South Australian Chamber Of Mines & Energy

06 April 2023

Aboriginal Heritage Team
Aboriginal Affairs and Reconciliation
Attorney-General's Department

Via email: AAR.CIR@sa.gov.au

To whom it may concern

The South Australian Chamber of Mines and Energy (SACOME) is the leading South Australian industry association representing the resources and energy sector, the powerhouse of the State's economy.

The sector has a proud history of engagement with Aboriginal people and SACOME welcomes the opportunity to provide a submission on the proposed amendments to the *Aboriginal Heritage Act 1988* ('the Act') to strengthen heritage protections.

Background

The factsheet circulated by the Attorney-General's Department sought feedback specifically on the following matters:

1. The enhanced penalty provisions;
2. The Aboriginal Heritage Fund;
3. Compensation, other punishments and remedies;
4. The new reporting and 'stop work' requirements where an authorisation has been given;
5. The scope of authorisations; and
6. The validation of past authorisations.

SACOME will address each of these matters respectively, noting the following:

- The current consultation is being conducted in parallel to a national consultation process to harmonise and strengthen Aboriginal heritage protection laws;
- The scope of the amendments is therefore limited to increasing penalties for breaches of the Act, which was an election commitment, and providing clarity

following the Supreme Court decision of *Dare, Bilney & Ors v Kelaray & Premier of SA* ('*Kelaray*'); and

- Changes beyond the scope of the above are unlikely to form part of this amendment Bill but may inform the national reform process.

1. Enhanced penalty provisions

SACOME members recognised the catalyst for the enhanced penalty provisions was the destruction of sacred sites at Juukan Gorge and these penalties are consistent with the recommendations emanating from the Joint Standing Committee on Northern Australia.

No specific comments were proffered on the increase in penalties per se, noting these affected the following substantive provisions:

S 10 – disclosing confidential information; s 35 – divulging information against Aboriginal tradition:
Penalties are proposed to increase to $250,000 or 2 years' imprisonment.

S 20 – failing to report a heritage discovery to the Minister; s 21 – excavating land to uncover heritage.
Penalties are proposed to increase to $500,000 for companies or $250,000 or 2 years' imprisonment for individuals.

New s 20A – failing to report a heritage discovery to the Minister while working under authorisation; New s 20B – failing to cease works upon heritage discovery while working under authorisation.
Penalties are proposed to be $500,000 for companies or $250,000 or 2 years' imprisonment for individuals.

SACOME understands that the current s 23 is a strict liability offence of damaging, disturbing, or interfering with Aboriginal heritage and this offence remains in the amendment Bill with no change to maximum penalties.

SACOME further understands that the purpose of introducing proposed s 23(1), whereby a person without authorisation intentionally or recklessly damages, disturbs, or interferes with Aboriginal heritage, is to create a more serious offence, with penalties up $2 million for companies or $250,000 or 2 years' imprisonment for individuals.

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SACOME supports the principle that intentional destruction of Aboriginal heritage warrants more serious penalties and, as a corollary, the retention of the existing penalties for damage without the requisite mental intent.

2. The Aboriginal Heritage Fund

Cl 9 of the Bill amends s 19 to clarify that all penalties recovered in respect of offences against the Act, and amounts paid to the Crown in accordance with s 37DA orders, will be paid into the Aboriginal Heritage Fund.

Members welcomed the changes clarifying that penalties recovered against the Act would be quarantined for use for Aboriginal heritage purposes, noting that the interest from the balance from the Fund could be diverted to General Revenue at the Treasurer's discretion.

3. Compensation, other punishments, and remedies

Clause 26 inserts proposed s 37DA, where the Court may make additional orders to the specific penalty when found guilty of contravening the Act. These are:

- Ordering the person to pay the Crown/specified Aboriginal person or body money towards repair, restoration, or reinterment of Aboriginal heritage or costs incurred or likely to be incurred in making good any harm caused by the contravention or both;
- Ordering the person to take specified action to make good any damage and, if appropriate, to take specified action to prevent or mitigate further damage;
- Ordering the person to take specified action to publicise the contravention and its consequences (i.e. name and shame themselves);
- Ordering the person to pay to an Aboriginal person or body an amount for reasonable costs and expenses incurred, or compensation for harm, relating to the breach;
- Ordering the person to pay the Crown the benefit acquired, or detriment avoided, as a consequence of the breach; and
- Any other ancillary orders.

Members had no specific feedback regarding the ancillary remedies and orders that could be made against those who breached the Act, in addition to the penalties specifically prescribed.

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4. New reporting and 'stop work' requirements where an authorisation has been given

Clause 13 inserts proposed ss 20A and 20B.

S 20A requires that authorisation holders, their employees or agents, must, as soon as practicable and in accordance with any regulations, report to the Minister any Aboriginal heritage that is discovered while acting, or purportedly acting, pursuant to the authorisation.

S 20 B requires that an authorisation holder who discovers Aboriginal heritage must immediately cease undertaking any activity within the *prescribed distance* (in the regulations, or, if silent, this provision) until:

- The Minister by notice in writing authorises the resumption of activities or specified activities;
- Gives a s 24 direction; or
- The *prescribed period* (in this provision) has expired without an answer.

The *Kelaray* decision has created uncertainty for companies operating with Ministerial authorisation as to their rights and obligations for Aboriginal heritage discoveries.

Members have queried the term 'discover' and whether this is excessively broad, covering off, for example, items of Aboriginal heritage that have previously been assessed in having obtained the authorisation as reasonably likely to be found but not yet discovered.

It would be unworkable and impractical in certain sites for operators to report discovery, cease work and propose a resolution for each individual find to the Minister, especially discoveries of a class contemplated by the Minister in making their decision.

The timeframes – i.e. the prescribed period in proposed s 20B – of five business days in the cases of sites or objects, or ten business days for remains, for the Minister to consider the operator's proposed methodology to minimise impact on Aboriginal heritage, was also considered by some members to be unworkable. The potential impact on project timelines is significant.

In addition, members queried the operation of these provisions against the background of s 35 of the Act; namely to divulge information contrary to Aboriginal tradition.

Local land agreements between operators and traditional owners allow for heritage discoveries to be kept secret in accordance with traditional owners' wishes.

While the intent of mandatory reporting requirements under proposed s 20A of the Bill is understood, in certain circumstances it will override the wishes of the traditional owners and this appears to be a contradictory outcome.

SACOME submits minor amendment is necessary to clarify the interaction of proposed s 20A against s 35 (especially in the context where penalties are being increased for breaches of s 35) and to preserve the wishes of traditional owners in maintaining their heritage.

5. Scope of authorisations

Cl 14 – or s 21 as amended – clarifies the Minister's powers to make authorisations. It clarifies that authorisations can apply to:

- Specified classes of persons (e.g. subcontractors, employees);
- Specified Aboriginal sites, or to all sites within a certain area; or
- Specified Aboriginal objects or objects of a specified class.

SACOME welcomes the clarification.

6. Validity of authorisations

Cl 30 introduces Schedule 1, which operates as a savings provision for authorisations that would otherwise be valid were it not for the *Kelaray* decision.

SACOME supports the proposed Schedule 1 and regards it as uncontroversial.

Consideration may need to be given to the impact of any agreements made under the *Native Title Act 1993* (Cth) and how this interacts with the Act, including the need for any transitional provisions.

SACOME also requests that draft Regulations be circulated to coincide with the introduction of the revised Bill to Parliament to give industry – and Members of Parliament – the opportunity to fully understand the proposed changes.

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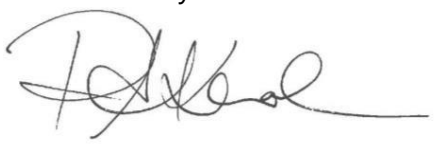
SACOME thanks the Attorney-General's Department for the opportunity to provide comment on this Bill.

Yours sincerely



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