



Hon Ben Wyatt MLA
Treasurer; Minister for Finance; Aboriginal Affairs; Lands

Our Ref: 69-21005

Dr Bill Pender
Inquiry Secretary
Joint Standing Committee on Northern Australia

Via email: jscna@aph.gov.au

Dear Dr Pender

JUUKAN GORGE – ADDITIONAL QUESTIONS ON NOTICE

I refer to your letter of 19 August 2020 to Mr Vaughan Davies, at the Department of Planning, Lands and Heritage, providing the Government of Western Australia (WA) with the opportunity to respond to the Joint Standing Committee on Northern Australia's questions on notice, following my appearance before the Juukan Gorge inquiry on 7 August 2020. The WA Government's responses are as follows.

1. Is the WA Government intending to ensure preservation and promotion of places of incredible significance, under the proposed new Aboriginal Heritage legislation? If yes, please provide details?

Yes. During the review of the *Aboriginal Heritage Act 1972* (Act) stakeholders clearly identified that the Act does little to prevent the destruction of valuable Aboriginal cultural heritage. The *Aboriginal Cultural Heritage Bill 2020* (Bill) is designed to significantly improve the protection of Aboriginal cultural heritage in Western Australia.

The Bill will encourage the nomination of areas of outstanding significance that contain Aboriginal cultural heritage to be declared Protected Areas. Unlike the current Act, a Protected Area order under the Bill will not trigger *Native Title Act 1993* (NTA) provisions, thus providing opportunity for more places of outstanding significance to be declared Protected Areas and enabling active management of Protected Areas by Aboriginal people.

Protected Areas declared under the Act will continue to be recognised as such. They will, however, no longer be vested in the Minister for Aboriginal Affairs, meaning management responsibilities for existing and future Protected Areas will now be able to be given to Aboriginal people.

2. The Minister indicated that under the newly proposed act there will be provision to give Traditional Owners effective decision-making authority in managing their sites, but also in areas of dispute the Minister will still have the decisive say. That is, Traditional Owners would not have the ability to veto site destruction. Does this mean that in practice that Traditional Owners have decision-making powers to approve destruction of sites, as proposed by a proponent (because they agree), but they do not have the decision-making authority to prevent site destruction (because they disagree)?

The Bill will reset the relationship between Aboriginal people and industry in Western Australia by promoting and supporting Aboriginal people and industry working together to reach agreements regarding the management of Aboriginal cultural heritage. The WA Government is not proposing that either Aboriginal people or industry have the ability to veto a proposed project which may impact Aboriginal cultural heritage.

Where agreement between a proponent and the relevant Aboriginal people cannot be reached, the Bill establishes an authorisation process for an Aboriginal Cultural Heritage Management Plan (Plan). In seeking such authorisation, proponents will need to provide details of the consultation and negotiation undertaken with the Aboriginal parties. The new Aboriginal Heritage Council (Council) can request the Aboriginal party to submit its own Plan and will be able to act as a mediator to facilitate agreement on a Plan between the parties.

Where agreement is still not reached, the Council may propose its own Plan for the Minister's authorisation or can recommend a Plan submitted by the Proponent or the Aboriginal party. The Council may also recommend that a submitted Plan not be authorised and the Minister will be able to refuse to authorise any such Plan. The Council can only recommend that the Minister authorise a Plan if satisfied that there has been consultation and that there are reasonable steps in place to avoid or minimise the risk of harm.

Both parties to a Plan have a right of review of the Minister's decision to the State Administrative Tribunal.

3. Please outline the three-tier heritage evaluation process, as briefly mentioned in the hearing?

Where impacts to Aboriginal heritage by proposed activities are unavoidable, the new approvals system will help reduce red tape by replacing the 'one size fits all' section 18 approvals system under the Act. The approvals system under the new Bill responds to the nature of the proposed land use and the level of impact that may result from it. This will allow proposals that do not result in significant impacts to Aboriginal cultural heritage to benefit from a streamlined approval pathway, encouraging proponents to avoid or minimise their impacts.

Proponents will be required to undertake a due diligence assessment in accordance with an Aboriginal Cultural Heritage Management Code (Code), developed by the new Council, to determine whether the proposed land use will impact Aboriginal cultural heritage, and the likely level of impact it will cause.

Where it is determined that the proposal will cause no or minimal impacts to heritage, proponents may proceed with the activity without requiring any approvals. Where an activity will result in a low level impact, proponents will need to apply for a permit. Before applying for a permit the proponent is required to notify Aboriginal parties in the area of the proposal to seek their comments. The Council will also be required to advertise the application and is required to take into consideration comments received when considering the application. It may only grant a permit if it is satisfied there are reasonable steps in place to minimise or avoid the risk of harm to Aboriginal cultural heritage.

For medium to high impact activities, proponents will be required to work with Aboriginal parties to seek agreement on the proposal, and to develop a Plan as per the process described above.

Where possible, the WA Government has sought to align the Bill with native title processes to avoid duplication and recognise heritage outcomes arising from agreements. Provisions in Native Title agreements or existing heritage agreements between proponents and Aboriginal parties that meet the criteria in the Bill may be used to meet requirements in a Plan.

4. The Minister talked about the benefit of PBCs entering a new era of agreement making with proponents and that to assist them the Commonwealth government should provide greater funding / support for them. Is the new Act only functional – at least in terms of ensuring a fairer system for Traditional Owners in protecting their heritage – to the degree that the Commonwealth Government provide this extra support?

The Bill will provide for Aboriginal people, through local Aboriginal cultural heritage services (LACHS), to actively engage in the management of their cultural heritage and to undertake activities such as those undertaken by Indigenous rangers under the Commonwealth system.

It is anticipated that the LACHS will, initially at least, primarily consist of existing native title holders' prescribed bodies corporate (PBCs) to align with, and to recognise bodies established under the NTA.

The recognition as a LACHS will empower native title holders to facilitate agreement making with proponents to manage Aboriginal cultural heritage as well as providing economic development opportunities to native title holders under a fee for service model for heritage services. The LACHS model embodies self-determination, economic development opportunities and Aboriginal empowerment within both State and Commonwealth legislative regimes relating to Native Title and Aboriginal cultural heritage.

The WA Government has been advised by PBCs that, while prescribed by the NTA, they are not adequately resourced by the Commonwealth to undertake their functions as a PBC. As part of consultations on the Bill, this has been confirmed including that this opportunity to embed the authority of Native Title rights and interests into State legislation in a meaningful way will be constrained by the limited resources of some PBCs to qualify as a LACHS.

The WA Government is considering providing initial establishment funding for LACHS and, as noted above, LACHS will have the ability to generate fees for services, however these are not intended to be a substitute to fund obligations imposed on PBCs by the Commonwealth.

5. Can Minister Wyatt confirm that section 18 of the Aboriginal Heritage Act permits him to decline consent to landowners to destroy Aboriginal heritage sites of significance?

Yes, the Minister can decline to grant consent to landowners.

6. Will the new Aboriginal heritage protection laws include provisions for the Minister to stop land uses to preserve Aboriginal heritage?

The Bill introduces mechanisms to improve the protection and management of Aboriginal cultural heritage that are not available under the Act. Orders that can be given are stop activity orders, prohibition orders and remediation orders.

Stop activity orders and prohibition orders can be issued by the Minister for Aboriginal Affairs to stop an activity that may harm Aboriginal cultural heritage where the activity is not authorised or there is new information relating to existing or new Aboriginal cultural heritage. Stop activity orders will be limited to 60 days in which time the Council will be required to consider the matter and make a recommendation to the Minister as to whether a prohibition order is required. The Council will be required to provide the opportunity for submissions to the person undertaking the activity as well as the relevant Aboriginal people. Prohibition orders may be made for a specified period or for an unlimited duration.

The Minister may issue a remediation order on the recommendation of the Council to require remediation where Aboriginal cultural heritage has been impacted in contravention of the Bill.

7. Can the Department and/or the Minister confirm that:
- a) on 19 August 2019 the Minister granted section 18 consent to Rio to destroy 2 rockshelters for the expansion of Rio's Silvergrass mining operations?

The Minister granted consent subject to conditions for the Silvergrass Pit 1 – East Stage 2 on 15 August 2019.

- b) on 30 November 2017 that the Minister consented to destroy 8 rockshelters at Spear Hill despite desperate pleas from the Eastern Guruma people not to grant the consent?

The Minister granted consent subject to conditions for the Solomon Mining and Infrastructure Phase 6 on 30 November 2017.

8. Is it correct that the Minister granted a section 18 on 29 May 2020 over the Djajaling Range (Site ID 25664) despite on 16 April 2020 Banjima Native Title Aboriginal Corporation RNTBC, advising Aboriginal Heritage Operations in DPLH of comments by the following elders, when asked to comment on the S.18 and subsequent mining activities (the purpose)?

Brian Tucker Senior Martidja Banyjima Elder commented that this would “hurt us Banjima people very bad. We can't change the lore, the songs or the county, because they given to us by the old people, but the mining companies can take the county away and make it changed forever. They can bugger it up”.

Charles Smith Senior Milyarranypa Banjima Elder commented that he and his family “are angry about it and don't support the destruction of those sites at South Flank under any circumstances”.

Maitland Parker Senior Martidja Banyjima Elder and Current Chair of BNTAC commented that he has been involved in this process now for many years, and that while he knows Banjima cannot object to the application, this in no way diminishes the cumulative loss that Banjima people feel each and every time significant places are to be harmed “so they know we didn't just sign off on this stuff and forget about it, we put up a fight about these places, about our lore and our culture. We need people to know that”.

Trevor Parker Senior Martidja Banyjima Elder commented that “that place and all the other ones were given to us by them old fellas like Wobby Parker and Pat Long. They gave us that lore, the songs and that culture. Its Wardilba, that place, men's business. Nobody should touch that place”.

Yes, the Minister granted consent subject to conditions for Mining Area C South Flank on 29 May 2020.

9. Is the Department or Minister aware if Rio intends to utilise Minister Wyatt's consent to destroy site SG-07-22 (43,000 years) to make way for its Silvergrass expansion?

The WA Government is not aware if Rio Tinto intends to utilise the consent to destroy site SG-07-22 (43,000 years) to make way for its Silvergrass expansion.

10. Can you provide details on the section 18 applications relevant for the Juukan Gorge, including:
- details and recommendations provided by the Aboriginal Cultural Material Committee to the Minister;
 - decisions made by the Minister along with reasons (if provided);
 - conditions on the approvals.

Please see Attachment A Consent 2013 Brockman 4 Pit 1. **Note: this document contains sensitive cultural and commercial information.**

11. Can you provide a breakdown of active section 18 consents pertaining to the mining and exploration sector, detailing:
- geographical area covered;
 - relevant parties;
 - recommendations made by the Aboriginal Cultural Material Committee to the Minister;
 - was consent given or withheld by relevant traditional owners.

Details of section 18 decisions are available on the Department's website at <https://www.dplh.wa.gov.au/acmc>.

12. Considering the sequence of events in this matter was 'legal', can you rule out the possibility that sites of significance can be destroyed under current legislative arrangements?

Under the Act, landowners who have section 18 consent have legal permission to use the land for a purpose which may include destroying Aboriginal cultural heritage sites.

13. Considering that reforms planned for the Aboriginal Heritage Act will not impact existing section 18 approvals, what measures are you undertaking to protect sites that may be vulnerable right now?

The events at Juukan Gorge have shown that the Act is outdated and cannot protect Aboriginal cultural heritage in Western Australia as expected by both the Aboriginal and broader community. The proposed Aboriginal Cultural Heritage Bill 2020 is the result of two years' consultation with Aboriginal people, industry and stakeholders. The WA Government considers replacing the Act with the Bill to be the most effective way to protect sites in Western Australia. As noted above, the Bill provides for stop activity orders to be made over areas subject of section 18 consents where new information has emerged. This new information may identify Aboriginal cultural heritage that was not identified or may relate to the significance of Aboriginal cultural heritage that was identified at the time the approval was granted.

14. Will the Minister provide a copy of all s 18 applications made by Rio Tinto with respect to the Juukan Gorge to the committee?

Please see Attachment A Consent 2013 Brockman 4 Pit 1. **Note: this document contains sensitive cultural and commercial information.**

15. To the best of your knowledge, does the Department of Mines, Industry Regulation and Safety keep records of all blast patterns which are loaded and detonated in mines around Western Australia?

Blasting records are not required to be submitted to the regulator; the mine operator would be expected to maintain these records.

16. To the best of your knowledge, does the Department of Mines, Industry Regulation and Safety keep records of all blast patterns which are loaded, but then unloaded prior to detonation?

Blasting records are not required to be submitted to the regulator, the mine operator would be expected to maintain these records.

Yours sincerely

Ben Wyatt MLA
MINISTER FOR ABORIGINAL AFFAIRS

15 SEP 2020