SACOME

Aboriginal Heritage Inquiry

Submission to Aboriginal Lands Parliamentary Standing Committee

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South Australian Chamber of Mines & Energy
The leading industry body representing the resources sector in South Australia

SACOME

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1. Introduction

The South Australian Chamber of Mines and Energy (SACOME) is the peak industry association representing companies with interest in the South Australian minerals, energy, extractive, oil and gas sectors and associated service providers.

SACOME welcomes the opportunity to make this submission to the Aboriginal Lands Parliamentary Standing Committee's Aboriginal Heritage Inquiry.

Per the Terms of Reference of the Inquiry, SACOME notes that the Committee will consider:

1. The operation of the Aboriginal Heritage Act 1988;
2. The management of Aboriginal Heritage in South Australia;
3. The level of protection that Aboriginal Heritage is afforded in South Australia;
4. Proposals to strengthen Aboriginal Heritage protection;
5. How to best protect intangible Aboriginal Heritage; and
6. How to best protect Aboriginal intellectual property.

SACOME acknowledges, respects, and supports the recognition of Aboriginal cultural heritage, interests, special connections and associated rights to land and water in South Australia.

Building robust, mutually beneficial relationships relies heavily on how the resources sector acknowledges and values Aboriginal cultural heritage. Cross cultural awareness is crucial for effective negotiations and the facilitation of a smooth operating environment.

Leading industry practices place value on the ideas and aspirations of local communities, seek to understand the way in which Aboriginal people connect and interact with one another and their land; and also how the activities of the resources sector can bring about positive change to remote communities.

While SACOME recognises the relevance of all issues identified in the Terms of Reference, this submission primarily focusses on interactions between the *Aboriginal Heritage Act 1988* ('the AHA'); those laws which govern mineral and petroleum activities in South Australia, principally the *Mining Act 1971* ('the Mining Act') and the *Petroleum, Geothermal & Energy Act 2000* ('the PGE Act'); and resources sector activity otherwise relevant to Aboriginal heritage.

2. Operation of the Aboriginal Heritage Act

SACOME acknowledges that the Aboriginal Heritage Act applies to all land, regardless of the existence of Native Title and independent of the operation of other statutes.

The AHA applies to all Aboriginal sites and objects whether they are registered, reported or unrecorded and under the Act it is an offence to damage, disturb or interfere with Aboriginal sites, objects or remains without Ministerial authorisation.

Resources sector operators work diligently with Traditional Owners to avoid the disturbance and, importantly, destruction of areas and features of heritage significance as identified by those Traditional Owners.

SACOME also notes the advice provided to operators in the Department of Premier & Cabinet's *Aboriginal heritage guidelines for resources projects in South Australia*, which highlights that:

> *There is no formal regulatory connection between native title and Aboriginal heritage, however, in practice, the Aboriginal Heritage Act plays a large role in influencing the interactions between you and the Aboriginal community when negotiating access to land. For example, where native title mining agreements or ILUAs are negotiated for your project, it is standard practice for the native title party to require you to undertake Aboriginal heritage clearances or surveys over the land.*[1]

Protection of Aboriginal heritage in South Australia is complicated by a lack of clarity in the AHA and its misalignment with other legislation, including the Mining and PGE Act.

Cultural heritage surveys and Work Area Clearances are the accepted mechanisms for protecting Aboriginal heritage and facilitating land access agreements between operators and Native Title Organisations (NTOs):

> *These surveys or clearances are usually required as part of the negotiations for a Native Title Mining Agreement, Indigenous Land Use Agreement (ILUA), or a Right to Negotiate (RTN) Agreement. Surveys and clearances, while not described in the Act, are the standard process used to identify whether on-ground works may impact on sites, objects or remains. They have no separate legal status other than as a contractual undertaking in the agreement.*[2]

The disconnect between accepted practice and legal requirement is a notable flaw in the AHA. This raises reasonable concerns about the adequacy of the Act as it relates to both preservation of Aboriginal heritage and in providing legal protection for proponents who often incur significant costs in undertaking this activity.

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[1] Department of the Premier and Cabinet 2017. *Aboriginal heritage guidelines for resource projects in South Australia*, Report Book 2017, p.7
https://sarigbasis.pir.sa.gov.au/WebtopEw/ws/samref/sarig1/image/DDD/RB201700035.pdf

[2] ibid. p.19

SACOME submits that improved alignment between the AHA and other laws with which it interacts would be a useful outcome of the Inquiry.

These issues are dealt with in further detail below.

2.1 Work Area Clearances and Cultural Heritage Surveys

Operators reach agreements with NTOs via the Mining Act through one of two paths; either via Part 9B of the Mining Act, or through ILUAs with the NTO determining their preferred approach.

For petroleum exploration, a licence cannot be granted without a RTN or an ILUA where Native Title exists.

It is a requirement of the Program for Environment Protection and Rehabilitation (PEPR) under the Mining Act; and the Statement of Environmental Objectives under the Petroleum, Geothermal & Energy Act that operators avoid damage to Aboriginal heritage.

Under the Part 9B approach, the resources company is required to successfully negotiate a Native Title Mining Agreement (NTMA) which will provide for a native title payment and often provides for other payments to and investments in the community and Aboriginal businesses.

Once negotiated, a NTMA is registered with the Mining Registrar and is a legally binding agreement per the terms set out therein.

As a matter of operational practice, the NTMA, RTN or ILUA will include an agreed process of recognising, recording, and protecting Aboriginal heritage through a Cultural Heritage Surveys or Work Area Clearances (WAC).

Cultural Heritage Surveys are recommended for projects which are intended to have a significant impact over a fixed area and heritage values must be clearly defined for consultation or conservation purposes.

Work Area Clearances are usually undertaken for small projects where operations are low risk and have short timeframes. They are generally used where the precise locations of on-groundwork areas have not been determined and the proposed footprint for ground disturbing activities is flexible and can be modified to avoid Aboriginal sites.

Operators have a responsibility to ensure the WAC does not result in damage to Aboriginal heritage and only areas which have been proven to have no heritage significance can be considered to have been cleared.

Under the WAC process, Traditional Owners will nominate senior men and women who can speak for country, have the knowledge of the lore of country, and can identify places of heritage.

The WAC process will see nominated persons drive and walk the land identified by the proponent for clearance, accompanied by specialists nominated by the NTO (anthropologists and/or archaeologists) who will identify areas that should be avoided by the company.
All costs for the survey are met by the resources company, including payments for Aboriginal survey team members and the specialists. Member companies have advised that the total cost of a clearance can be in excess of $70,000.

The purpose of surveys differs between resources companies and anthropologists/archaeologist in that proponents are seeking clear guidance on which areas are permissible or restricted (i.e. 'go or no go') and anthropologists/archaeologists are seeking to build their knowledge of country.

Given the considerable cost of undertaking survey or clearance work, greater certainty around timeframes for completion; nomination of specialists to undertake the work; and the bona fides of heritage findings is sought by resources operators.

Following this activity, reports are compiled by the specialists.

A report is provided to the proponent indicating where it cannot travel or explore, or what provision must be taken in certain areas. The reason for some of these exclusions may not be divulged to the company (on the grounds that they are 'secret business') but will be contained in longer reports supplied to the NTO.

In many cases, the disturbance or destruction of areas of heritage is not required as identified areas can simply be avoided.

Proponents do all they can to avoid making a Section 23 application under the AHA to interfere with, disturb, or destroy heritage. Such a move is seen as a last resort due to the dramatic implications for relationships between proponents and Traditional Owners; and the reputation of the resources company.

Cultural Heritage Surveys and WACs are not recognised under the AHA and afford no legal protection to proponents, rather they are an accepted practice which has been broadly accepted as a component of negotiating an agreement with NTOs.

Any Traditional Owner can at any time raise a claim in relation to the destruction of heritage, regardless of any Cultural Heritage Survey or WAC duly conducted by senior men or women. Such a claim can involve a current WAC or be retrospective. Further, the claim could be made by a member who is not recognised by the community to speak for country, or by someone involved in a personal or family dispute.

SACOME submits that ambiguity regarding the legal status of Cultural Heritage Surveys and WACs should be addressed to provide greater certainty to the agreement making process under the Mining Act and PGE Act.

2.2 Comment on 2017 amendments to the Aboriginal Heritage Act

Amendments to the AHA were passed by the South Australian Parliament in 2017, intended to give greater authority to NTOs regarding identification of heritage.

The intent of these amendments was for NTOs to become Recognised Aboriginal Representative Bodies (RARBs) with the authority to make heritage agreements for their country, with RARB duties included advising the Minister for Aboriginal Affairs on heritage matters relevant to their land (per section 19D(a)).

Under the AHA, the Anangu Pitjantjatjara Yankunytjatjara (APY); and the Maralinga Tjarutja were named as RARBs, with the expectation in the Act that other NTOs would also become RARBs. Section 19B of the AHA states that a registered Native Title body corporate will be taken to be appointed as a RARB in their relevant area.

Per Section 19B(5), this appointment will only be recognised if authorised by the State Aboriginal Heritage Committee, a body made up Aboriginal men and women who are appointed by the South Australian Government.

Since amendment of the Act in 2017, no additional RARBs have been appointed and it is unclear whether the Committee has specifically rejected any NTOs for appointment as RARBs.

SACOME notes that the Committee is not required to make a determination on a RARB application within a specified timeframe, nor to formally advise an NTO of their decision or reasons for rejection.

Given the intent of Parliament in amending the AHA was to assist Native Title groups to have a greater say over the preservation of their heritage, it is reasonable to ask whether the AHA is achieving this outcome.

2.3 Options for improvement of the Aboriginal Heritage Act

Member companies have suggested several possible avenues to better align the AHA with the Mining and PGE Acts; and to better realise the intent of the 2017 amendments:

- WACs performed by NTOs on their land and conducted under the authority of the Mining Act or PGE Act could have clear recognition under the AHA. A suggestion is for WACs to be recognised as Heritage Agreements under the AHA.

- The operation of the Aboriginal Heritage Committee could be reviewed with a view to requiring a timely response from the Committee regarding the declaration of RARBs, along with a requirement to provide reasons to an NTO when applications for RARB status are declined.

SACOME submits that these measures do not remove the right of any Aboriginal person to raise heritage issues, nor do they reduce the obligation on the part of industry proponents to recognise and protect Aboriginal Heritage.

They are put forward as mechanisms that will help to reduce the uncertainty for proponents and help ensure the proper recognition of relevant NTOs as the authority for heritage on their country.

3. Aboriginal Heritage & Engagement - SACOME Member Case Studies

The following case studies highlight leading practice examples of relationships between SACOME member companies and Aboriginal peoples in South Australia.

These examples demonstrate the widespread commitment to agreement making, Aboriginal employment targets and improving cultural competency within the resource sector.

Respect for and value of Aboriginal culture and heritage is a key operational principle for these resources companies.

OZ Minerals' Carrapateena Mine and the Kokatha Aboriginal Corporation

- OZ Minerals support the principles of Voice, Treaty and Truth (the NAIDOC 2019 theme) in their engagement with Aboriginal groups. They recognise the uniqueness of each community and believe in the importance of protecting and respecting country and culture.

- The *Nganampa palyanku kanyintjaku* "Keeping the future good for all of us" agreement was formed in 2016. It goes beyond the typical transactional agreements between operators and Indigenous communities, instead laying the foundations for a genuine partnership between OZ Minerals and the Kokatha community in relation to the Carrapateena Mine. This process has instilled trust, respect, and mutual understanding between the two groups.

- OZ Minerals has a similar agreement, *tjaku* "Coming together" with the Antakirinja Matu-Yankunytjatjara Aboriginal Corporation (AMYAC) in relation to the Prominent Hill Mine.

- Both the Carrapateena Mine and the Prominent Hill Mine operate according to Native Title Agreements under Part 9B of the Mining Act. These agreements formalise payments by OZ Minerals to the Native Title groups, including funds for scholarships.

- The "Partnering Agreements" underpin the formal process of a Part 9B agreement.

BHP's Olympic Dam Agreement

- BHP entered into the Olympic Dam Agreement (**ODA**) with three local Aboriginal groups, the Barngarla, Kokatha and Kuyani Peoples (**ODA Groups**) in January 2008.

- The negotiation of the ODA involved separate negotiating teams for each ODA Group and a 'lead negotiator' to coordinate the ODA Groups. Each of the ODA Groups also had its own legal advisers. The National Native Title Tribunal also provided assistance during the negotiations.

- The ODA was designed to facilitate cooperation and collaboration between BHP and each of the ODA Groups. A representative corporation and an advisory council were established under the ODA to facilitate engagement and coordinate the input of the ODA Groups in connection with BHP's operations.

- One of the primary purposes of the ODA was to establish an agreed protocol with the ODA Groups for the protection and management of Aboriginal heritage (**Heritage Protocol**). Among other things, the Heritage Protocol requires all of the ODA Groups to be consulted on heritage matters in the Olympic Dam area.

- Native title was determined for the Kokatha in 2014 in respect of areas that include the current Olympic Dam mine. The ODA remains in effect notwithstanding the determination of native title and the Heritage Protocol continues to play an important role in connection with the protection and management of the heritage interests of all the ODA Groups.

Iluka Resources' Jacinth-Ambrosia mine and the Far West Coast (FWC) Native Title Group

- Iluka Resources and the Far West Coast Native Title Claim Group entered into a Native Title Agreement in 2007 under Part 9B of the Mining Act. The FWC peoples thus agreed to allow mining on the land that the Jacinth-Ambrosia mine occupies.

- This Native Title Agreement allows for a mutually beneficial partnership between the two parties, including permission for Iluka to access land, underground water and the construction of a sealed road. Iluka agreed to establish a charitable trust for the FWC, scholarships for Indigenous students, grants of $30,000 over three years to support Indigenous art, and to rehabilitate the mine area upon closure.

- Iluka changed the route of their proposed road due to the good-faith groundwork that this agreement facilitated. Through two-way communication and cultural heritage surveys, several areas were deemed to be of cultural significance, leading to alteration of the proposed road.

- In 2018, Iluka Resources and the Far West Coast Aboriginal Corporation were the recipients of the Diversity in Action – resources sector category award as part of the South Australia Premier's Awards for Excellence in Diversity. The premier praised Iluka's commitment for diversity and social inclusion outcomes.

- The Jacinth-Ambrosia mine has proven itself to be an industry leader in developing strong relationships with Aboriginal communities. This includes maintaining 20% Aboriginal employment, even during periods of downturn.

Heathgate Resources and the Adnyamathanha Native Title holders

- Heathgate Resources undertakes in-situ recovery uranium mining at the Four Mile Uranium mine. In 2009, the Adnyamathanha community were formally recognised as

Native Title holders for the area. The Native Title Mining Agreements agreed to by the Adnyamathanha community in 2010 provide an important framework for consultation, payments and employment opportunities.

- Heathgate's annual compliance reports show compliance through comprehensive documentation of Aboriginal Heritage Clearance surveys, quarterly meetings with the Traditional Owners with no significant disputes, and no disturbance to any sensitive areas of heritage.

- Heathgate supports the Adnyamathanha community through employment initiatives and is committed to a target of filling a minimum of 20% of non-professional mine site-based positions with Adnyamathanha candidates.

Adbri (formerly Adelaide Brighton Cement)

- Adbri's Reconciliation Action Plan for 2020-2021 outlines their involvement in supporting Aboriginal communities and peoples.

- Adbri has supported the Indigenous Law Student Mentoring Program since 2012. This initiative facilitates mentorship from legal professionals for Indigenous law students from each South Australian university. Students can therefore form networks and strong relationships within the legal community.

- Adbri supports the Aurora Education Foundation, which aims to create long-term change for Aboriginal communities through education. The program works with students for six years, from the start of high school to the first year out of high school.

- Adbri also supports an Indigenous Scholarship at St Peter's College, Adelaide.

- Adbri is a signatory to the Uluru Statement from the Heart and the #InvasionDay campaign.

- The Annual Compliance Report 2019 and the Quarterly Compliance Report 1st January to 31st March 2020 for Adbri's Penrice Mine indicated no disturbance to Aboriginal artefacts.

4. Conclusion

SACOME welcomes the opportunity to make this submission to the Aboriginal Heritage Act Inquiry.

SACOME and its member companies deeply respect the heritage of the State's Traditional Owners and are committed to progressing meaningful improvement of the Aboriginal Heritage Act in a manner that ensures protection of important Aboriginal heritage; and results in greater alignment between the AHA and the many other laws with which it interacts.

SACOME welcomes the opportunity to further engage with the Aboriginal Lands Parliamentary Standing Committee throughout the course of this Inquiry.