



Hon Peter Collier MLC
Minister for Education; Aboriginal Affairs; Electoral Affairs
Leader of the Government in the Legislative Council

Our Ref: 34-61241

Hon Simon O'Brien MLC
Chairman
Standing Committee on Environment and Public Affairs
Parliament House
PERTH WA 6000

Dear Mr O'Brien

Thank you for your letter of 12 May 2015 regarding two petitions relating to the *Aboriginal Heritage Amendment Bill 2014* (the Bill).

The Bill proposes a series of modest changes to the *Aboriginal Heritage Act 1972* (the Act) to improve its efficiency and effectiveness in managing Aboriginal heritage in Western Australia. The reforms are important steps in improving the operation of a piece of legislation that came into operation more than 40 years ago.

Improved protection

The amendments in the Bill will enhance the protection of Western Australia's Aboriginal heritage by significantly increasing the penalties for site damage. For example, the maximum penalty will be increased to \$1 million when bodies corporate are convicted of a second or subsequent offence. This is a tenfold increase from the current \$100,000. For individuals, the penalties will increase to a maximum of \$200,000 for second and subsequent offences, up from \$40,000. Terms of imprisonment for individuals are retained and strengthened. Courts will also have the ability, upon conviction, to order site remediation when this is a possibility.

Importantly, the time available within which to commence a prosecution against a breach of the Act will increase from 12 months to five years. This is particularly important as much of the State's Aboriginal heritage is located in remote areas and 12 months can be an insufficient timeframe in which to conduct an investigation.

Honorary Wardens

The Bill proposes amendments to the appointment of honorary wardens so that wardens with a more appropriate range of powers can be appointed. This includes the powers to require a person to identify themselves to an honorary warden, the power to remove people, vehicles, animals and other things from sites, and the power to give people directions. The proposed Regulations under the Act will be used to prescribe these powers.

These changes will empower Aboriginal people to play an active role in heritage management, and complements the active role that Aboriginal people are playing in relation to land management. For example, Aboriginal rangers on the Burrup Peninsula could be provided with specific accredited honorary warden training by the Department of Aboriginal Affairs (DAA) and would play a leading 'on country' role in protecting the precious rock art of the area. Similarly, existing Indigenous Protected Area rangers in parts of the Kimberley could be provided with accredited training and, as honorary wardens, would be at the frontline of protecting their sites.

Heritage approvals

The proposed amendments will also streamline the decision-making processes for applications made under section 18 of the Act. Contrary to suggestions in the petitions and the accompanying submissions, the changes proposed in the Bill will not weaken the level of protection afforded to Aboriginal heritage. In particular, the changes will not make it easier for site destruction to occur.

Since 2011, DAA has been actively progressing administrative reforms aimed at improving and clarifying information about Aboriginal heritage sites and places. The current categories of the Aboriginal Heritage Inquiry System were developed to create clarity between registered Aboriginal sites that meet section 5 of the Act, those places pending assessment and those that have been assessed as not meeting section 5 of the Act.

It should be noted that the status of places on the Aboriginal Heritage Inquiry System is only changed once an assessment has been conducted by the Aboriginal Cultural Material Committee (ACMC) and in my capacity as Minister for Aboriginal Affairs.

No changes to the definitions of 'sites' under section 5 of the Act are proposed in the Bill and all places meeting the requirements of section 5 remain protected even if they are not registered. Importantly, any decisions relating to site damage will still need to be considered by the ACMC as is currently the case. The suite of powers explicitly provided to the Chief Executive Officer of the DAA in the Bill does not include the power to authorise site damage.

It should be noted that heritage protection regimes from other jurisdictions were taken into consideration during the development of the Bill. The Act was designed to cater for Western Australian circumstances and the amendments in the Bill have been prepared in this context.

Consultation

Extensive consultation took place during the development of the Bill. During 2012, Dr John Avery, who was engaged by the State Government as an independent consultant to review the Act, held more than 100 separate discussions with stakeholders prior to the release of his discussion paper *Seven Proposals to Regulate and Amend the Aboriginal Heritage Act 1972 for Improved Clarity, Compliance, Effectiveness, Efficiency and Certainty*.

Dr Avery's paper was subsequently released for public comment with more than 90 responses received. Dr Avery also met with native title representative bodies and other Aboriginal organisations after the release of the paper.

An exposure draft version of the Bill was released for public comment in June 2014 and 172 responses were received, including many from Aboriginal people and organisations. During this consultation period, DAA undertook a state-wide consultation process, providing briefings in regional locations including Kununurra, Carnarvon, Karratha and Broome. Native title representative bodies were consulted during this process, including the Kimberley Land Council, the South West Aboriginal Land and Sea Council, the Yamatji Marlpa Aboriginal Corporation, the Central Desert Native Title Service and the Goldfields Land and Sea Council. In addition, departmental staff held a number of meetings with a wide range of other Aboriginal organisations, land users, industry, peak bodies and service providers.

Several amendments were made to the draft Bill as a result of feedback received during this consultation process. DAA held a further round of meetings on the proposed changes with Aboriginal people and organisations between December 2014 and March 2015.

Aboriginal voice in the decision making process

Contrary to the suggestions in the petitions and submissions, there is no reduced role for Aboriginal people under the changes proposed by the Bill. There is no requirement in the current Act for consultation or surveys to be undertaken with Aboriginal stakeholders. The changes proposed in the Bill will encourage the early engagement between proponents and relevant Aboriginal people. Many proponents have already engaged in significant consultation with Aboriginal people as part of the native title 'future acts' regime.

The amendments also ensure the Chief Executive Officer's primary considerations when considering a possible Aboriginal site are the associated sacred beliefs and ritual or ceremonial usage of the place. This information can only come from Aboriginal people with knowledge of the place.

***Robinson v Fielding* [2015] WASC 108**

This was recently confirmed in the Supreme Court decision in *Robinson v Fielding* [2015] WASC 108 handed down on 1 April 2015, where it was stated that Aboriginal people are necessarily the principal source of information about the existence of sites to which the Act applies and as to the significance and importance of those sites.

The Supreme Court decision also confirms that 'procedural fairness' must be accorded to Aboriginal people affected by decisions. The current approach by DAA on affording procedural fairness reflects this position. The decision further demonstrates that a specific third party appeals mechanism via the State Administrative Tribunal is not necessary and confirms that the avenue for judicial review using the Supreme Court is effective.

The Government is still assessing the implications of *Robinson v Fielding* and it would be premature to pre-empt the final outcome of this assessment.

Please do not hesitate to contact Ms Kathryn Przywolnik, Chief Heritage Officer, by telephone on (08) 6551 8000, or email at Kathryn.Przywolnik@daa.wa.gov.au should you require any more information on this matter.

Kind regards

A handwritten signature in black ink, appearing to read 'P. Collier', written in a cursive style.

Hon Peter Collier MLC
MINISTER FOR ABORIGINAL AFFAIRS

09 JUN 2015