South Australian Chamber Of Mines & Energy

29 February 2024

Biodiversity Coordination Unit
Department for Environment and Water

Via email: biodiversityact@sa.gov.au

Dear Sir or Madam

Re: Proposed Biodiversity Act ('the Act')

Background

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

SACOME has quantified the sector's contribution to the South Australian economy, through its Economic Contribution Study, which analysed the expenditure patterns of 15 major operating member companies throughout 2021/22.

The 15 participating companies are some of the most significant industrial entities in South Australia, namely: Adbri, Adchem, Beach Energy, BHP, Boss Energy, Cooper Energy, FMG Resources, Nyrstar Port Pirie, OZ Minerals, Rex Minerals, Santos, and SIMEC Mining.

The Study found that these companies contributed $10.7 billion in direct and indirect spending to South Australia, equivalent to 8.3% of Gross State Product, or one dollar in every 12.

Furthermore, these member companies are responsible for the following economic contributions to the State:

- Directly employed 7,825 full-time jobs and supported the employment of 42,832 full-time jobs in total; or 1 in every 14 jobs are supported by the resources sector.

- Paid $1 billion in wages and salaries to direct full-time employees, representing an average salary of $133,672 per annum; significantly higher than the average

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South Australian salary of $77,800 per annum.

- Direct spending amounted to $5.3 billion, which included $3.75 billion in purchases of goods and services from over 2,851 local businesses.

- Paid $431 million to the State Government in royalties, stamp duty, payroll tax, and land tax.

- Provided $14.7 million to 197 different community organisations, funding health, education, the arts, sports clubs, and Indigenous communities.

Accordingly, decisions and regulations that impact our sector must be considered in this statewide context and with a view to prioritising its long-term economic viability. SACOME has already indicated to Ministers that we view 2024 to be a year of contraction and consolidation in the sector, without taking into account the *risks* posed by unnecessary or disproportionate State Government regulatory change.

Whilst we are supportive of the underlying intents of the proposed new *Biodiversity Act* ('the Act') in principle, including greater transparency and consistency, the sector views the proposal as containing *risks* regarding regulatory duplication, additional regulatory burden, the suggestion that non-government actors could issue compliance proceedings and a proposed new duty of care.

Regulatory burden and uncertainty as to the scope of reforms

SACOME nonetheless welcomes the opportunity to provide a submission, noting the Act's characterisation as "a tool to give appropriate weight to nature and its role in ensuring the long term future of South Australia" (emphasis added). SACOME agrees this to be the correct construction for regulatory reform generally for environmental matters.

SACOME thanks Mr Brett Simes for briefing SACOME members on the scope of the Act on 31 January and for also meeting with individual member companies thereafter. We welcome Mr Simes' acknowledgement in his presentation that the resources sector has mature processes for the minimisation of impacts on the environment.

In preparing this submission, SACOME has consulted widely amongst our membership, including mining, petroleum, and energy interests; as well as professional services firms.

The stated goals of the Biodiversity Act are:

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- To conserve biodiversity and maintain the diversity, quality, and function of ecosystems;
- To enhance capacity to adapt in the context of a changing climate;
- To protect threatened and culturally important species and ecological communities; and
- To recover threatened species and ecological communities so their conservation status improves.

The benefits of a dedicated Act are stated to include:

- A sense of shared responsibility in looking after our biodiversity;
- Improved conservation and protection of our biodiversity;
- Stronger partnerships with First Nations people in biodiversity conservation;
- Consistency and transparency in our approach to biodiversity conservation;
- Clearer provisions relating to identifying and protecting at-risk species;
- Improved alignment with national legislation and international obligations; and
- Support for a smart, sustainable, and inclusive economy.

It is SACOME's respectful submission that the intended goals and benefits of this proposed legislation are sufficiently covered by existing State legislation, such as the *Landscapes Act* and *Native Vegetation Act*. If DEW and the Government have identified lacunae in the existing objects clauses or substantive provisions, industry considers amendments to the same to be a proportionate and effective response that does not run the *risk* of duplication or the imposition of additional regulatory burden. Indeed, many of the benefits outlined above could be achieved by non-regulatory means or by the streamlining of existing processes.

As outlined above, DEW has acknowledged that our sector has processes in place to manage environmental impacts, which – often – form part of licensing approvals in addition to further regulatory requirements. Further reporting on the same will not lead to improved environmental outcomes, but it *risks* the viability of resource sector projects.

SACOME also highlights that significant reforms to the *Environment Protection and Biodiversity Conservation Act* ('EPBC Act') are likely to commence this year. Whilst the precise scope of the reform package is yet to be settled by the Commonwealth Government, or agreed upon by the Parliament, it will include *inter alia*:

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- New National Environmental Standards, including restoration actions and restoration contributions;
- A new Environmental Protection Agency responsible for project assessments and decisions, in addition to compliance and enforcement;
- Environmental offsets reform; and
- Recognising the importance of working with First Nations through the creation of an explicit Environmental Standard.

Our sector has been responding to, and preparing for, what the Commonwealth Government's EPBC Act changes would look like and how they may work in practice since Minister Plibersek announced the response to the Samuel Review in 2022. In addition to other representative organisations, the Minerals Council of Australia, in particular, has been in almost constant formal and informal contact with the Department for Climate Change, the Environment, Energy, and Water since that release and the rolling nature of consultation for the overall reform package. This consultation will continue throughout 2024.

In the absence of a settled reform package from the Commonwealth, which traverses many of the same policy areas and will have material impacts on our sector, it is hard to accurately assess the Act's impact (which is only at a conceptual stage) and impossible to determine which provisions will be consistent with the national reforms – which is purportedly one of the Act's benefits.

SACOME therefore recommends that the Government defer the consideration and drafting of the Act until the EPBC Act changes have commenced and outcomes and impacts are known to both Government and industry.

Should the Government accept such a deferral, it would give our sector confidence that our concerns regarding regulatory burden and the *risk* of economic viability are taken seriously; to not do so, given the breadth of the Commonwealth changes, invites the inevitable conclusion that this Act is rushed and this consultation will be ultimately meaningless.

<u>Power for non-government actors to commence proceedings</u>

SACOME reiterates its support for the underlying principles of the Act, namely promoting biodiversity restoration; however, we have significant concerns regarding the suggestion the Government is contemplating 'contemporary alternatives' for

enforcement such as enabling non-government actors to commence proceedings for offences. Such a power represents a material *risk* to our sector, which is already grappling with increased 'lawfare' suits from third parties in circumstances where environmental or other regulatory agencies had approved the licensed activity.

Sufficient legal avenues already exist for interested parties to challenge approvals.

If the Government is concerned that it is unable to enforce actions against companies that are not fulfilling their obligations, it is a matter of adequately resourcing the competent authority. Shifting responsibilities to third parties with vested interests *risks* project viability and will come, ultimately, with a cost to the Government.

Thematic areas of discussion and the duty of care

There are ten thematic areas of the Discussion Paper:

- Biodiversity and South Australia's First Nations people
- Avoiding impacts
- Transparent decision-making
- Threats to biodiversity
- Assessing the risk of extinction
- Biodiversity planning and reporting
- The benefits of information
- Achieving "30 by 30"
- Biodiversity – a shared responsibility
- Consequences of doing the wrong thing

In light of our comments above, SACOME notes that it is hard to meaningfully comment on these thematic areas in the absence of certainty from the national reform process or a substantive Bill.

However, SACOME cautions the Government that the absence of comment – because it is so difficult to do so – be regarded as tacit support.

The reference to a 'biodiversity duty of care' is a particularly apt example that SACOME and its members unequivocally do not support. The lack of a clear definition of 'biodiversity' compounds this problem.

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Existing Regulations and licensing approvals contain discrete positive obligations on operators that define responsibilities or obligations, as referred to above.

A duty of care for biodiversity is novel and raises serious questions as to whom the duty attaches, the duty's scope and the standard of care owed, what constitutes a breach, and the extent and nature of the remedies for the same. How this would overlap and interact with existing obligations is uncertain and why this duty is necessary is unclear.

These are all questions that would ultimately need to be determined by a court.

This uncertainty would represent yet another *risk* and begs the question as to why responsibilities and obligations cannot be proactively identified and managed.

Recommendations

In summary, SACOME recommends:

1. The reform process for the Act be deferred until the national reforms have commenced and its impacts are known;

2. In the alternative, if the Government wishes to proceed, a series of discrete amendments be prepared to the relevant legislation, including an amendment to the short title to include reference to biodiversity; and

3. The Government does not proceed with enabling non-government actors to commence proceedings or support the creation of a novel and untested duty of care.

Yours faithfully



Rebecca Knol
Chief Executive Officer
South Australian Chamber of Mines and Energy

CC: The Hon The Deputy Premier
The Hon The Leader of the Opposition
As portfolio leads for the Environment