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Chief Heritage Officer
Department of Aboriginal Affairs

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Dear Chief Heritage Officer

Feedback on the Aboriginal heritage legislative changes

Thank you for the opportunity to provide feedback on the Aboriginal heritage legislative changes.

I would like first to acknowledge that the Aboriginal Heritage Amendment Bill 2014 makes improvements, for example the extension of time in which to bring a prosecution, the provision of express penalties where these are currently lacking, and the increased penalties for offences.

The Bill also seems likely to deliver on its promise to deliver better quality registers, and the inclusion of a historic record of all approvals should assist with monitoring compliance.

The Bill also seems likely to deliver on its promise to deliver faster decision making, and the prescribing of processes for decision-making would make those processes more certain and transparent.

However, on the draft legislation currently available, and particularly in the absence of draft regulations, I am not at all satisfied that the legislative changes will effectively improve either the protection of Aboriginal heritage or adequately involve Aboriginal peoples in that process. At the end of the day, protection of Aboriginal heritage is what the Act is for. Prosecution processes that for many offences cannot be used, registers that are not acknowledged as being necessarily incomplete, and decision-making that is fast and according to a set process but largely not subject to review and does not adequately involve Aboriginal people, will not protect Aboriginal heritage.

The Greens will not support the Bill in its current form, at least pending provision of draft regulations. My four main concerns are:

Omissions in the Bill
It is disappointing that the Bill omits all of the following themes, which have been repeatedly raised in reports on the Act and also in the 2012 round of submissions, and which aim to improve protection of Aboriginal heritage and the involvement of Aboriginal people in that process:

- Inclusion of a cultural duty of care requiring people and companies to take all reasonable and practicable measures to not harm Aboriginal cultural heritage through any activity

- Extension of the Act's application to other forms of heritage eg landscapes, repatriation of human remains, intellectual property, waterholes, campsites, hunting grounds
- Extension of the Act's application to regionally significant places, given the heterogeneousness of Aboriginal peoples
- Special status in the Act for Aboriginal peoples in respect of Aboriginal heritage
- A statutory process that prevents harm to Aboriginal heritage from happening, rather than responding after it has happened. I understand that common law preventative measures do exist, but how often they are used and how effective they are in protecting Aboriginal heritage is not clear.

Regulations to deal with central concerns
Matters that are left by the Bill to the regulations include:

- Additional matters to be considered when evaluating the importance or significance of a place or object
- Matters the CEO will consider and information s/he will require (and how this will be obtained) before issuing a declaration or permit, or amending it, or cancelling it
- Matters the CEO will consider and information s/he will require (and how this will be obtained) when deciding what is entered on a register, is amended, or is deleted from it
- Form of the registers and what information on a register will not be made available to the public
- Which if any of the above matters or considerations will carry more weight.

That is, it is the as yet undrafted regulations that will deal with such central concerns raised repeatedly in the 2012 submissions and in reports on the Act as whether and how Aboriginal peoples will be heard on matters affecting their own heritage, the accessibility of those processes, how much weight will be given to what they do say, how responsive the Act's processes will be to Aboriginal customary law prohibitions on disclosure of information including gender restrictions, and the extent of inquiry into the possible presence of as yet undiscovered and/or unregistered Aboriginal sites or objects before decisions that could damage or destroy Aboriginal heritage are made.

These matters are especially important given the lack of both review/appeal processes and compensation processes in the Act and Bill for Aboriginal peoples facing damage to or destruction of their heritage.

The Department of Aboriginal Affairs ("DAA") and its Minister have repeatedly said the amendments will give Aboriginal people a stronger voice in respect of heritage matters. DAA's Factsheets state for example:

- While the Act cannot require heritage surveys to be conducted, a s18A(3) declaration will not be granted unless either heritage surveys or adequate consultation with a prescribed body corporate, registered native title claimants and/or traditional custodians has been conducted, and thus the Bill will ensure that Aboriginal peoples are engaged early in the decision-making process about land use activities. (Factsheet "Aboriginal Heritage Legislative Changes – Approvals by the Minister for Aboriginal Affairs")

- Generally the information that there are no sites present will have come directly from traditional custodians, registered native title claimants or registered native title bodies corporate (Factsheet "Change in the Way We Do Business – Aboriginal Heritage Act 1972 (WA)").

However this is simply not delivered by the draft legislation currently provided. All the Bill provides for with regard to the voice of Aboriginal peoples is the transfer of most of the Aboriginal Cultural Material Committee's functions to the DAA's Chief Executive Officer, two references to native title claimants and native title registered bodies corporate, restriction of the right of review in respect of declaration and permit decisions to the applicant or permit-holder, no right of review regarding decisions about the content of the register of Aboriginal Sites and Objects, and a regulation-making power which will empower the government of the day to provide for a higher or lower level of Aboriginal involvement as it wishes. Only section 9, unchanged by the Bill, expressly envisages Aboriginal people making decisions about Aboriginal heritage, and then only at the Minister's discretion.

It is a great pity that the government has not provided draft regulations along with the draft Bill. Without draft regulations, the government's proposal is incomplete in important respects and is therefore incapable of fair assessment.

Further, as you will be aware, the process for the making, amending and repealing of regulations is substantially different from that applicable to statutes. A government can introduce new regulations unilaterally, and those regulations remain in force unless and until a successful motion to the contrary is brought in Parliament. In contrast an Act can only come into force after it has passed through both Houses of Parliament.

With such substantial matters left to undrafted regulations, this Bill cannot be said to improve either the protection of Aboriginal heritage or the involvement of Aboriginal peoples in heritage matters.

Insufficient review of decisions
Under section 19D, only the would-be beneficiary of a declaration or permit who has not got what they sought can apply for a review. There is no review process for people whose interests are detrimentally affected by a permit or declaration that has been granted. Such detriment may include loss of currently-used traditional water, medicine or food sources.

Similarly, decisions about what is entered on or deleted from the register of Aboriginal Sites and Objects are not reviewable, and no reasons for those decisions need to be provided. This is notwithstanding that the practicability of prosecution, ie the ability to actually protect Aboriginal heritage, will be greatly affected by whether or not registration exists.

This contrasts strongly with the retained process for declaration of an Aboriginal site as a protected area. Here aggrieved persons have the right to have their concerns considered not once but twice, both before and after any such declaration is made.

Increased difficulty in enforcement for offences relating to unregistered sites and objects
Aboriginal sites and objects may be registered or unregistered. Reasons for non-registration include disclosure being prohibited by Aboriginal law or tradition, or the site/object being currently unknown eg buried.

The Act applies to Aboriginal sites and objects whether they are registered or unregistered. The Bill does not change this.

However, what the Bill does do is make successful prosecution of offences harder to achieve where current registration does not exist. The Bill's amendment of section 60(2) removes the reversed onus of proof that currently applies. Further, the Bill's amendment of section 60(3) removes the rebuttable presumption that currently applies. The DAA's Factsheet "Aboriginal Heritage Legislative Changes – Stronger Compliance and Enforcement" concedes that if the Bill is passed, government capacity to lead a successful prosecution will be greatly enhanced if registration exists.

It is worth noting that only six prosecutions have ever been brought, and they were all pleas of guilty.

Even if registration does exist, the amendment in section 60(3) of the word "proof" to "evidence" appears to lessen the standard of evidence needed to rebut the presumption.

These changes make it especially important that:
- Declarations and permits are refused unless steps have been taken to ascertain whether there are any unknown or unregistered sites or objects present
- Registration processes are highly accessible to Aboriginal peoples who wish to use them, including being responsive to restrictions on disclosure imposed by their laws and traditions.

The amendments place pressure on Aboriginal peoples to register, notwithstanding limited resources and notwithstanding disclosure prohibitions in their laws or traditions, the existence of which is expressly acknowledged by section 7.

I urge the Minister to make draft regulations publicly available. This is reasonable, given the extremely high degree of importance to stakeholders of the matters the Bill leaves to the regulations. Most of the feedback my office has received has raised concerns about how the CEO will exercise his/her proposed extensive new functions. The DAA's Factsheets, not being draft legislation, have failed to allay this concern. Ongoing failure to provide a draft of legislation specifying how the CEO's functions will be exercised is hardly conducive to the government's stated aim of building up trust in its ability to protect Aboriginal heritage.

I also urge the government to re-consider its decisions to omit the themes described above, to omit a review process for Aboriginal peoples detrimentally affected by a declaration/permit or by a registration decision, and to make it harder to prosecute offences relating to unregistered heritage when there are compelling reasons for non-registration.

Last, I ask that section 63 be amended to insert after “Act” the words “and its regulations”, to ensure there is absolutely no question when the time comes to review the Act that the review is required to also include the operation of the regulations to the Act.

Yours sincerely,

The Hon Robin Chapple MLC
Member for the Mining and Pastoral Region
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