



# LEGAL REVIEW

**Identification and description of the legal obligations of South African National Parks in respect of the management of heritage resources within the Cape Peninsula National Park**

*Prepared for:*

**South African National Parks**

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## EXECUTIVE SUMMARY

A Heritage Resource Management Plan (“management plan”) is being developed for the Cape Peninsula National Park (“CPNP”) which is to provide a contextual framework, detailed guidelines and ISO 14001 compliant procedures for the management of heritage resources within the Park. The management plan is to encompass an overview of the legal obligations of South African National Parks (“SANParks”) as manager and operator of the CPNP, in relation to the management, protection and maintenance of the heritage resources in the Park and is to contain management protocols, to guide the actions of SANParks managers and employees in their dealings with the heritage resources in the CPNP. *EnAct* International has been appointed to undertake the legal review and to assist with the legal content of the final management plan, including the management protocols. This document comprises the first component of *EnAct*’s output, the legal review.

The legal review recognises that tensions exist around the issue of what can be said to comprise heritage resources, because aspects of heritage have differing significance for divergent groups of people, of which South Africa, and Cape Town, has many. It also acknowledges the complexities of the potentially conflicting imperatives of promoting biodiversity and preserving the natural elements of cultural heritage which are not indigenous.

The obligations of SANParks in respect of the heritage resources within the CPNP arise from international Conventions, the common law, the Constitution and various statutes. *EnAct*’s approach to the legal review was to consider each of these sources of law, and to provide SANParks with an overview of its legal obligations and rights under each. The review provides a brief discussion of the hierarchy of South African laws. All law is subject to the Constitution, which provides the foundation of South Africa’s legal system. Most of the obligations of SANParks in respect of the heritage resources in the CPNP arise from national legislation, although the common law, which applies where statute does not, and in addition to statute in certain circumstances, has some relevance. SANParks also needs to be aware of obligations imposed by international Conventions, insofar as they are binding.

International Conventions of relevance to the management of heritage resources in the CPNP are the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, the United Nations Law of the Sea Convention, the Convention on the Protection of Underwater Cultural Heritage and the Convention on Biological Diversity. Although only the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage has been given effect in domestic law, SANParks must be aware of the obligations imposed on the State, of which SANParks is an organ, by the other Conventions.

SANParks, as an organ of State as defined in the Constitution, must adhere to the principles of co-operative governance and must apply the values and principles applicable to public administration. The rights in the Bill of Rights may also be applied both by and against SANParks in respect of its management and operation of the CPNP.

Each of the pieces of legislation applicable to the management of heritage resources in the CPNP is considered and analysed in the legal review. Applicable to the management of all heritage resources within the CPNP are the National Heritage Resources Act (“the NHRA”), the National Environmental Management Act (“NEMA”) and the Environmental Conservation Act (“ECA”). As SANParks is aware, the majority of its obligations arise from the NHRA, which replaces the National Monuments Act. The NHRA imposes general obligations upon SANParks which apply to all types of heritage resources, including to take cognisance of and incorporate principles that guide action relating to heritage resources, to maintain and conserve heritage resources within the CPNP, to assist heritage resources authorities in the performance of their functions and to submit annual reports to the national heritage resources authority, SAHRA. It must be noted that the primary obligation to classify and manage heritage resources under the NHRA is imposed upon heritage resources authorities

and not upon SANParks. The NHRA also imposes general obligations on SANParks in respect of specific heritage resources. Certain rights are conferred upon SANParks by the NHRA, including to apply for financial assistance for specific projects that are consistent with the principles laid down in the Act. SANParks must be aware of the offences and penalties for contraventions of provisions of the NHRA. NEMA imposes upon SANParks the obligation to take into account the principles laid down in the Act when exercising any function when taking any decision in terms of NEMA or other legislation concerned with the environment. When undertaking any activity that requires authorisation or permission by law and which may significantly affect the environment, SANParks must consider, investigate and assess the potential impact on the environment, socio-economic conditions and cultural heritage, before the activity is implemented. SANParks has a duty under NEMA to prevent pollution or degradation of the environment, or to take steps to minimise or rectify such pollution or degradation where it has occurred. Under the ECA, if SANParks wishes to undertake an activity within the CPNP that comprises an 'identified activity' it will have to obtain authorisation therefor, after undertaking one or more assessments of the environmental impacts of the proposed activity.

The following legislation is relevant to particular heritage resources: the Wreck and Salvage Act, the Commonwealth War Graves Act, the Rhodes Will (Groote Schuur Devolution) Act, the Defence Endowment Property and Account Act and the World Heritage Convention Act. Each imposes obligations upon SANParks to the extent that heritage resources to which the acts apply, exist within the CPNP. The World Heritage Convention Act, for example, which will apply when a World Heritage Site or special heritage site is declared in the CPNP, obliges SANParks to develop measures for the cultural and environmental protection and sustainable development of World Heritage Sites and special heritage sites. The National Heritage Council Act, in terms of which the National Heritage Council is established, and the Cultural Institutions Act, which are relevant to heritage resources generally, do not impose any obligations on SANParks.

The CPNP Management Policy and Strategic Management Plan were considered with reference to the applicable heritage resources legislation, and were found to be compatible with it. To the extent that the practice within the CPNP conforms to the Management Policy and Strategic Management Plan, it too will be consistent with legislation.

There is potential for conflict between the Conservation of Agricultural Resources Act ("CARA") (and in particular, regulations made under it) and the National Environmental Management: Biodiversity Bill ("the Biodiversity Bill") and the relevant heritage resources legislation. CARA, for example, requires the combating of what is defined as 'invader plant species', into which category a plant protected under heritage legislation may fall. SANParks is advised to compile an inventory of all plants that may be plants controlled both under CARA or the Biodiversity Bill and heritage resources legislation, and approach the relevant authorities for a directive on how the conflict should be dealt with.

A number of inconsistencies, overlap and gaps in the legislative framework are identified and discussed in the legal review. Within the NHRA, there exists a number of confusing provisions, and there is some internal inconsistency. The NHRA also appears to contain or omit provisions, the result of which is gaps in the law. There are overlaps between the provisions of the NHRA and the Commonwealth War Graves Act, and between the World Heritage Convention Act and the NHRA.

Non-statutory considerations relevant to heritage resource management in the CPNP are found in the common law and agreements to which SANParks is a party. The common law, for example, imposes on SANParks duties in relation to the owners of properties adjacent to the CPNP.

In summary, numerous obligations are imposed upon SANParks by international Conventions, the common law, legislation and agreements, most significantly by the NHRA,

which must guide SANParks' management and employees in all their dealings with the heritage resources within the CPNP and accordingly must be included in the management protocols to be formulated as part of the Heritage Resource Management Plan.

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## 1. INTRODUCTION

SANParks is the statutory body primarily responsible for the operation and management of the CPNP. In the course of its activities, it is necessary for SANParks to ensure that it complies with the requirements of legislation relevant to heritage resources, including the National Heritage Resources Act (“NHRA”).<sup>1</sup> In order to do so, SANParks is developing the management plan. SANParks requires the management plan to include detailed guidelines and procedures which are compliant with ISO 14 001. One of the requirements of ISO 14 001 is that the operation must either comply with applicable national law or must have a programme in place for achieving compliance. To this end, we have been asked to provide, firstly, a legal review and secondly, assistance with the legal content of management protocols in order to ensure that SANParks employees have a clear understanding of the laws which regulate heritage resources. This document is the legal review. We have been asked to prepare a first draft, upon which SANParks and the other members of the project team may wish to comment. On receipt of those comments we will finalise the review.

A “Review of the legal framework applicable to the development of an integrated environmental management system for the Cape Peninsula National Park and Cape Peninsula Protected Natural Environment” was prepared in February 2000 (“the February 2000 Legal Review”).<sup>2</sup> Where appropriate, we have cross-referred to this document. However, it is beyond the terms of our appointment to update that document, and we have not done so. Furthermore, we have only mentioned those aspects of the law which directly or indirectly have a bearing on the management of heritage resources. We anticipate that there may be practices or situations regarding heritage resource management in the CPNP of which we are unaware and which may have legal implications. These will be addressed either in a final draft, or in the management protocols, whichever is more appropriate.

The manner in which we have approached this review is, firstly, to explain the hierarchy of laws in South Africa and, thereafter, to give a brief overview of the international framework relevant to heritage resources. Following that, an analysis of the national legislation relevant to heritage resources and their management has been undertaken. It is divided into four sections: firstly, national legislation which is relevant to all heritage resources;<sup>3</sup> secondly, legislation which is relevant to specific heritage resources and their management;<sup>4</sup> thirdly, legislation which is relevant to the management of heritage resources but may not impose direct obligations on SANParks;<sup>5</sup> and legislation which is potentially in conflict with obligations imposed under the NHRA and other heritage resource legislation and SANParks’ practice.<sup>6</sup> We have also considered the extent to which the CPNP Management Policy, Strategic Management Plan and practices, are consistent with applicable heritage resource management legislation. This is, to some extent, constrained by the absence of information concerning existing management practices. Finally, we have assessed inconsistencies, overlaps and gaps in the legislative framework and the extent to which these may have implications for SANParks. In addition to this, we have summarised, at the end of each section, the primary obligations imposed on SANParks by the legislation concerned. These are to be found in text boxes at the end of each section. Furthermore, for ease of reference, Annex A canvasses the permits or authorisations required in respect of the NHRA.

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<sup>1</sup> 25 of 1999.

<sup>2</sup> By attorneys Cliffe Decker Fuller Moore Inc.

<sup>3</sup> Section 5.

<sup>4</sup> Section 6.

<sup>5</sup> Section 7.

<sup>6</sup> Section 9.

## **2. TERMINOLOGY AND INTERPRETATION OF TERMS**

We recognise that there is a range of issues which underlie the meaning of “heritage resources”, “cultural heritage” and the like because aspects of heritage have differing significance for divergent groups of people, of which South Africa, and Cape Town, has many. These tensions have been discussed more fully in section 4 of the main report. For the purposes of legal analysis, we have adopted the definitions contained in applicable laws. However, the use of these must be understood in the context of the wider debate relating to cultural and heritage resources.

## **3. HIERARCHY OF LAWS**

Primary sources of South African law are the Constitution of the Republic South Africa (“the Constitution”),<sup>7</sup> legislation and common law. Another source is international law. We have considered each of these in turn.

The State and all citizens of South Africa are bound by the provisions of the Constitution, the foundational legislative instrument against which all other laws and all conduct may be tested. For example, all legislation and action in respect of the environment, including the actions of SANParks officials in respect of the CPNP, is testable against the environmental right enshrined in the Constitution. National legislation, such as the NHRA, is binding, to the extent applicable, throughout the country, whereas provincial legislation, of which the Western Cape Nature and Environmental Conservation Ordinance<sup>8</sup> is an example, is applicable only within the province from which it emanates. Local legislation (by-laws) has application only in the limited jurisdiction to which it is relevant. The common law, which originates mainly from the British and Roman-Dutch legal systems, applies where legislation does not directly govern a situation. It comprises definitions, concepts and principles, for example that damages are payable where harm is wrongfully caused, that are applied on their own, or in conjunction with legislative provisions. It also consists of decided cases, which may also interpret the application of statutes. International law, in the form of treaties, conventions or custom, is binding on the South African government to the extent that it has adopted the international instrument, and on South African citizens only in so far as it has been adopted into domestic law. The Constitution stipulates that recourse must be had by courts to international law when interpreting the Bill of Rights.<sup>9</sup>

## **4. OVERVIEW OF THE INTERNATIONAL FRAMEWORK RELEVANT TO HERITAGE RESOURCES**

It is important to recognise that international laws impose obligations on nation states. They do not impose primary obligations on individuals or bodies within states, even statutory bodies such as SANParks. Accordingly, until international conventions and treaties relevant to heritage resources have been incorporated into South African law through the enactment of domestic legislation which embodies those international law obligations, SANParks is not bound by them.<sup>10</sup> However, for the sake of completeness and, in accordance with our terms of reference, we have provided a brief overview of the content of each of the relevant conventions.

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<sup>7</sup> Act 108 of 1996.

<sup>8</sup> 19 of 1974.

<sup>9</sup> Section 39(1)(b).

<sup>10</sup> Although SANParks, as an organ of state, is obliged not to undermine the principles of international instruments to which South Africa is a signatory.

#### **4.1 Convention Concerning the Protection of the World Cultural and Natural Heritage**

The UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972 (“the World Heritage Convention”) is the primary international treaty regulating heritage resources. The Convention was ratified by South Africa on 10 July 1997, and was incorporated into South African law by the World Heritage Convention Act.<sup>11</sup> The Convention defines the kind of natural or cultural sites which can be considered for inscription on the World Heritage List, and sets out the duties of Parties in identifying potential sites and their role in protecting and preserving them. Various definitions are relevant:

“cultural heritage” is defined as:

*“monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;*

*groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;*

*sites: works of man or the combined works of nature and of man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological points of view”;*<sup>12</sup>

“natural heritage”, on the other hand, is defined as:

*“natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;*

*geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science or conservation;*

*natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty”.*<sup>13</sup>

Operational guidelines developed by the World Heritage Committee give further substance to these definitions.<sup>14</sup>

By signing the Convention, each Party pledges to conserve not only the World Heritage sites situated on its territory, but also to protect its national heritage. The Convention describes the function of the World Heritage Committee and the World Heritage Fund.

We are instructed that application has been made to have a large portion of the CPNP declared a World Heritage Site under the Convention. If a portion of the CPNP is declared a World Heritage Site, the principles and rules contained in the Convention will have to be

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<sup>11</sup> Discussed in section 6.5 of this review.

<sup>12</sup> Article 1.

<sup>13</sup> Article 2.

<sup>14</sup> The Operational Guidelines may be found on the World Heritage Committee website, at <http://whc.unesco.org/opqutoc.htm#debut>

adhered to by SANParks. These are in addition to the obligations imposed upon SANParks by the World Heritage Convention Act discussed in 6.5 of this review, in so far as the Convention obligations differ from those of the Act. Once a World Heritage Site has been declared, the Convention imposes a primary obligation on the state in whose territory the Site is situated, to ensure the identification, protection, conservation, presentation and transmission to future generations of the Site.<sup>15</sup> This obligation would be imposed upon SANParks, as an organ of State. It is not clear from international law precisely how far the obligation to preserve a World Heritage Site extends, but it is clear that a state may not knowingly allow a Site to be degraded.

Operational Guidelines developed by the World Heritage Committee which was established under the Convention, prescribe certain control measures over declared World Heritage Sites. For example, there is a requirement that a listed natural site should have a management plan.<sup>16</sup> A declared Natural Heritage Site should have adequate long-term legislative, regulatory, institutional or traditional protection. The boundaries of a Natural Heritage Site should include sufficient areas immediately adjacent in order to provide a buffer zone and thereby protect the Site's heritage values from the effects of human encroachment and the impacts of resource use outside of the site.<sup>17</sup>

The Operational Guidelines also specify that State parties to the Convention may notify the World Heritage Committee of an intention to undertake or authorise restorations or new constructions in areas protected by the Convention, where those activities may affect the world heritage value of the property. Notice must be given to the Committee as soon as possible and before any decisions that would be "difficult to reverse" are made.<sup>18</sup> The Committee cannot veto the development, but it is required to assist in seeking appropriate solutions to ensure that the world heritage value of the Site is fully preserved.

It is therefore important for SANParks to bear in mind the provisions of the Convention and of the Operational Guidelines developed in terms of it, as well as to other recommendations and rules of conduct that may arise out of the Convention, if a portion of the CPNP is declared a World Heritage Site.

## **4.2 Law of the Sea Convention**

Notwithstanding that in terms of the United Nations Convention on the Law of the Sea, 1984 ("UNCLOS") states enjoy sovereignty over their territorial waters,<sup>19</sup> UNCLOS imposes certain obligations on member states regarding the protection of heritage resources on the seabed.<sup>20</sup> In this regard, parties must protect objects of an archaeological and historical nature found at sea, and must co-operate for that purpose.<sup>21</sup> It is noteworthy that the provision is subject to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature,<sup>22</sup> which would include the World Heritage Convention.

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<sup>15</sup> Article 4.

<sup>16</sup> Guideline 44(b)(v).

<sup>17</sup> Guideline 44(b)(vi).

<sup>18</sup> Guideline 56.

<sup>19</sup> i.e. the area falling within 12 nautical miles from the baseline (usually the low water mark).

<sup>20</sup> UNCLOS has been ratified by South Africa, but the provisions relevant to heritage resources on the seabed have not been given domestic effect in South Africa.

<sup>21</sup> Article 303(1).

<sup>22</sup> Article 303(4).

SANParks must be aware of the obligations imposed upon the State under this convention to protect objects of archaeological and historical value found in South African waters, including the waters, if any, which form part of the CPNP.<sup>23</sup>

### **4.3 Convention on the Protection of Underwater Cultural Heritage**

The Convention on the Protection of Underwater Cultural Heritage was adopted by UNESCO and its 140 states on 2 November 2001. The Convention will only come into force, however, once twenty countries have ratified it. The Convention is designed to fill a legal vacuum by protecting and managing historic wrecks and sites in international waters. Its relevance to CPNP's management of wrecks is therefore limited, as the wrecks in question fall within South Africa's territorial waters and, therefore, as far as we are aware, outside the boundaries of the CPNP. The definition of "underwater cultural heritage" may however be relevant: "all traces of human existence of a cultural, historical or archaeological character which have been partially or totally under water for at least 100 years".<sup>24</sup> SANParks must take cognisance of the international obligation to protect underwater cultural heritage, of which some exists in the waters which form part of the CPNP.

### **4.4 Convention on Biological Diversity**

Although the Convention on Biological Diversity, 1992, which is shortly to be brought into effect in South African domestic law,<sup>25</sup> is concerned primarily with the protection of biological diversity and access to genetic resources, it does include a provision on the protection of indigenous knowledge which may be relevant to the management of the heritage resources within the CPNP. In this regard, article 8(j) provides that a state party must:

*"subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices".*

## **5. NATIONAL LEGISLATION RELEVANT TO ALL HERITAGE RESOURCES AND THEIR MANAGEMENT**

### **5.1 The Constitution**

The Constitution, dealt with in detail in the February 2000 Legal Review,<sup>26</sup> is the yardstick against which all laws and all conduct of the State and of citizens is measurable. SANParks comprises an 'organ of State' in terms of the Constitution.<sup>27</sup> Accordingly, it must take cognisance of the constitutional values and principles relevant to public administration,<sup>28</sup> and of the principles of co-operative governance,<sup>29</sup> in terms of which it is obliged to co-operate with other organs of state and with national, provincial and local authorities.

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<sup>23</sup> Article 303(1).

<sup>24</sup> Article 1.

<sup>25</sup> And is discussed more fully in section 9 of this review.

<sup>26</sup> At pages 31-36.

<sup>27</sup> Section 239.

<sup>28</sup> Section 195. Refer to page 32 of the February 2000 Legal Review.

<sup>29</sup> Section 41.

A number of rights in the Bill of Rights, discussed in the February 2000 Legal Review<sup>30</sup> may be relevant to the conduct of SANParks in respect of the CPNP. SANParks must be aware that the environmental right<sup>31</sup> imposes upon it a duty to protect the environment, which encompasses the heritage resources within the CPNP. SANParks officials, when undertaking administrative action, must also be aware of the provisions of the right to just administrative action,<sup>32</sup> in terms of which their conduct may be reviewed. The right of access to information<sup>33</sup> may be relied upon by members of the public to obtain information that is in the possession of SANParks, or by SANParks, to obtain information in the possession or under the control of a public or private body.

## **5.2 The National Heritage Resources Act**

### **5.2.1 Background and application**

The NHRA is the cornerstone of heritage resource regulation in South Africa. All South African places and objects of cultural significance<sup>34</sup> or of other special value for the present community and for future generations (“heritage resources”), are part of the “national estate” and fall within the ambit of the NHRA. Unlike under previous legislation protecting cultural heritage, which focused on the conservation of colonial heritage, the NHRA recognises the need to affirm the diverse cultures within South Africa, and to encompass the cultural heritage of Africa as well as of the colonial past.<sup>35</sup>

Places or objects form part of the national estate if they have cultural significance or other special value because they:

- have importance in a community or pattern of South Africa’s history;
- possess uncommon, rare or endangered aspects of South Africa’s natural or cultural heritage;
- have potential to yield information that will contribute to an understanding of South Africa’s natural or cultural heritage;
- are important to demonstrate the principal characteristics of a particular class of South Africa’s natural or cultural places or objects;
- are important to exhibit particular aesthetic characteristics valued by a community or cultural group;
- are important to demonstrate a high degree of creative or technical achievement at a particular period;
- have a strong or special association with a particular community or cultural group for social, cultural or spiritual reasons;

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<sup>30</sup> At pages 33-36.

<sup>31</sup> Section 24.

<sup>32</sup> Section 33. The right to just administrative action is given effect to by the Promotion of Administrative Justice Act, 2000, the provisions of which are beyond the scope of this review and will not be considered in this review.

<sup>33</sup> Section 32. The Promotion of Access to Information Act, 2000, gives content to the right of access to information. Its provisions are beyond the scope of this review and will not be considered in this review.

<sup>34</sup> Places and objects of aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance have ‘cultural significance’ under section 2 of the NHRA.

<sup>35</sup> Preamble to the Act.

- have a strong or special association with the life or work of a person, group or organisation of importance in the history of South Africa; or
- are sites of significance relating to the history of slavery in South Africa.<sup>36</sup>

The NHRA provides a non-finite list of examples of the kinds of places and objects which may be included in the national estate, for example historical settlements and townscapes and archaeological and palaeontological sites.<sup>37</sup>

The provisions of the NHRA are applicable to all places and objects within the CPNP which are determined by heritage resources authorities or local authorities to be heritage resources as defined in the NHRA. All places and objects that were protected by notice in the Government Gazette under the old National Monuments Act<sup>38</sup> (“the old Act”) continue to be protected under the NHRA.<sup>39</sup>

## 5.2.2 Bodies created under the NHRA

Overall management of South Africa’s heritage resources is the duty of the national and provincial heritage resources authorities. The South African Heritage Resources Agency (“SAHRA”) is the national heritage resources authority established under the NHRA.<sup>40</sup> Its primary object is identifying and managing the national estate.<sup>41</sup> The old National Monuments Council established under the old Act is abolished under the NHRA and all its assets, rights, liabilities and obligations have been transferred to SAHRA.

The Council of the South African Heritage Resources Agency (“the SAHRA Council”), established under the NHRA,<sup>42</sup> controls, manages and directs the affairs of SAHRA, and SAHRA is accountable to it. (The SAHRA Council must be distinguished from the National Heritage Council, established under the National Heritage Council Act,<sup>43</sup> discussed in 6.5 and 12 below, which is charged with developing, promoting and protecting the national heritage, and heritage management for future generations.)

Provision is made in the NHRA<sup>44</sup> for the establishment of provincial heritage authorities by the MEC of each province, to be responsible for the management of certain heritage resources within provinces. In October 2002 regulations were promulgated for the establishment of the Western Cape heritage resources authority. A Provincial Heritage Council was appointed in January 2003. As at 24 March 2003, the Heritage Western Cape awaits the promulgation of further regulations which will enable it to perform its functions under the NHRA. The general duties of provincial heritage authorities are laid down in section 24 of the NHRA. In the Western Cape, where SAHRA is based, pending the

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<sup>36</sup> Section 3(3).

<sup>37</sup> Section 3(2).

<sup>38</sup> 28 of 1969.

<sup>39</sup> Section 58(11), which specifies how particular resources protected under the old Act should be classified under the NHRA. National monuments declared in terms of section 10 of the old Act, for example, must be viewed as provincial heritage resources sites under the NHRA and conservation areas declared under the old Act are heritage areas under the NHRA.

<sup>40</sup> Section 11.

<sup>41</sup> SAHRA is charged, among other things, with establishing principles, standards and policy for the identification, recording and management of the national estate, co-ordinating the management of the national estate and the monitoring of the activities of the bodies who are managing heritage resources on a daily basis, advising, assisting and providing expertise to authorities responsible for managing heritage resources and promoting public understanding and enjoyment of the national estate (section 13(1)). It also has numerous other powers and duties conferred under section 13(2).

<sup>42</sup> Section 14.

<sup>43</sup> 11 of 1999.

<sup>44</sup> In section 23.

conferring of power to act upon the provincial heritage resources authority, SAHRA may be undertaking some of the duties assigned under the NHRA to the provincial authority. Acts performed by statutory bodies without the necessary powers are *ultra vires* and therefore invalid. In the judgment of *Gordon v South African Heritage Resources Agency and Minister of Arts, Culture and Technology*,<sup>45</sup> the High Court considered the question of whether SAHRA, or a Committee to whom powers were delegated by SAHRA, validly could undertake certain duties assigned to provincial heritage resources authorities under the NHRA when a provincial heritage resources authority had not been declared. The Court held that a regulation made under the Act, which purported to grant to SAHRA the power to exercise the functions of a provincial heritage resources authority for two years after the commencement of the NHRA in certain circumstances,<sup>46</sup> was not valid because it conflicted with provisions of the Act in terms of which SAHRA and provincial heritage resources authorities exercise their power, including a provision which allows SAHRA to perform the functions of a provincial or local authority only where such authority “*does not have the capacity or is not competent to perform a specific function for which it is responsible.*”<sup>47</sup> The judgment indicates therefore, that functions undertaken by SAHRA under the regulation which purported to give it powers to perform duties of provincial heritage resources authorities for two years after the commencement of the Act pending the declaration of provincial heritage resources authorities, were *ultra vires* or invalid. The two years specified in the regulation are now, in any event, over,<sup>48</sup> and it appears therefore, that where SAHRA exercises powers which are assigned to provincial heritage resources under the NHRA, unless some other (validly made) delegation has occurred, SAHRA may be acting unlawfully.

Any of the functions and powers of SAHRA or of a provincial heritage resources authority under the NHRA may be delegated to other specified parties, including to authorities or bodies which are shown to be competent to perform the functions and powers, by agreement with such body or authority.<sup>49</sup> The delegation must occur in writing, after the Minister of Arts, Culture, Science and Technology (“the Minister”) or a provincial MEC has made regulations to enable the delegation.<sup>50</sup> SANParks may therefore, if powers or functions are delegated to it in this way by SAHRA or a provincial heritage resources authority, perform functions which fall within the ambit of heritage resources authorities under the NHRA, including those of policing and enforcement of the provisions of the NHRA.<sup>51</sup>

### 5.2.3 Classification and management of heritage resources

Heritage resources may be classified under a system of grading established by SAHRA in consultation with the Minister and the MEC of each province.<sup>52</sup> Heritage resources must be

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<sup>45</sup> An unreported judgment of the Eastern Cape High Court, under case number 720/2001.

<sup>46</sup> Regulation 10 promulgated under Government Notice No. GN R323 dated 7 April 2000. The regulation gives to SAHRA the power to perform functions of provincial heritage resources authorities, which SAHRA “*considers essential for the functioning of the national system for the management of heritage resources*” for a maximum period of two years from the commencement of the NHRA.

<sup>47</sup> Section 8(6)(b). The Court held that regulation 10 conflicted with s8(6) because, among other things:

- (a) it empowers SAHRA to perform the functions of a provincial heritage resources authority before such agency’s competence or capacity could be determined, because such agency had not yet come into existence; and
- (b) without a determination of capacity and competence, it is not permissible for SAHRA to perform the functions of the provincial heritage resources authority because the NHRA circumscribes when SAHRA’s powers in this regard may be exercised.

<sup>48</sup> The NHRA commenced on 1 April 2000, and the regulation was therefore referring to the period which ended on 31 March 2002.

<sup>49</sup> Section 26(1)(f) and (g). SANParks would presumably be thought to have the required competence.

<sup>50</sup> Section 26(1).

<sup>51</sup> Such functions and duties are discussed in 5.2.5 below.

<sup>52</sup> Section 7(1).

classified as Grade I, II or III resources, depending on their significance. A three-tier system is put in place for the management of heritage resources, in terms of which national level functions are the responsibility of SAHRA, provincial level functions are the responsibility of provincial heritage resources authorities and local level functions the responsibility of local authorities.<sup>53</sup> A South African Heritage Resources Survey (SAHRS) is to be established to coordinate national strategy for the identification of heritage resources.<sup>54</sup> SAHRA is responsible for the identification and management of Grade I heritage resources and other heritage resources specifically under its competence in terms of the NHRA. Provincial heritage resources authorities are responsible for the identification and management of Grade II resources and others within their competence, and local authorities are responsible for the identification and management of Grade III heritage resources and other which fall within their competence under the NHRA.

The fact that the primary obligation to classify and to manage heritage resources is not SANParks' is significant. It is entirely possible that SANParks will identify heritage resources which it believes are significant but which are not similarly identified by another authority competent to make that classification under the Act. Alternatively, a competent authority may identify something as a heritage resource where it is not regarded as significant by SANParks. This may require amendment to the management protocols. It also points to the importance of becoming as involved as is possible with the different competent authorities, both provincial and local, which have not yet been established. Wherever possible, agreement should be reached regarding identification and synthesis.

#### **5.2.4 Inventories of heritage resources**

SAHRA is obliged to compile and maintain an inventory of the national estate.<sup>55</sup> In addition, SAHRA is obliged to maintain records of nationally significant heritage resources.<sup>56</sup> Provincial heritage resources authorities must compile and maintain heritage registers which list heritage resources in their province which are considered to be conservation-worthy.<sup>57</sup> As an organ of State, SANParks is obliged to compile and submit to SAHRA information on and an inventory of the heritage resources within the CPNP, when requested to do so by Regulations or by the Minister, or within 10 years from the commencement of the NHRA.<sup>58</sup>

#### **5.2.5 Powers and duties of heritage resources authorities**

Extensive powers are conferred and duties are placed, upon heritage resources authorities under the NHRA.<sup>59</sup> These include inspecting certain heritage resources, educating the public about the management of the national estate, facilitating access to heritage resources and making arrangements for the protection of heritage resources. Heritage resources authorities are empowered to engage in activities to ensure the protection of the national estate.<sup>60</sup> Heritage resources authorities and local authorities must, where appropriate, co-ordinate and promote the presentation and use of the national estate for public enjoyment, education, research and tourism.<sup>61</sup>

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<sup>53</sup> Section 8.

<sup>54</sup> SAHRA Website – [www.nationalmonuments.co.za](http://www.nationalmonuments.co.za)

<sup>55</sup> Section 39.

<sup>56</sup> Section 13(1)(c)

<sup>57</sup> Section 30.

<sup>58</sup> Section 9(3)(c).

<sup>59</sup> Section 25.

<sup>60</sup> Section 25(2).

<sup>61</sup> Section 44.

SAHRA and provincial heritage resources authorities may appoint heritage inspectors.<sup>62</sup>

The NHRA provides for delegation of the functions and powers of heritage resources authorities to various parties, including to bodies or authorities such as SANParks which are shown to have competence to perform such functions and powers.<sup>63</sup> In certain circumstances, the NHRA also places duties in respect of the management of heritage resources on parties other than the heritage resources authorities, including on national, provincial and local government and organs of state in those spheres.

## 5.2.6 Obligations of SANParks under the NHRA

The owner of the heritage resources in the CPNP is the State, which exercises its powers of ownership through SANParks, an organ of State, over most of the heritage resources within the CPNP.<sup>64</sup> It is safe, therefore, to regard SANParks as the owner of the heritage resources within the CPNP which are not owned by other state parties. Duties placed upon both organs of state and upon owners of heritage resources by the NHRA are therefore relevant to SANParks in respect of its dealings with the heritage resources in the CPNP.

Certain heritage resources are afforded 'formal' protection under the NHRA, while others are afforded 'general' protection. Neither 'formal protection' nor 'general protection' is defined under the NHRA. However, it appears that formally protected heritage resources are those in respect of which formal legal designations are made by the Minister or a provincial MEC in a *Government Gazette* or *Provincial Gazette*, while generally protected heritage resources are those that are protected under the NHRA without being declared to be worthy of protection in a *Gazette*. Various obligations, discussed below, are imposed upon SANParks in respect of both formally and generally protected heritage resources under the NHRA.

### (a) In respect of all of heritage resources in the CPNP

#### (i) *To take cognisance of and incorporate principles that guide action in respect of heritage resources:*

Sets of principles are laid down in the NHRA to guide management of and action in respect of heritage resources. They must be recognised by all authorities, bodies and persons performing functions and exercising powers under the NHRA for the management of heritage resources. The principles must therefore be integrated into the management plan, and SANParks must take cognisance of them in all its dealings in respect of the CPNP's heritage resources.

Authorities, bodies and persons performing functions and exercising powers in terms of the NHRA for the management of heritage resources must recognise that:

- heritage resources have lasting value in their own right and provide evidence of the origins of South African society;
- because heritage resources are valuable, finite, non-renewable and irreplaceable, they must be carefully managed to ensure their survival;

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<sup>62</sup> Section 50. All members of the South African Police Services and all customs and excise officers are deemed to be heritage inspectors. Heritage inspectors may inspect heritage resources for the purposes of the NHRA and have some powers of search and seizure to enable them to fulfil the purposes of the NHRA.

<sup>63</sup> Section 26. Refer to 5.2.2 above.

<sup>64</sup> The State may also be exercising its powers of ownership over some of the heritage resources within the CPNP through other organs or branches of state, such as the South African National Defence Force.

- every generation of South Africans has a moral responsibility as trustee of the national heritage for succeeding generations and the State has an obligation to manage heritage resources in the interests of all South Africans (i.e. the intergenerational principle);
- heritage resources have the capacity to promote reconciliation, understanding and respect among South Africans and to contribute to the development of a united South African identity; and
- heritage resources management must guard against the use of heritage resources for sectarian purposes or political gain.<sup>65</sup>

In addition, it must be kept in mind that heritage resources:

- form an important part of the history and beliefs of communities and must be managed in a way that acknowledges the right of affected communities to be consulted and to participate in their management; and
- contribute significantly to research, education and tourism and must be developed and presented for these purposes in a way that ensure dignity and respect for cultural values.<sup>66</sup>

The identification, assessment and management of heritage resources must:

- take account of all relevant cultural values and indigenous knowledge systems;
- take account of material or cultural heritage value and involve the least possible alteration or loss of it;
- promote the use and enjoyment of and access to heritage resources consistently with their cultural significance and heritage needs;
- contribute to social and economic development;
- safeguard the options in respect of heritage resources for present and future generations; and
- be fully researched, documented and recorded.<sup>67</sup>

SANParks must be aware that SAHRA and provincial heritage resources authorities may:

- prescribe additional principles for heritage resource management consistent with the above principles;
- prescribe the above principles in greater detail; and
- publish policy relating to heritage resources management consistent with the above principles, for application, respectively, nationally and provincially.<sup>68</sup>

These may require the alteration of management protocols insofar as they impose additional requirements or are in conflict with management protocols. As at 22 July 2002, however, no additional principles, more detailed principles, or policy, have been prescribed by SAHRA.

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<sup>65</sup> Section 5.

<sup>66</sup> Sections 5(4) and 5(5).

<sup>67</sup> Section 5(7).

<sup>68</sup> Section 6.

*(ii) To assist heritage resources authorities*

SANParks as an organ of State, is obliged to give SAHRA and the Western Cape heritage resources authority, when formed, such assistance in the performance of their functions in relation to the CPNP as is reasonably practicable.<sup>69</sup> This duty includes making available, on request, any information which it has on record on heritage resources under its control.<sup>70</sup>

*(iii) Generally*

In relation to the CPNP, SANParks, as an organ of state, is obliged to:<sup>71</sup>

- maintain and conserve the heritage resources under its control in accordance with standards and procedures prescribed by SAHRA;
- submit a report to SAHRA annually on the maintenance and development of the heritage resources under its control;
- compile and submit to SAHRA information on and an inventory of its heritage resources, when requested to do so by Regulations or the Minister or within 10 years from the commencement of the NHRA;
- prepare management plans in respect of specified heritage resources when requested to do so by the Minister and in accordance with Regulations;
- not take any action<sup>72</sup> that will adversely affect a heritage resource under its control unless it is satisfied that no feasible or prudent alternative exists and that all measures that can reasonably be taken to minimise the adverse affects will be taken;
- inform SAHRA of proposed action that will adversely affect a heritage resource under its control, at the initiation of the planning process of the project, or at least 90 days before taking the action, whichever is the greater, and give SAHRA a reasonable opportunity to consider and comment on the proposed action;<sup>73</sup> and
- where the destruction of a heritage resource under its control is permitted by the NHRA, record such resource in accordance with standards set by SAHRA and undertake any other mitigating actions which may be required by SAHRA.<sup>74</sup>

Compliance with the above does not, however, exempt SANParks from complying with other obligations placed upon it in the NHRA as owner of the heritage resources in the CPNP that are not owned by other state parties.<sup>75</sup>

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<sup>69</sup> Section 9. Section 9 also imposes duties on 'supported bodies', which are defined as bodies which are funded or financially supported by the State. We do not agree with the view expressed on page 57 of the February 2000 Legal Review that SANParks is a 'supported body' as defined. In our view, an organ of state, which is, by definition, part of government, is not also a body supported by government.

<sup>70</sup> Section 9(2). When supplying the information, SANParks may set conditions regarding its disclosure and distribution by the heritage resources authorities.

<sup>71</sup> Section 9(3).

<sup>72</sup> 'Action' includes the making of a recommendation, which, if adopted, would affect a heritage resource, the making of a decision, the approval of a programme, the issue of a licence or the granting of a permission (section 9(5)).

<sup>73</sup> Where SAHRA has been informed of a proposed action, it must submit its comments thereon to the proposer as soon as practicable (section 9(4)).

<sup>74</sup> Section 9(3).

<sup>75</sup> Section 9(6).

(b) In respect of heritage resources within the CPNP that are 'formally' protected

(i) *Heritage Sites*

SAHRA may declare places with exceptional qualities that are of special national significance, to be national heritage sites, and a provincial heritage resources authority may declare places that have special qualities which make them significant in the context of a province or a region, to be provincial heritage sites.<sup>76</sup> SAHRA is responsible for the protection of national heritage sites, and the provincial heritage resources authorities are responsible for the protection of provincial sites.<sup>77</sup>

Before declaring a site to be a heritage site, the relevant heritage resources authority is obliged to notify the owner of the site, anyone else with a registered interest in the site and interested conservation bodies, and to give them at least 60 days to make submissions regarding the proposed declaration.<sup>78</sup> Pending a final declaration of a site as a heritage site, a place may be deemed to be protected as a heritage site for six months from the date upon which the owner and other parties were notified of the proposal to make the declaration.<sup>79</sup>

If heritage sites are or have been declared within the CPNP, SANParks, as owner, must maintain the sites according to a minimum standard and according to a procedure prescribed by the responsible heritage resources authority after consultation with the relevant Department of Works.<sup>80</sup> The responsible heritage resources authority may, by agreement with SANParks as owner, conserve or improve a heritage site, construct fences, walls or gates around or on a heritage site, acquire, construct or maintain access roads to a heritage site and erect signs on or near a heritage site.<sup>81</sup>

Permits are required by SANParks (and any other person) for any alteration to, damage, destruction, relocation, subdivision or changing of planning status of a heritage site within the CPNP.<sup>82</sup>

The responsible heritage resources authorities may make regulations pertaining to heritage sites which safeguard heritage sites from destruction, damage and alteration, regulate the conditions of use or development of a heritage site and that govern the admission of members of the public to heritage sites.<sup>83</sup> SANParks will have to be aware of any such regulations made in respect of heritage sites in the CPNP.

All rights in respect of two and three dimensional reproductions of heritage sites belong to the State and vest in the heritage resources authority responsible for the protection of the heritage site or a party which is managing the site by agreement with the heritage resources authority. The State's rights, however, are subject to the owner of the site agreeing thereto and any of the owner's existing reproduction rights. Only the owner of a heritage site may make reproductions of a heritage site for profit without a permit issued by the relevant heritage resources authority.<sup>84</sup>

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<sup>76</sup> Section 27(1) and 27(2).

<sup>77</sup> Sections 27(15) and (16).

<sup>78</sup> Section 27(8).

<sup>79</sup> Section 27(10).

<sup>80</sup> Section 27(20).

<sup>81</sup> Section 27(21).

<sup>82</sup> Section 27(18). Refer to Annex A.

<sup>83</sup> Section 27(19).

<sup>84</sup> Section 27(23). Refer to Annex A.

Where the relevant heritage resources authority is of the opinion that a heritage site has been allowed to fall into disrepair or is neglected to such an extent that it will lose its potential for conservation, the authority may serve on the owner an order to repair or maintain the site, within a specified period, at the owner's cost, so as to prevent any further deterioration. Where an owner fails to abide the order, the heritage resources authority may take steps to repair or maintain the site itself, and recover the costs thereof from the owner.<sup>85</sup>

(ii) *Protected areas*

SAHRA may, with the consent of the owner of an area, designate the following to be protected areas:

- an area of land surrounding a national heritage site, so as to ensure the protection and enjoyment of the site or to protect the view to and from the site;
- an area of land surrounding a wreck, so as to ensure its protection; or
- an area of land covered by a mine dump.<sup>86</sup>

A provincial heritage resources authority may, with the consent of the owner of an area, designate as a protected area, an area of land surrounding a provincial heritage site, so as to ensure the protection and enjoyment of the site or to protect the view to and from the site, and an area of land surrounding any archaeological or palaeontological site or meteorite, so as to ensure its protection.<sup>87</sup>

Protected areas may be provisionally protected by heritage resources authorities or local authorities.<sup>88</sup>

No person may damage, disfigure, alter or in any way develop any part of a protected area without consulting the relevant heritage resources authority.<sup>89</sup>

Both SAHRA and provincial heritage resources authorities may make regulations providing for specific protections of protected areas, for example the prohibition of certain activities in the area.<sup>90</sup>

(iii) *Provisionally protected places and objects*

SAHRA or a provincial heritage resources authority may provisionally protect for a maximum of two years, a protected area, a heritage resource whose conservation it believes is threatened, or a heritage resource whose protection it wishes to investigate.<sup>91</sup> Similarly, a local authority may provisionally protect for up to three months, any place which it considers to be 'conservation-worthy' and whose conservation it believes is threatened.<sup>92</sup> Owners of

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<sup>85</sup> Section 45.

<sup>86</sup> Section 28(1).

<sup>87</sup> Section 28(2).

<sup>88</sup> Section 29. Refer 5.2.7(a)(iii).

<sup>89</sup> Section 28(3). Refer to Annex A.

<sup>90</sup> Section 28(5).

<sup>91</sup> Section 29(1).

<sup>92</sup> Section 29(2).

heritage resources to be provisionally protected have to be notified in writing of the proposed provisional protection before the resource is provisionally protected.<sup>93</sup>

No person may damage, disfigure, alter or in any way develop any part of a provisionally protected place or object without obtaining a permit from the relevant heritage resources authority or local authority.<sup>94</sup>

(iv) *Heritage Areas*

SANParks must be aware that provincial heritage resources authorities and local authorities may designate certain areas, which are deemed to be worthy of protection because they are of environmental or cultural interest, or contain heritage resources, to be heritage areas.<sup>95</sup>

Any alteration or development affecting a heritage area can only be undertaken with the consent of the local authority responsible for its protection.<sup>96</sup>

(v) *Heritage Objects*

SAHRA may declare certain objects or types of objects that are part of the national estate, and the export of which SAHRA wishes to control, to be “heritage objects”.<sup>97</sup> Owners of such objects must be notified and given an opportunity to make representations or submissions before a declaration is made.<sup>98</sup>

SAHRA is obliged to maintain a register of heritage objects. The owner of a heritage object listed in Part II of the register<sup>99</sup> must notify SAHRA when a heritage object is sold and must provide it with the details of the new owner.<sup>100</sup> The owner or custodian of a heritage object listed in Part II of the register is obliged to keep the object in good condition and in a secure place,<sup>101</sup> and if the heritage object is lost or damaged, must report the loss or damage to SAHRA immediately.<sup>102</sup>

No one may carry out restoration work or repair to a heritage object listed in Part II of the register without a permit issued by SAHRA.<sup>103</sup> SAHRA may assist by funding the restoration or repair work, if it is undertaken by a craftsperson approved by it.<sup>104</sup>

No person may destroy, damage, disfigure or alter any heritage object without a permit.<sup>105</sup>

The export of heritage objects out of South Africa is strictly regulated by SAHRA.<sup>106</sup>

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<sup>93</sup> Section 29(4).

<sup>94</sup> Section 28(10). Refer to Annex A.

<sup>95</sup> Section 31.

<sup>96</sup> Section 54(7). Refer to Annex A.

<sup>97</sup> Section 32. The objects include archaeological and palaeontological objects, art objects, military objects and objects of cultural and historical interest.

<sup>98</sup> Section 32(3).

<sup>99</sup> Part II of the register contains a list of specific heritage objects as listed in the inventory of a public museum or otherwise displayed or kept in secure conditions and other specific heritage objects identified by SAHRA (section 32(7)).

<sup>100</sup> Section 32(12).

<sup>101</sup> Section 32(15).

<sup>102</sup> Section 32(16).

<sup>103</sup> Section 32(17).

<sup>104</sup> Section 32(18).

<sup>105</sup> Section 32(13). Refer to Annex A.

*(vi) Places and Objects listed on provincial heritage registers*

Provincial heritage resources authorities are obliged to compile and maintain lists of heritage resources in their province which they consider to be conservation-worthy in terms of the criteria laid down in sections 3(3) and 7 of the NHRA.

Local authorities are charged with most of the protection of places and objects listed on heritage registers and the consent of the relevant local authority is required for the alteration or development of, or which will affect, a place listed on the heritage register.<sup>107</sup>

*(c) In respect of heritage resources in the CPNP that are 'generally' protected**(i) Structures*

Permits from provincial resources authorities are required for the altering or demolition of any structure or part of a structure that is older than 60,<sup>108</sup> other than those exempted by provincial heritage resources authorities under section 34(3).<sup>109</sup>

*(ii) Archaeology, palaeontology and meteorites*

The protection of archaeological and palaeontological sites and materials and meteorites is the responsibility of a provincial heritage resources authority, other than any wreck in the territorial waters and maritime cultural zone which is the responsibility of SAHRA.<sup>110</sup>

With some exceptions,<sup>111</sup> all archaeological objects, palaeontological material and meteorites are the property of the State and must be lodged by the responsible heritage authority with a museum or other public institution.

Any person who discovers archaeological and palaeontological objects or material or a meteorite in the course of development or agricultural activity must immediately report the find to the relevant heritage resources authority or to the nearest local authority offices or museum.<sup>112</sup>

No person may without a permit, destroy, damage, excavate, alter, deface or otherwise disturb or remove from its original position, collect or own, or trade in, sell or export any archaeological and palaeontological site or meteorite, or use any unauthorised excavation equipment at an archaeological and palaeontological site.<sup>113</sup>

The owner or controller of land on which a archaeological and palaeontological site or meteorite is situated, may, after being consulted, be served with a notice by the relevant heritage resources authority, which prevents activities within a specified distance of the site or meteorite.<sup>114</sup>

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<sup>106</sup> Section 32(19) to (31).

<sup>107</sup> Section 30(11).

<sup>108</sup> Section 34.

<sup>109</sup> Refer to Annex A.

<sup>110</sup> Section 35(2).

<sup>111</sup> Section 35(7).

<sup>112</sup> Section 35(3).

<sup>113</sup> Section 35(4). Refer to Annex A.

<sup>114</sup> Section 35(6).

*(iii) Burial grounds and graves*

SAHRA is responsible for the conservation of general care of burial grounds and graves<sup>115</sup> where they are not the responsibility of any other authority.<sup>116</sup>

SAHRA is obliged to identify and record the graves of victims of conflict and any other graves which it considers to be of cultural significance. It may erect memorials and maintain such memorials.<sup>117</sup>

Permits are required from SAHRA or a provincial heritage authority to destroy, damage, alter, exhume or remove from its original position or otherwise disturb the grave of a victim of conflict, or any burial ground which contains graves of victims of conflict.<sup>118</sup> The applicant for a permit of this kind must satisfy the heritage resources authority to whom it is applying that it has made satisfactory arrangements for the exhumation and re-interment of the contents of the graves.<sup>119</sup>

Similarly, permits are required to destroy, damage, alter, exhume or remove from its original position or otherwise disturb any grave or burial ground that is older than 60 years and which is situated outside a formal cemetery.<sup>120</sup> The applicant for this kind of permit must show the relevant heritage resources authority that it has made a concerted effort to contact and consult communities and individuals who by tradition have an interest in the grave or burial ground and has reached agreements with such communities and individuals in respect of the future of the grave or burial ground.<sup>121</sup> The Act requires that the application must be made in accordance with regulations. However, none have yet been made. It is therefore necessary, when making such an application, to request SAHRA to give directions concerning the form and substance of the application until the regulations are promulgated.

Permits are also required to bring onto a burial ground or use any excavation equipment or any equipment which assists in the detection or recovery of metals.<sup>122</sup>

Any person who discovers a previously unknown grave, must report the discovery to the responsible heritage resources authority.<sup>123</sup>

*(iv) Public monuments and memorials*

Public monuments and memorials are protected in the same manner as heritage resources listed in the heritage register which provincial heritage resources authorities are obliged to compile and maintain under section 30 of the NHRA.<sup>124</sup>

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<sup>115</sup> 'Grave' is defined in the NHRA as a place of interment, including the contents, headstone or other marker and any other structure associated with it.

<sup>116</sup> Section 36(1).

<sup>117</sup> Section 36(2).

<sup>118</sup> Section 36(3)(a).

<sup>119</sup> Section 36(4).

<sup>120</sup> Section 36(3)(b).

<sup>121</sup> Section 36(5).

<sup>122</sup> Section 36(3). Refer to Annex A.

<sup>123</sup> Section 36(6).

<sup>124</sup> Refer to Annex A.

(d) In respect of developments affecting heritage resources

With some exceptions, dealt with below, any person undertaking a development of a type named in the NHRA,<sup>125</sup> must 'at the very earliest stages of initiating such a development', notify the relevant heritage resources authority<sup>126</sup> and furnish it with details regarding the nature, location and extent of the proposed development.<sup>127</sup>

Within 14 days of receipt of the notification of the proposed development, the relevant heritage resources authority must determine whether or not the development is one which is likely to affect a heritage resource. If the development is considered to be one which will affect a heritage resource, the developer is required to submit an impact assessment report to the relevant heritage resources authority, prepared at the developers cost, by a person with relevant qualifications, experience and professional standing in heritage resources management, who is approved by the heritage resources authority.<sup>128</sup>

The relevant heritage resources authority must indicate what is to be contained in the impact assessment report, but the NHRA specifies<sup>129</sup> what must be contained at minimum, including the identification and mapping of all heritage resources in the area to be developed, an evaluation of the impact of the development on heritage resources relevant to social and economic benefits that will be derived from it and plans for mitigation of adverse affects.

After receipt of the report, the responsible heritage resources authority must decide whether the development may go ahead, with or without restrictions.<sup>130</sup> A right of appeal against the decision of a provincial heritage resources authority exists to the relevant provincial MEC.<sup>131</sup> Appeal against a decision of SAHRA under section 38 may be made to the SAHRA Council in writing within 14 days of the issuing of the minutes recording SAHRA's decision, and the Council must consider the appeal within 21 days.<sup>132</sup> An appeal against the SAHRA Council may be lodged with the Minister, who will appoint an independent tribunal to hear it.<sup>133</sup>

The provisions of section 38 of the NHRA do not apply to:

- a development affecting any heritage resource 'formally protected' by SAHRA, unless the relevant heritage resources authority decides otherwise;
- a development of a place exempted from the requirements of the NHRA by a provincial heritage resources authority with the approval of the relevant MEC;

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125 (a) the construction of a bridge or similar structure exceeding 50 m in length;  
 (b) any development or other activity which will change the character of a site –  
     (i) exceeding 5000m<sup>2</sup> in extent; or  
     (ii) involving three or more existing erven or subdivisions thereof; or  
     (iii) involving three or more erven or divisions thereof which have been consolidated within the past five years;  
     or  
 (c) the costs of which will exceed a sum set in terms of regulations by SAHRA or a provincial heritage resources authority;  
 (d) re-zoning of a site exceeding 10 000m<sup>2</sup> in extent; or  
 (e) any other category of development provided for in regulations by SAHRA or a provincial heritage resources authority..”

<sup>126</sup> Presumably the provincial heritage resource authority in the area in which the development is taking place, or SAHRA, if the development appears likely to impact upon a national heritage resource, although the NHRA does not specify this.

<sup>127</sup> Section 38(1).

<sup>128</sup> Section 38(2).

<sup>129</sup> In s38(3).

<sup>130</sup> Section 38(4).

<sup>131</sup> Section 38(6).

<sup>132</sup> Regulations promulgated under the NHRA in terms of Government Notice R.323 of 7 April 2000.

<sup>133</sup> Section 49(2).

- a development for which an impact assessment in respect of heritage resources is required under:
  - the Environmental Conservation Act;<sup>134</sup>
  - the integrated environmental management guidelines issued by the Department of Environmental Affairs and Tourism;
  - the Minerals Act;<sup>135</sup> or
  - any other legislation,<sup>136</sup>

as long as the consenting authority is satisfied that the assessment required under those legislative instruments contains the information required by the heritage resources authority and the NHRA under section 38(3), and provided that any comments and recommendations of the relevant heritage resources authority are taken into account before any consent for development is granted.

Where an impact assessment report has been furnished, either in terms of the NHRA or under other legislation, and the developer has complied with the decision/s of the authorities who considered the report, the developer is exempted from separate compliance with the other provisions of Part 2 of Chapter II of the NHRA, which relate to the protection of structures, archaeology, palaeontology and meteorites, burial grounds and graves and public monuments and memorials.

### 5.2.7 Rights of SANParks under the NHRA

The NHRA envisages co-operation and agreement between heritage resources authorities and bodies such as SANParks that are responsible for the management of heritage resources.<sup>137</sup> It confers upon bodies such as SANParks, rights with respect to the management of particular heritage resources.

#### (a) In respect of “formally” protected heritage resources

##### (i) *Heritage Sites*

SANParks may submit nominations to SAHRA or the provincial heritage resources authority to have a place with the CPNP declared as a national or provincial heritage site.<sup>138</sup>

SANParks as owner of a site to be declared as a heritage site, must be notified of a decision to declare a site a heritage site, and must be given at least 60 days in which to make submissions regarding the proposal and to propose conditions under which the declaration will be acceptable.<sup>139</sup>

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<sup>134</sup> 73 of 1989.

<sup>135</sup> 50 of 1991.

<sup>136</sup> For example, section 24(7) of the National Environmental Management Act 107 of 1998.

<sup>137</sup> See for example, sections 13(1) and 24(1) of the NHRA, which require SAHRA and provincial heritage resources authorities, among other things, to assist and support bodies such as SANParks that are responsible for the management of heritage resources.

<sup>138</sup> Section 27(3).

<sup>139</sup> Section 27(8).

As owner of a heritage site, SANParks must agree that two and three dimensional reproduction rights in respect of the heritage site belong to the State and vest in the heritage resources authority responsible for the protection of the site. SANParks may make reproductions of the site for profit without a permit issued by the relevant provincial resources authority.<sup>140</sup>

(ii) *Protected areas*

Areas within the CPNP owned by SANParks, may only be declared to be protected with the consent of SANParks.

(iii) *Provisionally protected places and objects*

SANParks as owner of a heritage resource to be provisionally protected must be notified in writing of the proposed provisional protection before the resource is provisionally protected.<sup>141</sup>

(iv) *Heritage Areas*

Before declaring an area within the CPNP to be a heritage area, the relevant local authority must consult SANParks as owner of the area.<sup>142</sup>

(v) *Heritage Objects*

SANParks as owner of any object to be declared a heritage object, must be notified and given at least 60 days to lodge an objection or suggest reasonable conditions regarding the care and custody of the object before a declaration is made.<sup>143</sup> In the case of a type of objects to be declared as heritage objects, any interested party who might be adversely affected by a declaration of the objects as heritage objects, may make submissions to or lodge objections with SAHRA within 60 days of being notified thereof.<sup>144</sup>

An owner or custodian of a heritage object listed in Part II of the heritage objects register referred to above, may apply to SAHRA for funding to assist it to restore or repair that object.<sup>145</sup>

(vi) *Places and objects listed on provincial heritage registers*

A provincial heritage resources authority may not list a place in a heritage register without having consulted the owner of the place.<sup>146</sup>

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<sup>140</sup> Section 27(23).

<sup>141</sup> Section 29(4).

<sup>142</sup> Section 31(5).

<sup>143</sup> Section 32(5). However, where 'circumstances militate against this', owners need not be given an opportunity to make representations.

<sup>144</sup> Section 32(5)(b).

<sup>145</sup> Section 32(18).

<sup>146</sup> Section 30(7).

*(vii) To financial assistance from SAHRA*

SAHRA may provide financial assistance in the form of a grant or a loan to an approved body or individual, including the owner of heritage resources, from the National Heritage Resources Fund established under the NHRA, for any project which is consistent with the principles laid down in section 5 of the NHRA and which contributes to the purposes of the NHRA highlighted in those principles.<sup>147</sup>

The procedures and criteria for applications for funding will be prescribed by SAHRA and as of 30 May 2002, had not yet been prescribed.

*(b) In respect of heritage agreements*

Heritage agreements may be entered into between SAHRA or a provincial heritage authority and an authority, body, individual or community to provide for the conservation, improvement or presentation of a heritage resource. (If the party to the agreement with the heritage resources authority is not the owner, the owner must consent to the agreement.)<sup>148</sup>

The owner of a heritage site or a place listed in the heritage register may appoint a heritage resources authority or local authority to be the guardian of that place.<sup>149</sup> The guardianship agreement may provide, among other things, for the maintenance and management of the resource, the custody of the resource, the occupation or use of the resource by the owner or other parties, the restriction of the right of the owner or occupier to do certain things in respect of the resource, access to the resource and expenses in respect of the resource.<sup>150</sup> The rights of an owner of a place under guardianship in terms of a heritage agreement are not, in general, affected by the agreement.<sup>151</sup>

Heritage resource agreements may not prevent a heritage resources authority charged with protecting a resource from exercising powers conferred on it in terms of the NHRA. A heritage resources agreement may not permit or allow any activities in respect of a heritage resource that are contrary to the provisions of the NHRA.<sup>152</sup>

**5.2.8 Appeals against SAHRA and provincial heritage authorities**

Regulations not yet promulgated will provide for a system of appeal to the SAHRA Council or a provincial heritage resources council against a decision of SAHRA (or a body to whom it has delegated authority) or a provincial heritage resources authority.<sup>153</sup> Appeals against a decision of the SAHRA Council or a provincial heritage resources council must be made to the Minister or relevant MEC in writing within 30 days of the decision, and an independent tribunal will be appointed to hear the appeal.<sup>154</sup>

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<sup>147</sup> Section 40(1).

<sup>148</sup> Section 42(1).

<sup>149</sup> Section 42(8).

<sup>150</sup> Section 42(9).

<sup>151</sup> Section 42(10).

<sup>152</sup> Section 42(11).

<sup>153</sup> Section 49(1).

<sup>154</sup> Section 49(2).

### 5.2.9 Offences and penalties under the NHRA

Offences and penalties for contraventions of the provisions of the NHRA are detailed in section 51, read with the Schedule to the Act.

Offences are grouped into six categories.<sup>155</sup>

<b>Category of offence</b>	<b>Penalty</b>
Contravention of sections 27(18) (destroying, damaging, altering, moving etc. a heritage site without a permit); 29(10) (destroying, damaging, altering, moving etc. a provisionally protected place or object without a permit); 32(13) (destroying, damaging, disfiguring or altering any heritage object or dispersing any heritage collection without a permit); 32(19) (exporting or attempting to export any heritage object without a permit).	A fine or imprisonment for a period not exceeding five years or to both such fine and imprisonment.
Contravention of sections 33(2) (importing foreign cultural property); 35(4) (destroying, damaging, altering or disturbing etc. any archaeological or palaeontological site or any meteorite; destroying, damaging, moving, collecting or owning etc. any archaeological or palaeontological material or object or any meteorite; trading in, selling, exporting etc. any archaeological or palaeontological material or meteorite; bringing onto or using any excavation equipment etc. on an archaeological or palaeontological site without a permit); or 36(3) (destroying, damaging, altering etc. graves or burial grounds; bringing onto or using at a burial ground or grave any excavation equipment without a permit).	A fine or imprisonment for a period not exceeding three years or to both such fine and imprisonment.
Contravention of sections 28(3) (damaging, disfiguring, altering etc. a protected area without consultation with a heritage resources authority); or 34(1) (altering or demolishing any structure older than 60 years without a permit).	A fine or imprisonment for a period not exceeding two years or to both such fine and imprisonment.
Contravention of sections 27(22) (damaging any fence, wall, sign or gate constructed by a heritage resources authority); 32(15) (not keeping a heritage object in good order and in a secure place); 33(1) (importing any foreign cultural property other than in accordance with the NHRA); 35(6) (activities within a specified distance from an archaeological or palaeontological site or meteorite in contravention of a notice); or 44(3) (erecting a plaque or other permanent display or structure in respect of a protected resource without consultation with the heritage resources authority).	A fine or imprisonment for a period not exceeding one year or to both such fine and imprisonment.
Contravention of sections 27(23)(b) (reproduction of a heritage site for profit without a permit); 32(17) (restoration or repair of a heritage object without a permit); 35(3) failing to report the discovery of an archaeological or palaeontological object or material or meteorite); 36(3) (destroying, damaging, altering etc. graves or burial grounds; bringing onto or using at a burial ground or grave any excavation equipment without a permit); or 51(8) (damage to or alteration of a protected heritage resource).	A fine or imprisonment for a period not exceeding six months or to both such fine and imprisonment.
Contravention of sections 32(13) (destroying, damaging, disfiguring or altering a heritage object or dispersing of a heritage collection without a permit); 32(16) (failure to report loss or damage to a heritage object); 32(20) (removal of a heritage object from South Africa other than in accordance with the NHRA); 35(7)(a) (failing to lodge lists of archaeological or palaeontological material or objects or meteorites which were acquired other than	A fine or imprisonment for a period not exceeding three months or to both such fine and imprisonment.

<sup>155</sup> Section 51(1).

in terms of a permit); 44(2) (failure to consult with a heritage resources authority in respect of the presentation of a heritage resource); 50(5) (failure to hand in an identity card by a former heritage inspector); or 50(12) (failure to assist a heritage inspector).	
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Failure to comply with regulations or contravention of regulations made by heritage resources authorities may result in a penalty of a fine or of imprisonment for a period not exceeding six months.<sup>156</sup>

Where a person has been convicted of a contravention of the NHRA which has resulted in damage to or alteration of a protected heritage resource, a court may, in addition to imposing a fine and/or imprisonment, order the person to rectify the results of the act or pay for the rectification of the act.<sup>157</sup>

If the owner of a place has been convicted of an offence in terms of the NHRA involving the destruction of or damage to a protected place, the Minister may serve an order on the owner that no development of the place may be undertaken for a period of up to ten years from the date of the order.<sup>158</sup> An order of no development attaches to the land and is binding not only on the current owner but also on any person who becomes owner subsequently.<sup>159</sup>

**Rights and obligations for inclusion in the heritage resource management protocols**

The provisions of the NHRA are applicable to all places and objects within the CPNP which are determined to be “heritage resources” as defined in the NHRA, including all places and objects that were protected under the now repealed National Monuments Act.

**General obligations of SANParks under the NHRA which apply to all types of heritage resources:**

- to take cognisance of and incorporate principles that guide action in respect of heritage resources;
- to assist heritage resources authorities in the performance of their functions in relation to the CPNP, including making available on request: any information in respect of heritage resources within the CPNP, an inventory of its heritage resources, or a management plan in respect of a specific heritage resource;
- to maintain and conserve the heritage resources within the CPNP in accordance with standards and procedures prescribed by SAHRA, which includes the obligation not to take any action that will adversely affect a heritage resource under its control unless no alternative exists and all measures to minimise the adverse effects are taken, and SAHRA has been informed of the proposed action, and, where destroying a resource, to record such resource in accordance with SAHRA’s standards and undertake mitigating actions; and
- to submit a report to SAHRA annually on the maintenance and development of the heritage resources under its control.

**General obligations of SANParks under the NHRA which apply to specific heritage resources:**

- to be aware of the classification by heritage resources authorities of heritage resources within the CPNP (the classification of heritage resources by heritage resources authorities prevail over any other classification), and

*in relation to heritage objects:*

<sup>156</sup> Section 51(2).

<sup>157</sup> Section 51(8).

<sup>158</sup> Section 51(9).

<sup>159</sup> Section 51(11).

- to inform SAHRA of dealings in respect of such objects;
- to obtain a permit from SAHRA before carrying out restoration work or repair on a heritage object listed in Part 2 of the heritage register; and
- to obtain a permit before destroying, damaging, disfiguring or altering any heritage object;

*in relation to heritage sites:*

- to maintain them according to a minimum standard and procedure prescribed by the heritage resources authorities; and
- to obtain a permit for any alteration to, damage, destruction, relocation, subdivision or changing of planning status of such a site;

*in relation to protected areas or heritage areas:*

- to consult the relevant heritage resources authority before damaging, disfiguring, altering or in any way developing any part of a protected area; and
- to obtain the consent of the relevant local authority for any alteration or development affecting a heritage area;

*in relation to provisionally protected places or objects:*

- to obtain a permit from the relevant heritage resources authority or local authority before damaging, disfiguring, altering or in any way developing any part of a provisionally protected place or object; and
- to obtain the consent of the relevant local authority for altering or developing or affecting a place listed on a provincial heritage register;

*In relation to graves or burial grounds:*

- to obtain a permit from the relevant heritage resources authority before destroying, damaging, altering, exhuming or removing from its original position or otherwise disturbing, the grave of a victim of conflict or any burial ground which contains graves of victims of conflict; and
- to obtain a permit before destroying, damaging, altering, exhuming, or removing from its original position or otherwise disturbing any grave or burial ground that is older than 60 and which is situated outside a formal cemetery;

*and otherwise:*

- to notify the heritage resources authority before undertaking a development of the kind named in SAHRA, and in certain circumstances submit an impact assessment report to the heritage resources authority;
- to obtain a permit before destroying, damaging, excavating, altering, defacing or otherwise disturbing or removing from its original position or dealing with any archaeological or palaeontological site or meteorite or using any excavating equipment at an archaeological or palaeontological site;
- to obtain a permit from the provincial resources authority before altering or demolishing any structure or part of a structure that is older than 60 years; and
- to report the finding of any archaeological or palaeontological object or material or meteorite to the relevant heritage resources authority.

**Rights of SANParks under the NHRA:**

- to obtain financial assistance from SAHRA for projects consistent with the principles laid down in the NHRA and which contribute to the purposes of the NHRA.

### 5.3 The National Environmental Management Act

The National Environment Management Act (“NEMA”),<sup>160</sup> discussed in detail in the February 2000 Legal Review,<sup>161</sup> imposes upon SANParks, as an organ of State, the obligation to take into account the principles laid down in the Act<sup>162</sup> when exercising any function when taking any decision in terms of NEMA or other legislation concerned with the environment. SANParks must be aware when taking any decisions in respect of the heritage resources in the CPNP, among other things, that development must be socially, environmentally and economically sustainable, that elements of the environment are linked and interrelated and therefore that the effects of decisions on all aspects of the environment and all people in the environment must be taken into account, that equitable access to environmental resources must be pursued and that there must be intergovernmental co-ordination and harmonisation of environmental policies, legislation and actions.

NEMA imposes upon all parties involved in activities that require authorisation or permission by law and which may significantly affect the environment, a duty to consider, investigate and assess the potential impact on the environment, socio-economic conditions and cultural heritage, before the activity is implemented.<sup>163</sup> Thus when wishing to undertake any development in the CPNP that may significantly affect the environment and that requires legal authorisation, SANParks is obliged to follow the procedure laid down in NEMA. This obligation does not exclude the environmental impact assessment obligations imposed by the Environment Conservation Act, discussed in 5.4 below, and in most circumstances, the obligations under both Acts will have to be met in respect of the same proposed activity.

All persons have a duty under NEMA,<sup>164</sup> to prevent pollution or degradation of the environment, or to take steps to minimise or rectify such pollution or degradation where it has occurred. The obligation is imposed upon SANParks in respect of the CPNP, not only as a potential polluter, but also as the owner of land upon which pollution or degradation may be caused by a third party.

#### Obligations for inclusion in the heritage resource management protocols

**NEMA imposes duties upon departments and organs of state with the aim of achieving a realisation of the constitutional environmental right and co-operative environmental governance and on all parties in respect of preventing damage to the environment.**

#### **Obligations imposed upon SANParks:**

- **make reference to the principles set out in NEMA when exercising any function when taking any decision in terms of NEMA or any other statutory provision concerning the environment;**
- **to consider, investigate and assess the potential impact on the environment, socio-economic conditions and cultural heritage before any activity that may significantly affect the environment is undertaken;**

<sup>160</sup> Act 107 of 1998.

<sup>161</sup> At pages 36 – 43.

<sup>162</sup> Section 2.

<sup>163</sup> Section 24(1) read with section 24(7).

<sup>164</sup> Section 28.

- to prevent pollution or degradation of the environment from occurring, continuing or recurring, unless it is authorised by law or cannot reasonably be avoided or stopped, in which case, the pollution or degradation must be rectified or minimised.

## 5.4 The Environment Conservation Act

The Environment Conservation Act (“the ECA”),<sup>165</sup> considered in detail in the February 2000 Legal Review,<sup>166</sup> is largely repealed by NEMA, but a number of sections which may be relevant to SANParks in its dealings in the CPNP remain in force. Certain obligations are imposed upon SANParks because the CPNP was declared a ‘protected natural environment.’<sup>167</sup> Further, if SANParks wishes to undertake an activity within the CPNP that comprises an ‘identified activity’ under the ECA and the Regulations promulgated in terms of it, it will have to obtain authorisation therefor, after undertaking one or more assessments of the environmental impacts of the proposed development.<sup>168</sup> Such an environmental impact assessment may need to be undertaken in conjunction with one required under NEMA.<sup>169</sup>

### Obligations for inclusion in the heritage resource management protocols

The ECA imposes duties upon all parties within South Africa to protect the environment, including obligations on all parties wishing to undertake certain identified activities, to obtain authorisation therefor.

**Obligations imposed upon SANParks:**

- to comply with the directives issued under the ECA in respect of the management of protected natural environments;
- to comply with the provisions of the ECA and Regulations promulgated in terms of it when undertaking any ‘identified activities’.

## 6. LEGISLATION RELEVANT TO SPECIFIC HERITAGE RESOURCES AND THEIR MANAGEMENT

### 6.1 Wreck and Salvage Act

#### 6.1.1 Background and application

The Wreck and Salvage Act<sup>170</sup> (“the Wreck Act”) provides for the salvage of certain vessels and regulates activities in respect of certain wrecks in the Republic. It also brings into force in South African domestic law, the International Convention on Salvage, 1989, (“the Convention”) to which South Africa is a party.

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<sup>165</sup> Act 73 of 1989.

<sup>166</sup> At pages 43-49.

<sup>167</sup> Refer to pages 46-47 of the February 2000 Legal Review.

<sup>168</sup> Sections 21 and 22, read with the Regulations promulgated in Government Notices R.1182 and R.1183 of 5 September 1997.

<sup>169</sup> Refer 5.3 above.

<sup>170</sup> 94 of 1996.

The Wreck Act defines a “wreck” as including:

*“any flotsam, jetsam, lagan or derelict, any portion of a ship or aircraft lost, abandoned, stranded or in distress, any portion of the cargo, stores or equipment of any such ship or aircraft and any portion of the personal property on board such ship or aircraft when it was lost, abandoned, stranded or in distress”*

We are instructed that there are approximately 400 shipwrecks along the coast of the Cape Peninsula, most of which currently fall outside the management area of the CPNP and, all of which are likely to constitute “wrecks” as defined in the Wreck Act. The Wreck Act, however, has limited application to wrecks of the type in the CPNP, because its primary focus is the regulation of conduct in respect of vessels that are newly wrecked, stranded or in distress.

The NHRA contains detailed provisions relating to wrecks of the type found in the CPNP.<sup>171</sup> The Wreck Act refers to wrecks declared to be monuments, and provides that it “shall not derogate from the National Monuments Act, 1969”.<sup>172 173</sup> Where the Wreck Act is inconsistent with the NHRA, therefore, the provisions of the NHRA prevail.<sup>174</sup> In its dealings with the wrecks in the CPNP that fall within the NHRA’s ambit, therefore, SANParks must rely primarily upon the provisions of the NHRA, and on the provisions of the Wreck Act in so far as they are applicable and are not inconsistent with the provisions of the NHRA. Where the NHRA is not applicable to a wreck in the CPNP,<sup>175</sup> SANParks must have recourse to the relevant provisions of the Wreck Act, of which there are few, when dealing with the wrecks in the CPNP.

### 6.1.2 Obligations imposed upon SANParks

Most of the provisions of the Wreck Act relate to salvage operations, which the Convention defines as an ‘act or activity undertaken to assist a vessel or any other property in danger in navigable waters or in any other waters whatsoever’ and which SANParks will not conduct in respect of the wrecks in the CPNP.<sup>176</sup> A number of provisions of the Wreck Act may, however, impose obligations on SANParks.

A salvage officer appointed by the Minister of Transport under the Wreck Act, or a person authorised by a salvage officer, may conduct investigations concerning ‘wrecked’ ships, including the name and description of the ship and the cause of wrecking and other relevant

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<sup>171</sup> The NHRA regulates conduct in respect of ‘any vessel or aircraft, or any part thereof, which was wrecked in South Africa, whether on land, in the internal waters, the territorial waters or in the maritime culture zone of the Republic, as defined respectively in sections 3, 4 and 6 of the Maritime Zones Act, 1994 (Act 15 of 1994), and any cargo, debris or artefacts found or associated therewith, which is older than 60 years or which SAHRA considers to be worthy of conservation’. Seven of the wrecks within the CPNP about which we have been provided information, are older than 60. And therefore fall within the ambit of the NHRA. Any wrecks in the CPNP not older than 60 will also fall within the ambit of the NHRA if SAHRA has or does consider them to be ‘worthy of conservation’.

<sup>172</sup> Section 23.

<sup>173</sup> Under the laws of statutory interpretation (section 12 of the Interpretation Act 33 of 1957), because the National Monuments Act has been repealed by the NHRA, where the Wreck Act refers to the National Monuments Act, it should be interpreted to be referring to the NHRA.

<sup>174</sup> Where the Wreck Act and the NHRA are not inconsistent, their provisions should be read together and may apply simultaneously where appropriate.

<sup>175</sup> This would only be the case if SAHRA did not declare one or more of the wrecks that is younger than 60 to be worthy of conservation.

<sup>176</sup> The Convention too regulates only salvage operations and therefore is not relevant to SANParks in its dealing with the wrecks in the CPNP.

matters.<sup>177</sup> If it were decided that an investigation was to be undertaken in respect of a wreck in the CPNP, therefore, SANParks would be obliged not to obstruct it.<sup>178</sup>

Salvage officers or their representatives are empowered to control plundering of wrecks and to prevent disorder and obstruction of the preservation of a wrecked ship.<sup>179</sup> Anyone attempting, in a salvage officer’s view, to plunder, create disorder or prevent preservation of a wrecked ship may be detained by the salvage officer.

It is an offence under the Wreck Act to ‘secrete any wreck’ or deface it or remove any marks from on it or wrongfully to carry away or remove any wreck.<sup>180</sup> Fines and imprisonment of up to two years are imposed.<sup>181</sup> In respect of wrecks in the CPNP that fall within the ambit of the NHRA, the provisions of the NHRA relevant to interference with wrecks, for which permits are required,<sup>182</sup> prevail. For wrecks not covered by the NHRA, the provisions of the Wreck Act apply.

The South African Maritime Safety Authority established under the South African Maritime Safety Authority Act (“SAMSA”) is empowered to cause any wreck or any part thereof, to be raised, removed or destroyed or dealt with in a manner it deems fit, where it has not been able to contact the master or owner of the wreck. Where expenses are incurred, these may be recovered by SAMSA from the owner of the wreck.<sup>183</sup> Goods may be removed from the wreck to cover the expenses, and SAMSA may sell the wreck or detain it or goods to defray expenses.<sup>184</sup> These provisions, we believe, are not intended to apply in the case of wrecks of the kind found in the CPNP, but rather to ships that have been recently wrecked, and which SAMSA wishes to move or have moved, for safety or other reasons.<sup>185</sup> However, it is conceivable that the provisions could be interpreted to apply to wrecks of the kind in the CPNP, and therefore that SANParks must be aware of SAMSA’s powers to move wrecks, and to charge the owner for the removal.<sup>186</sup>

The obligations of SANParks in respect of the wrecks in the CPNP can be summarised as follows:

<b>Activity</b>	<b><i>Wrecks that fall within the ambit of the NHRA: Applicable provisions include:</i></b>	<b><i>Wrecks that do not fall within the ambit of the NHRA: Applicable provisions include:</i></b>
Investigation of wreck	Section 35(1), 35(2) and 35(5) of the NHRA read with the Permit Regulations and where not inconsistent, section 11 of the Wreck	Section 11 of the Wreck Act

<sup>177</sup> Section 11.

<sup>178</sup> The methods of investigation by the salvage officer would have to comply with the provisions of the NHRA if the wreck being investigated fell within the ambit of the NHRA, and any obligations imposed by the NHRA on SANParks would have to be taken into account.

<sup>179</sup> Section 13.

<sup>180</sup> Section 14(2)(b) and (c).

<sup>181</sup> Section 22.

<sup>182</sup> Section 35 read with the Regulations promulgated in terms of Government Notice R.548 of 2 June 2000 (“the Permit Regulations”).

<sup>183</sup> Section 18(2) and (3).

<sup>184</sup> Section 18(4).

<sup>185</sup> Section 18(1), which refers to ‘when a ship is wrecked’ and makes reference to contacting the owner or master of the ship to move the ship, supports this interpretation.

<sup>186</sup> The provisions of the NHRA relevant to the moving of wrecks would be applicable to those wrecks that fall within the NHRA’s ambit, and the permit and other requirements of that Act would have to be adhered to by the Authority when moving a wreck.

	Act.	
Plundering, creating disorder or obstructing preservation of a wreck	Sections 35(1), 35(2), 35(4)(a), (b) and (d), 35(5), 35(6) of the NHRA read with the Permit Regulations and, where not inconsistent, section 13 of the Wreck Act.	Section 13 of the Wreck Act
Interfering with a wreck	Section 35(1), 35(2), 35(4)(a), (b) and (d), 35(5), 35(6) of the NHRA read with the Permit Regulations and where not inconsistent, section 14 of the Wreck Act.	Section 14 of the Wreck Act
Moving and performing activities that the Authority may specify in respect of a wreck	Section 35(1), 35(2), 35(4)(a), (b) and (d), 35(5), 35(6) of the NHRA read with the Permit Regulations and where not inconsistent, section 18 of the Wreck Act.	Section 18 of the Wreck Act

**Rights and obligations for inclusion in the heritage resource management protocols**

The Wreck Act applies to shipwrecks within the boundaries of the CPNP or the territorial waters to the extent that the provisions are not inconsistent with the provisions of the NHRA and to the extent applicable.

**Obligations imposed upon SANParks:**

- not to obstruct any investigation undertaken in respect of a wreck in the CPNP;
- not to plunder, create disorder or prevent preservation of a wreck within the CPNP; and
- not to secrete any wreck or deface it or remove any marks from it or wrongfully carry away or remove any wreck (only applicable where the provisions of the NHRA do not apply).

## 6.2 Commonwealth War Graves Act

### 6.2.1 Background and application

The Commonwealth War Graves Act<sup>187</sup> (“the Commonwealth Act”) protects Commonwealth war graves, which comprise all graves, tombstones, monuments and memorials connected with Commonwealth war burials.<sup>188</sup> To the extent that any of the graves in the CPNP are Commonwealth war graves,<sup>189</sup> therefore, the Commonwealth Act is applicable to them.

The NHRA also contains provisions in respect of graves and burial grounds that are deemed to be heritage resources.<sup>190</sup> The NHRA expressly excludes from its definition of ‘graves of victims of conflict’, graves protected under the Commonwealth Act. However, in addition to protecting graves of victims of conflict, the NHRA protects all graves older than 60 which are situated outside of formal cemeteries administered by a local authority and all graves which it

<sup>187</sup> 8 of 1992.

<sup>188</sup> A Commonwealth war burial is a burials of “any member of the naval, military or air forces of the Commonwealth who died as a result of injuries sustained or illnesses contracted in the course of active duty during the First World War or Second World War”.

<sup>189</sup> We have not been instructed about the nature of the graves in the CPNP.

<sup>190</sup> Section 36 of the NHRA read with the Permit Regulations.

deems to be of cultural significance. Commonwealth war graves within the CPNP which are older than 60 and/or deemed to be of cultural significance may therefore fall both within the ambit of the Commonwealth Act and the NHRA.

Because the NHRA has not repealed the Commonwealth Act, the NHRA prevails over the Commonwealth Act to the extent that provisions of the Commonwealth Act are in conflict with provisions of the NHRA.<sup>191</sup> Thus if any of the graves within the CPNP are identified as Commonwealth war graves, the Commonwealth Act will apply. If they are shown also to fall within the ambit of the NHRA, both the Commonwealth Act and the NHRA will apply, but the provisions of the Commonwealth Act will apply only to the extent that they are not in conflict with the provisions of the NHRA.<sup>192</sup>

## 6.2.2 Obligations of SANParks

The Commonwealth Act creates imposes a prohibition against the desecration, damaging or destruction of Commonwealth war graves.<sup>193</sup> In the case of Commonwealth war graves that are also protected by the NHRA, this prohibition will be weakened by the provisions of the NHRA<sup>194</sup> which allow for the destruction and damaging of graves and burial grounds in certain circumstances where a permit has been obtained. SANParks is therefore obliged to take cognisance of the provisions of Commonwealth Act and the NHRA where applicable, before undertaking action that may desecrate, damage or destroy a Commonwealth grave.

An owner of land on which a Commonwealth war grave is situated or the controller of a burial place, may not 'disinter, remove, reinter or cremate' a Commonwealth war burial or remove or alter a Commonwealth war grave, unless it has notified the Commonwealth War Graves Commission ("the Commission") in writing by registered letter, of the proposed action at least three months before the action is contemplated.<sup>195</sup> The provisions of the NHRA<sup>196</sup> would also be applicable to such action in the case of graves protected by that Act. SANParks, if owner or controller of land on which Commonwealth graves are situated, must therefore inform<sup>197</sup> the Commission before undertaking activities of this kind.

The Commission may, subject to the provisions of any other law, authorise people to enter upon land or premises on which a Commonwealth war grave is situated to inspect, repair or maintain the grave.<sup>198</sup> SANParks may not, therefore, prevent an authorised party from entering the CPNP to carry out such work.

The Commission may, with agreement of SANParks, construct or maintain an access road to any Commonwealth grave and construct fences, walls or gates on, across or next to the road.<sup>199</sup>

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<sup>191</sup> The presumption of statutory interpretation relevant where two statutes in force cover the same or similar subject matter, that the newer act prevails to the extent of any consistency, applies.

<sup>192</sup> For specific examples of conflict between the provisions of the NHRA and the Commonwealth Act, refer to 10.2 below.

<sup>193</sup> Section 2.

<sup>194</sup> Section 36(3).

<sup>195</sup> Section 3(1).

<sup>196</sup> Section 36(3), (4) and (5).

<sup>197</sup> The notice to the Commission must describe the intended action, indicate where the burial or grave concerned is situated and state an address where written objections against the proposed action can be lodged (section 3(2)). The owner of controller of the land must consider all written objections and notify the Commission of its decision in respect of the action (section 3(3)).

<sup>198</sup> Section 4.

<sup>199</sup> Section 5(b).

A fine or imprisonment for a period not exceeding 12 months is imposed for contravention of all provisions of the Commonwealth Act.<sup>200</sup>

### 6.2.3 Rights of SANParks

SANParks as owner or controller of land on which Commonwealth graves may be situated, has certain rights.

Although obliged to inform the Commission that it intends taking action, SANParks may make the final decision in respect of disinterring, removing, reintering or cremating a Commonwealth war burial or removing or altering a Commonwealth war grave, provided it has considered any objections to the proposed action.<sup>201</sup>

SANParks may enter into agreements with the Commission to the effect that the Commission acquires a right to repair or maintain a Commonwealth war grave, or that SANParks repairs or maintains the grave.<sup>202</sup>

#### Rights and obligations for inclusion in the heritage resource management protocols

The Commonwealth Act applies to any Commonwealth War Graves within the CPNP, to the extent applicable, and where not in conflict with the provisions of the NHRA.

#### Obligations of SANParks:

- not to desecrate, damage or destroy any Commonwealth war grave within the CPNP or, where the NHRA is applicable, to do so only in terms of a permit under the NHRA;
- to notify the Commonwealth War Graves Commission before disinterring, removing, reintering or cremating a Commonwealth War Burial or removing or altering a Commonwealth War Grave (although SANParks may make the final decision in respect of the action).

## 6.3 Rhodes Will (Groote Schuur Devolution) Act

### 6.3.1 Background and application

In terms of the Rhodes Will (Groote Schuur Devolution) Act,<sup>203</sup> (“the Rhodes Will Act”), the property known as the Groote Schuur Estates, on which Rhodes Memorial is situated, was given to the State pursuant to the will of Cecil John Rhodes. The Act provides for the control and development of the Groote Schuur Estates by the State in accordance with the instructions in Rhodes’ will.

Recourse must therefore be had by SANParks<sup>204</sup> to the Rhodes Will Act when dealing with any part of the Groote Schuur Estates that falls within the CPNP, including Rhodes Memorial.

<sup>200</sup> Section 6.

<sup>201</sup> Section 3(3).

<sup>202</sup> Section 5(a).

<sup>203</sup> 9 of 1910.

<sup>204</sup> SANParks, as an organ of state, is entitled to manage any part of Groote Schuur Estates that falls within the CPNP.

## Obligations imposed upon SANParks

Rhodes specified in his will that no part of Groote Schuur Estates could be sold, let or alienated. All buildings erected on the property must be used exclusively “for public purposes” and must be in the style of architecture “similar to or in harmony with” what was Rhodes’ residence, ‘De Groote Schuur’. Servitudes, tenancies, rights, privileges and concessions granted by Rhodes and his trustees in respect of the property remain of full force and effect. Thus SANParks must be aware that any part of the CPNP which comprises Groote Schuur Estates would be subject to the above restrictions, and may be encumbered by a right granted by Rhodes or the trustees of his estate.

The Rhodes Will Act also contains some provisions in respect of specific objects within Groote Schuur Estates, including the grave of Jan Hendrik Hofmeyer, which must be protected and access thereto permitted at all reasonable times to members of the Hofmeyer family, and Rhodes Memorial.

Rhodes Memorial must, in terms of the Act, be properly and efficiently maintained and preserved and there must at all times, be a right of public access to it, subject to any regulations which the State might make.<sup>205</sup> When dealing with the Rhodes Memorial, therefore, SANParks must be aware that under the Rhodes Will Act, and in addition to any other obligations imposed by any other legislation such as the NHRA, it may not sell, let or alienate any part of it, and must maintain and preserve it, and not inhibit public access to it.

### **Rights and obligations for inclusion in the heritage resource management protocols**

The Rhodes Will Act applies to all property within the CPNP which was part of the Groote Schuur Estate as defined in the Will of Cecil John Rhodes.

#### **Obligations of SANParks:**

- not to sell, let or alienate any part of the property that falls within what was Groote Schuur Estate; and
- properly and efficiently to maintain and preserve the Rhodes Memorial and at all times grant a right of public access to it.

## **6.4 Defence Endowment Property and Account Act**

### **6.4.1 Background and application**

Under the Defence Empowerment Property and Account Act (“the Defence Act”),<sup>206</sup> the Union Government was empowered to take over certain military land and buildings (“defence endowment property”)<sup>207</sup> and certain admiralty lands from the British Government and to hold, use and conserve them for defence purposes.

Amendments to the Defence Act allow the Minister of Defence, where he or she is of the opinion that any defence endowment property is not required or likely to be required for the purposes of the South African Defence Force, to enter into arrangements in respect of the property, including reserving parts of it for use by a state department, selling or leasing it, or

<sup>205</sup> Schedule 2 .

<sup>206</sup> 33 of 1922.

<sup>207</sup> Listed in the Schedule to the Act.

granting rights over it.<sup>208</sup> If the Minister of Defence has exercised his powers under the Act, therefore, parts of the defence endowment property may no longer be under State control, and/or may be subject to restrictions. Any part of the defence endowment property that falls within the CPNP will be subject to the provisions of the Defence Act and/or of any agreement entered into by the Minister of Defence or any other party in respect of that property.

## 6.4.2 Obligations imposed upon SANParks

SANParks will have to establish from the Department of Defence, which parts, if any, of the defence endowment property described in the schedule to the Act, fall within the CPNP, and will have to adhere to the provisions of the Defence Act and/or any other agreements in respect of the property, when dealing with such property. We have not been furnished with a list of defence endowment properties within the CPNP, nor with copies of leases or agreements that exist in relation to such properties, if any, and cannot therefore comment in any more detail on the obligations imposed on SANParks.

### Rights and obligations for inclusion in the heritage resource management protocols

The Defence Act applies to any parts of the “defence endowment property” within the CPNP.

#### Obligations of SANParks:

- to establish from the Department of Defence the status of such defence endowment property and adhere to the provisions of the Act and/or any other agreements entered into in respect of the property.

## 6.5 World Heritage Convention Act

### 6.5.1 Background and application

The World Heritage Convention Act<sup>209</sup> incorporates the World Heritage Convention (“the Convention”) into South African domestic law and regulates a number of matters related to the Convention, including the recognition, establishment and management of World Heritage Sites.<sup>210</sup>

A South African world heritage site may be declared in one of two ways.<sup>211</sup> It may be proclaimed by the Minister of Environmental Affairs and Tourism (“the Minister”) to be a world heritage site after being declared as such under the Convention. Alternatively, it may be proclaimed by the Minister, after consultation with various parties, to be a ‘special heritage site’, which is to be managed in accordance with the provisions of the Act relating to world heritage sites.<sup>212</sup>

<sup>208</sup> Section 3(2) and 3(2)*bis*.

<sup>209</sup> 49 of 1999.

<sup>210</sup> Long title to the Act.

<sup>211</sup> Definition of “World Heritage Site” in the Act.

<sup>212</sup> All references in the Act to World Heritage Sites, should therefore, to the extent applicable, be read to include a reference to special heritage sites.

Among other things, the Act imposes obligations on authorities in respect of the protection, promotion and sustainable development of world heritage sites.

## 6.5.2 Obligations imposed upon SANParks

To date, no World Heritage Sites have been proclaimed within the CPNP, however, we are instructed that an application for declaration of part of the CPNP as a Heritage Site is pending. No special heritage sites have been declared in the CPNP.

In respect of any World Heritage Sites or special heritage sites that are declared within the CPNP, SANParks must be aware of the objects of the Act,<sup>213</sup> which include:

- to promote, manage, oversee, market and facilitate tourism and related development in connection with World Heritage Sites in accordance with applicable law, the Convention and the operational guidelines for the implementation of the Convention (“the Operational Guidelines”), so as to maintain the cultural and ecological integrity of the sites;
- to ensure that the cultural and natural heritage of South Africa is protected, conserved and represented;
- to encourage investment, innovation and job creation in connection with World Heritage Sites;
- to promote the development of sustainable projects in connection with World Heritage Sites; and
- to promote empowerment and advancement of historically disadvantaged people in projects related to World Heritage Sites.

The Act contains a number of principles which are applicable to the actions of all organs of state and authorities<sup>214</sup> in relation to World Heritage Sites.<sup>215</sup> The principles should be read in conjunction with principles contained in other legislation relevant to the environment, including those in the NHRA and NEMA.<sup>216</sup> Relevant to the actions of SANParks in respect of any World Heritage Sites or special heritage sites are principles including that:

- development must be socially, culturally, environmentally and economically sustainable;<sup>217</sup>
- equitable access to sites must be pursued and special measures taken to ensure access by historically disadvantaged people;
- decisions must take into account the interests, needs and values of interested and affected parties;
- the social, economic, cultural and natural heritage consequences of activities, including disadvantages and advantages, must be considered;

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<sup>213</sup> Section 3. Some of the objects are translated into duties imposed on organs of state or Authorities under the Act, discussed further below.

<sup>214</sup> SANParks may be both an organ of state and an ‘Authority’ under the Act, if declared by the Minister of Environmental Affairs and Tourism to be an Authority. The duties of Authorities are discussed below.

<sup>215</sup> Section 4.

<sup>216</sup> In the event of conflict between the principles contained in the NHRA, NEMA or other legislation, and those in the World Heritage Convention Act, the latter are over-riden.

<sup>217</sup> The meaning of sustainable development of World Heritage Sites is given content in section 4(2) of the Act.

- decisions must be taken in an open and transparent manner; and
- cultural and natural heritage is held in public trust for the people of South Africa and must be protected as the common heritage of the people.

The Minister may declare SANParks, as an organ of State which is already lawfully managing or involved in the management of a World Heritage Site or special heritage site in the CPNP, to be an Authority under the Act.<sup>218</sup> Instead of declaring SANParks to be an Authority, the Minister may just grant SANParks 'additional' powers and duties of the type conferred upon Authorities<sup>219</sup> in relation to a World Heritage Site or special heritage site in the CPNP.<sup>220</sup>

The Act provides for extensive powers and duties that may be conferred upon Authorities declared under the Act.<sup>221</sup> These include the powers to:

- implement the Convention;
- conserve, manage, promote, facilitate and monitor cultural and natural heritage;
- manage cultural and natural heritage in accordance with all applicable legislation, policies and management plans;
- charge fees or other consideration for any of its functions or any rights granted; and
- undertake, or cause to be undertaken, research or investigations relevant to World Heritage Sites or special heritage sites.

Duties of Authorities include those to:

- develop measures for the cultural and environmental protection and sustainable development of World Heritage Sites and ensure that the values of the Convention are given effect to;
- promote, manage, oversee, market and facilitate tourism and related development in connection with World Heritage Sites in accordance with applicable law, the Convention and the Operational Guidelines, so as to maintain the cultural and ecological integrity of the sites;
- identify cultural and natural heritage that must be transmitted to future generations;
- take measures to protect, conserve and present cultural and natural heritage;
- take measures to encourage investment, innovation and job creation;
- establish and implement an integrated management plan; and
- be sensitive to the needs of communities living in or near World Heritage Sites.

The Minister is empowered to investigate, at any time, the performance of an Authority of its powers and duties under the Act, the Convention or the Operational Guidelines.<sup>222</sup> Boards

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<sup>218</sup> Section 8(a).

<sup>219</sup> In section 13.

<sup>220</sup> Section 8(b).

<sup>221</sup> Section 13.

<sup>222</sup> Section 12(2).

which are responsible for the oversight of Authorities, for formulating policy and for co-ordination with other Boards, may be established by the Minister under the Act.<sup>223</sup> Each Board is required to appoint an Executive Staff Component for the Authority.<sup>224</sup>

Every Authority is obliged to prepare and implement an integrated management plan (“IMP”) for the World Heritage Sites under its control and to conduct its affairs in accordance with that IMP.<sup>225</sup> Thus if SANParks is declared to be an Authority under the Act, it will have to comply with this requirement. The object of an IMP is to ensure the protection and management of the Site in a manner that is consistent with the objects and principles of the Act.<sup>226</sup> The Act specifies what is to be contained in each Authority’s IMP.<sup>227</sup> In preparing an IMP, an Authority must integrate and harmonise it with the requirements of the Convention and the Operational Guidelines, as well as with plans formulated under NEMA, the NHRA or other Acts relevant to heritage resources, and other planning and development plans.<sup>228</sup> IMPs must be submitted to the Minister for approval within 6 months after an Authority has been established (or a later date set by the Minister).<sup>229</sup>

SANParks must be aware that the Minister may purchase any property and reserve it for the purposes contemplated in the Act in relation to World Heritage Sites, if the purpose is in the public interest.<sup>230</sup> Expropriation of this kind could only be undertaken, however, in terms of the provisions of the Constitution and the Expropriation Act, 1975.<sup>231</sup>

Movable or immovable property may be transferred by the Minister to an Authority, to enable that Authority to perform its powers or duties or achieve its objectives under the Act.<sup>232</sup>

The finances of Authorities may be governed by Chapter VI of the Act, if the Minister declares some or all of its sections to be applicable to that Authority. Authorities may receive and raise monies from any legal source, including the charging of fees, loans, sales or contracts for goods or services.<sup>233</sup> Fairly onerous reporting procedures are imposed upon Authorities. They are required to submit annual financial plans to the Minister, not later than 30 days before the end of each financial year.<sup>234</sup> A five year financial strategic plan must be submitted not later than 30 days before the end of the Authority’s first financial year, and a revised strategic plan must be submitted each financial year.<sup>235</sup> Proper books and records of account must be kept by Authorities<sup>236</sup> and these are subject to audit by the Auditor-General.<sup>237</sup> Authorities are also required to submit to the Minister, within six months of the end of each financial year, Annual Reports.<sup>238</sup>

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<sup>223</sup> Sections 14 – 16.

<sup>224</sup> Sections 17, 19 and 20.

<sup>225</sup> Section 21.

<sup>226</sup> Section 23.

<sup>227</sup> Section 24.

<sup>228</sup> Section 22.

<sup>229</sup> Section 25.

<sup>230</sup> Section 29.

<sup>231</sup> Act 63 of 1975.

<sup>232</sup> Section 31(1).

<sup>233</sup> Section 33.

<sup>234</sup> Section 36 .

<sup>235</sup> Section 37.

<sup>236</sup> Section 39.

<sup>237</sup> Section 40.

<sup>238</sup> Section 42.

### 6.5.3 Rights of SANParks

Before the Minister declares a party to be an Authority under the Act, he or she must consult with interested parties,<sup>239</sup> which, in the case of the declaration of an Authority who dealt with World Heritage Sites or special heritage sites within the CPNP, would include SANParks. After consultation, but before declaring an Authority, the Minister must notify parties with an interest in the relevant area. SANParks therefore has the right to be consulted and notified before the Minister exercises powers in respect of declaring Authorities.

#### Rights and obligations for inclusion in the heritage resource management protocols

The Act applies to any World Heritage Site or a Special Heritage Site that is declared within the CPNP.

#### General obligations of SANParks:

- to be aware of the objects of the Act and to adhere to the principles laid down in the Act in relation to action in respect of World Heritage Sites and Special Heritage Sites; and
- to comply with the guidelines for financial management in the Act;

#### Obligations which may or may not be imposed on SANParks depending on whether SANParks is declared to be an "Authority" under the Act or whether SANParks is given additional powers and duties under the Act:

- to develop measures for the cultural and environmental protection and sustainable development of declared sites;
- to ensure that the values of the World Heritage Convention are adhered to;
- to promote, manage, oversee, market and facilitate tourism and related development in connection with declared sites;
- to identify cultural and natural heritage that must be transmitted to future generations;
- to take measures to protect, conserve and present cultural or natural heritage, and to encourage investment, innovation and job creation;
- to establish and implement an integrated management plan in respect of each declared site; and
- to be sensitive to the needs of communities living in or near any declared site.

## **7. LEGISLATION RELEVANT TO HERITAGE RESOURCES GENERALLY, BUT WHICH MAY NOT IMPOSE OBLIGATIONS ON SANPARKS**

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<sup>239</sup> Section 7.

## **7.1 National Heritage Council Act**

The National Heritage Council Act<sup>240</sup> (“the NHCA”) establishes the National Heritage Council (“the Council”) which has the objects of:

- developing, promoting and protecting the national heritage for future generations;
- co-ordinating heritage management;
- protecting, promoting and preserving the content and heritage in orature;
- integrating living heritage with the functions and activities of the Council and all other heritage authorities and institutions at national, provincial and local level;
- promoting and protecting indigenous knowledge systems; and
- intensifying support for the promotion of the history and culture of all South Africa’s peoples, particularly that of slaves.

The objects of the Council overlap with those of SAHRA. Its functions also are similar to those of the SAHRA Council. No mention is made, however, in the NHCA of the Council’s relationship either to SAHRA or the SAHRA Council. The objects of the Council are broader than either SAHRA’s or the SAHRA Council’s, because the Council protects the national heritage, which encompasses the national estate and national heritage resources, over which SAHRA and the SAHRA Council have jurisdiction.

No obligations are created for SANParks in respect of the CPNP under the NHCA.

## **7.2 Cultural Institutions Act**

The Cultural Institutions Act<sup>241</sup> provides, among other things, for the declaration of certain institutions as cultural institutions and for the payment of subsidies to those institutions.

A ‘cultural institution’ is not defined in the Act, but cultural institutions currently declared under the legislation include museums, scientific research institutes and art galleries. None of the institutions declared under previous legislation<sup>242</sup> is situated within the CPNP, and it appears unlikely that any property within the CPNP will be declared to be a cultural institution under the Act.

## **8. COMPATIBILITY OF THE CPNP MANAGEMENT POLICY, MANAGEMENT PLAN AND PRACTICES IN RESPECT OF HERITAGE RESOURCES WITH HERITAGE RESOURCES LEGISLATION**

We are provided with the CPNP Management Policy 2000 and Strategic Management Plan 2000 – 2004. We are not instructed about the actual practices of SANParks officials within the CPNP, including the extent to which they are consistent with the Management Policy and Strategic Management Plan.

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<sup>240</sup> 11 of 1999.

<sup>241</sup> 119 of 1998.

<sup>242</sup> Which includes in the Western Cape, the Robben Island Museum.

## **8.1 The Management Policy**

The guiding principle relevant to ‘common heritage’ within the CPNP, expressed in the Management Policy, that CPNP management is to safeguard heritage resources as a common heritage and national asset for all South Africans, is consistent the principles and objects of the NHRA and NEMA. Similarly, Objective 1c) of Goal 1 of Policy Theme 1 reflects the objects and principles of the NHRA, NEMA, the ECA and the World Heritage Convention Act. Policy Theme 4, which is concerned only with cultural heritage, is consistent with the provisions of the NHRA. Practice that is in accordance with the above principle, objective and theme will therefore conform to what is required by legislation.

## **8.2 The Strategic Management Plan**

The section on cultural heritage resources management prioritises the identification and protection of heritage resources within the CPNP, and is consistent with the provisions of the NHRA and other legislation that protects heritage resources. Practice in accordance with the identified goals and strategies will therefore accord with relevant legislation.

## **9. LEGISLATION POTENTIALLY IN CONFLICT WITH OBLIGATIONS IMPOSED UNDER THE NHRA AND OTHER HERITAGE RESOURCE LEGISLATION AND SANPARKS PRACTICE**

### **9.1 The Conservation of Agricultural Resources Act**

The Conservation of Agricultural Resources Act (“CARA”)<sup>243</sup> and the regulations promulgated under it,<sup>244</sup> dealt with in detail in the February 2000 Legal Review,<sup>245</sup> provide for the conservation of natural agricultural resources by, among other things, the combating of invader plant species, which are identified in the regulations. This provides a potential conflict for SANParks, which, under the NHRA, the World Heritage Convention Act or other pieces of legislation protecting heritage resources, now or in the future, may be required to protect invader plants that are deemed to be, or be part of, heritage resources. Thus, under the NHRA, for example, an area declared to be a heritage site or a provisionally protected place may not be damaged, altered or interfered with other than in terms of a permit from the relevant heritage resources authority, who will have to be convinced of the necessity of the action. If such site or place, however, contains plants that are considered to be invaders under CARA, SANParks will be in breach of the provisions of CARA if it fails to take the necessary steps to remove the plants in a manner directed by CARA. We do not know which of the identified invaders are both present in the CPNP and constitute heritage resources.

### **9.2 The National Environmental Management: Biodiversity Bill**

The National Environmental Management: Biodiversity Bill, now in its eighth draft, also contains provisions regarding alien and invasive species.<sup>246</sup> If the relevant chapter of the Bill is contained in the final Act when promulgated, SANParks will be obliged to comply with its provisions when dealing with alien and invasive species within the CPNP, and may, for

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<sup>243</sup> Act 43 of 1983.

<sup>244</sup> Government Notice No. R1048 of 25 May 1984 as amended by Government Notice No. R.2687 of 6 December 1985.

<sup>245</sup> At pages 77-79.

<sup>246</sup> Chapter 6. ‘Alien species’ are those that are not indigenous, or are indigenous but have been translocated or are intended to be translocated by humans to a place outside of their natural distribution range in nature. ‘Invasive species’ are those whose establishment and spread outside of their natural distribution range threatens ecosystems, habitats or other species or has the potential to do so and may result in economic or environmental harm or harm to human health.

example, require a permit to retain an alien or invasive tree within the CPNP. If a particular plant is declared to be both a heritage resource under the NHRA or other legislation, and is considered to be alien or invasive under the biodiversity legislation, SANParks may be violating the provisions of the biodiversity legislation by retaining such plant without a permit, but would violate the provisions of the heritage protection legislation if it removed the plant without a permit.

There are conflicting pieces of legislation, therefore, to which SANParks is subject in its operations in the CPNP. It is suggested that an inventory be compiled of the plants within the CPNP which are both alien, invader or invasive plants under CARA and the Biodiversity Bill, and heritage resources or potential heritage resources under the NHRA or other heritage resource legislation. The conflict between the statutory provisions should be drawn to the attention of the relevant heritage resources authority and conservation committee under CARA, who will be able to provide SANParks with a directive in respect of how the plants should be dealt with.

## **10. IDENTIFICATION OF INCONSISTENCIES, OVERLAP AND GAPS IN THE LEGISLATIVE FRAMEWORK**

The review of all legislation relevant to heritage resources within the CPNP has revealed a number of inconsistencies between and overlap of legislative provisions, as well as gaps in the legislative framework.

### **10.1 Within the NHRA**

In parts, the NHRA is difficult to interpret because it lacks internal consistency and contains a number of ambiguities.

- A striking example is to be found in the definition of 'heritage resource' and corresponding provisions about protection. A 'heritage resource' is defined as 'a place or object of cultural significance'.<sup>247</sup> A later reference to heritage resources is both circular and vague – in section 3, the national estate is defined to include 'those heritage resources of South Africa which are of cultural significance' or which are of 'other special value for the present community and for future generations'.<sup>248</sup>
- In the chapter on the Protection and Management of Heritage Resources,<sup>249</sup> reference is made to heritage resources 'under the control' of heritage resources authorities, about which the heritage resources authorities may make regulations for certain matters.<sup>250</sup> It is not made explicit, however, when and by whom, a heritage resource is deemed to be under an authority's control, and it is accordingly not clear in respect of which heritage resources regulations may be made.
- Public monuments and memorials are said to be afforded the protection afforded heritage resources listed on provincial heritage registers, and nothing more is said about their protection.<sup>251</sup> However, some of the protections afforded to heritage resources on

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<sup>247</sup> Section 2.

<sup>248</sup> 'Special value' is not defined.

<sup>249</sup> Chapter II.

<sup>250</sup> Section 27(19).

<sup>251</sup> Section 37.

provincial heritage registers are not applicable to public monuments or memorials, and accordingly are meaningless in that context, resulting in weaker protection of monuments and memorials than is afforded other specific heritage resources.

- A lacuna in the NHRA is found in respect of the development of protected areas, where consultation with SAHRA or the relevant provincial heritage resources authority is required,<sup>252</sup> but the Permit Regulations<sup>253</sup> make reference only to consultation with SAHRA, and are silent with respect to consultations with provincial heritage resources authorities. Similarly, while application must be made to provincial heritage resources authorities when a reproduction of a provincial heritage site is to be made, the Permit Regulations do not deal with such application.
- Another legal vacuum exists because of the finite categories of objects in respect of which provision is made for protection. It is perceivable that a heritage resource may be included on a heritage register because it is deemed by a provincial heritage resources authority or local authority to be conservation-worthy.<sup>254</sup> But, because that resource does not fall into a category of resources for which specific provision is made in the NHRA or Permit Regulations for protection, if provincial or local heritage resources authorities do not make adequate provision for its protection, it may not be afforded protection equivalent to that afforded other, formally and generally protected heritage resources.<sup>255</sup>

## **10.2 Between legislative provisions**

Both the NHRA and the Commonwealth Act impose obligations on parties to protect graves under their ownership or within their control.<sup>256</sup> It appears that Commonwealth war graves within the CPNP which are older than 60 and/or are deemed to be of cultural significance, fall within the ambit of both Acts. However, under the NHRA<sup>257</sup> SAHRA is only responsible for conserving and caring for burial grounds and graves 'where it is not the responsibility of any other authority'. It is not clear whether the existence of the Commonwealth War Graves Commission and its jurisdiction over Commonwealth war graves, ousts completely the application of the NHRA and the jurisdiction of SAHRA in respect of all Commonwealth war graves within the CPNP and elsewhere. We are of the view that SAHRA is obliged under the NHRA<sup>258</sup> to identify and record all burial grounds and graves of cultural significance within the CPNP, including Commonwealth war graves, but that because of the existence of the Commonwealth War Graves Commission, SAHRA is not responsible for the conservation of Commonwealth war graves within the CPNP. However, the jurisdiction of SAHRA is also not excluded with regard to destruction, damage, altering or disturbing of Commonwealth war graves within the CPNP which are older than 60 and which are situated outside of formal cemeteries.<sup>259</sup> When SANParks wishes to undertake such activities, it must comply with the

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<sup>252</sup> Section 28(3) of the NHRA.

<sup>253</sup> Chapter X.

<sup>254</sup> Under section 30.

<sup>255</sup> An example of such a heritage resource may be a tree with historical value. Although it would be recognised in the NHRA as being worthy of protection, neither the Act nor the Regulations make specific provision for its protection, for example for permitting requirements.

<sup>256</sup> Refer 5.2.6(c)(iii) and 0 above.

<sup>257</sup> Section 36(1).

<sup>258</sup> Section 36(2).

<sup>259</sup> Section 36(3) of the NHRA.

requirements of the NHRA and the Permit Regulations,<sup>260</sup> as well as those of the Commonwealth Act.<sup>261</sup>

The World Heritage Convention Act imposes duties on 'Authorities' declared under the Act, many of which are similar to those imposed on heritage resources authorities under the NHRA. Thus where an Authority under the World Heritage Convention Act, operating in the same jurisdiction as a heritage resources authority, has interests or views that conflict with those of a heritage resources authority established under the NHRA, tensions may arise. However, it is arguable that the views and actions of the heritage resources authorities established under the NHRA would predominate, because its fundamental principles are said, in the World Heritage Convention Act, to prevail in cases of conflict.<sup>262</sup>

### **10.3 Generally**

Until very recently (January 2003) a legal vacuum has existed due the failure, of any province to declare a provincial heritage resources authority.<sup>263</sup> The effect has been that the duties imposed upon provincial heritage resources authorities under the NHRA may not be performed at all, or may be undertaken by bodies without the requisite authority.<sup>264</sup> We are informed, however, that the Western Cape has appointed a Provincial Heritage Council and is in the process of becoming effective after and awaits the promulgation of further regulations which will enable it to perform its functions under the NHRA.

## **11. NON-STATUTORY CONSIDERATIONS RELEVANT TO HERITAGE RESOURCE MANAGEMENT**

SANParks must be aware of common law duties which may be imposed upon it in regard to the management of the heritage resources within the CPNP. A comprehensive overview of all the common law principles which are or may become relevant to SANPark's dealings with the heritage resources in the CPNP is not possible without detailed knowledge of all present and future activities within the Park. However there are a number of primary principles and concepts, many of which form part of the laws of property and delict, which may well be of relevance currently or in the future, of which SANParks is advised to take cognisance.

The February 2000 Legal Review<sup>265</sup> provides an overview of the common law in respect of the ownership and rights over land and other types of property. Certain common law remedies are available to SANParks where its ownership of land or other property, including heritage resources, within the CPNP, is interfered with. Thus, for example, SANParks may claim damages from a third party that unlawfully and intentionally or negligently damages a heritage resource within the CPNP. Applying the same principle, however, a third party might be able to hold SANParks liable for damages where he or she suffered harm as a result of wrongful and culpable conduct by SANParks within the CPNP, where a heritage resource has collapsed as a result of negligence on the part of SANParks. SANParks must also be aware of the principles of neighbour law, in terms of which it has certain obligations to and rights in respect of the owners of property adjacent to the CPNP. Thus, for example, when SANParks undertakes any development of heritage resources within the CPNP which may involve demolition or construction, it must be aware that under the law of nuisance (a

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<sup>260</sup> Refer to Annex A.

<sup>261</sup> Refer 6.2.2 above.

<sup>262</sup> Section 4 of the World Heritage Convention Act

<sup>263</sup> Refer 5.2.2above.

<sup>264</sup> Refer 5.2.2 above.

<sup>265</sup> At pages 140-144.

category of 'neighbour law'), it may not intentionally cause smoke, vibrations, noise or any other pollutant to affect the property of any of the neighbours of the CPNP. Generally, SANParks must ensure that its uses of the CPNP and everything within it, do not cause damage to others.

Another source of non-statutory obligations upon SANParks in respect of the heritage resources within the CPNP are agreements to which it is party which are of relevance, directly or indirectly, to the management of heritage resources. The February 2000 Legal Review<sup>266</sup> contains an overview and discussion of the agreements, leases and servitudes to which SANParks is a party and/or which are of relevance to the CPNP, to which SANParks must have reference in its dealings with the heritage resources within the CPNP.

## **12. INSTITUTIONAL ARRANGEMENTS**

As can be seen from this review, there are various agencies and authorities which have different, potentially overlapping, rights and obligations under legislation which addresses, directly or indirectly, the question of heritage resource management. For ease of reference, we have prepared a table reflecting those different authorities, the legislation under which they were established and, where appropriate, their primary object.

<b>Institution</b>	<b>Role</b>
SAHRA Council (Created under the NHRA)	<u>Primary object</u> To control, manage and direct the affairs of SAHRA Required to: <ul style="list-style-type: none"> <li>• advise the Minister on matters concerning heritage resources management;</li> <li>• be responsible and accountable for the implementation of the functions, powers and duties of SAHRA;</li> <li>• advise and assist SAHRA in the performance of its functions, powers and duties;</li> <li>• promote the co-ordination of policies and planning for management of the national estate at national and provincial levels; and</li> <li>• furnish the Minister with such information as the Minister may require.</li> </ul>
SAHRA (Created under the NHRA)	<u>Primary object:</u> To co-ordinate the identification and management of the national estate. Required to: <ul style="list-style-type: none"> <li>• Establish principles, standards and policy for its primary object;</li> <li>• Co-ordinate and monitor the management of the national</li> </ul>

<sup>266</sup> At pages 119-136.

Institution	Role
	<p>estate;</p> <ul style="list-style-type: none"> <li>• Identify, record and manage nationally significant heritage resources;</li> <li>• Provide assistance to bodies concerned with heritage resource management;</li> <li>• Promote and encourage public understanding and enjoyment of the national estate ;</li> <li>• Promote education and training in respect of management of the national estate;</li> <li>• Investigate on behalf of and advise the SAHRA Council on <i>inter alia</i>: the state of South Africa’s heritage resources, national policy, legislative amendments and enactments, State expenditure, education and training;</li> <li>• Establish and maintain the national heritage resources library;</li> <li>• Promote the identification and recording of the national estate; and</li> <li>• Prescribe national norms and standards for the recording of information about heritage resources.</li> </ul>
<p>Provincial heritage resources authorities  (Created under the NHRA)</p>	<p><u>Primary object:</u></p> <p>To manage Grade II heritage resources within provinces and heritage resources deemed to be provincial competences; (only Grade two or one two and three?);</p> <p>Required to:</p> <ul style="list-style-type: none"> <li>• Advise the MEC of the province on implementation of the NHRA or other legislation;</li> <li>• Promote the identification, recording and assessment of heritage resources within the province;</li> <li>• Protect and manage provincial heritage resources;</li> <li>• Notify SAHRA of heritage resources within the province of national significance and nominate such resources for national level protection;</li> <li>• Maintain data bases on heritage resources in accordance with national standards;</li> <li>• Establish policy, objectives and strategy plans for heritage resources management in the province;</li> <li>• Determine the competence of local authorities to manage heritage resources in accordance with the national system for the heritage grading of local authorities;</li> <li>• co-ordinate and monitor the performance of local authorities;</li> </ul>

Institution	Role
	<ul style="list-style-type: none"> <li>• assist local authorities to manage heritage resources.</li> </ul>
<p>Local authorities</p> <p>(Created under the Constitution and Local Government Transition Act, 1993)</p>	<p><u>Primary object</u></p> <p>Various duties under the NHRA including identifying and managing Grade III heritage resources and heritage resources which are deemed to fall within the competence of local authorities under the NHRA..</p>
<p>National Heritage Council</p> <p>(Created under the National Heritage Council Act)</p>	<p><u>Primary objects</u></p> <ul style="list-style-type: none"> <li>▪ To develop, promote and protect the national heritage for present and future generations;</li> <li>▪ to co-ordinate heritage management;</li> <li>▪ to protect, preserve and promote the content and heritage which reside in orature in order to make it accessible and dynamic;</li> <li>▪ to integrate living heritage with the functions and activities of the council and all other heritage authorities and institutions;</li> <li>▪ to promote and protect indigenous knowledge systems; and</li> <li>▪ to intensify support for the promotion of the history and culture of all South Africa's peoples.</li> </ul> <p>Required to:</p> <ul style="list-style-type: none"> <li>• advise the Minister on national policies on heritage matters and any other matter concerning heritage;</li> <li>• advise the Minister on the allocation of funding to cultural institutions;</li> <li>• investigate ways of ensuring the repatriation of South African heritage resources currently held overseas;</li> <li>• make grants to people or organisations in order to promote and develop national heritage activities and resources;</li> <li>• co-ordinate the activities of public institutions involved in heritage management in an integrated manner;</li> <li>• monitor and co-ordinate the transformation of the heritage sector;</li> <li>• consult and liaise with stakeholders on heritage matters;</li> <li>• support, nurture and develop access to institutions and programmes that promote and bring equity to heritage management;</li> <li>• promote an awareness of the history of South Africa's peoples; and</li> <li>• lobby to secure funding for heritage management and create</li> </ul>

Institution	Role
	greater public awareness of the importance of South Africa's heritage.
Commonwealth War Graves Commission  (Created under the Commonwealth War Graves Act)	<u>Primary object:</u>  To oversee the management and protection of commonwealth war graves.

### 13. CONCLUSION

The South African legislative framework contains various Acts which have either a direct or indirect bearing on heritage resource management. In addition, this matter is regulated by the common law and, to a lesser extent, by international conventions. As we have explained, the laws as they currently stand contain a number of shortcomings. These include overlaps, and gaps, and in particular, an inadequacy in that the authorities which have the primary obligation to declare and to impose management requirements on heritage resources at a provincial and local level have not yet been established.

Notwithstanding these shortcomings, the laws which we have discussed impose a wide range of obligations upon and grant a number of rights to SANParks in respect of the cultural heritage resources within the CPNP. We have identified these and, where appropriate, for ease of reference, have also summarised them.

**DATED at CAPE TOWN on this 22<sup>nd</sup> day of JULY 2002.**

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**T J WINSTANLEY**

## 14. ANNEX “A”

### Formally protected Heritage Resources

<b><i>Heritage Resource</i></b>	<b><i>Controlled activities</i></b>	<b><i>Permit or other authorisation requirements</i></b>	<b><i>Additional factors</i></b>
Heritage Site	1. Destroying, damaging, defacing, excavating, altering, removing from its original position, subdividing or changing the planning status <sup>267</sup>	<p><u>Issuing authority:</u> Relevant heritage resources authority</p> <p><u>Requirements:</u> Permit application on the official form, available from SAHRA.</p> <p><u>Information to be provided in application:</u></p> <ul style="list-style-type: none"> <li>▪ information identifying the site and the relevant planning authority;</li> <li>▪ the number and date of the notice of declaration of the site in the Government Gazette;</li> <li>▪ a statement of conservation policy for the site;</li> <li>▪ an annotated recording of the site or parts of the site to be affected by the action/s for which application is made, in accordance with SAHRA guidelines;</li> <li>▪ details of the action/s for which application is made, in accordance with SAHRA guidelines;</li> <li>▪ motivation for the proposed action/s, including supporting documentation and research, in accordance with the SAHRA guidelines;</li> <li>▪ details of cost/s of the action/s;</li> <li>▪ details, including qualifications and relevant experience, and signature/s of the person/s responsible for the action/s;</li> <li>▪ details and signature of the owner of the site;</li> <li>▪ details and signature of the applicant/s, if not the owner;</li> <li>▪ any other information required by SAHRA.</li> </ul>	Permits for work on national heritage sites will be issued only for actions to be undertaken by persons who, in accordance with SAHRA Guidelines, are suitably qualified and/or have suitable experience of the nature and cultural significance of the site and the work to be undertaken.

<sup>267</sup> Section 27(18) of the NHRA

<b>Heritage Resource</b>	<b>Controlled activities</b>	<b>Permit or other authorisation requirements</b>	<b>Additional factors</b>
Heritage Site <i>cont.</i>	2. Reproducing for profit <sup>268</sup>	<p><u>Issuing authority:</u> Relevant heritage resources authority.</p> <p><u>Requirements:</u> Permit application on the official form, available from SAHRA.</p> <p><u>In the case of an application to SAHRA, information to be provided:</u><sup>269</sup></p> <ul style="list-style-type: none"> <li>▪ information identifying the site;</li> <li>▪ the number and date of the notice of declaration of the site in the Government Gazette;</li> <li>▪ a full and accurate description of the proposed reproduction, including size, colours, materials, any wording associated with it, methods of reproduction, and a scale drawing/model or sample;</li> <li>▪ the purpose of the reproduction, estimated numbers to be made and methods of distribution;</li> <li>▪ details of the owner of the site;</li> <li>▪ the signed consent of the owner for the proposed reproduction; and</li> <li>▪ details and signature of the applicant.</li> </ul> <p>SAHRA guidelines will stipulate an application fee.</p>	
Protected areas	Damaging, disfiguring, altering, subdividing or in any other way developing any part	<p><u>Authority with whom CPNP must consult:</u> Relevant heritage resources authority</p> <p><u>Requirements:</u> Consultation with relevant heritage resources authority at least 60 days</p>	Where SAHRA is consulted, it must make its final comments and recommendations within 45 days of receipt of the information.

<sup>268</sup> Reproduction for profit includes the making and use of an image, in two or three dimensions, for the purposes of sale or lease, advertising, promotion, or decorating any product or service offered for sale or lease, or any activity for which a fee will be charged. The making of a unique, individual image by hand without the use of mechanical reproductive techniques is not deemed to be making a reproduction for profit, even if the image itself is offered to sale or lease.

<sup>269</sup> The Permit Regulations do not deal with applications to a provincial heritage resources authority to reproduce a provincial heritage site. It can probably be assumed, however, that a provincial heritage resources authority to whom an application is made, should be provided with information of the kind provided to SAHRA in respect of an application to reproduce a national heritage site.

<sup>270</sup> The Permit Regulations do not deal with consultation with a provincial heritage resources authority, but presumably the same kind of information, in the same format, as is provided to SAHRA, should be provided to a provincial heritage resources authority.

<b>Heritage Resource</b>	<b>Controlled activities</b>	<b>Permit or other authorisation requirements</b>	<b>Additional factors</b>
Protected areas <i>cont.</i>		<p>prior to the initiation of the changes.</p> <p><u>In the case of consultation with SAHRA, the following information must be supplied:</u><sup>270</sup></p> <ul style="list-style-type: none"> <li>▪ the name and location of the protected area;</li> <li>▪ the number and date of designation in the Government Gazette of the protected area;</li> <li>▪ the number and date of any regulations in the Government Gazette for the protection of the area;</li> <li>▪ details of the proposed actions or development, accompanied by sufficient plans, drawings and photographs to illustrate the effect on the protected area;</li> <li>▪ the details of the owner of the area to be developed;</li> <li>▪ the signed consent of the owner for the proposed actions or development;</li> <li>▪ comments of the local authority regarding the proposed actions or development;</li> <li>▪ the details and signature of the person/s responsible for the proposed actions or development;</li> <li>▪ any other relevant information requested by SAHRA.</li> </ul>	
Provisionally protected places	Destroying, damaging, defacing, excavating, altering, removing from its original position, subdividing or changing the planning status <sup>271</sup>	<p><u>Issuing authority:</u> Heritage resources authority or local authority responsible for the provisional protection.</p> <p><u>Requirements:</u> Permit application on the official form, available from SAHRA.</p> <p><u>Information to be provided in application:</u></p> <ul style="list-style-type: none"> <li>▪ information identifying the place and the relevant planning authority;</li> <li>▪ the number and date of the notice of declaration of the place in the Government Gazette;</li> <li>▪ a statement of conservation policy for the place;</li> </ul>	

<sup>271</sup> Section 29(10) of the NHRA

<b>Heritage Resource</b>	<b>Controlled activities</b>	<b>Permit or other authorisation requirements</b>	<b>Additional factors</b>
Provisionally protected places <i>cont.</i>		<ul style="list-style-type: none"> <li>▪ an annotated recording of the place or parts of the place to be affected by the action/s for which application is made, in accordance with SAHRA guidelines;</li> <li>▪ details of the action/s for which application is made, in accordance with SAHRA guidelines;</li> <li>▪ motivation for the proposed action/s, including supporting documentation and research, in accordance with the SAHRA guidelines;</li> <li>▪ details of cost/s of the action/s;</li> <li>▪ details, including qualifications and relevant experience, and signature/s of the person/s responsible for the action/s;</li> <li>▪ details and signature of the owner of the place;</li> <li>▪ details and signature of the applicant/s, if not the owner;</li> <li>▪ any other information required by SAHRA.</li> </ul>	
Heritage area	Altering or developing in a way that will affect a heritage area	Special consent of the relevant local authority is required. (No guidelines given in the NHRA or Regulations about how such consent should be applied for.)	<p>In assessing an application to alter or develop in a way that will affect a heritage area, the local authority must consider the significance of the area and how this could be affected by the proposed alteration or development.</p> <p>If alteration or development is undertaken without the consent of the local authority, the local authority may require the owner of the thing being altered or developed to cease work immediately, and to restore the site to its original condition within a specified period. If the owner fails to comply with the request of the local authority, the authority may undertake the work itself and recover the costs thereof from the owner.</p>

<b>Heritage Resource</b>	<b>Controlled activities</b>	<b>Permit or other authorisation requirements</b>	<b>Additional factors</b>
Heritage object	1. Destroying, damaging, disfiguring or altering or dispersing a collection or carrying out any work of restoration or repair.	<p><u>Issuing authority:</u> SAHRA or duly authorised representative of SAHRA.</p> <p><u>Requirements:</u> Permit application on the official form, available from SAHRA.</p> <p><u>Information to be provided in application:</u></p> <ul style="list-style-type: none"> <li>▪ the number and date of the notice of declaration of the object in the Government Gazette;</li> <li>▪ a precise description of the object, as listed in the Register of Heritage Objects;</li> <li>▪ the physical location of the object;</li> <li>▪ full details of the action/s for which the application is made;</li> <li>▪ motivation for the proposed action/s, including supporting documentation and research in accordance with SAHRA guidelines;</li> <li>▪ the details, including qualifications and relevant experience, and signature of the person who will be responsible for the action/s;</li> <li>▪ the details, including signature, of the owner or custodian of the object or collection;</li> <li>▪ details and signature of the applicant, if not the owner; and</li> <li>▪ any other relevant information required by SAHRA.</li> </ul>	A permit for physical work on a heritage object will be issued only if SAHRA deems the person responsible for the work to be suitably qualified to perform such actions. In the case of dispersal of a collection, the applicant must provide SAHRA with the details of the new owners or custodians.

<b>Heritage Resource</b>	<b>Controlled activities</b>	<b>Permit or other authorisation requirements</b>	<b>Additional factors</b>
	2. Exportation	<p><u>Issuing authority:</u> SAHRA.</p> <p><u>Requirements:</u> Permit application on the official form, available from SAHRA.</p> <p><u>Information to be provided in application:</u></p> <ul style="list-style-type: none"> <li>▪ the number and date of the Notice of Declaration of the heritage object in the <i>Government Gazette</i>;</li> <li>▪ the number of the object or type of object in the Register of Heritage Objects;</li> <li>▪ a precise description and scaled photographs and/or drawings of the objects, including all information necessary to assess its significance, in accordance with SAHRA guidelines;</li> <li>▪ the physical location of the object at the time of application;</li> <li>▪ the reason for export;</li> <li>▪ the name and address of the recipient of the object;</li> <li>▪ in the case of temporary export –               <ol style="list-style-type: none"> <li>(1) the period during which the object will be outside the country;</li> <li>(2) the address at which the object will be located; and</li> <li>(3) the written undertaking of the South African cultural or scientific institution that the object will be returned in good condition.</li> </ol> </li> </ul>	The Regulations prescribe conditions for export of heritage objects.

**Generally protected Heritage Resources**

<b>Heritage Resource</b>	<b>Controlled activities</b>	<b>Permit Requirements</b>	<b>Additional factors</b>
Structures <sup>272</sup>	Altering or demolishing any structure or part of a structure which is older than 60 years without a permit. <sup>273</sup>	<p><u>Issuing authority:</u> Provincial heritage resources authority</p> <p><u>Requirements:</u> Permit application on the official form, available from SAHRA.</p> <p><u>Information to be provided in application:</u></p> <ul style="list-style-type: none"> <li>▪ information identifying the structure and the relevant planning authority;</li> <li>▪ the number and date of the notice of declaration of the structure in the Government Gazette;</li> <li>▪ a statement of conservation policy for the structure;</li> <li>▪ an annotated recording of the structure or parts of the structure to be affected by the action/s for which application is made, in accordance with SAHRA guidelines;</li> <li>▪ details of the action/s for which application is made, in accordance with SAHRA guidelines;</li> <li>▪ motivation for the proposed action/s, including supporting documentation and research, in accordance with the SAHRA guidelines;</li> <li>▪ details of cost/s of the action/s;</li> <li>▪ details, including qualifications and relevant experience, and signature/s of the person/s responsible for the action/s;</li> <li>▪ details and signature of the owner of the structure;</li> <li>▪ details and signature of the applicant/s, if not the owner;</li> <li>▪ any other information required by SAHRA.</li> </ul>	Within 3 months of a refusal to issue a permit, the relevant provincial heritage resources authority must give consideration to formally protecting the structure concerned under Part 1 of Chapter 2 of the Act.

<sup>272</sup> A structure is “any building, works, device or other facility made by people and which is fixed to land, and includes any fixtures, fittings and equipment associated therewith” (section 2).

<b>Heritage Resource</b>	<b>Controlled activities</b>	<b>Permit Requirements</b>	<b>Additional factors</b>
Archaeology, <sup>274</sup> palaeontology <sup>275</sup> and meteorites <sup>276</sup> (whether provisionally or formally protected) (Wrecks dealt with separately below)	Finding of objects.  Destroying, damaging, excavating, altering, defacing or otherwise disturbing, removing from its original position, owning collecting. Bringing onto or use at an archaeological or palaeontological site, any excavation equipment, or any equipment to assist in the detection or recovery of metals or archaeological or palaeontological	<p><u>Requirements:</u>                      Immediate reporting of finding to the responsible heritage resources authority, the nearest local authority or museum.</p> <p><u>Issuing authority:</u>                      Relevant heritage resources authority</p> <p><u>Requirements:</u>                      Permit application on the official form, available from SAHRA.</p> <p><u>Information to be provided in application:</u></p> <ul style="list-style-type: none"> <li>▪ the number and date of the notice of declaration as a heritage resource in the Government Gazette;</li> <li>▪ the geographical position of the site, including latitude and longitude, farm or erf number, nearest town or city and magisterial district;</li> <li>▪ a short description of the site, including the type and approximate date, in accordance with the SAHRA Guidelines;</li> <li>▪ full details of the action/s for which application is made;</li> <li>▪ a brief motivation for the actions;</li> <li>▪ where relevant, a brief motivation for the use of equipment;</li> </ul>	<p>Permits for archaeological and palaeontological work will be issued only to persons whom SAHRA deem to be qualified archaeologists or palaeontologists and who have the appropriate expertise.</p> <p>Permits to destroy archaeological or palaeontological sites in the course of earthmoving or development will be issued only after a survey has been done by a qualified archaeologist or palaeontologist and sites have been sampled to the satisfaction of SAHRA.</p> <p>Permits to destroy, damage, excavate, alter or remove meteorites will be given only to persons working in collaboration with an approved scientific institution.</p> <p>Standards of practice for excavation and removal are prescribed by the Regulations. For example, a permit holder is responsible at all times for the</p>

<sup>273</sup> Section 34.

<sup>274</sup> “‘Archaeological’ means -

(a) material remains resulting from human activity which are in a state of disuse and are in or on land and which are older than 100 years, including artefacts, human and hominid remains and artificial features and structures;

(b) rock art, being any form of painting, engraving or other graphic representation on a fixed rock surface or loose rock or stone, which was executed by human agency and which is older than 100 years, including any area within 10m of such representation;

(c) wrecks, being any vessel or aircraft, or any part thereof, which was wrecked in South Africa, whether on land, in the internal waters, the territorial waters or in the maritime culture zone of the Republic, as defined respectively in sections 3, 4 and 6 of the Maritime Zones Act, 1994 (Act 15 of 1994), and any cargo, debris or artefacts found or associated therewith, which is older than 60 years or which SAHRA considers to be worthy of conservation; and

(d) features, structures and artefacts associated with military history which are older than 75 years and the sites on which they are found”

<sup>275</sup> “‘palaeontological’ means any fossilised remains or fossil trace of animals or plants which lived in the geological past, other than fossil fuels or fossiliferous rock intended for industrial use, and any site which contains such fossilised remains or trace”.

<sup>276</sup> “‘meteorite’ means any naturally-occurring object of extraterrestrial origin”.

<b>Heritage Resource</b>	<b>Controlled activities</b>	<b>Permit Requirements</b>	<b>Additional factors</b>
	<p>materials or objects, or using such equipment for the recovery of meteorites.</p>	<ul style="list-style-type: none"> <li>▪ the period for which the permit is required;</li> <li>▪ details, including qualifications and relevant experience, and signature of the applicant;</li> <li>▪ the name and address of the collaborating institution in the Republic;</li> <li>▪ the signature of the head of department or institution where the applicants will be based while undertaking the project;</li> <li>▪ the name and address of the South African institution that will curate the material recovered, and signature of the relevant head;</li> <li>▪ any other information required by SAHRA.</li> </ul>	<p>excavation work and the objects recovered and they or their representative must at all times, be present during the excavation and removal.</p> <p>To safeguard meteorites and archaeological and palaeontological sites and artefacts, the permit holder must:</p> <ul style="list-style-type: none"> <li>▪ supervise all excavations, castings, removals, sieving and so, removals, sieving and sorting;</li> <li>▪ in the case of archaeological deposits, excavate or remove no more than half of the original deposits or objects, unless the site or object is likely to be destroyed by development or special permission has been obtained from SAHRA;</li> <li>▪ in the case of archaeological or palaeontological excavations, make a detailed photographic record of the site and work in progress and take photographs of any significant artefacts and/or fossils, trace fossils or trackways covered in situ;</li> <li>▪ draw an accurate measured drawing of the site on which the positions of all excavations and significant fossils, artefacts and features are marked;</li> <li>▪ trace any rock paintings or engravings before removal and note the positions, colours, dimensions and other features of the drawings, paintings or engravings;</li> <li>▪ make a carbon rubbing or cast, in an acceptable material, of an engraving only if it is likely to be damaged or destroyed unavoidably;</li> <li>▪ make a detailed record of any graffiti before removal from a painted or engraved surface or site;</li> <li>▪ leave the site neat and tidy during and after</li> </ul>

<b>Heritage Resource</b>	<b>Controlled activities</b>	<b>Permit Requirements</b>	<b>Additional factors</b>
	<p>Trading in, selling for private gain, exporting, attempting to export</p>	<p><u>Requirements:</u> Permit application on the official form, available from SAHRA.</p> <p><u>The following information is required:</u></p> <ul style="list-style-type: none"> <li>▪ the number and date of the notice of declaration of the heritage object;</li> <li>▪ a precise description and scaled photographs and/or drawings of the object, including all information necessary to assess its significance, in</li> </ul>	<p>an excavation and fill in the excavation or stabilise the sections, unless written exemption has been granted by SAHRA;</p> <ul style="list-style-type: none"> <li>▪ treat all human remains with respect; and</li> <li>▪ remain aware of the non-renewable nature of archaeological and palaeontological sites and material and not remove them from their original position unnecessarily.</li> </ul> <p>The Regulations also prescribe standards of curation for the institutional organisation that will be curating and storing the archaeological or palaeontological material or objects or meteorite.</p> <p>Every permit holder for the collection of meteorites or palaeontological work must submit an annual report to SAHRA listing the name and geographical location of sites from which meteorites or fossils were collected during the year, with a brief description of the specimens recovered and the name of the institution curating them.</p> <p>Within a year of the expiry of a permit, the permit holder must submit to SAHRA a report concerning the excavation or removal and containing information and illustrations as provided for in the Regulations.</p> <p>The Regulations prescribe detailed conditions in respect of temporary and permanent export of objects. Permits for bona fide archaeological, palaeontological or meteorite research by qualified South African citizens or permanent residents will be issued free of charge.</p>

<b>Heritage Resource</b>	<b>Controlled activities</b>	<b>Permit Requirements</b>	<b>Additional factors</b>
		<p>accordance with the SAHRA Guidelines;</p> <ul style="list-style-type: none"> <li>▪ the physical location of the object at the time of application;</li> <li>▪ the reason for export;</li> <li>▪ the name and address of the recipient of the object;</li> <li>▪ in the case of temporary export, the period which the object will be outside the country, the address at which the object will be located and a written undertaking of a South African cultural or scientific institution that the object will be returned in good condition.</li> </ul>	
<p>Wrecks</p>	<p>Destroying, damaging, excavating, altering, defacing or otherwise disturbing any wreck site or destroying, damaging, excavating or removing from its original position, collecting or owning and wreck material or object or bringing onto or using at a wreck site, any excavation equipment or any equipment that assists in the detection or recovery of metals or wreck material or objects.</p>	<p><u>Issuing authority:</u> SAHRA.</p> <p><u>Requirements:</u> Permit application on the official form, available from SAHRA.</p> <p><u>Information to be provided in application:</u></p> <ul style="list-style-type: none"> <li>▪ the presumed name of the vessel and date of the wreck, accurate geographical co-ordinates of the site and the name of the nearest port;</li> <li>▪ the details of the collaborating institution;</li> <li>▪ a signed undertaking to collaborate on the project from the head of the collaborating institution;</li> <li>▪ a draft agreement between the applicant and the collaborating institution regarding the disposal of any objects recovered from the wreck and any proposed division of such objects between the applicant and the collaborating institution;</li> <li>▪ a comprehensive written motivation for the project, including the research motivation and the information listed in the SAHRA guidelines;</li> <li>▪ an estimate of the cost of the project;</li> <li>▪ the source of funds for the project and the name and address of the person, company or agency providing the funding;</li> <li>▪ the address of the place where any objects will be housed and/or conserved upon recovery from the wreck;</li> <li>▪ in the case of a wreck deemed by SAHRA to be significant or a wreck older than 150, the details including qualifications and relevant experience and signature of the maritime archaeologist or archaeologist who will work on the project;</li> </ul>	<p>SAHRA must circulate the application for comment to members of its review committee, the relevant SAHRA regional manager, the collaborating institution and the Southern African Association of Archaeologists.</p> <p>To safeguard the integrity of wreck sites and objects, when considering an application SAHRA must take into account:</p> <ul style="list-style-type: none"> <li>(a) archaeological principles and practice; and</li> <li>(b) the benefits in terms of <i>bona fide</i> research.</li> </ul> <p>Comments from interested parties will be invited by SAHRA in respect of the proposed project. A permit may be issued by SAHRA three weeks after the date on which comments from interested parties is invited.</p> <p>A permit will be valid for a maximum of three years.</p> <p>Permits may be issued in two phases:</p> <ul style="list-style-type: none"> <li>(a) a pre-disturbance permit in terms of which the applicant is required to conduct a pre-disturbance of the wreck site; and</li> <li>(b) an excavation permit.</li> </ul>

<b>Heritage Resource</b>	<b>Controlled activities</b>	<b>Permit Requirements</b>	<b>Additional factors</b>
		<ul style="list-style-type: none"> <li>▪ the names and identity numbers of all divers taking part in the project;</li> <li>▪ the details including qualification and relevant experience and signature of the applicant;</li> <li>▪ a copy of the applicant's salvage licence from the Department of Finance: Customs and Excise;</li> <li>▪ the numbers and dates of any other wreck permits currently and previously issued to the applicant;</li> <li>▪ any other relevant information requested in the SAHRA guidelines or by SAHRA.</li> </ul>	<p>SAHRA may refuse to issue a permit or a permit extension if it has reason to believe that the applicant is not qualified or experienced enough to do the work or if permit conditions are not met.</p> <p><u>Minimum qualifications</u> Permits for wrecks will be issued only to persons working with an approved collaborating institution. Applicants have to demonstrate a knowledge and understanding of and commitment to the use of underwater archaeological recording and excavation procedures and methods as set out in SAHRA guidelines.</p> <p>The Regulations prescribe standards of practice in respect of the project. For example, every object recovered must be declared at the nearest office of the Department of Finance: Customs and Excise, within seven days of landing. No wood, ivory, other organic materials or ferrous materials may be removed from a wreck site before special facilities for their conservation have been organised to the satisfaction of SAHRA. No other divers other than those listed in the application may take part in the project without the prior permission of SAHRA.</p> <p>The permit holder is responsible for all costs involved in the excavation and the cost of transportation of recovered material to the collaborating institution and for the conservation thereof.</p> <p>The Regulations also prescribe standards of curation in respect of objects recovered from wrecks.</p>

<b>Heritage Resource</b>	<b>Controlled activities</b>	<b>Permit Requirements</b>	<b>Additional factors</b>
			<p>Permits for <i>bona fide</i> archaeological research on wrecks by qualified South African citizens or permanent residents shall be issued free of charge.</p> <p>Every permit holder must by the 31<sup>st</sup> of December of each year, submit to SAHRA an annual progress report in accordance with SAHRA guidelines which include the description of the work done during the year, an accurate plan with positions of all objects excavated or collected clearly marked and a list of all objects removed from the site and their current whereabouts. A final report, conforming to standards set out in the SAHRA guidelines, must be submitted to SAHRA within six months of the date of expiry of the permit.</p>

<b>Heritage Resource</b>	<b>Controlled activities</b>	<b>Permit Requirements</b>	<b>Additional factors</b>
Burial grounds and graves	Destroying, damaging, altering, exhuming or removing from its original position or otherwise disturbing the grave of a victim of conflict or any burial ground which contains such graves of any grave or burial ground older than sixty years which is situated outside a formal cemetery administered by local authority or bringing into use at a burial ground or grave any excavation equipment of any equipment that assists in the detection or recovery of metals.	<p><u>Issuing authority</u> Relevant heritage resources authority.</p> <p><u>Requirements</u> Permit application on the official form, available from SAHRA.</p> <p><u>Information to be provided in application</u></p> <ul style="list-style-type: none"> <li>▪ the name and address, erf/stand/farm number or geographical co-ordinates of the grave or burial ground and the magisterial district;</li> <li>▪ the details of the planning authority for the place;</li> <li>▪ details of the action/s for which application is made, in accordance with SAHRA guidelines;</li> <li>▪ motivation for the proposed action/s including supporting documentation and research in accordance with the SAHRA guidelines;</li> <li>▪ details of the cost of the action/s;</li> <li>▪ the details including qualifications, relevant experience and signature of the person who will be responsible for the action/s;</li> <li>▪ details including signature of the owner of the land on which the grave or burial ground is situated;</li> <li>▪ in the case of exhumation or removal of a grave, the details including qualifications, relevant experience and signature of the archaeologist who will supervise the work;</li> <li>▪ in the case of destruction or damage of any burial ground or grave of a victim of conflict, details of arrangements for the exhumation and re-interment of the contents of such grave;</li> <li>▪ in the case of any activity in respect of graves or burial grounds older than sixty,               <ul style="list-style-type: none"> <li>(i) details of efforts made to contact and consult communities and individuals who by tradition have an interest in such grave or burial grounds; and</li> <li>(ii) copies of agreements reached with such communities or individuals regarding the future of such grave or burial ground;</li> <li>(iii) details including signature of the applicant if not the owner;</li> <li>(iv) any other relevant information required by the relevant heritage resources authority.</li> </ul> </li> </ul>	A permit will be issued only for exhumation or removal to be done under the supervision of a qualified archaeologist or person approved by the relevant heritage resources authority, with due respect for any human remains and the customs and beliefs of any person or community concerned with such grave or burial ground and, when requested, in the presence of such person or community representative and after arrangements have been made for the re-interment of any human remains and the re-interment or curation of any other contents of such grave or burial ground, to the satisfaction of SAHRA or the relevant heritage resources authority, in accordance with the SAHRA guidelines.

<b>Heritage Resource</b>	<b>Controlled activities</b>	<b>Permit Requirements</b>	<b>Additional factors</b>
	2. Destroying, damaging, altering, removing from its original position or otherwise disturbing any grave or burial ground older than sixty which is situated outside a formal cemetery without consultation.	<p><u>Requirements</u> The applicant is required to</p> <p>(a) make an effort to identify the descendants and family members of the persons buried in and/or any other person or community by tradition concerned with such grave or burial ground by an archival or documentary research regarding the origin of the grave or burial ground;</p> <p>(b) direct consultation with local community organisations and/or members;</p> <p>(c) the erection for at least sixty days of a notice at the grave or burial ground displaying information about the proposals affecting the site and contact details of the applicant; and</p> <p>(d) advertising in the local press.</p>	<p>The applicant must consult any interested parties regarding the effect of the proposals on the grave or burial ground, with the aim of reaching agreement about the future of such grave or burial ground.</p> <p>Unless otherwise agreed by the interested parties, the applicant is responsible for the cost of any remedial action required in terms of the agreements with the interested parties.</p> <p>If the applicant fails to reach agreement with interested parties, the applicant must submit records of the consultation with the interested parties and their comments to the relevant provincial heritage resources authority.</p>
	3. Discovery of previously unknown graves.  Disturbance of a previously unknown grave without authority of the provincial heritage resources authority.	The discovery of a previously unknown grave must be reported to the responsible heritage resources authority. If after investigation, the provincial heritage resources authority determines that the grave should be protected, activity within the vicinity of the grave will be regulated.	
Public monuments and memorials	Altering or developing in a way that will affect the public monument or memorial	Public monuments and memorials are afforded the protection given to heritage resources listed on provincial heritage registers. <sup>277</sup> Thus special consent of the relevant local authority is required for any alteration or development that will affect a public monument or memorial. <sup>278</sup> (No guidelines given in the NHRA or Regulations about how such consent	Prior to the consideration of an application to alter or develop a public monument or memorial, the local authority must notify any conservation bodies which have registered an interest in the property, and give them a reasonable period

<sup>277</sup> Section 37.

<sup>278</sup> Section 30(11).

<b>Heritage Resource</b>	<b>Controlled activities</b>	<b>Permit Requirements</b>	<b>Additional factors</b>
		should be applied for.)	<p>within which to register an objection or make other representations.<sup>279</sup></p> <p>In assessing an application to alter or develop a public monument or memorial, the local authority must consider the property's cultural significance and how this could be affected by the proposed alteration or development, as well as any objections received to the alteration or development.<sup>280</sup></p> <p>If alteration or development is undertaken without the consent of the local authority, the local authority may require the development or alteration to be ceased immediately, and for the property to be restored to its original condition within a specified period. If the developer fails to comply with the request of the local authority, the authority may undertake the work itself and recover the costs thereof from the developer.</p>

<sup>279</sup> Section 30(11)(b).

<sup>280</sup> Section 30(11)(c).