South Australia in administering the provisions of the *Mining Act 1971 (SA)*.
- Part 9B of the *Mining Act* is unique in that in every other state, the Right to Negotiate process for registered native title claimants and native title holders is governed by the provisions of the *Native Title Act 1993 (Cth)*. In all other jurisdictions, negotiations must occur prior to the grant of an exploration authority. This enables adequate site protection and consultation measures to be put in place through a native title agreement. In South Australia, however, exploration licences are granted first, and then it is up to a given explorer to decide if, and when, their activities “affect” native title (see s63F of the *Mining Act (SA)*). As a consequence, explorers can legally undertake significant ground disturbing activities and reconnaissance, with no reference whatsoever to the heritage concerns of the native title claimants. Activities such as rock chipping, soil sampling, creation of new access tracks and geological reconnaissance can be undertaken and will be approved by the State authorities without any due diligence by authorities on whether the explorer has obtained agreement from the Kokatha people (or other native title claimants in relation to other areas) or provided any form of compensation to such groups or peoples.
- Accordingly, the proposal to open the areas of the WPA up to future mining and exploration “to the maximum extent possible” is of great concern to the Kokatha Uwankara native title claim group and it submits that it is appropriate for to Defence ensure that no exploration licences or Mining Tenements or permissions to access are granted over the areas

identified by Kokatha from time to time. While this would not allay the entire concerns of the Kokatha, it would at least ensure that these sites are not damaged or interfered with during the early exploration process.

- It is submitted that it is in the best interests of the State and Commonwealth to ensure no exploration authorities are granted over these areas because the native title claimants and traditional owners will not permit any damage to such sites of significance.
- Kokatha would also like to point out that it is not just the direct results of mineral exploration that will impact upon Kokatha's heritage as a result of the outcomes of the Hawke Review. Increased presence of explorers camping, staying at Woomera and driving to their tenements also means the more likely it is that damage to sites will occur merely through increased human presence in the area. People are naturally inquisitive – and get bored. Kokatha has learnt from experience that whenever explorers are out in the field conducting work, during “down time” they go for walks, drive their vehicles into sacred areas, and visit sites which could be gender restricted.
- In summary, Kokatha Uwankara claimants would like the following actions to be taken by the inquiry in relation to mineral exploration on the WPA:
 - a. Petition the Federal Attorney General to ensure Part 9B of the Mining Act 1971 (SA) is amended to provide that exploration licences and tenements are granted subsequent to the right to negotiate process, not prior to the initiation of negotiations;
 - b. Petition the State of South Australia to exclude the above-identified areas from the issue of exploration licences.
- A further issue which has arisen is the fact that pastoral lease holders are able to negotiate with defence in relation to compensation for defence activities on the WPA, whereas the Kokatha Uwankara claimants have no such right. Traditional Kokatha people residing in the area were removed from the Woomera area long ago, due to the safety concerns of Defence. Many fled to the North – West Reserve. Due to the timing of the Defence Act and the establishment of Woomera town and the Woomera Prohibited Area, these acts will never be able to be subject to any form of compensation under the *Native Title Act 1993* (Cth).
- Further, the Commonwealth acquired substantial freehold property over areas at Woomera and the Range-head prior to the commencement of the Racial Discrimination Act 1975 (Cth). These Acts resulted in substantial and complete extinguishment of native title rights and interests, and again, this extinguishment can never be subject to a compensation application under the *Native Title Act 1993* (Cth).
- To this end, Kokatha Uwankara submits that it is entirely appropriate for the Commonwealth to transfer some land to the Kokatha people (or facilitate its transfer), in consideration of this past history but also in consideration of the outcome of the Hawke Review, which is opening up the area to mineral exploration to the maximum extent possible (noting that 99% of exploration

results in the company packing up and walking away). Kokatha Uwankara would welcome the opportunity to be transferred freehold title to some land in the following areas:

- Any areas within the Woomera Township, to be used as accommodation for Kokatha persons and their contractors (if relevant) from time to time for activities associated with cultural heritage protection and economic development;
- A resumption of part of the pastoral lease Purple Downs (now owned by BHP Billiton), (an extremely important cultural site and complex used as a teaching tool by Kokatha to Kokatha youth and also a ceremony place), and its transfer from the State to Kokatha Uwankara claimants. Defence is asked to petition the State for this process and fund this process.
- An excision of Lake from the Commonwealth freehold area and a transfer of this area to the Kokatha Uwankara claimants. Again, this area is of High cultural importance and contains some unique rock art which is listed on the State heritage register.

We urge the Senate Inquiry to view this submission with the upmost importance and to assist the Kokatha Uwankara people in protecting their cultural heritage and being fairly compensated for: their loss of native title rights; the removal of Kokatha traditional inhabitants from the Woomera area; and the increased use of their traditional lands brought about as an outcome of the Hawke Review.

- Please contact solicitor Osker W. Linde on to discuss this matter at your earliest convenience. The Kokatha Uwankara native title claimants would be happy to meet with members of the Inquiry if required at short notice to discuss the issues raised by this submission.

18 July 2013