

The Western Australian Government's Submission on the Native Title Legislation Amendment Bill 2019 [Provisions]

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1 Introduction

The Western Australian Government (WA) is pleased to make a submission in response to the *Native Title Legislation Amendment Bill 2019 [Provisions]* (**Bill**). This submission provides WA's detailed response to the proposed clauses.

1.1 Background

The Bill is the result of previously considered but unimplemented amendments and reforms in relation to the *Native Title Act 1993 (NTA)*, which were set out in the background section of the WA Government's Submission to the Commonwealth Attorney-General and Minister for Indigenous Affairs on the *Reforms to the Native Title Act 1993 (Cth) Options Paper November 2017* of January 2018 (**Options Paper Submission**). The Bill also follows from the exposure drafts of the *Native Title Legislation Amendment Bill 2018 (Exposure Draft)*, which WA made submissions on in December 2018.

The West Australian Government supports the passage of the Bill as introduced to the Federal Parliament. However, this submission also highlights matters that could improve the operation of the Native Title Act, which could be considered at some point in the future.

WA has now examined the Bill and makes the comments set out below. Given the similarity between the Bill and the Exposure Draft, most of these comments are consistent with WA's submissions to the Exposure Draft.

1.2 Summary of the Western Australian Government's position

WA is broadly supportive of the proposals in the Bill. However, it does have some concerns that it would like to see detailed in the body of this submission. WA's main concerns are set out below.

While the proposed new section 47C of the NTA is supported, WA considers there are a number of matters that require further attention including, but not limited to, the form and content of an agreement, the application of the future act regime of the NTA to the agreement area, the clarity of the process used to reach agreement and the proposed definition of a 'park area'.

WA is generally supportive of the principle of confirming the application of the future act regime of the NTA in instances where sections 47, 47A, 47B and 47C apply. However, it considers that further clarification is required in the drafting of the amended section 227 of the NTA, to provide clarity as to the timing and the effect of the application of these sections.

The Bill does not propose to allow the government party to opt out of being a 'negotiation party' to section 31 agreements, as had previously been proposed in the Options Paper, and WA now has concerns about the practical application of the current proposal.

There are a number of proposals that were supported by WA in its Options Paper Submission which WA notes with disappointment are not included in the Bill. These include:

- (a) proposal B4 of the Options Paper to amend section 24LA of the NTA to allow low-impact future acts to be validly done following a positive determination of native title;
- (b) proposal G1 of the Options Paper Submission to amend the objection period in relation to the expedited procedure;
- (c) proposal G9 of the Options Paper to amend section 24MD(3) to clarify that it applies to a compulsory acquisition of native title rights and interests;
- (d) proposal G2 of the Options Paper to amend the NTA to provide that a minor defect in a notice does not invalidate; and
- (e) proposal C10 of the Options Paper to provide for and encourage the electronic transmission of notices.

2 The Native Title Legislation Amendment Bill 2019

2.1 Schedule 1, Part 1 – Role of the applicant – authorisation

Item 12

WA supports the proposed new section 62B, given that the clause does not impose a separate statutory duty on the applicant, but simply states that the NTA does not relieve the applicant of its common law duties.

Item 23

The Bill proposes a new section 251BA, allowing persons who authorise an ILUA, determination or compensation application to impose conditions.

WA supports this proposal and supports that the imposition of the conditions must be done in accordance with a process of decision-making under traditional laws and customs, where it exists, or otherwise a process agreed and adopted in relation to authorising things of that kind.

However, WA has some concerns regarding the practicality of ensuring that the conditions are imposed properly. It is also important to ensure that the form of the conditions and the way they are utilised are transparent. In this regard, the amendments should also set out requirements of the form of conditions imposed and how they are to be documented.

2.2 Schedule 1, Part 2 – Role of the applicant – applicant decision-making

Items 43-44

WA strongly support these amendments in the form proposed, to allow the applicant to act as a majority, subject to any conditions that have been imposed under the proposed section 251BA.

2.3 Schedule 1, Part 3 – Role of the applicant – replacement of applicant

Item 59

WA has previously raised some concerns regarding the difficulty with determining how a person becomes 'unwilling to act', as set out in WA's Submissions to the Option Paper.

WA supports the amendments in the form proposed, given that 'unwilling to act' as a ground for changing the composition of the applicant without re-authorisation has been removed from the Bill.

However, WA's view is that the amendments should go further in allowing succession planning by claimant groups. The drafting can provide for the original authorisation to specify a method by which a replacement person to make up the composition of the applicant could be selected which will allow more flexibility and efficiency in succession planning.

2.4 Schedule 2, Part 1 – Indigenous land use agreements – body corporate agreements and area agreements

Item 2

WA supports the new section 24BC(2) that allows for body corporate ILUAs to be made over areas where there is a determination that native title does not exist.

Item 3

The proposed amendment to section 24CH(1) is supported as it alleviates unnecessary procedures for the Registrar, who is currently required to notify an area ILUA even if they form the view that it does not meet the requirements to be an ILUA.

2.5 Schedule 2, Part 2 – Indigenous land use agreements – deregistration and amendment

Item 5-6

The proposed amendments to sections 24EB(2) and 24EBA are supported. In addition, the amendments should also clarify that payment of compensation pursuant to an ILUA would also be similarly valid, and not affected by the removal of that ILUA from the Register.

For example: 'To avoid doubt, removal of the details of an agreement from the Register of Indigenous Land Use Agreements does not affect the validity of a future act done, including any payment of compensation made with respect to a future act done, while the details were on the Register.'

Item 7

The proposed new section 24ED is generally supported. In addition, WA reiterates its support for a proposal in the Submissions to the Option Paper that an amendment for a

variation to an ILUA can be agreed via a deed of variation between the parties, without undertaking a further authorisation process, which will assist with implementation of ILUAs and will reduce ongoing costs.

It is noted that the proposed section 24ED(1)(e) in the Exposure Draft, which referred to 'update administrative processes relating to the agreement', is no longer included in the Bill. WA is generally supportive of broadening the scope of agreed variations to ILUAs to allow more flexibility between the parties, and it is unclear why this proposed amendment has been excluded in the Bill.

2.6 Schedule 3, Part 1 – historical extinguishment - park areas

Item 2

WA is supportive of the proposed section 47C, subject to the following comments and proposed amendments:

- (a) The amendments should clarify the nature and timing of an agreement that will attract the operation of section 47C. In particular:
 - (i) The requirement is that the operation of the section be "agreed to in writing **by**" each of the parties mentioned in subsections (1)(b)(i) and (ii). The exception is subsection (5) which requires an agreement **between** the parties mentioned in sections 5(a) and (b). The rationale for that distinction is not clear. Also, the language is inconsistent (e.g. agreement "given" in proposed amendment to section 13(5) (Pt 1, Div 1, cl 1) cf agreement "made" in section 47C(6) and (7)). All extinguishment should be capable of being disregarded if agreed to in writing **by** each of the parties.
 - (ii) However, the amendment should also clarify that agreement for the purposes of subsection (1)(b) (and (5)) *may* be in the form of an agreement between the parties mentioned in subsections (1)(b)(i) and (ii) including an indigenous land use agreement (ILUA). It is appropriate to provide an ability to use ILUAs in these circumstances because the effect of the agreement will be that native title revives. In WA, national parks and nature reserves created before the commencement of the NTA often involved the complete extinguishment of native title. An agreement in the form of a registrable ILUA is not possible where native title does not exist anywhere in the agreement area (e.g. Gibson Desert Nature Reserve and Karlamilyi National Park). The Bill should enable ILUAs to be made and registered in these circumstances.
 - (iii) The Bill does not make sufficiently clear that a section 47C agreement must be made before a claimant application or a revised native title determination application is made in relation to a park area. The proposed wording in section 47C(1)(b) ("has been agreed to in writing") suggests that the section 47C agreement must have already been made when a claimant application or a revised native title

determination application is made. However, it is equally arguable that a section 47C agreement is capable of being made at any time when the application is on foot. Also, it should be clarified that section 47C applies only to applications made after its commencement (see Part 2, item 19).

- (b) The section should clarify the matters that can be included in a section 47C agreement and any specifically excluded matters. The amendments should specify that any agreement between the parties can include provision for an alternative future act regime negotiated between the parties. Moreover, it is critical that section 47C protects all rights and interests that are currently permissible under the existing legislative framework for the relevant park area without the reintroduction of future act processes, including any current interest which enables other permissions to be granted in the future. Otherwise, this will act as a disincentive for States and the Territory to enter into agreements. The amendments should also specify that rights and interests in the area subject to section 47C are not interfered with if an agreement is made under the section, unless otherwise specified, and may be renewed without triggering the future acts regime of the NTA.
- (c) In addition, WA notes that there may be existing ancillary agreements negotiated pursuant to subdivision P of the NTA between grantee parties and native title parties which may either include, or exclude, arrangements between parties pertaining to the proposed section 47C area. The proposed amendments should take into consideration the potential effect of the section 47C regime on these prior arrangements.
- (d) Consistent with agreement being a pre-condition to a native title determination application or revised native title determination application being made, the reference to 'applicant' in section 47C(1)(b)(ii) should be to the person or persons who have been authorised by the native title claim group to make the application to which section 47C applies.
- (e) Given the focus of section 47C as applying by agreement only, and that an agreement must be reached before a claimant application or revised native title determination application is made, WA suggests reordering section 47C(1)(a) and (b) for clarity.
- (f) The proposed definition of 'park area' is broad and may create uncertainty. As currently proposed, a 'park area' may include *'an area ...over which an interest is granted...under a law of...a State...for purposes that include, preserving the natural environment of the area.'* (underlining added). This would include interests granted where preservation of the natural environment is a secondary or ancillary purpose. WA suggests clarifying that the purposes set out in the proposed section 47C(2) must be the *primary* purpose for which the area is set aside or the interest is granted.
- (g) With respect to the notification and opportunity to comment set out in section 47C(5), WA has concerns that giving any 'interested persons' the right to comment may be too expansive. It may be appropriate to restrict this to *'any persons whose interest may be affected by the proposed agreement'*.

- (h) If a claimant application is to be made in reliance on section 47C, the applicant cannot, in the supporting affidavit to the claimant application, swear to the matter set out in the proposed section 62(1A)(a), given native title rights and interests in the area the subject of the section 47C claim will have been extinguished. WA suggests that section 62(1A) provide that, in the case of a claimant application made in reliance on section 47C, the applicant must instead swear that he or she *'believes that native title rights and interests exist or have existed in relation to a park area the subject of an application referred to in paragraph 47C(1)(a)'*.

WA notes that the proposal in the Exposure Draft to allow native title representative bodies to enter into an agreement with a State or the Territory regarding the operation of section 47C, without the input of the native title claimants, has been removed. This amendment is supported by WA.

2.7 Schedule 3, Part 2 – historical extinguishment - pastoral leases held by native title claimants

Item 18-19

WA is supportive of the amendment to section 47(1)(b)(iii) in the form proposed.

2.8 Schedule 4, Part 1 – Allowing a prescribed body corporate to bring a compensation application – Amendments commencing of Proclamation

Item 7

WA is supportive of the proposed amendments to allow a RNTBC to be the applicant in respect of a compensation claim.

2.9 Schedule 5, Part 1 – Intervention and consent determination – intervention in proceedings

Items 3-4

WA is supportive of the proposed amendments to section 87(1)(a) and (b).

Item 6

WA is supportive of this proposed amendment to section 87A(1)(c)(vii).

2.10 Schedule 5, Part 2 – Intervention and consent determination – consent determinations

Item 9

WA is supportive of this proposed amendment to section 87A(1)(b).

2.11 Schedule 6, Part 1 – Other procedural changes – Objections

Item 1

WA is supportive of this proposed amendment, subject to clarification in section 24MD(6B)(f) that there is nothing preventing the government party from referring the matter to the independent person *prior* to the end of the eight month period.

Item 2

WA is supportive of this proposed substitution of section 141(2).

2.12 Schedule 6, Part 2 – Other procedural changes – section 31 agreements

Items 4 and 5

The Bill does not propose to allow the government party to opt out of being a 'negotiation party' to section 31 agreements, as had previously been proposed in the Options Paper. The Bill instead proposes to allow the government party to limit its participation in negotiations, as long as the other parties consent. The new section 31(1B) clarifies that each negotiation party needs to be a party to the agreement.

WA has concerns about the practicality of the proposal that the government party would not be able to 'opt out' of negotiations about matters which does not affect it without the other parties' written consent, and what happens in circumstances in which it may wish to 'opt back in' (i.e. is the parties' consent also required?).

Further, the government party having to be a party to the agreement, even if it has 'opted out' and has not been negotiating, may still result in unnecessary costs and delay for all parties. In particular, WA notes that there is no reference in the amendments to the potential financial implications for the government party at section 60AB of the NTA.

Item 7

WA is generally supportive of this proposed amendment, subject to the drafting stating that it is the responsibility of the grantee party and the native title party to notify the National Native Title Tribunal about any ancillary agreements. WA does not receive or hold any information about the ancillary agreements and would want to avoid any expectation that it was otherwise responsible for compliance with the requirements of this proposed amendment.

Further, WA would not want any notification or registration procedure to be applied.

2.13 Schedule 7 – National Native Title Tribunal

Item 1

WA has no issues with the proposed insertion of a new section 60AAA.

2.14 Schedule 8, Part 1 – Registered native title bodies corporate – Requirements for constitutions

WA is broadly supportive of the items discussed below as they are measures which will support a more efficient operation of RNTBCs.

Item 1-2, 5-7

WA has no issues with the proposed sections regarding dispute resolution processes in the RNTBC constitution, and notes that it may also be appropriate to broaden this to also require a process for resolving disputes between common law holders to be included in the constitution.

Item 3-4, 8-9, 11

WA has no issues with the proposal regarding edibility requirements in the RNTBC constitution.

Items 12-17

WA has no issues with this proposal regarding the grounds for cancelling RNTBC membership.

Item 22

WA has no issues with this proposal, and consider that a two-year term for existing corporations to prepare and lodge any necessary constitution changes to be reasonable.

2.15 Schedule 8, Part 2 – Registered native title bodies corporate – Refusal of membership

Items 20-24

WA has no issues with the proposed amendments relating to the refusal of membership applications.

2.16 Schedule 8, Part 3 – Registered native title bodies corporate – Registrar oversight

Item 25

WA is generally supportive of this provision, noting that its previous concerns in the Exposure Draft to references to a 'class' of common law holders of native title have now been removed.

2.17 Schedule 9 – Just terms compensation and validation

Item 2

WA is strongly supportive of the proposed amendment to validate existing section 31 agreements.

3 Matters which are not dealt with in the Bill

WA is disappointed that a number of matters of importance to WA that it supported in the Options Paper Submission have not been included in the Bill. The failure to include these matters is a lost opportunity that could provide for greater efficiency and effectiveness in the native title system, in particular:

1. Proposal B4 of the Options Paper to amend section 24LA of the NTA to allow low-impact future acts to be validly done following a positive determination of native title. Currently, land use activities that are statutorily undertaken, or currently rely on licences granted under section 91 of the *Land Administration Act 1997* (WA) (**LAA**) and the *Conservation and Land Management Act 1984* (WA), cannot be lawfully undertaken post-determination without an ILUA or compulsory acquisition of native title. The benefit of this proposal was that it enabled these activities to continue validly post-determination without interruption or re-negotiation, and would minimise costs and efficiency for all parties involved, as well as the National Native Title Tribunal. The need for review was broadly supported by the majority of stakeholders who participated in the Options Paper process.
2. Proposal G1 of the Options Paper Submission to amend the objection period in the expedited procedure to 35 days after notification of the proposed future act, where the entire area affected by the act is subject to a determination of native title and a RNTBC is already established. Given that there is no issue as to the identity of the native title holders, the 4-month notification and objection period is considered unnecessary, and contrary to the intention of the process specifically designed to be 'expedited'.
3. Proposal G9 of the Options Paper to amend section 24MD(3) in order to clarify that it applies to a compulsory acquisition of native title rights as if the taking of native title rights and the grant of the new interest in land are the same act. Under the LAA, there is always a gap in time between the taking of land for the purposes of conferring an interest, and the grant of the interest itself, such as it may appear that there are two separate future acts. WA is strongly supportive of the previous proposal to confirm that these are in fact one act, given that it streamlines processes, provides certainty for parties without abrogating rights, and avoids resource intensive challenges to validity of the creation of interests.
4. Proposal G2 of the Options Paper to amend the NTA to provide that a minor defect in a notice does not invalidate the notice if there is no detriment to the interest holder affected. This proposal was strongly supported, given that it promoted efficient and effective outcomes without prejudice to any parties.
5. Proposal C10 of the Options Paper to provide for and encourage the electronic transmission of notices, including amending sections 29 and 6(1) of the *Native Title (Notices) Determination 2011 (No 1)* to provide that notices can always be transmitted electronically.