



## **BHP LEGAL PRIVILEGES IN THE OLYMPIC DAM INDENTURE ACT 1982 OVERRIDE SA LAWS**

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*For more information on BHP's proposed expansion of the Olympic Dam mine visit [nuclear.foe.org.au/olympic-dam](http://nuclear.foe.org.au/olympic-dam)*

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The Olympic Dam mine is governed by the outdated [Roxby Downs \(Indenture Ratification\) Act 1982](#) which grants extensive legal privileges to BHP. These “take precedence over” a range of key public interest legislation in SA including: the *Mining Act 1971*, *Aboriginal Heritage Act 1988*, *Environment Protection Act 1993*, and *Natural Resources Management Act 2004* (incorporating water issues).

BHP’s Olympic Dam operations have unacceptable stand-alone arrangements under the 1982 Act and in the “Olympic Dam and Stuart Shelf Indenture” (the ‘Indenture’, March 1982), which applies to an area of over 12 000 km<sup>2</sup> or more than 1% of the total area of SA - defined as the Stuart Shelf Area.

ACF, FoEA and Conservation SA call for the repeal of these outdated and unacceptable legal privileges held by the proponent BHP. The entire Olympic Dam operation, existing and any proposed expansion needs to be assessed and regulated under the objects and provisions, standards and procedures and other requirements of contemporary relevant legislation of the SA Parliament.

This is required in order to best reflect the legitimate community expectation for best industry, legislative and environmental protection practices regarding Olympic Dam. This is especially important given that the project is by far the largest, most influential and environmentally impacting mining operation in SA. This legitimate community expectation is heightened in the case of BHP uranium mining given the related significant radiological risks and impacts and ongoing long-term toxic tailings waste management responsibilities.

The “[Olympic Dam Major Projects Declaration](#)” (SA Government Gazette, 14 Feb 2019, p. 461-462) has made the proposed BHP mining expansion project subject to a determination by the SA Minister for Energy and Mining under the Indenture and its multiple exemptions and overrides.

This raises public interest concerns over the integrity of the required environmental impact assessment process and on the real or perceived conflict of interest in government decision making.

Section 7 of the *Roxby Downs (Indenture Ratification) Act 1982* (Interaction with other Acts) which “takes precedence over” the *Development Act 1993*, and the 1982 Act and Indenture does not provide for a proper and independent environmental assessment process.

For instance, it is unacceptable for the Minister for Energy and Mining to use the Indenture to assume the place of the Major Development Panel in consideration of public submissions and in development of the Final Guidelines to a required Environmental Impact Statement (EIS) process.

Further, the effect of the Major Projects Declaration precludes future Appeals and the Indenture Confidentiality Clause 35 overrides the *SA Freedom of Information Act 1991*.

The state Declaration has unacceptably sought to “exclude” existing operations, and an array of significant future “enabling activities” including a major new Tailings Storage Facility No.6 and Evaporation Pond No.6, from this EIS assessment process.

ACF, FoEA and Conservation SA call on BHP to surrender these outdated legal privileges and to agree to be governed by a full set of contemporary public interest SA laws and standards and due process.

### **BHP Olympic Dam legal privileges override the SA *Aboriginal Heritage Act 1988***

The [Roxby Downs \(Indenture Ratification\) Act 1982](#) Section 9 Application of Aboriginal heritage (p.4-7) restricts application of Aboriginal heritage legislation to that of the *Aboriginal Heritage Act 1979* in a form modified by Section 9, stating that: “subsequent replacement or repeal of that Act shall not affect its operation in so far as it applies by virtue of this section”.

The Indenture states “the consent” of the company is required for any change to the form of the modified *Aboriginal Heritage Act 1979* that is applied at Olympic Dam “by virtue of this section”.

The [SA Attorney-General’s Department](#) website states regarding the *Aboriginal Heritage Act 1979*:

*“This Act has never been brought into operation but has not been expressly repealed. Section 9 of the Roxby Downs (Indenture Ratification) Act 1982 applies this Act to certain operations. Apart from that, the Act has been effectively impliedly repealed by the [Aboriginal Heritage Act 1988](#) and is, consequently, treated as a historical version.”*

BHP Indenture legal privileges take precedence over Aboriginal Heritage across an extensive Indenture area which includes the defined Stuart Shelf Area – applying to an area of over 12 000 km<sup>2</sup>, equal to over 1% of the total area of South Australia (see the [1982 Indenture Act, Stuart Shelf Area Map B](#), p.288), and including the area of the Olympic Dam Special Mining Lease (SML).

For instance, applications from BHP to ‘damage, disturb or interfere with’ Aboriginal cultural heritage sites in the Indenture area are decided by the Mineral for Mining and not by the Minister for Aboriginal Affairs – as is due process under the contemporary *Aboriginal Heritage Act 1988*.

Areas to protect Aboriginal heritage shall not be declared unless BHP “agree to the declaration”, and powers conferred by the 1979 Act to remove Aboriginal heritage for safe storage “are not exercisable without the consent of” BHP, under the 1982 Indenture Act Section 9.

Successive SA State governments maintain these outdated BHP legal privileges are “appropriate”.

At the last SA assessment of a proposed Olympic Dam expansion earlier this decade, the “SA Assessment Report EIS Olympic Dam Expansion” ([SAAR](#), Indigenous issues, p.366-370, Sept 2011), concluded that:

*“...appropriate mechanisms are already in place for the management of indigenous people, employment and heritage”; stating: “Cultural heritage matters will continue to be dealt with under separate legislation and agreed processes.”*

The [SAAR](#) (p.366) clearly states the precedence and legal privilege of BHP activities through the 1982 Indenture to require Aboriginal heritage issues to be dealt with under modified 1979 legislation and not by the *Aboriginal Heritage Act 1988* - which applies elsewhere across SA and arguably provides Indigenous communities with a semblance of contemporary rights and due process.

SAAR, p366: “12.5 Indigenous issues  
12.5.1 General This section applies to the proposed Olympic Dam expansion project as a whole and considers the issues the project raises in relation to indigenous people. ...

## 12.5.2 Legislative environment

12.5.2.1 SA Legislation The Roxby Downs (Indenture Ratification) Act 1982 requires that Aboriginal heritage issues on the Stuart Shelf and Olympic Dam area (SML) be dealt with under the Aboriginal Heritage Act 1979 (the '1979 Act'). For activities located outside the Stuart Shelf and the SML, the Aboriginal Heritage Act 1988 (the '1998 Act') applies.

In 2011 amendments to the Indenture Act were passed by a bipartisan vote of the SA Parliament (note: these amendments never came into force as the proposed BHP open pit mine project did not go ahead). However, BHP's outdated legal privilege override of Aboriginal heritage was retained.

A SA government spokesperson asked in Parliament (Oct 2011) why BHP's outdated override of Aboriginal heritage rights and interests was intended to be retained, responded:

***"BHP were satisfied with the current arrangements and insisted on the continuation of these arrangements, and the government did not consult further than that."***

Such an approach is unacceptable and in conflict with both best of sector practice and contemporary community expectation.

The 1982 Indenture Act makes provisions for Section 9 Application of Aboriginal heritage "to cease to operate" subject to/only with "the consent" of the company (Section 9, subsections 10-13, p.7).

The 1982 Indenture Act requires BHP's consent to a proclamation to replace the form of the *Aboriginal Heritage Act 1979* which applies under Section 9 to BHP Olympic Dam operations.

However, BHP has never offered their consent and the SA State government has never sought it. This is a most striking example of unacceptable corporate self-interest overriding the public interest.

This unacceptable situation has adverse consequences for both broad Aboriginal rights and interests and for protection of Aboriginal cultural heritage in the current BHP proposed mining expansion.

Despite a range of strong public concerns on Indigenous issues being evidenced in public submissions, the state and federal government's failed to make recommendations on Aboriginal heritage issues in the 2011 assessment of BHP's previous Olympic Dam mine expansion project.

This failure must not be repeated in setting Guidelines on an EIS Assessment process in 2019.

The [SA Assessment Report, Chapter 12: Effects on communities](#) (SAAR, Sept 2011) lists significant public interest issues raised across submissions (note: there were some 4,000 submissions in total).

These key matters continue to be unresolved in BHP's 2019 Olympic Dam expansion project:

SAAR, p.369: "12.5.5 Summary of submissions - Public submissions

*Public submissions raised the following matters in relation to indigenous issues:*

- *The impact of the Indenture on BHP's statutory obligation to consult with traditional owners, and the level of protection they receive;*
- *Additional detail on measures undertaken and proposed by BHP to protect cultural heritage and to consult with relevant groups;*
- *The cultural significance of the Mound Springs and Great Artesian Basin to Aboriginal people;*
- *Concern that Aboriginal people would inherit radioactive land and waters when the mine closed and that they should be included as stakeholders to be consulted post-closure."*

## **Recommendations:**

### **Repeal BHP legal privileges overriding SA laws, standards and due process:**

The Australian Conservation Foundation, Friends of the Earth Australia and Conservation SA call for the repeal of outdated unacceptable legal privileges in the *Roxby Downs (Indenture Ratification) Act 1982* held by BHP over the Olympic Dam mine operations.

The entire Olympic Dam operation, existing and any proposed expansion, should be assessed and regulated under the objects and provisions, standards and procedures and other due process requirements of contemporary relevant legislation of the South Australian Parliament.

There is a strong public interest imperative to repeal the Olympic Dam Indenture Act 1982, especially the overrides of the *Environment Protection Act 1993*, the *Aboriginal Heritage Act 1988* and the *Natural Resources Management Act 2004* (incorporating ground water issues).

### **The Australian Conservation Foundation, Friends of the Earth Australia and Conservation SA call on BHP to surrender its outdated Olympic Dam Indenture Act legal privileges as a clear corporate commitment to compliance with best of sector practice:**

ACF, FoEA and Conservation SA call on BHP to surrender and forego the outdated and unacceptable legal privileges in the *Roxby Downs (Indenture Ratification) Act 1982* over the Olympic Dam mine;

BHP should agree to be governed by contemporary public interest laws and standards and due process in SA across the entire Olympic Dam mine operation. This includes existing operations, any future proposed “*enabling activities*” and the current 2019 BHP proposed underground mining expansion project.

### **EIS Guidelines to investigate and recommend on Aboriginal heritage issues:**

The Guidelines for the EIS Assessment process on BHP’s proposed 2019 Olympic Dam mining expansion project should require investigation of Aboriginal heritage issues across the entire Olympic Dam operation, with the EIS Assessment to make relevant recommendations.

This should include investigations on the lead set of public matters raised on Indigenous issues and summarised in the [SA Assessment Report, Chapter 12: Effects on communities](#) (SAAR, p.369, Sept 2011) during assessment of BHP’s previous Olympic Dam mine expansion project:

- *“The impact of the Indenture on BHP’s statutory obligation to consult with traditional owners, and the level of protection they receive;*
- *Additional detail on measures undertaken and proposed by BHP to protect cultural heritage and to consult with relevant groups;*
- *The cultural significance of the Mound Springs and Great Artesian Basin to Aboriginal people;*
- *Concern that Aboriginal people would inherit radioactive land and waters when the mine closed and that they should be included as stakeholders to be consulted post-closure.”*