To: SA Attorney General's Department – Aboriginal Affairs and Reconciliation

Re: Proposed changes to the *Aboriginal Heritage Act 1988* (SA)

6 April 2023

Introduction

AMEC appreciates the opportunity to provide a submission to the South Australian Government's consultation on proposed changes to the *Aboriginal Heritage Act 1988* (AH Act). These reforms, while part of a broader national initiative to harmonise and strengthen Aboriginal heritage protection laws across Australia, will introduce changes to the management of Aboriginal heritage in South Australia. It is important all consultation processes are subject to robust industry consultation, with a wide range of stakeholders, to ensure holistic consideration of potential implications and unintended considerations have been addressed, prior to Gazettal.

About AMEC

The Association of Mining and Exploration Companies (AMEC) is a national industry association representing over 540 member companies across Australia, with over 37 member companies with direct project interests in South Australia. Our members are mineral explorers, emerging miners, producers, and a wide range of businesses working in and for the industry. Collectively, AMEC's member companies account for over $100 billion of the mineral exploration and mining sector's capital value.

Mineral exploration and mining make a critical contribution to Australia's economy, directly employing over 274,000 people. In 2020/21 Industry generated a record high $301 billion in mining exports, invested $3.2 billion in exploration expenditure to discover the mines of the future, and collectively paid over $39.3 billion in royalties and taxes.

In South Australia in 2021-2022(FY) mineral exploration expenditure was at an 8-year high at $122.3 million, a 34% increase from the previous year, and $2.5 billion was spent on capital expenditure. In 2020-21, over $237 million was generated in royalties from the $7.1 billion in mineral commodity sales, representing a record high.

AMEC position

AMEC has a long-standing objective for increased clarity, certainty, efficiency and effectiveness of Aboriginal cultural heritage and Native Title processes to:

- Ensure fair, equitable and quality negotiated outcomes and benefits for Aboriginal people, Governments and Industry;
- Reduce delays and costs for all stakeholders;

- Provide increased trust, integrity and confidence in decision making; and
- Ensure compliance.

These objectives are intended to enhance, and not diminish native title or cultural heritage values.

Our commentary in this submission in no way seeks to diminish respect for Aboriginal heritage. Places which are sacred, ritual, or ceremonial sites of importance to Aboriginal people should be valued. Acts or processes that irreversibly damage or destroy these sites are to be avoided or resolved to the satisfaction of relevant parties.

The frameworks in place to permit access to land and development whilst balancing important Aboriginal heritage considerations, are comprehensive. They have however, been noted to be complex, challenging to navigate, and at times, opaque for all parties. There is opportunity, through effective, robust reforms, to improve existing processes. Through best practice consultation, unintended consequences can be addressed.

AMEC has, and continues to consistently advocate for the need to align existing State, Territory and Commonwealth legislation, while retaining the flexibility to allow each jurisdiction to manage important Aboriginal cultural heritage concerns using modernised existing frameworks, without creating additional layers of duplication and complexity.

Proposed changes to the *Aboriginal Heritage Act 1988* (SA)

General Comments

AMEC acknowledges the 2022 State election commitments of the South Australian Government, to strengthen Aboriginal Heritage protections across the State.

We acknowledge and support the need for increased clarity and consistency via legislative and non-legislative frameworks, to improve Aboriginal heritage protections. These introductions and reforms must be carefully balanced to protect heritage whilst enabling access to land for permitted activities, in line with the processes and frameworks developed to manage multiple stakeholder interests.

This reform process can importantly, provide certainty to Aboriginal heritage processes across South Australia, that have been subject to unnecessary certainty following the recent South Australian Supreme Court *Dare v Kelaray* decision, particularly the reporting obligations and associated penalties relating to discoveries.

The South Australian Government has indicated it is not currently seeking to introduce major Aboriginal heritage reforms while federal legislation is subject to reform, indicating major reform is likely to proceed, subject to Commonwealth-lead agendas.

The complexity and sensitivity surrounding Aboriginal heritage processes is notably challenging to navigate in all jurisdictions. Across Australia, including South Australia, mineral explorers and miners seek to uphold best practice engagement and consultation practices with their stakeholders, in recognition of the importance of establishing positive relationships.

AMEC welcomes ongoing consultation to ensure the reforms proposed have been adequately considered, and do not result in unintended consequences for South Australian mineral explorers and

miners, as we seek to work towards a framework that is mutually beneficial and streamlined, for all stakeholders.

Penalties

There has been a substantial proposed increase in penalties companies are liable to face, both financial and criminal. AMEC notes the 2022 South Australian State Election Commitment made by the incumbent Malinauskas Government, to increase penalties for offences under the Act. The proposed increase in penalties aligns with national movements to strengthen protection laws for Aboriginal heritage, following recent reports and inquiries, most notably, the Federal Government's Inquiry into Juukan Gorge[1].

The increased financial penalty provisions, while seemingly excessive, in large part, for the principal offender, align with national fees. Questions around penalty structure should be addressed, if South Australia will again seek to substantially increase fees, subject to potential federal changes, and what the distinction in the penalties will be, depending on the level of significance of the site or object.

For example, the deliberate relocation of a single archaeological artefact, whereby a geologists who has sufficient knowledge to recognise a worked stone flake, within a background scatter of similar artefacts, in order to take a soil sample, could fall under the category of 'deliberate', thus attracting the maximum penalty. A clear distinction is required to demonstrate the significance of the damage, and the penalty that could be incurred.

AMEC is concerned with the quantum of fee increase proposed, and the rationale for the increase, with notable fee increases including:

Current legislation – individuals:	Proposed legislation – individuals:
▪ From $2,000 - $10,000 or ▪ Imprisonment for up to 6 months;	From $10,000 - $250,000 and / Imprisonment for up to two years;
Current legislation – body corporates:	
▪ Maximum of $50,000	Maximum of $2M.

The proposed penalty provisions also include new categories for s20A, whereby authorisation holders who fail to report a discovery to the Minister, and who fail to stop work upon discovering a site, object or remains, they suspect or know to be Aboriginal heritage, are $250,000 and/or 2 years' imprisonment for the authority holder, or up to $500,000 for a body corporate.

The same penalties are proposed to apply to the new category s20B offence, whereby activity occurring under authorisation is, subject to passage of this legislation, required to cease immediately, upon the discovery of certain sites, objects and remains within prescribed distances and periods.

The onus of proof that all reasonable steps have been taken to discover whether there was a risk of damaging or interfering with sites, falls to the proponent. Clarity is sought as to what standard of proof is required for the defence to be available. AMEC queries if potential issues will arise because of the

[1] https://www.aph.gov.au/~/link.aspx?_id=FE887411CFA84822853C275BE078265E&_z=z

reversal of the typical onus of proof, in this defence provision? As a criminal provision, the typical standard of proof would be beyond reasonable doubt, however, it is proposed the proponent is required to demonstrate an absence of knowledge, intent and/or recklessness, in that it could not reasonably have been expected to know. Clarity is sought as to the level of due diligence anticipated to demonstrate this defence.

The introduction of the s20 offences appear to be a strict liability offence, creating concern for industry. It does not appear there is sufficient defence to avoid looking at, touching, or otherwise interfering with the artefact by walking away. Clarity as to how claims of uncertainty, for instance whether or not the artefact was of Aboriginal origins, and significant, for the purposes of this Act, is required. Clarity is also sought as to the interaction of requirements under s20 and s35 regarding the protection of heritage knowledge. The Chief Justice's interpretation of s20 implies upon sighting something and suspecting it is of Aboriginal origins and/or significance, a report is required and unless compliant, penalties could be incurred.

The proposed new category created under s23(1) penalties relating to intentional or reckless damage introduce a maximum penalty of $2M for body corporates; and $250,000 and/or 2 years' imprisonment for individuals. This is a serious offence for intentional or reckless damage without Ministerial authorisation.

S23(2) proposed penalties for damage, disturbance or interference without authorisation can incur a maximum $50,000 fine for body corporates; or $10,000 and/or 6 months' imprisonment for individuals.

AMEC seeks clarity on the definition and criteria of 'intentional' or 'reckless' relating to s23 of the Act.

AMEC also seeks clarity that only harm of tangible heritage will be liable to the penalty provisions of the Act. In Western Australia, the process to reform the Aboriginal Cultural Heritage framework has undergone over five years of robust co-design, to ultimately reach agreement that tangible harm provisions only, have been legislated. While it is recognised that Aboriginal Cultural Heritage can be both tangible and intangible, an important distinction has been made, that harm to tangible heritage can be prosecuted as it is quantifiable and identifiable.

It is important that guidance and as much clarity can be provided in the Regulations, to provide much-needed certainty of the requirements under the proposed s23(3) defence for the strict liability offence, that in defence, the defendant must prove they did not know, and could not reasonably have been expected to have known that the site, object or remains to which the alleged offence relates, was an Aboriginal site, object or remains.

AMEC recommends a robust due diligence management procedure is developed in consultation with industry prior to the next stages of consultation, to ensure these provisions are supported by effective frameworks. Without a necessary element of certainty that the practices and protections in place can be relied upon to carry out vital land access works which interact with Aboriginal heritage, without significant risk of legal prosecution, there is substantial risk that all commercial activity may halt, to avoid complex and unnecessary litigious processes.

Need to address existing uncertainty

There remains too much ambiguity in the drafting of the Act, that does not alleviate concerns that breaches may occur.

The definitions of Aboriginal site and object are too broad and open to subjective interpretation, after the fact.

For example, who will be deemed a traditional owner, and how will that person's authority to speak for an object or site be determined, with certainty? What level of significance is proposed to be attached to a site or object to encapsulate it within the definition of a site or object, for the purpose of this legislation?

Uncertainty also exists as to the treatment of objects, whereby objects which are likely to be of Aboriginal origin, are also considered Aboriginal objects, for the purpose of this Act. Clarity is sought urgently, to address growing uncertainty whether or not every stone artefact across regional South Australia has the potential to be of significance, and therefore every person who has been in, or worked within these areas, could be in potential breach of the Act, inadvertently. These are unintended consequences that must be addressed.

Discoveries of heritage – mandatory notification

The proposed new requirement to notify the Minister upon the discovery of a site, object or remains, is a direct response to uncertainty arising from the *Dare v Kelaray* case. The proposed introduction of s20B protections stipulate that "a site, object or remains that the person suspects, or ought reasonably to suspect, may be an Aboriginal site, object or remains". How this system is anticipated to operate in practice, will need to be carefully considered, with the development of notification and response guidelines, procedures and frameworks, including robust criteria, definitions, and escalation pathways. Definition of "ought reasonably to suspect" and the grounds that may warrant suspicion, are required. These definitions and their application will underpin this clause.

It is not common practice for 'owners' to report sites or objects to the Minister under existing s20 provisions. The previous interpretation afforded the Minister to give direction about remains, not sites and/or objects. This proposed new provision expands the Minister's powers.

AMEC advocates that legislation can ensure the full, mandatory disclosure of the location of heritage objects, places and sites via the Register, to increase certainty and transparency for exploration and mining companies, ensuring their activities do not damage or interfere with culturally significant areas. Mandatory disclosure via the Register can minimise risks for land developers, while allowing the State to maintain its role of balancing interests. There will however undoubtedly be opposing and alternate views to mandatory disclosure, and the rationale for not reporting should be a consideration.

Ultimately, exploration and mining proponents do not want to breach requirements under the Act. However, s20 proposes they must report sites and objects, regardless of the preference of the groups they have worked with, potentially jeopardising agreed upon heritage management plans. There is a real risk this will leave companies and those progressing towards agreement, at an impasse, creating a significant barrier to development.

Once the mandatory disclosure of heritage objects, places and sites is enacted, an indemnity clause for mineral exploration and mining companies against prosecution should be introduced, if companies can demonstrate they used the register of sites, objects and places, and a non-registered discovery is made. A delegated authority, such as the Minister or Department, could provide this indemnity to land developers.

However, subject to placement on the Register, verification is required. The proposal for notification on suspicion of heritage, will overload the system with notifications and increased demand out of necessity and fear of breach, without commensurate increase to cultural heritage protections. Proponents seeking access, will then need to enact the s23 process. If the conservative approach of AAR continues, in increasing the use and size of buffer zones around reported sites and objects to protect sensitive information, this will sterilise large parts of the state. Arguably, many of these areas could otherwise be accessed via negotiation of appropriate heritage management processes with the relevant groups.

AMEC recognises the intent of this reform process is to ensure Aboriginal heritage is not damaged, intentionally or unintentionally. Where unintentional damage does occur, despite best efforts and checks and balances being met via robust legislative processes, it is appropriate strong protections are in place. AMEC recommends an indemnity clause be developed in consultation with industry. These protections must be sound and not unintentionally penalise those who are seeking not to damage heritage, but may be subject to ambiguous expectations and unreasonable expectations beyond their control.

S20B (6)(c) seeks to prescribe maximum distances where not specified, of buffer zones. It is concerning that the term ‘buffer zone’ has not been defined. Is the buffer zone anticipated to form part of a site or object? If so, will entry within the area constitute an offence? There is growing use of landscape features including waterways, salt lakes, clay pans and sand dunes being listed as culturally significant landscape features, with their own buffers required. These critical issues must be clearly defined. In the case of a site or object, 3M was proposed, or in the case of remains 5M proposed. AMEC considers these prescribed distances are too restrictive. AAR is noted to create new, or extend existing buffer zones without notice. These buffers may be placed around sites or objects, covering areas where a previous heritage survey has cleared areas for work, albeit in proximity to a known site. Without notice of the ‘new buffer zone’, a proponent would not have reasonable reason to check the Register for updates. This creates risk that they could be in breach by entering the buffer zone. AMEC requires clarity.

AMEC is concerned the drafting appears to read, that the prescribed period as per s20B(6) is proposed to be 5 business days for sites and objects, and 10 business days for remains, respectively. In practice, the 5 or 10 business days will come at the final stage of this process, following the proponent submitting to the Minister a proposal on elements of cultural heritage to be addressed, and the Minister prescribing what elements of cultural heritage management the proponent must demonstrate. The timeframe for this in practice, is open-ended, and poses a substantial barrier to development. Certainty of timeframes, and less ambiguous drafting, is required.

Further, the these appear conservative time considerations given the complexity involved with Aboriginal heritage matters and consultation expectations, and appear tailored to align with industry

operations outside of mineral exploration and mining. They also do not consider the expectant increase in demand, on the back of increased mandatory notification requirements, and the backlog this will create. AMEC questions the interaction between notification requirements relating to remains, between the Minister and the South Australian (and / or) Federal Police. Clear, consistent timeframes and escalation pathways must be developed, subject to industry consultation.

Consideration should also be given to provisions to remove reported sites or objects from the Register after a report has been made. In the instance the proposed process is followed, and a suspected site notified to the Minister under s20, it is the Minister's discretion as to whether any activity will require a s12 or s23 approval. However, subject to a specific assessment of a site in question, a group may determine the site is not culturally significant and/or does not contain significant artefacts. There could be a substantial impact on project timelines, and on cultural heritage relevant to local groups, if such provisions are not considered, and legislated for.

It is important the terms 'discovery', 'new discovery' and 'new information' are succinctly and unambiguously clarified to address existing uncertainty. Equally important, will be the development of the notification procedures and protocols, between industries, Government and relevant heritage bodies. The next round of consultation documents should involve the development of these processes, procedures and documents, as well as criteria for circumstances when an Inspector may issue directions to protect and / or preserve the heritage, as opposed to the Minister.

These items are important documents and should be subject to robust consideration and consultation from industry, to consider commercial implications, timeframes, and practicalities including existing agreements and access arrangements, to ensure their validity remains unchallenged despite the proposed passage of this legislation.

Post-Juukan Gorge amendments

AMEC acknowledges the need for stronger Aboriginal heritage protections to prevent an incident occurring in South Australia, similar to the devastating Juukan Gorge incident in Western Australia's Pilbara Region. There have been a range of Federal and WA reviews and legislative reform processes enacted in direct response. It is imperative that State, Territory and Commonwealth Governments, work collaboratively, so as not to duplicate an already complex topic, but also to ensure the lessons learnt inform effective and forward-looking reforms to support genuine improvement.

As a national industry association, AMEC has been strongly engaged in Aboriginal Cultural Heritage reform processes across Australia. It is an area of immeasurable importance to our members, who seek to build strong, meaningful partnerships and relationships with their local communities and traditional owners. To successfully do so, industry must operate in jurisdictions which have a solid Aboriginal Heritage framework, a State Government that collaborates with the Federal Government, and a best-practice approach to regulation.

South Australia's current reform process must enable risk-based regulation, with strong checks and balances, whilst learning from the lessons of the past, and considerations of 'best practice' both domestically and internationally, recognising the intent of the reforms, and their practical and operational impacts.

More transparent and consistent timeframes are needed. Currently, there is a lack of consistent, transparent timeframes, leading to increased costs across and diminished certainty of land access. Certainty of land access is fundamental to not only best practice engagement, but in meeting Government's legislated approvals and compliance requirements. Ultimately, this delays the realisation of benefits to local communities. More stringent timeframes will address a long-term element of uncertainty.

Due diligence / indemnity for explorers and miners

AMEC strongly advocates that a due diligence assessment (DDA) process or indemnity statement is legislated, to provide a defence against prosecution. An effective due diligence process and associated protections are vital to mineral explorers, as without clear, legislated protections, explorers will be subject to unnecessary uncertainty and risk of legal challenge and extensive penalties.

An effective due diligence assessment process will consider the risk of harm, and their relativeness to protected areas of Aboriginal heritage.

It must be supported by clear definitions and expectations of what Government will consider to be reasonable steps to avoid or minimise the risk of harm to Aboriginal heritage, and what demonstration of consideration and mitigation has been employed.

All documents pertaining to the legislative reform process, including identification of AH, AH investigations guidelines, notification guidelines, Register user guidelines, survey guidelines, will interact with a DDA process. They should be developed in collaboration with industry, as their content and application will have direct and indirect impacts on the DDA process.

AMEC considers the requirements for proponents to undertake due diligence to avoid reckless damage or disturbance, ambiguous. More certainty is required to demonstrate the expected level of due diligence a proponent will need to undertake. For example, will a heritage survey with native title holders meet expectations? With increasing calls to remove 'gag order provisions' from NTMAs, proponents could be allowed to rely on a clearance as a defence against prosecution, warrant the traditional authority of survey team members or otherwise represent the accuracy and/or reliability of information provided by a survey, and give longevity to a clearance. There should not be the ability to withdraw a clearance at any time without notice or sufficient reason, and opportunity to engage.

For early mineral exploration work, specific heritage surveys may not always be undertaken. Will a search of the Register be sufficient, at the time of grant of a tenement? AMEC notes ongoing concern that there is no 'notification' process when 'new' sites are entered into the central archive. Will it be reasonable for a proponent to rely on a clearance which has been given? Or will a search of the register be required every single day or week and/or every time access is required on tenements with an existing clearance, as parties who were not involved in the original clearance, may have added new 'reports' to the Register, and the proponent will not have been notified?

It is also unclear if previous AH surveys and reports that are held by proponents, but not in the Register (which is not publicly accessible) remain valid or not. The lack of certainty as to whether or not a site or object has previously been reported under the Act is a clear omission which will lead to unintended consequences. Clarity is sought. Confidentiality and disclosure restrictions will continue to

pose a challenge as to the limitations of information that can be shared. These limits will have obvious impacts on considerations of what is reasonable in preventing or minimising the risk of harm, and what constitutes known or reported heritage. It should be made clear that proponents can rely on these reports, and this statement be reflected consistently throughout the ensuing package of reform documents.

AMEC considers any risk of unreliability of the Register should be assumed by the Government. There must be clear statements included in the Regulations and/or Policy to the effect that the information in the Register can be relied upon for the purpose of the DDA process under the Act, unless the proponent is or becomes aware of any additional information that reasonably indicates that the Directory information is inaccurate or unreliable.

Notification of objects, sites and/or remains

The clarity sought by drafting this Bill, to address uncertainty arising from the chance find procedure and accepted policies and procedures of the AAR, following *Dare v Kelaray*, is noted.

However, AMEC has strong concerns that the increased requirements to notify the Minister, will substantially increase the volume of notifications and the required communication back to authorisation holders, with limited proven increase in cultural heritage protection.

Notification criteria and circumstances should be clearly developed subject to robust, holistic consultation, including the mining and exploration sector, and other industries. These processes and policies will need to clearly articulate how notification is intended to work from a practical perspective given the interaction of various legislative frameworks, cultural sensitivities, and overlap between reporting authorities. Resourcing to address a significant reform process, while addressing a growing backlog of lengthy s23 applications, is required.

AMEC questions the efficacy of proposing to introduce increased reporting requirements without first undertaking an assessment of the likely increase in reporting numbers. If such an activity has been undertaken, the findings should be publicised. Industry, subject to this Bill's passage, will have to navigate increasing timeframes, delays, and costs, as a result of increased requirements to report. This will undoubtedly lead to further delays due to a recent trend of risk averse regulation, seeking additional State legal advice, and an expected significant increase in demand for service from all industries.

AMEC recommends significant funding for recruitment and training is added as a Budget line item, in preparation of the substantial work agenda.

Consistency across requirements for industries other than exploration and mining

The mineral exploration and mining industry is one that can attract significant public attention, despite its robust regulatory processes. Other industries are not subject to the same rigour of regulation, nor scrutiny. AMEC recommends in undertaking this reform process, similar focus is given to other industries , for transparency and consistency between industries and Aboriginal heritage parties, to ensure all industries and workers understand that their obligations and responsibilities, are not solely limited to their own operations.

All industries operating under the AH Act, should demonstrate the same level of engagement, ongoing relationship building, clearance permitting and surveying, as the mineral exploration and mining industry, for consistency, if it has been considered best practice.

S24 - Directions by Minister

The proposed changes to s24(1a)(a) seek to introduce stronger powers for the Minister to protect and preserve sites, objects or remains. However, AMEC has concerns with the drafting and potential delays, uncertainty, and lack of clarity their passage will entail for industry.

A clearly defined criteria for situations in which the Minister may determine it necessary to prohibit or restrict access, is required to be consulted on. This will underpin the pragmatism of the reforms and perceptions of whether development will still be permitted in South Australia or not. There is significant concern that these new powers could restrict access and development, despite granted authorisations, and increase the likelihood of legal challenge.

Once the criteria have been developed, clear pathways for communication and appeal must be developed. AMEC would be concerned if the Directions leave no room for industry to participate in timely consultation with the Minister or their delegate, to address a proposed Direction under s24(1). An escalation pathway is recommended.

Additionally, AMEC questions how the legislative reforms will address 'sites within sites'. S24(1a)(a) stipulates the new requirements will apply to new sites, objects or remains discovered after a s21, s23 or both authorisations are given, but there are instances where a site, object or remain, may be contained within an already registered site. For instance, will the discovery of a 'site within a site' be decoupled from the prevailing authorisation, and treated as a new discovery? Will an existing report containing an overarching statement about landscape features now impose an obligation on an owner to actively identify and report such locations under s20, and/or report them when such areas are discovered in the course of activities?

For the mineral exploration and mining industry, where it is regular practice for tenements to pass through multiple companies on the pathway to project development, there is a strong likelihood that similar information may be recorded multiple times by multiple parties, unless heritage surveys are made transferrable, as we have long-advocated for. This would require extensive cross-referencing and potentially, years of delay. In recognition of the importance of due diligence and appropriate consultation, AMEC recommends this uncertainty that exists in the current legislation should be addressed to provide a clear pathway.

Part 3A – Additional court orders where contravention of the Act

The new proposed s37DA seeks to give the Court additional orders where parties are found guilty, over and above financial and criminal penalties.

AMEC is concerned that an untenable amount of uncertainty via financial and non-financial costs can be ordered by the Court, in the event of a guilty verdict.

For instance, s37DA (1)(a)(i) proposes the Court can order the person to pay to the Crown or a specified Aboriginal person or body an amount of money for or towards one or both of the following – repair, restoration or reinterment of an Aboriginal site, object or remains affected by the contravention.

AMEC questions how such amounts will be determined, and what parameters will be pre-determined and publicly released prior to enforcement. It is the intent of explorers and miners to meet legislated requirements and community expectations. However, without strong due diligence frameworks and protections in place, there will be substantial concern that authorised activities, may contravene, despite meeting all requirements. AMEC recommends the next round of consultation releases a 'fee schedule' or ranges likely to be considered as reasonable, to provide meaningful comment.

The 'name and shame' provisions proposed under s37 DA (1)(c) are also a substantial new addition to the existing regime. AMEC supports transparency and engagement, but Court determinations and proceedings have a litigious undertone that typically does not uphold good faith negotiations and relationship building undertaken across the sector. The name and shame provisions, if not appropriately managed and enforced, may unintentionally, detrimentally impact the broader industry as a whole. This is an outcome that must be avoided. AMEC recommends a criteria for the category of offence that will be subject to these requirements is developed, and the extent of information that will be shared with stakeholders outside of those immediately impacted is clearly defined in collaboration with all industries subject to the AH Act reforms, so as not to interfere with the course of natural justice and due process.

There is broad concern that the introductions under the Court's additional powers, are open-ended, and limitless. There is no extent to their reach based on current drafting, leading to great uncertainty. The ability of a court to determine fees increases the likelihood of judicial proceedings, disputes and appeals. AMEC recommends adequate resourcing is dedicated to the AAR, the South Australian Courts and legal systems, to ensure timely and efficient services can be provided, as there will likely be a significant increase in demand, should these reforms progress.

Past Authorisations

AMEC considers the clarity provided by the Government that authorisations granted before *Dare v Kelaray* will remain valid, an important and necessary clarification to be built into the legislation to address uncertainty across the sector, and all developments.

We do however question the arrangements that will now need to be made, subject to the passage of this legislation, to encompass the proposed notification procedures, for those granted and/or pending authorisation applications, that do not include a notification procedure in alignment with the strengthened Government stance?

Clearly articulated, well considered transition requirements must be established, and well communicated, prior to passage. This includes sufficient time to consider what changes are likely to be required, the interaction of potential changes on existing and/or pending agreements and/or authorisations, and the impacts this may have on other legislative frameworks and policies, given the significant intersection of various State and Commonwealth legislation and approvals mechanisms.

It is important a balanced approach to the transition is adopted from the outset, to ensure development is not inadvertently halted due to uncertainty and ambiguous processes, with lack of clarity as to the extent of authorisations. Explorers and miners comply with arguably, the world's most robust regulatory frameworks to get approval to even enter land to conduct the most basic exploration activity. Extending these processes or increasing complexity must be carefully considered, particularly given pending changes at a Commonwealth level, to ensure the level of regulation is commensurate with the level of risk, proportionate to the level of activity.

S41 Vicarious liability

While there have been no proposed amendments to the s41 provisions, there are concerns the vicarious liability provisions have not been duly considered, and could extend to principals and/or employers, including board directors, unless reasonable due diligence considerations are deemed to have been able to prevent the commission of the offence.

With increased financial and criminal penalties proposed, it is strongly recommended the vicarious liability provisions are amended, to reflect a reasonable penalty. AMEC does not consider an equal penalty, given the significant increase, to be reasonable, particularly in the instance of criminal charges.

Aboriginal Heritage Fund

AMEC supports the proposal as per s19(2)(e) that penalties in respect of offences against this Act will go into the South Australian Aboriginal Heritage Fund; kept in a separate account under Treasury.

It is important the management and administration of the fund is transparent, to ensure it is being utilised to garner maximum benefit for South Australians. AMEC welcomes transparency and oversight as to the use of the funds, the interest earned, and plans for the Fund, being regularly communicated with Industry.

Other recommendations

- Standardise fees and charges for heritage clearances: There is a large range of fees and charges exploration and mining companies pay for heritage clearance work. Delays have been reported with execution of Agreements until formal payments have been received, causing further land access delays. A standardised Fees and Charges Schedule developed by Government in consultation with stakeholders will provide more consistency and certainty.
- Transferability of heritage surveys: Heritage surveys are a fundamental, but timely and costly process which can create extensive delays to land access. Permitting exploration and mining companies to access and use heritage surveys conducted by previous tenement holders with Traditional Owners and/or claimant groups would remove duplication and delays.
- Competing stakeholder claims: To address overlaps which can occur where different stakeholders and individuals have requested consultation over the same area, it is recommended Guidelines on the management of overlapping claims, including competing and differing stakeholder views and needs, are developed to support relationship building across South Australia. This should be coupled with an education and awareness program, encouraging communities to actively

participate in, and gain an understanding of, the long-term relationship between Industry and cultural heritage.

- Knowledge holder guidelines: Western Australia is currently developing guidelines to assist in the identification of knowledge holders. A similar process in South Australia is recommended. It is a noted challenge across all jurisdictions to identify the suitable representatives to speak for land, and these guidelines will provide more clarity and consistency.
- Adequate Government funding of Recognised Aboriginal Representative Bodies (RARB): Sufficient baseline funding of RARBs and Indigenous groups is critical to the successful operation of cultural heritage practices across South Australia. Cost recovery and commercialisation of heritage surveys has created opacity and uncertainty in systems, that could be addressed by sufficiently resourcing established bodies to fulfil their requirements.
- Consideration of designating existing PBCs as the automatic RARB for their determination area, to provide a greater level of certainty as to the traditional owner terminology used in the Act, and interaction with proposed increase use of s23, in an under-resourced area.

Final comment

AMEC invites continued engagement with the Department and other co-regulatory agencies involved in this important reform process, through the next phases of consultation. We welcome opportunities to provide briefings and workshops for our members, broader industry and Government, to ensure the potential ramifications of proposed reforms have been subject to robust consultation and consideration, to mitigate unintended consequences.

In an overwhelming regulatory reform environment, there is substantial concern that reform fatigue will detract from the ability of robust consultation and consideration in detail. AMEC welcomes clearly outlined timelines for the next stages of this process, and due consideration of a rapidly evolving Commonwealth landscape, with undeniable impacts on South Australia's legislative framework.

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Recommendations:

- Provide certainty Aboriginal heritage processes across South Australia, particularly the reporting obligations and associated penalties relating to discoveries.
- AMEC welcomes ongoing consultation to ensure the reforms proposed have been adequately considered, and do not result in unintended consequences for South Australian mineral explorers and miners, as we seek to work towards a framework that is mutually beneficial and streamlined, for all stakeholders.
- AMEC strongly advocates that a due diligence assessment (DDA) process or indemnity statement is legislated, to provide a defence against prosecution.
- It must be supported by clear definitions and expectations of what Government will consider to be reasonable steps to avoid or minimise the risk of harm to Aboriginal heritage, and what demonstration of consideration and mitigation has been employed.
- Address questions around the penalty structure, if South Australia will again seek to substantially increase fees, subject to potential federal changes.
- AMEC seeks clarity on the definition and criteria of 'intentional' or 'reckless' relating to s23 of the Act.
- Clarify that only harm to tangible Aboriginal Heritage will be subject to the penalty provisions of the Act.
- More stringent timeframes will address a long-term element of uncertainty.
- Develop guidance and as much clarity can be provided in the Regulations, to provide much-needed certainty of the requirements under the proposed s23(3) defence for the strict liability offence, that in defence, the defendant must prove they did not know, and could not reasonably have been expected to have known that the site, object or remains to which the alleged offence relates, was an Aboriginal site, object or remains.
- AMEC recommends a robust due diligence management procedure is developed in consultation with industry prior to the next stages of consultation, to ensure these provisions are supported by effective frameworks.
- Robust consultation on the development of s20B notification and response guidelines, procedures and frameworks, including robust criteria, definitions, and escalation pathways.
- The next round of consultation documents should involve the development of these processes, procedures and documents, as well as criteria for circumstances when an Inspector may issue directions to protect and / or preserve the heritage, as opposed to the Minister.
- Clarity is sought if previous AH surveys and reports that are held by proponents, but not in the Register (which is not publicly accessible) remain valid or not.
- Definition of "ought reasonably to suspect" and the grounds that may warrant suspicion, are required
- A clearly defined criteria for situations in which the Minister may determine it necessary to prohibit or restrict access, is required to be consulted on.
- AMEC recommends the issue of 'sites within sites' and the uncertainty that currently exists, is addressed in the drafting process.
- AMEC advocates that legislation can ensure the full, mandatory disclosure of the location of heritage objects, places and sites via the Register.

- Once the mandatory disclosure of heritage objects, places and sites is enacted, an indemnity clause for mineral exploration and mining companies against prosecution should be introduced, if companies can demonstrate they used the register of sites, objects and places, and a non-registered discovery is made.
- AMEC considers any risk of unreliability of the Register should be assumed by the Government.
- Clearly articulated, well considered transition requirements must be established, and well communicated, prior to passage.
- Resourcing to address a significant reform process, while addressing a growing backlog of lengthy s23 applications, is required.
- AMEC recommends significant funding for recruitment and training is added as a Budget line item, in preparation of the substantial work agenda.
- AMEC recommends adequate resourcing is dedicated to the AAR, the South Australian Courts and legal systems, to ensure timely and efficient services can be provided, as there will likely be a significant increase in demand, should these reforms progress.
- AMEC recommends clarity around buffer zones in s20B(6)(c) is provided, and notification of changes to buffer zones be provided to proponents.
- S20B(6) Clear, consistent timeframes and escalation pathways must be developed, subject to industry consultation.
- S37DA - AMEC recommends the next round of consultation releases a 'fee schedule' or ranges likely to be considered as reasonable, to provide meaningful comment.
- Name and shame provisions - AMEC recommends a criteria for the category of offence that will be subject to these requirements is developed, and the extent of information that will be shared with stakeholders outside of those immediately impacted is clearly defined.
- It is important the terms 'discovery', 'new discovery' and 'new information' are succinctly and unambiguously clarified to address existing uncertainty.
- Aboriginal Heritage Fund - AMEC welcomes transparency and oversight as to the use of the funds, the interest earned, and plans for the Fund, being regularly communicated with Industry.
- All industries operating under the AH Act, should demonstrate the same level of engagement, ongoing relationship building, clearance permitting and surveying, as the mineral exploration and mining industry, for consistency, if it has been considered best practice.
- Standardise fees and charges for heritage clearances.
- Permitting exploration and mining companies to access and use heritage surveys conducted by previous tenement holders with Traditional Owners and/or claimant groups would remove duplication and delays.
- To address overlaps which can occur where different stakeholders and individuals have requested consultation over the same area, it is recommended Guidelines on the management of overlapping claims, including competing and differing stakeholder views and needs, are developed to support relationship building across South Australia. This should be coupled with an education and awareness program, encouraging communities to actively participate in, and gain an understanding of, the long-term relationship between Industry and cultural heritage.
- Develop knowledge holder guidelines. It is a noted challenge across all jurisdictions to identify the suitable representatives to speak for land, and these guidelines will provide more clarity and consistency.

- Sufficient baseline funding of RARBs and Indigenous groups is critical to the successful operation of cultural heritage practices across South Australia.
- Consideration of designating existing PBCs as the automatic RARB for their determination area, to provide a greater level of certainty as to the traditional owner terminology used in the Act, and interaction with proposed increase use of s23, in an under-resourced area.