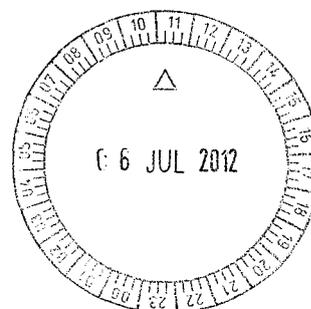




Hon Peter Collier MLC
Minister for Education; Energy; Indigenous Affairs

Our Ref: 34-19082
Your Ref: Petition No 162 - Review of the Aboriginal Heritage Act



Hon Brian Ellis MLC
Chair
Standing Committee on Environment and Public Affairs
Parliament House
PERTH WA 6000

Dear Mr Ellis

Thank you for your letter dated 13 June 2012 seeking comments on the terms of the petition and the submission from the principal petitioner regarding the review of the *Aboriginal Heritage Act 1972 (AHA)*.

The review of the AHA is critical to restore public confidence in the laws and processes to protect Aboriginal cultural heritage in Western Australia. Certainty the application of the AHA and its enforceability is especially necessary in light of the new demands placed on the AHA by mining and exploration, rapid State development and to accommodate Native Title.

The petition and the submission from the principal petitioner (the submission) provides that the proposed amendments to the AHA will result in Aboriginal people of Western Australia being dispossessed of their rights and interests in their unique heritage and culture in breach of the *Racial Discrimination Act 1975 (Cth)*.

The submission also asserts that the true intention of the proposed AHA amendments is to remove consideration of Aboriginal sites as an impediment to development, further removing control of cultural heritage from Aboriginal people.

Contrary to the petition and the submission, the purpose and effect of the proposed amendments are to create a clearer regulatory environment which will improve processes around heritage protection, approvals and site registrations. The intention is that these reforms will improve the ability of the Department of Indigenous Affairs (DIA) to provide greater protection and management of important and significant Aboriginal sites.

It is highlighted that no amendments have been proposed to any of the current AHA provisions which afford preservation and protection to places and objects to which the AHA applies, for example sections 16, 17, 18(3) and 19 of the AHA. An amendment to section 18(1) is proposed only to ensure that all developers may validly apply for consent pursuant to section 18(3) of the AHA.

Current legal requirements for prosecution under the AHA are onerous. A prosecution and protection of a site can only take place where there is sufficient evidence that a place is a site, and that the AHA therefore applies. At present, potential prosecutions under the AHA have not been progressed because of the inability to provide sufficient evidence to prove that a place is a site. Proposed changes to the AHA provide that regulations can be made to ensure that information provided about a site is robust enough to support a prosecution where a site is impacted.

The proposals will also introduce stronger compliance measures including civil penalties and remediation orders to enable the Compliance Unit to pursue a number of options when impact to a site occurs. Additional powers to issue formal notices of infringement may be added subject to further legal advice. The State's Office of the Auditor General stated last year, in its report *Ensuring Compliance with Conditions on Mining (8/2011)*, that "DIA has not effectively monitored or enforced compliance with conditions on mines under the *Aboriginal Heritage Act 1972*" and raising concerns about potential impact to heritage sites. The reform measures as outlined above will assist DIA with compliance monitoring.

Site avoidance certificates have also been proposed to ensure that Aboriginal people are consulted thoroughly in the early stages of proponent project development, rather than being considered after a project footprint has already been determined, as is likely under the current Act.

The proposal to remove the requirement for the Environmental Protection Authority to consider Aboriginal heritage in environmental impact assessment is intended to minimise delays and duplication of Aboriginal heritage processes. This is to ensure that decisions about preserving Aboriginal heritage are made as soon as possible when activities are being planned so as to avoid and minimise impacts on Aboriginal sites.

The submission refers to an April 2009 report on approval processes prepared by the Industry Working Group (IWG) for the Minister for Mines and Petroleum and states that the IWG contains the blueprint for practically all of the 'proposals for reform'. I am advised that only certain aspects of Proposal 1 and Proposal 7 can be seen as having any commonality with the report. The IWG proposal also stated that the primary focus should be "an overhaul of the administration of the AHA rather than legislation" and no amendments to the AHA or its regulations were proposed.

With regards to consultation on the proposed reforms, Dr John Avery, who was appointed as an independent consultant to conduct a review of the AHA, has considerable expertise in the area of Aboriginal heritage reforms, having worked with the Commonwealth Government on the reforms to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) just previous to this appointment. Dr Avery was also involved with the development of heritage legislation in the Northern Territory and is an eminent senior anthropologist with experience in land rights and Aboriginal heritage who has engaged for many years with Aboriginal people.

Dr Avery has held more than 100 informal discussions with stakeholders since he was appointed and prior to the release of the Discussion Paper "*Seven proposals to regulate and amend the Aboriginal Heritage Act 1972 for improved clarity, compliance, effectiveness, efficiency and certainty*" (the Discussion Paper). More details of stakeholders consulted are provided in the Discussion Paper,

The Discussion paper provides an opportunity for consultation and public submissions from all stakeholders, and was released after a period of stakeholder consultation of 18 months. The number and quality of submissions (there are currently 90 posted on the Department of Indigenous Affairs website) indicates that there has been a high level of consideration of the proposed reforms by the community.

Five weeks is the usual consultation period set by Cabinet. The Discussion Paper does not propose substantial changes to the scope of the AHA, therefore, the level of consultation which took place and the time allowed for comments was corresponding with the level of reforms. However, due to feedback from stakeholders, the closing date for submissions was later extended to 26 June 2012.

Post the release of the Discussion Paper, Dr Avery has consulted with officers from all Native Title Representative Bodies. Dr Avery has also consulted with members of the Goldfields Land and Sea Council, members of the Ngumpan community in Fitzroy Valley, the Yindjibarndi community in Karratha, the Miriuwung Gajerrong community in Kununnurra, the Yawuru community in Broome, several individual Aboriginal people, consultant archaeologists, anthropologists and senior academics.

As outlined above, the proposed amendments to the AHA are modest and do not intend to change the scope of the Act or alter the fundamentals of the section 18 process. The intention is that the amendments will strengthen the administration of the AHA and continue to protect Aboriginal cultural heritage in Western Australia.

Please do not hesitate to contact Ms Kathryn Przywolnik, Acting Chief Heritage Officer, on telephone (08) 6551 8096, or at Kathryn.Przywolnik@dia.wa.gov.au if you require more information on the review of the AHA.

Kind regards



Hon Peter Collier MLC
MINISTER FOR EDUCATION; ENERGY; INDIGENOUS AFFAIRS
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