



TABLED BY
LYNSEY WARBEY.
AUG 21 2003.

PUBLIC

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FACSIMILE TRANSMISSION

TO:	OFFICE OF THE DIRECTOR GENERAL DEPARTMENT OF THE PREMIER AND CABINET
ATTENTION :	LYNSEY WARBEY
FAX NO.:	9222 9965
SUBJECT:	LOCKRIDGE ABORIGINAL RESERVE
FROM:	JOHN LYON
FAX NO.:	9264 1111
DATE:	8 MAY 2003
NO OF PAGES:	8 (INCLUDING COVER SHEET)

COMMENTS :

Lynsey,

I fax for your information a copy of a letter of advice despatched to DOLA today.

Regards,

John

PLEASE TELEPHONE 9264 1871 IF ALL PAGES ARE NOT RECEIVED OR ARE NOT LEGIBLE

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**LAND ADMINISTRATION ACT 1997 - LOCKRIDGE RESERVE 43131 FOR
USE AND BENEFIT OF ABORIGINAL INHABITANTS - REVOCATION
OF MANAGEMENT ORDER**

1. I refer to your fax of 1 May 2003 to Mr Frediani of this office. Upon my return from leave on 5 May 2003 it was referred to me for advice. As you are aware I met that day with Mr Grahame Searle, A/Chief Executive Officer of your department, and with Ms Lynsey Warbey, Senior Policy Officer of the Department of the Premier and Cabinet.
2. In your fax you pose three queries. I will deal with each in turn.
3. First, you ask what action can be taken if a condition of the management order vesting care, control and management of Reserve 43131 in the Swan Valley Nyungah Community Aboriginal Corporation is breached. The care, control and management of the reserve has been placed with the Corporation in accordance with section 46(1) of the *Land Administration Act 1997*. This provision enables the relevant management order to be made subject to such conditions as the Minister specifies. You have provided me with a copy of the Annexure to the relevant management order. The bulk of the contents of this Annexure clearly constitute relevant conditions. Section 46(2) of the Act empowers the Minister, with the consent of the particular management body, to vary any condition. Section 49 provides for management plans. Section 49(2) enables the Minister to request a management body to submit for approval a management plan. Section 50(1)(b) provides that when a management body does not comply with its management order or with a management plan which applies or does not submit the management plan in compliance with a request, the Minister may by order revoke the management order. The short answer to your question is that if a management body commits a significant breach of a condition of a management order the Minister may revoke the order;

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section 50(1)(b) being in point. In my view, significant non-compliance with a condition would constitute non-compliance with the management order. Natural justice requirements concerning the giving of notice of an intention to revoke and the provision of an opportunity to comment would have to be complied with. It would seem from your fax that there has been no relevant breach of condition at the present time.

4. The second question posed is what the Minister would need to be able to establish in order to be able to argue that it is in the public interest to revoke the management order pursuant to section 50(2) of the *Land Administration Act*. That provision provides that if, in the absence of agreement or the non-compliance referred to in section 50(1), the Minister considers that it is in the public interest to revoke, he or she may by order so revoke. As I indicated to Mr Searle and Ms Warbey, the expression "in the public interest" has been interpreted by the courts in fairly wide terms. In *O'Sullivan v Farrar* (1989) 168 CLR 210, at 216, the majority in the High Court considered the relevant authorities and observed:

"The expression "in the public interest" when used in a statute classically imports a discretionary value judgment to be made by reference to undefined factual matters confined only insofar as the subject matter and the scope and purpose of the statutory enactments may enable."

This passage was quoted with approval by Rowland J in the Full Court of the Supreme Court of Western Australia in the case of *Re Cockram, ex p Williamson* [1994] 940673 at 14. It is thus the case that the Minister's discretion is very wide. It is to be noted that the factors as to the subject matter, scope and purpose of a relevant Act are those which were identified by Mason J in the case of *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR as being in point in the context of what were matters of relevance to the exercise of a statutory discretion. In this context I draw your attention to the comments of Mason J at pages 39-42 of the report of that case.

I enclose a further copy of that letter.

5. In the context of the management order relating to Reserve 43131 it is apparent that a prime consideration concerning the public interest would be whether, in practical terms, the use of the reserve by the Swan Valley Nyungah Community Aboriginal Corporation conforms to the purpose of the reserve. That purpose is that of the "Use and Benefit of Aboriginal Inhabitants." It is obviously very relevant to consider whether use by the Corporation benefits the Aboriginal inhabitants living on the reserve. If there is evidence that, in fact, care, control and management by the Corporation has an adverse, rather than a beneficial, effect upon the life of the inhabitants, that would be a significant factor for the Minister to weigh up insofar as the public interest is concerned.

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6. Thirdly, you ask what steps the Minister would need to follow should she wish to revoke the management order under section 50(2). As you are aware, an overriding consideration in this respect is the need to accord the Corporation a right to be heard in compliance with natural justice requirements. In the case of *Annetts v McCann* [1990] 170 CLR 596, at 597, three judges of the High Court observed:

"It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intendment."

While it is to be noted from section 46(5) of the *Land Administration Act*, that the making of a management order does not create any interest in the land, it is nonetheless readily apparent that the Corporation and those occupying the land have relevant rights and expectations concerning occupation of the reserve and the continuation thereof.

7. It is therefore clear that the Minister would need to give an appropriate period of notice of her intention to revoke to the Corporation and at the same time invite comment. So that it may appropriately comment she would need to apprise it of the substance of her concerns relating to the public interest. Insofar as the period for a response is concerned it would seem in all the circumstances that a period of at least one month would need to be provided. Further advice in relation to natural justice, including the possible need to give notice, etc. to individual occupants, can be provided if the Hon Minister decides to go down the path of revocation.
8. During the course of my discussions with Mr Searle and Ms Warbey a fourth query was posed concerning the possibility of legislating to revoke the management order. There would appear to be no legal reason why an appropriately drafted Act could not be employed for the purpose in question. Whether it is preferable to do this by entitling the necessary Bill a "Reserves Bill" is a matter that can be evaluated.

9.

10.

11. I trust the above queries adequately deal with your concerns. I am providing a copy of this letter to Ms Warbey.


DEPUTY CROWN SOLICITOR

8 May 2003

Enc. cc Ms L Warbey, Department of the Premier and Cabinet