### CLIENT ALERT

## Requirement of prompt government notification in the event of a “chance find” of an item of Aboriginal heritage confirmed as immutable by the supreme court

19 September 2022

In *Dare, Bilney & Ors v Kelaray Pty Ltd, Premier of South Australia*[[1]](#footnote-1) (***Dare***), the Supreme Court of South Australia has set aside a decision of the Premier to grant an authorisation to Kelaray Pty Ltd (***Kelaray***) (a subsidiary of Argonaut Resources NL) under the Aboriginal Heritage Act 1988 (SA) (***AHA***) in connection with exploration activity at Lake Torrens, ruling the authorisation was invalid on the basis its terms were inconsistent with another Aboriginal heritage protection in the AHA.

A person will commit an offence against section 23 of the AHA if it: (a) damages, disturbs or interferes with an Aboriginal site, (b) damages an Aboriginal object or (c) where an Aboriginal object or remains are found, disturbs or interferes with the object or remains (or removes the object or remains). However, a person will be immune from prosecution for doing the same to the extent it has been first authorised to do so by the relevant Minister under section 23.

Dare relates to such an authorisation granted under section 23 to Kelaray by former Premier Steven Marshall (who was the Minister responsible for the administration of the AHA at the time), permitting Kelaray to damage or interfere with any Aboriginal site, object or remains in the course of exploration activity related to its Murdie Project (an iron oxide and copper-gold mineralisation project in its exploration phase).

Rather than obtaining permission to damage or interfere with particular registered Aboriginal sites, objects or remains, Kelaray was granted a general authority to damage or interfere with any it encountered in the course of its proposed exploration program. For context, in considering the application for the authorisation, it appears the Premier accepted the subject area was of spiritual importance to various Aboriginal peoples and that ancestral remains were likely buried in the relevant area.

**Interaction between notification requirement and subject authorisation**

The applicants challenged the Premier’s decision to grant the authorisation on seven grounds. Six were dismissed. The Court accepted that the Premier acted ultra vires in making the authorisation conditional upon Kelaray’s compliance with its own “chance find procedure” (established as part of its cultural heritage management policies) (***CFP***).

The Court’s criticism of the CFP was that it did not require Kelaray to report the discovery of an item it considered may be of Aboriginal heritage to the relevant Minister before proceeding to interfere with it. The Court considered that was a defect of the CFP because it made the authorisation inconsistent with section 20 of the AHA. Section 20 provides that a person having the benefit of a mining tenement (like the exploration licences held by Kelaray) who discovers an Aboriginal site, object or remains must, as soon as practicable, report the discovery to the Minister. In the case of Aboriginal remains, section 20(3) then enables the Minister to direct the reporter to “take such immediate action for the protection or preservation of the remains as the Minister considers appropriate”.

The Court was primarily concerned that compliance with the CFP (which, instead, required Kelaray to, before proceeding to interfere with an item it suspected may be of Aboriginal heritage, first consult with an appropriate cultural heritage expert and relevant Aboriginal group representatives) would deprive the Minister of the opportunity to make a direction for the protection or preservation of discovered remains. That concern, coupled with its view the relevant Minister does not have the power to exempt a person from the reporting obligation in section 20, caused the Court to find the authorisation had been granted invalidly on the basis it is inconsistent and cannot co-exist with section 20.

**Whether authorisation can only be given in respect of identified Aboriginal sites, objects or remains**

One of the dismissed grounds of challenge was the applicants’ submission to the Court that an authorisation under section 23 can only be given in respect to one of more identified Aboriginal sites, objects or remains, or one or more identified classes of Aboriginal sites, objects or remains. Citing existing Supreme Court authority (*Starkey & Ors v The State of South Australia* [2011] 111 SASR 537), the Court found it is not necessary for an item to have first been determined under section 12 of the AHA to be of Aboriginal heritage before an authorisation under section 23 can be granted in respect to it, on the basis the AHA provides a blanket protection of all Aboriginal sites and objects (registered or not). Of note also was the Court’s comment that it could foreseeably result in unnecessary excavation and interference by the Minister to require a particular site to be investigated before an authorisation in respect to it is granted.

Hence, Dare makes clear a party may seek authority to damage, disturb or interfere with an Aboriginal object in circumstances where the status of that object as being of Aboriginal heritage is not yet formally confirmed. Further, the Court was satisfied it is acceptable for an authorisation under section 23 to be granted in circumstances where the relevant Minister does not know whether there are any Aboriginal items in existence at the relevant site.

**Whether a person must be aware an item is of Aboriginal heritage in order to breach section 23**

The Court in Dare also expressed its view that it is not an element of a breach of section 23 (e.g. to not damage, disturb or interfere with any Aboriginal site or damage any Aboriginal object) that the offender knew the relevant site or object is of Aboriginal heritage, subject to the defence of reasonable mistake. The Court did not, however, go on to consider whether a person is able to breach section 23 also without there being any indication or reasonable grounds to suspect or consider whether the relevant site or object is of Aboriginal heritage.

**In summary**

Dare is informative for parties both protected by and required to comply with (or looking to obtain exemption or relief from specific prohibitions in) the AHA and is therefore an important decision to consider.

It remains to be seen if Kelaray will look to appeal or apply for a replacement authorisation on terms consistent with section 20 of the AHA.

### If you have questions regarding this decision, please contact:

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1. [2022] SASC 91. [↑](#footnote-ref-1)