

Fitch-Rabbitt, Hannah

From: Joe Dortch <joe.dortch@dortchcuthbert.com.au>
Sent: Friday, 10 December 2021 4:17 PM
To: Dawson, Stephen
Cc: 'Anne Poelina'; 'Kado Muir'; Jo Thomson (TCHM); Neil.Thomson; Office of Hon Brad Pettitt MLC
Subject: RE: Reviewable decisions in the ACH Bill
Categories: Waiting on direction from Brad, Initial response complete, Hannah assigned

PS A version of the email below was also sent to Hon Brad Pettit and Hon Neil Thomson.
Thank you.

From: Joe Dortch
Sent: Friday, 10 December 2021 4:11 PM
To: 'stephen.dawson@mp.wa.gov.au' <stephen.dawson@mp.wa.gov.au>
Cc: 'Anne Poelina' <anne@majala.com.au>; 'Kado Muir' <kadomuir@gmail.com>; 'Jo Thomson (TCHM)' <thomsonheritage@bigpond.com>
Subject: Reviewable decisions in the ACH Bill

Dear Mr Dawson

I refer to your comments of 9 December 2021 reported in Hansard:

Hon Dr Brad Pettitt quoted from an article from The Conversation that said —

... the developer can appeal to the state administrative tribunal over ministerial decisions they don't like. The Aboriginal custodians for that area will not have an equivalent right of appeal.

This is inaccurate and wrong. Under the bill, both the proponent and the Aboriginal parties will have no right of review to the State Administrative Tribunal for ministerial decisions to authorise an ACH management plan. I point out that under the 1972 act, the right to SAT review for section 18 decisions is afforded to only the proponents. Unlike what Hon Dr Brad Pettitt said, SAT review avenues will be available for various decisions under the bill, both for the proponent and the Aboriginal party; for example, there will be a right of review to SAT for both the proponent and the Aboriginal party if the minister cancels an Aboriginal cultural heritage management plan that is agreed between both parties. There will be a right of review to SAT for proponents if the minister issues a stop activity order that stops the activity. There will be a right of review to SAT for Aboriginal parties if the minister cancels a prohibition order that was prohibiting an activity that was harming Aboriginal cultural heritage. Therefore, I think members need to stick to the facts and stay away from myths or untruths that are being perpetuated by some people who I cannot be confident have read the final bill.

As a co-author of the article referenced, I think the original claim stands. Please be assured, we read the final Bill, despite the limited time made available. To show our reasoning, I have added a column to the table in s227 of the ACH Bill 2021:

From ACHB 2021 Part 12, s227 Review of certain decisions

Item	Reviewable decision	Affected person	Person to benefit from review
1	A decision of the Minister under section 154(1) to cancel or suspend the approval of an ACH management plan	A party to the ACH management plan	Proponent

2	A decision of the Minister under section 180(1) to give a stop activity order	The person who was given the stop activity order	Proponent
3.	A decision of the Minister under section 188(1)(b)(i) to give a prohibition order	The person who was given the prohibition order	Proponent
4.	A decision of the Minister under section 191(1) to extend the term of a prohibition order	The person who was given the prohibition order	Proponent
5.	A decision of the Minister under section 194(1) to give a remediation order	The person who was given the remediation order	Proponent
6.	A decision by the Minister under section 203(1)(a) to amend or cancel a prohibition order	The person who was given the prohibition order A person referred to in section 187(3) to (d)	Proponent LACHS

The SAT-reviewable decisions do not include authorisation of an ACHMP by the ACH Council or the Minister. While a proponent is unlikely to seek review of an ACHMP they sought, a LACHS might want a review if they did not agree that an impact could be accepted or managed, and therefore did not agree to authorisation by the Minister despite their objection (s157).

For a LACHS or any affected Aboriginal person, an equivalent right to the set of reviewable decisions available to a proponent would be the right to review of an ACHMP authorisation. However, the Government proposes to exclude this right. This imbalance may endanger the principles of Free and Prior Informed Consent as well (s146).

Kind regards

Joe Dortch

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Dortch Cuthbert acknowledges Traditional Owners of country and their continuing connection to land, sea and community. We pay our respects to them, their cultures and their Elders, past present and emerging.

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