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CONFIRMATION
OF FAX

RESERVES (RESERVE 43131) BILL 2003 - LEGISLATIVE COUNCIL AMENDMENTS

1. Thank you for your fax of 23 May 2003. I confirm that you have requested the views of this office upon the *Reserves (Reserve 43131) Bill 2003* as it would be if enacted in accordance with the amendments made by the Legislative Council. This issue has been the subject of discussion between yourself, Ms O'Dwyer of the Parliamentary Counsel's Office, Ms Eckert of the Department of Land Administration and myself.
2. The new clause 2(2) is what is usually termed a "sunset clause." Its appropriateness is dependent upon the efficacy of other changes to the Bill and the timeframe involved in effecting the purposes of the Bill.
3. The major change to the Bill is, of course, that to clause 4. It will now read:

"In addition to the circumstances set out in section 50(2) of the LAA Management order no. I262262 may be amended by the Minister from time to time as the Minister considers appropriate."

The Bill itself, on coming into operation, will no longer be the vehicle for revocation of the existing management order. Incidentally, the headnote to clause 4 referring to revocation remains and will cause confusion. The reference in clause 4 to section 50(2) of the *Land Administration Act* is somewhat odd since section 50 is all about revocation of management orders and not amendment/variation. Section 50(1) provides for two situations in which the Minister may revoke a management order - by consent and because of non-compliance. Section 50(2) provides for another situation in which the Minister may revoke the management order - if it is in the public interest to do so. The remainder of section 50 provides for matters arising on revocation. The provisions of clause 4 raise a number of questions. Does clause 4 purport to provide for yet another way of revoking

13(4) provides that an order amended under section 13(3) is to be treated as having been made in its amended form. Section 13(7) refers to an order amended under section 165(4). It is noteworthy that section 165(4) refers to an order to "revoke or amend an order." The word "amend" is here being used to mean something other than revoke. It is to be noted also that in the provisions of the *Land Administration Act* of greatest relevance, ie sections 46 and 49, only references to variation and revocation appear. There is no reference to amending an order. Section 46(2) allows only for the variation of a condition. If the word "amended" relates to the order as a whole, and does not mean simply a revocation, it is not immediately apparent what aspects of an order it relates to. Nonetheless, in all the circumstances it is apparent that Parliament would be taking a great risk in adopting the position that the word "amended", in the Bill as it stands, embraces a revocation.

6. The deletion of the former clause 5 accords with the elimination of the revocation power previously contained in clause 4. The removal of the former clause 6 is incidental to that measure.
7. Great difficulty arises in the interpretation of clause 5 as it reads following the introduction of the new subclause (2). Subclause (1) does not appear to be necessary since it duplicates subclause (10). Subclause (2) provides that the LAA Minister may appoint the Aboriginal Affairs Planning Authority "as administrator of the reserve." The definition of the word "administrator" has been changed to include a reference to the Authority. Under the Bill, as it was when it passed the Legislative Assembly, the Aboriginal Affairs Planning Authority would have had all the necessary attributes of a management body under the *Land Administration Act*. This would have occurred by the operation of section 46(7) of that Act. Those provisions give a body relevant capacity, functions and powers to deal with a reserve. The capacity, functions and powers of the Aboriginal Affairs Planning Authority as set out in the *Aboriginal Affairs Planning Authority Act 1972*, may arguably be adequate for the purposes of the Bill.
8. The most obvious difficulty with clause 5 is that recourse to certain of the powers in it will result in there being both a management body charged under the *Land Administration Act* with the care, control and management of the reserve and an administrator (be it the Authority or a person engaged or nominated by it) or the LAA Minister having direction powers by the operation of clause 5(8)(a). Neither the administrator nor the Minister will have general administration powers. He or she will only have the direction powers set out in clause 5(5).
9. From our conversation it is apparent that a major practical difficulty arises in leaving the Swan Valley Nyungah Community Corporation having care, control and management. I understand that the Corporation does not function in an appropriate corporate way via its Governing Committee and Public Officer.

inserted in the Bill originally in order to exclude legal attack upon the giving of any direction. The major substantive effect of the Bill, the revocation of the order, did not require such protection. The amended Bill leaves revocation to the administrative process, but provides no protection from legal attack. Provisions such as those in the former clauses 8 to 11 are necessary, otherwise the Bill becomes to some extent pointless. Failure to provide such provisions make it extremely likely that all measures taken under the Bill, once enacted, will be challenged in the Supreme Court by prerogative writs involving injunctions. Such challenges will, at least, be most disruptive. They could cause months of delays.

14. The new clause 6(3) appears to be dealing with a subject matter different from that, the subject of clause 12 as originally drafted. It should probably constitute a new separate clause. The effect of the provision, it would seem, can only be favourable to the intention of the legislation but is not an adequate substitute for the protection offered by the former clauses 8 to 11.
15. In summary, and broadly speaking, the following major difficulties emerge from the amendments made by the Legislative Council.
 - (i) The provisions of clause 4 are confusing, there being a number of possible interpretations.
 - (ii) It is most doubtful that clause 4 provides an extended power to revoke.
 - (iii) The role of the Aboriginal Affairs Planning Authority is substantially reduced.
 - (iv) It appears incompatible for there to be both a management body having a care, control and management function and an administrator having a particular direction power.
 - (v) A major barrier to the exercise of the LAA Minister's powers is section 12 of the *Land Administration Act*, requiring the consent of the management body (the Corporation) to the exercise of clause 4 powers.
 - (vi) No protection is given to prevent legal proceedings being instituted to challenge revocation outside the new Act or under it or to challenge directions under the new Act.


DEPUTY CROWN SOLICITOR

27 May 2003