



HAUT-COMMISSARIAT AUX DROITS DE L'HOMME • OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS
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29 August 2022

Excellency,

I write to inform you that in the course of its 107th session, the Committee considered additional information received under its early warning and urgent action procedure, related to the Western Australian Aboriginal Cultural Heritage Act 2021 (ACH Act), and its impact on Aboriginal peoples.

The Committee would like to thank the State party for its reply dated 14 April 2022 in response to the Committee's letter of 3 December 2021. It takes note of the information provided by your Government with regard to the allegations set out in the Committee's previous letter.

The Committee also takes note of the information regarding the mechanisms included in the ACH Act, in particular the establishment of the Aboriginal Cultural Heritage Council; the "no contracting out" clause; the power of the Western Australian Minister for Aboriginal Affairs to issue a stop activity order or a prohibition activity order to prevent harm to Aboriginal cultural heritage; and the requirement that the party seeking to conduct an activity that will impact Aboriginal cultural heritage must consult and reach an agreement with interested Aboriginal peoples on a Management Plan.

It also notes that under the ACH Act, if the parties do not reach an agreement, the decision rests with the Minister for Aboriginal Affairs who must decide to approve or refuse the Management Plan based on an "interests of the State" test. The Committee is concerned about the discretionary power attributed to the Minister of Aboriginal Affairs, the absence of effective remedies and legal redress for Aboriginal peoples to challenge his decisions and the absence of a requirement of free, prior and informed consent of interested Aboriginal persons for the approval of the Management Plan.

H.E. Ms. Amanda Gorely
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Moreover, the Committee notes that the Western Australian Mining Act of 1978 requires the written consent of private landowners for the approval of mining activities on privately owned land. The Committee notes with concern that the ACH Act does not afford Aboriginal peoples a similar consent requirement. Such a difference of treatment and lesser protection provided to Aboriginal peoples under the law would fail to comply with State obligations under the Convention on the Elimination of Racial Discrimination and would need to be modified to fulfil principles of equality before the law and non-discrimination. This is particularly relevant in light of the fact that the ACH Act also regulates impacts by mining activities and, according to the information received, the majority of applications made under the former Aboriginal Heritage Act of 1972 were mining related and none of the 463 mining-related applications made since 2010 were rejected.

The Committee recalls its general recommendation No. 23 (1997) on the rights of indigenous peoples. It further recalls its concluding observations of 2017 (CERD/C/AUS/CO/18-20, para. 22), in which the Committee recommended the State party to ensure that the principle of free, prior and informed consent is incorporated into pertinent legislation and fully implemented in practice. The Committee further recommended the State Party to respect and apply the principles enshrined in the United Nations Declaration on the Rights of Indigenous Peoples.

The Committee's final observations on this matter will be included in its next annual report.

Finally, the Committee requests the State party to submit the overdue 21st to 22nd combined periodic report as a matter of urgency and to include information on the measures adopted to review the ACH Act.

Allow me, Excellency, to reiterate the wish of the Committee to continue to engage in a constructive dialogue with the Government of Australia, with a view to ensuring the effective implementation of the Convention.

Yours sincerely,

Verene Shepherd
Chair

Committee on the Elimination of Racial Discrimination