

House of Assembly—No 108

As received from the Legislative Council and read a first time, 8 February 2024

South Australia

**Aboriginal Heritage (Miscellaneous) Amendment
Bill 2023**

A BILL FOR

An Act to amend the *Aboriginal Heritage Act 1988*.

Contents

Part 1—Preliminary

- 1 Short title
- 2 Commencement

Part 2—Amendment of *Aboriginal Heritage Act 1988*

- 3 Amendment of section 3—Interpretation
 - 4 Amendment of section 6—Delegation
 - 5 Amendment of section 10—Confidentiality of archives
 - 6 Amendment of section 13—Consultation on determinations, authorisations and regulations
 - 7 Amendment of section 14—Authorisations subject to conditions
 - 8 Amendment of section 18—Offences
 - 9 Amendment of section 19—The Fund
 - 10 Amendment of section 19L—Interaction of Division with other provisions
 - 11 Amendment of heading to Part 3 Division 1
 - 12 Amendment of section 20—Discovery of sites, objects or remains
 - 13 Insertion of sections 20A and 20B
 - 20A Activity occurring under authorisation to cease on discovery of certain sites, objects and remains
 - 20B Reporting discovery of sites, objects or remains discovered while acting under authorisation
 - 14 Amendment of section 21—Excavating sites, objects or remains
 - 15 Amendment of section 22—Access to and excavation of land by authorised persons
 - 16 Repeal of heading to Part 3 Division 2
 - 17 Substitution of section 23
 - 23 Damaging, disturbing or interfering with sites, objects or remains
 - 18 Amendment of section 24—Directions by Minister restricting access to sites, objects or remains
 - 19 Amendment of section 25—Directions by inspector restricting access to sites, objects or remains
 - 20 Amendment of section 26—Failure to comply with directions of Minister or inspector
 - 21 Amendment of section 28—Care of Aboriginal objects
 - 22 Amendment of section 29—Control of sale of and other dealings with objects
 - 23 Amendment of section 32—Surrender of objects and records
 - 24 Amendment of section 35—Divulging information contrary to Aboriginal tradition
 - 25 Amendment of section 36—Access to land by Aboriginal people
 - 26 Insertion of Part 3A
 - Part 3A—Additional court orders where contravention of Act
 - 37DA Court may make additional orders where contravention of Act
 - 27 Amendment of section 38—Interference with signs
 - 28 Repeal of section 44
 - 29 Amendment of section 45—Commencement of prosecutions
-

The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Aboriginal Heritage (Miscellaneous) Amendment Act 2023*.

2—Commencement

This Act comes into operation on a day to be fixed by proclamation.

Part 2—Amendment of *Aboriginal Heritage Act 1988*

3—Amendment of section 3—Interpretation

Section 3, definition of *mining tenement*, (b)—delete "*Petroleum Act 1940*" and substitute:

Petroleum and Geothermal Energy Act 2000

4—Amendment of section 6—Delegation

Section 6(1)—delete "other than the power to authorise the commencement of proceedings for an offence against this Act"

5—Amendment of section 10—Confidentiality of archives

Section 10(4), penalty provision—delete "\$10 000 or imprisonment for 6 months." and substitute:

\$250 000 or imprisonment for 2 years or both.

6—Amendment of section 13—Consultation on determinations, authorisations and regulations

Section 13(3)—after paragraph (c) insert:

or

- (d) an authorisation under section 20A(1)(c); or
- (e) an amendment of an authorisation under Part 3 Division 1 or 3 (not being an amendment that has the effect of authorising the uncovering, damage to, disturbing of, interference with or removal of additional Aboriginal sites, objects or remains); or
- (f) a repeal of an authorisation under Part 3 Division 1 or 3; or
- (g) an authorisation under section 45.

7—Amendment of section 14—Authorisations subject to conditions

(1) Section 14(2), penalty provision, (a)—delete "\$50 000" and substitute:

\$500 000

- (2) Section 14(2), penalty provision, (b)—delete "\$10 000 or imprisonment for 6 months." and substitute:

\$250 000 or imprisonment for 2 years or both.

8—Amendment of section 18—Offences

- 5 Section 18, penalty provision—delete "\$2 000 or imprisonment for 3 months." and substitute:

\$10 000 or imprisonment for 6 months or both.

9—Amendment of section 19—The Fund

Section 19(2)—after paragraph (d) insert:

10 and

- (e) penalties recovered in respect of offences against this Act; and
(f) amounts paid to the Crown in accordance with an order under section 37DA.

10—Amendment of section 19L—Interaction of Division with other provisions

- 15 Section 19L—After its present contents (now to be designated as subsection (1)) insert:

- (2) To avoid doubt, nothing in this Division limits section 20.

11—Amendment of heading to Part 3 Division 1

Heading to Part 3 Division 1—delete "of, and search for," and substitute:

20 , protection and management of

12—Amendment of section 20—Discovery of sites, objects or remains

- (1) Heading to section 20—delete the heading and substitute:

Reporting discovery of sites, objects or remains where person not acting under Ministerial authorisation

- 25 (2) Section 20(1), penalty provision, (a)—delete "\$50 000" and substitute:

\$500 000

- (3) Section 20(1), penalty provision, (b)—delete "\$10 000 or imprisonment for 6 months." and substitute:

\$250 000 or imprisonment for 2 years or both.

- 30 (4) Section 20(3)—delete "to take such immediate action for the protection or preservation of the remains" and substitute:

, or the owner or occupier of the land to which the report relates, (or both) to take such immediate action for the protection or preservation of the Aboriginal site, object or remains

- 35 (5) Section 20(4), penalty provision—delete "\$2 000 or imprisonment for 3 months." and substitute:

\$10 000 or imprisonment for 6 months or both.

(6) Section 20—after subsection (4) insert:

(5) This section does not apply in relation to—

- 5
- (a) Aboriginal sites, objects or remains discovered by a person acting pursuant to a Ministerial authorisation given under section 21 or 23 (being a discovery that must be reported under section 20B); or
 - (b) Aboriginal sites, objects or remains the discovery of which has previously been reported under this Act.

13—Insertion of sections 20A and 20B

10 After section 20 insert:

20A—Activity occurring under authorisation to cease on discovery of certain sites, objects and remains

15 (1) A person who, while acting, or purportedly acting, pursuant to an authorisation given by the Minister under section 21 or 23 or both, discovers—

- (a) an Aboriginal site, object or remains; or
- (b) a site, object or remains that the person suspects, or ought reasonably to suspect, may be an Aboriginal site, object or remains,

20 must immediately cease undertaking any activity within the prescribed distance of the site, object or remains until—

- (c) the Minister, by notice in writing, authorises the resumption of such activities, or activities of a specified kind; or
- (d) the Minister gives a direction under section 24; or
- 25 (e) the expiration of the prescribed period in relation to the site, object or remains,

whichever occurs first.

(2) A person who contravenes subsection (1) is guilty of an offence.

Maximum penalty:

- 30
- (a) in the case of a body corporate—\$500 000;
 - (b) in any other case—\$250 000 or imprisonment for 2 years or both.

(3) This section does not apply in relation to the following Aboriginal sites, objects or remains:

- 35
- (a) Aboriginal sites, objects or remains specified in the relevant authorisation;

- 5
- (b) Aboriginal sites, objects or remains that are known to the Minister and disclosed to the applicant in the course of an application for the relevant authorisation (whether or not the discovery of the sites, objects has previously been reported under this Act);
- (c) Aboriginal sites, objects or remains the discovery of which is reported under section 20;
- 10 (d) Aboriginal sites, objects or remains that are the subject of a management methodology approved by the Minister for the purposes of this section at the time the relevant authorisation was given;
- (e) Aboriginal sites, objects or remains that are the subject of a local heritage agreement;
- 15 (f) any other Aboriginal site, objects or remains, or Aboriginal sites, objects or remains of a kind, prescribed by the regulations.
- (4) Before approving a management methodology for the purposes of subsection (3)(d), the Minister must be satisfied that—
- 20 (a) the management methodology was developed in consultation with the traditional owners of the sites, objects or remains; and
- (b) the management methodology includes provisions requiring consultation with the traditional owners in relation to sites, objects or remains discovered in the course of undertaking an activity pursuant to the relevant authorisation; and
- 25 (c) the management methodology requires sites, objects and remains discovered in the course of undertaking an activity pursuant to the relevant authorisation to be reported in accordance with section 20B; and
- 30 (d) a condition is imposed on the relevant authorisation requiring the person to whom the authorisation is given to comply with the management methodology in relation to sites, objects and remains discovered in the course of undertaking an activity pursuant to the authorisation; and
- 35 (e) the management methodology complies with any other requirements set out in the regulations or guidelines.
- (5) Nothing in this section limits a direction that may be given by the Minister or an inspector under this Act (and, in particular, nothing in this section authorises a person to contravene such a direction).
- 40 (6) This section applies in relation to an authorisation by the Minister given before or after the commencement of this section.

(7) In this section—

prescribed distance, in relation to a site, object or remains, means—

- (a) if the regulations prescribe a distance for the purposes of this section—that distance; or
- (b) if the site, object or remains are discovered in the course of undertaking an activity pursuant to an authorisation of the Minister under section 21 or 23, and that authorisation specifies a distance for the purposes of this section—that distance; or
- (c) in any other case—
 - (i) in the case of a site or object—3 metres; or
 - (ii) in the case of remains—5 metres;

prescribed period, in relation to a site, object or remains, means—

- (a) in the case of a site or object—5 business days; or
- (b) in the case of remains—10 business days,

after the day on which a proposed methodology for avoiding, impacting or managing the site, object or remains is provided to the Minister following the discovery of the site, object or remains in accordance with any requirements determined by the Minister.

20B—Reporting discovery of sites, objects or remains discovered while acting under authorisation

- (1) A person who is given an authorisation by the Minister for the purposes of section 21 or 23 or both must, as soon as practicable and in accordance with any requirements set out in the regulations, report to the Minister the discovery of any Aboriginal site, object or remains made while acting, or purportedly acting, pursuant to the authorisation (whether the discovery was made by the person, an employee or agent of the person or otherwise).
- (2) However, subsection (1) does not relate to—
 - (a) an Aboriginal site, object or remains of a kind referred to in section 20A(3) (other than a site, object or remains referred to in section 20A(3)(d)); or
 - (b) any other Aboriginal site, object or remains, or Aboriginal sites, objects or remains of a kind, prescribed by the regulations.
- (3) A person who contravenes subsection (1) is guilty of an offence.
Maximum penalty:
 - (a) in the case of a body corporate—\$500 000;
 - (b) in any other case—\$250 000 or imprisonment for 2 years or both.

- 5 (4) An employee or agent of, or a person who is otherwise acting for or behalf of, a person who is given an authorisation by the Minister for the purposes of section 21 or 23 or both must, as soon as practicable, report to the person to whom the authorisation is given the discovery of any Aboriginal site, object or remains made while acting, or purportedly acting, pursuant to the authorisation.

Maximum penalty: \$250 000 or imprisonment for 2 years or both.

- 10 (5) This section applies to—
- (a) a traditional owner of the site or object to the extent that the traditional owner is an employee or agent of, or is otherwise acting for or on behalf of, a person who is given an authorisation by the Minister for the purposes of section 21 or 23 or both; or
 - (b) an employee or agent of, or a person otherwise acting for or on behalf of, a traditional owner referred to in paragraph (a).
- 15 (6) This section applies in relation to an authorisation by the Minister given before or after the commencement of this section.
- (7) To avoid doubt, this section applies despite a provision of an authorisation to the contrary.

20 **14—Amendment of section 21—Excavating sites, objects or remains**

- (1) Section 21—delete "the authority of" and substitute:

authorisation by

- (2) Section 21, penalty provision, (a)—delete "\$50 000" and substitute:

\$500 000

- 25 (3) Section 21, penalty provision, (b)—delete "\$10 000 or imprisonment for 6 months." and substitute:

\$250 000 or imprisonment for 2 years or both.

- (4) Section 21—after its present contents (now to be designated as subsection (1)) insert:

- 30 (2) Without limiting any other provision of this Act, the Minister may give an authorisation for the purposes of this section to a specified class of persons.
- 35 (3) Without limiting any other provision of this Act, the Minister may give an authorisation for the purposes of this section in relation to specified Aboriginal sites, objects or remains, or to all Aboriginal sites, objects or remains within a specified area (whether or not those Aboriginal sites, objects or remains are entered in archives kept under Part 2 or have otherwise been reported under this Act).

(4) Without limiting any other provision of this Act, the Minister may give an authorisation for the purposes of this section to a specified class of persons.

(5) Without limiting any other provision of this Act, the Minister may give an authorisation for the purposes of this section in relation to specified Aboriginal sites, objects or remains, or to all Aboriginal sites, objects or remains within a specified area (whether or not those Aboriginal sites, objects or remains are entered in archives kept under Part 2 or have otherwise been reported under this Act).

(6) Section 20 does not apply in relation to Aboriginal sites, objects or remains discovered in the course of activities carried out with an authorisation given by the Minister for the purposes of this section.

Note—

Such discoveries may be required to be reported to the Minister under section 20B.

(7) This section does not apply to damage to, disturbance of or interference with Aboriginal sites, objects or remains occurring in the course of complying with a direction of the Minister under this Act.

18—Amendment of section 24—Directions by Minister restricting access to sites, objects or remains

(1) Heading to section 24—delete "restricting access to" and substitute:

for protection and preservation of

(2) Section 24(1)—delete "directions prohibiting or restricting—" and substitute:

1 or more of the following directions:

(3) Section 24(1)(c)—before "access" insert:

a direction prohibiting or restricting

(4) Section 24(1)(d)—before "activities" insert:

a direction prohibiting or restricting

(5) Section 24(1)—after paragraph (d) insert:

(e) any other directions the Minister considers necessary or appropriate for the protection or preservation of the site, object or remains.

(6) Section 24—after subsection (1) insert:

(1a) In the case of Aboriginal sites, objects or remains on land to which an authorisation given by the Minister under section 21 or 23 or both relates, this section will be taken only to apply to—

(a) a new site, object or remains discovered after the authorisation is given; or

- 5 (b) a site, object or remains discovered before the authorisation is given but that should, due to the receipt of new information about the site, object or remains, in the opinion of the Minister, be the subject of a direction under this section.
- (1b) To the extent that a direction is inconsistent with a provision of—
- 10 (a) an authorisation given by the Minister under section 21 or 23; or
- (b) a management methodology approved for the purposes of section 20A(3)(d); or
- (c) a local heritage agreement; or
- (d) an agreement to which Part 3 Division A2 applies,
- the provision will, while the direction is in force and to the extent of the inconsistency, be taken to be of no effect.
- 15 (7) Section 24(2)—after "directions" insert:
- (other than a direction given in the circumstances contemplated by subsection (1a))
- (8) Section 24(2a)—delete subsection (2a) and substitute:
- 20 (2a) Before giving a direction under this section, the Minister must have regard to such of the following as may be relevant to the Aboriginal site, object or remains:
- (a) an authorisation given by the Minister under section 21 or 23;
- 25 (b) a management methodology approved for the purposes section 20A(3)(d);
- (c) a local heritage agreement;
- (d) an agreement to which Part 3 Division A2 applies,
- however nothing in this subsection prevents the Minister from giving a direction in relation to sites, objects or remains that are the subject of such an instrument.
- 30 (9) Section 24(4)(a)—delete "private"
- (10) Section 24—delete subsection (5) and substitute:
- (5) The Minister may give a direction under this section without the notice required by subsection (4)—
- 35 (a) if satisfied that urgent action is necessary; or
- (b) in relation to an Aboriginal site, object or remains discovered in the course of acting pursuant to an authorisation given by the Minister under section 21 or 23,
- but must, in that event, take reasonable steps to give the notice as soon as practicable after giving the direction.
- 40

(5a) To avoid doubt, nothing in this section limits, or is limited by, any directions the Minister may give under section 20.

(11) Section 24(10)—delete "\$2 000" and substitute:

\$10 000

5 **19—Amendment of section 25—Directions by inspector restricting access to sites, objects or remains**

(1) Heading to section 25—delete "restricting access to" and substitute:

for protection and preservation of

(2) Section 25(1)—delete "directions prohibiting or restricting—" and substitute:

10 1 or more of the following directions:

(3) Section 25(1)(c)—before "access" insert:

a direction prohibiting or restricting

(4) Section 25(1)(d)—before "activities" insert:

a direction prohibiting or restricting

15 (5) Section 25(1)—after paragraph (d) insert:

(e) any other directions the inspector considers necessary or appropriate for the protection or preservation of the site, object or remains.

(6) Section 25—after subsection (1) insert:

20 (1aa) In the case of Aboriginal sites, objects or remains on land to which an authorisation given by the Minister under section 21 or 23 or both relates, this section will be taken only to apply to—

(a) a new site, object or remains discovered after the authorisation is given; or

25 (b) a site, object or remains discovered before the authorisation is given but that should, due to the receipt of new information about the site, object or remains, in the opinion of the inspector, be the subject of a direction under this section.

(1ab) To the extent that a direction is inconsistent with a provision of—

30 (a) an authorisation given by the Minister under section 21 or 23; or

(b) a management methodology approved for the purposes of section 20A(3)(d); or

(c) a local heritage agreement; or

35 (d) an agreement to which Part 3 Division A2 applies,

the provision will, while the direction is in force and to the extent of the inconsistency, be taken to be of no effect.

20—Amendment of section 26—Failure to comply with directions of Minister or inspector

- (1) Section 26, penalty provision, (a)—delete "\$50 000" and substitute:

\$500 000

- 5 (2) Section 26, penalty provision, (b)—delete "\$10 000 or imprisonment for 6 months." and substitute:

\$250 000 or imprisonment for 2 years or both.

21—Amendment of section 28—Care of Aboriginal objects

- (1) Section 28, penalty provision, (a)—delete "\$50 000" and substitute:

10 \$500 000

- (2) Section 28, penalty provision, (b)—delete "\$10 000 or imprisonment for 6 months." and substitute:

\$250 000 or imprisonment for 2 years or both.

22—Amendment of section 29—Control of sale of and other dealings with objects

15

- (1) Section 29(1)—delete "the authority of" and substitute:

authorisation by

- (2) Section 29(1), penalty provision, (a)—delete "\$50 000" and substitute:

\$500 000

- 20 (3) Section 29(1), penalty provision, (b)—delete "\$10 000 or imprisonment for 6 months." and substitute:

\$250 000 or imprisonment for 2 years or both.

- (4) Section 29—after subsection (2) insert:

25

(2a) Without limiting any other provision of this Act, the Minister may give an authorisation for the purposes of this section to a specified class of persons.

(2b) Without limiting any other provision of this Act, the Minister may give an authorisation for the purposes of this section in relation to a specified Aboriginal object, or to Aboriginal objects of a specified class.

30

23—Amendment of section 32—Surrender of objects and records

Section 32(3), penalty provision—delete "\$2 000 or imprisonment for 3 months." and substitute:

\$10 000 or imprisonment for 6 months or both.

24—Amendment of section 35—Divulging information contrary to Aboriginal tradition

Section 35(1), penalty provision—delete "\$10 000 or imprisonment for 6 months." and substitute:

5 \$250 000 or imprisonment for 2 years or both.

25—Amendment of section 36—Access to land by Aboriginal people

Section 36(4), penalty provision—delete "\$2 000 or imprisonment for 3 months." and substitute:

\$10 000 or imprisonment for 6 months or both.

10 **26—Insertion of Part 3A**

After section 37D insert:

**Part 3A—Additional court orders where
contravention of Act**

15 **37DA—Court may make additional orders where contravention
of Act**

- (1) Where, in proceedings under this Act, a court finds a person guilty of a contravention of this Act, the court may, in addition to any penalty it may impose, do 1 or more of the following:
- 20 (a) order the person to pay to the Crown or a specified Aboriginal person or body an amount of money for or towards 1 or both of the following:
 - 25 (i) repair, restoration or reinterment of an Aboriginal site, object or remains affected by the contravention;
 - (ii) any other costs incurred, or likely to be incurred, to make good any other harm caused by the contravention;
 - 30 (b) order the person to take specified action to make good any damage caused by the contravention and, if appropriate, to take specified action to prevent or mitigate further damage;
 - (c) order the person to take specified action to publicise the contravention and its consequences;
 - 35 (d) order the person to pay to a specified Aboriginal person or body an amount determined by the court for reasonable costs and expenses incurred, or compensation for harm suffered, in relation to the contravention;
 - 40 (e) order the person to pay to the Crown an amount not exceeding the court's estimation of the amount of the economic benefit acquired by the person, or accrued or accruing to the person, as a result of the contravention;

(f) make any ancillary orders the court considers appropriate.

- (2) For the purposes of subsection (1)(e), an economic benefit obtained by delaying or avoiding costs will be taken to be an economic benefit acquired as a result of a contravention if the contravention can be attributed (in whole or in part) to that delay or avoidance.

5

27—Amendment of section 38—Interference with signs

Section 38, penalty provision—delete "\$1 000" and substitute:

\$10 000

28—Repeal of section 44

Section 44—delete section 44

10

29—Amendment of section 45—Commencement of prosecutions

- (1) Section 45(1)—delete "an offence" and substitute:

a summary offence

- (2) Section 45(2)—delete subsection (2) and substitute:

- (2) Without limiting subsection (1), a prosecution for a summary offence against this Act may be commenced at any time within 3 years after the date of the alleged commission of the offence or, with the authorisation of the Minister, at any later time within 10 years after the date of the alleged commission of the offence.

15