

RESERVES (TJUNTJUNTJARA COMMUNITY) BILL 2018

EXPLANATORY MEMORANDUM

The Great Victoria Desert Nature Reserve 30490 is a class-A reserve of approximately 2,495,777 hectares situated within the Shire of Menzies. It was set aside in 1970 for the purpose of "conservation of flora and fauna". It is formally vested in the Conservation and Parks Commission and managed, in practice, by the Department of Biodiversity, Conservation and Attractions.

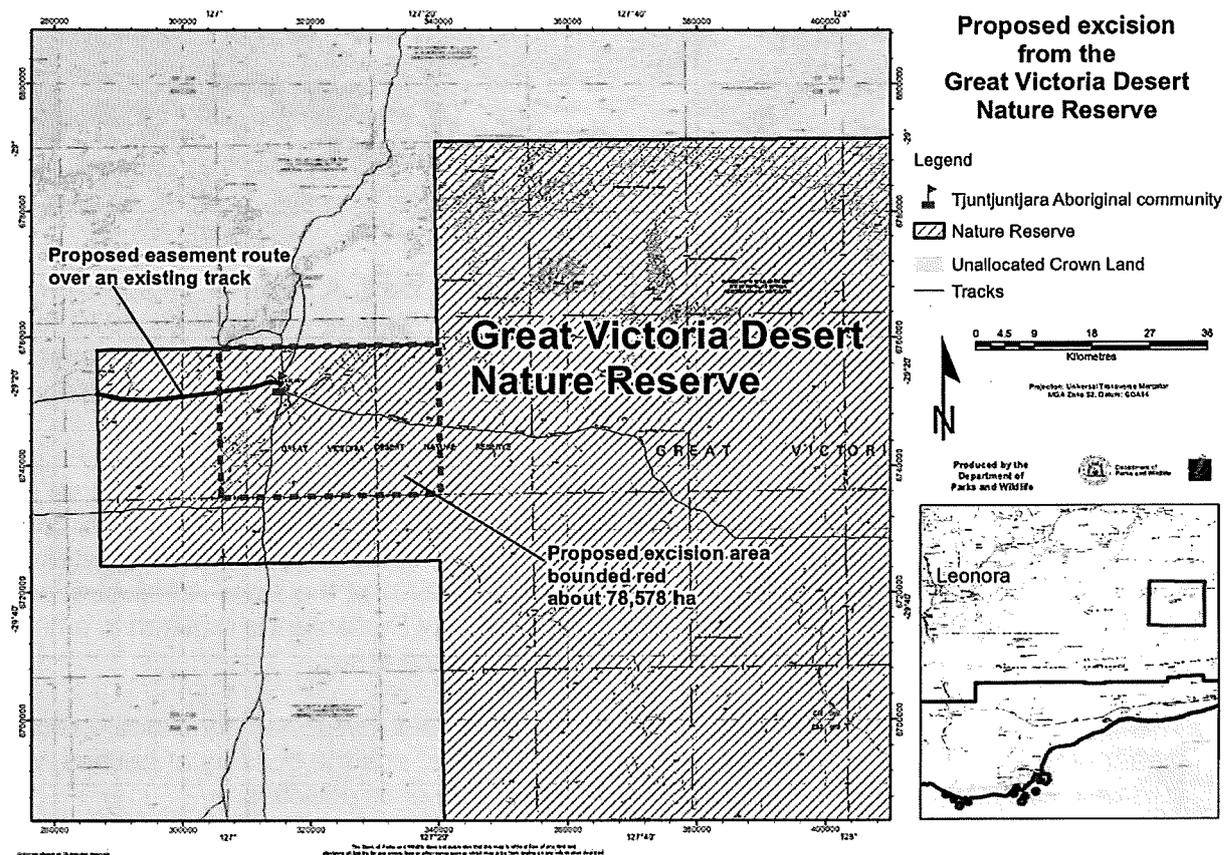
The Tjuntjuntjara community has existed on the western extent of the Nature Reserve since at least 1988 but has never had a registrable land interest over the area it occupies, or legal access to it. The Commission cannot legally grant a lease of the land that is inconsistent with the reserve's purpose. In addition, pursuant to section 45(3) of the *Land Administration Act 1997*, the reserve's class A designation means that an Act of Parliament is required to authorise removal and repurposing of a significant portion of its existing area.

The lack of formal tenure limits the community's ability to seek investment for critically required infrastructure; such as for an expansion of the health clinic and the building of houses, whilst also restricting the community's pursuit of on-ground economic activities.

The Tjuntjuntjara community members are part of a larger group known as the 'Spinifex People', a proud and dynamic traditional Aboriginal group who were removed from their homelands before the British atomic testing at Maralinga in the 1950s and 1960s, but then decided to return in the early 1980s.

Since that time, the Tjuntjuntjara community has steadily grown, whilst maintaining a focus on traditional cultural cycles of desert life. People from across the western desert regions with traditional attachment to the Spinifex Lands, have returned to live at Tjuntjuntjara. Despite isolation and remoteness, the Spinifex People's resilience and determination to live in country and provide strong local governance, makes this a unique community.

The State Government is working hard to improve the circumstances and futures of Aboriginal people living in remote communities, and has recently announced a \$23.8 million capital injection for Tjuntjuntjara, to significantly boost community housing and infrastructure, whilst simultaneously engaging Aboriginal businesses and supporting Aboriginal jobs. The upgrade made possible by this investment will be one of the biggest ever undertaken in a remote community in Western Australia. The Pila Nguru Aboriginal Corporation has been awarded funding of \$770,000 through the Government's Aboriginal Ranger Program. The funding provided will allow four female rangers to be employed under Minyma Uninypa - the Seed Women project. To complement these investments, the Government also wishes to finally resolve the matter of a more appropriate tenure for the Tjuntjuntjara Community. This Bill sets out to obtain the requisite approvals to do that.



Clause 1 Short title

This Bill seeks Parliament's approval to excise an area of some 78,578 hectares from the Great Victoria Desert Nature Reserve 30490, in order to enable the grant of registrable tenure for the Tjuntjuntjara Aboriginal community, and for related purposes. The excision of the Tjuntjuntjara Community land out of the Nature Reserve is for the purpose of granting the Tjuntjuntjara Community land lease to the Pila Nguru Aboriginal Corporation (PNAC), the registered native title body corporate holding the native title rights and interests of the Spinifex People on trust, and being the people who will benefit from the grant.

Clause 2 Commencement

Provides for sections 1, 2, 3, 4 and 6 of the Act to come into operation on the day on which the Act receives Royal Assent, with the rest of the Act commencing on a day fixed by proclamation. Different days may be fixed for different provisions. In practice, following the initial commencement of sections 1 and 2, the balance of the Act is likely to be proclaimed in two separate parts. The correction to the Nature Reserve's technical description dealt with in clause 4 will occur as soon as possible after the Act receives assent because it is merely fixing an existing error dating back to 1970. The excision of the Tjuntjuntjara Community land, dealt with in clause 5, may occur quite sometime after the Act has been assented to, because it will first be necessary to formally execute and then register with the National Native

Title Tribunal, a suitable Indigenous Land Use Agreement (ILUA). The Federal Court of Australia has previously determined the existence of native title rights and interests over the area of the proposed excision in favour of the Spinifex People. The grant of new land tenure to the Tjuntjuntjara Community will constitute a future act under the Commonwealth *Native Title Act 1993*, meaning that prior execution and registration of a suitable ILUA will be necessary to ensure the legal validity of the excision, and the Minister's subsequent grant of the lease over the Tjuntjuntjara Community land, and the associated access easement. The terms of a draft ILUA have previously been agreed in-principle with PNAC's Directors, but formal execution, authorisation and subsequent registration of the ILUA will not be progressed, unless and until Parliament authorises the removal of the Tjuntjuntjara Community land from the Reserve.

Clause 3 Terms used

This clause defines several key terms and expressions used throughout the Act to avoid ambiguity and provide legal certainty.

Clause 4 Great Victoria Desert Nature Reserve boundary amended

Due to the Nature Reserve's remote location and physical size (2,495,777 hectares), its boundaries were established in August 1970 by technical description (as opposed to formal survey).

The eastern boundary of the Nature Reserve is the Western Australian-South Australian border, a certain distance north of the Deakin Obelisk. The Obelisk itself is physically situated on this border. However, the technical description in the 1970 Gazette notices includes wording that incorrectly places the Deakin Obelisk inside the State of South Australia. The Act will simply correct this, by removing the erroneous elements of the original description. There is no effect on the actual area of the Nature Reserve, nor impact on that part of it which is now the subject of the Spinifex People's determined native title rights and interests.

Clause 5 Great Victoria Desert Nature Reserve – Tjuntjuntjara Community land excised

Pursuant to section 45(3) of the *Land Administration Act 1997*, land that is reserved under section 41 of this same Act for the purpose of a class A nature reserve, ...remains so reserved for that purpose until by an Act in which that land is specified, it is otherwise enacted. To progress the grant of the proposed Tjuntjuntjara Community lease, the area to be leased (to become Lot 9 on Deposited Plan 220992), needs to be excised from the Nature Reserve by an Act of Parliament. Clause 5 is the operative provision which excises the area over which the Tjuntjuntjara Community Lease is to be issued, from the existing Nature Reserve.

Clause 6 Registrar of Titles to take certain measures

Authorises and directs the Registrar of Titles to formally record the correction to the existing technical description of the Great Victoria Desert Nature

Reserve (clause 4) and the excision of the area over which the Tjuntjuntjara Community lease is to be issued (clause 5), in the Register maintained in accordance with the requirements of the *Transfer of Land Act 1893*. Unless and until these amendments are physically registered in that Register, they have no real effect. Under the *Land Administration Act 1997*, such changes are ordinarily implemented by Ministerial Order hence, for the sake of efficiency, clause 6 also negates the need to provide separate Orders.

Clause 7 *Residential Tenancies Act 1987 not applicable to Tjuntjuntjara Community lease*

Once all statutory and other approvals have been successfully obtained, it is intended that the Minister for Lands grant a lease in perpetuity over the area to be excised (Lot 9) from the Nature Reserve. This lease, granted under section 83 of the *Land Administration Act 1997*, will be in favour of the Pila Nguru Aboriginal Corporation (PNAC) as Registered Native Title Body Corporate for the Spinifex People. The lease will permit the use of Lot 9 for any purpose which advances the interests of the Native Title Holders including Aboriginal cultural, community and commercial purposes. For the avoidance of doubt, the Permitted Use will include the subleasing of the leased area or parts thereof for commercial return, where the income is used for the financial benefit of the Lessee and its members.

The operation of any community inevitably includes residential housing but, given the size of the area of Lot 9 (78,578 ha) and the multiple uses of the land intended to be permitted under the Lease, it is unlikely that the land comprising Lot 9 would be regarded as *residential premises* under the *Residential Tenancies Act 1987* (WA) (RT Act). However, the RT Act does not contain criteria relating to the size of the 'premises' that rules out its application; nor does it provide that it is only if the 'predominant use' of the land is *residential* that the RT Act applies. Hence clause 7 provides certainty that the Lease to PNAC of Lot 9 will not be subject to the provisions of the RT Act. That said, it is not intended to affect the operation of the RT Act in respect of sub-interests that may be granted by PNAC or any of its sublessees that would ordinarily be regulated by the RT Act.

Clause 8 *Proposed easement over Great Victoria Desert Nature Reserve*

Physical access over an existing track will be required by PNAC and members of the Tjuntjuntjara Community through the westernmost portion of the Nature Reserve to the boundary of Lot 9. It is proposed that the Minister for Lands grant an easement under section 144 of the *Land Administration Act 1997* (Access Easement) to legalise this. The Access Easement will benefit the leasehold interest of PNAC in Lot 9 under the Lease. The proposed easement corridor will be 20 metres wide (10 metres either side of the centreline of the existing track) and extend some 19.3 kilometres from the Community to the westernmost boundary of the Nature Reserve. Its area is calculated at about 33.71 hectares and is depicted on Deposited Plan 414191. The easement area is not within the Spinifex determination area and is over an area where native title has previously been extinguished. Section 44 of the *Land Administration Act 1997* requires that, if the Minister for Lands proposes to grant an easement under section 144 of that same Act over

Crown land which is classified under section 42 as a class A nature reserve, the Minister must cause the proposal to be laid before both Houses of Parliament and section 43(1) then applies. As an Act is required to excise Lot 9 from the Nature Reserve, rather than go through a second Parliamentary process as provided by sections 44 and 43(1) of the *Land Administration Act 1997* for grant of the access easement, the matter of Parliament's authority for the grant of the access easement is dealt with in clause 8 of this Bill.

Clause 9 Mining on Tjuntjuntjara Community land

Under the *Mining Act 1978*, different rules apply for the application of tenements, or for mining to occur, depending on the category of land. Once the TJ Community land has been excised from the class A reserve it will be Crown land that is open for mining under section 18 of the *Mining Act 1978* (either because it will initially be Unallocated Crown land or because once the requisite ILUA has been executed and formally registered, the Minister for Lands will have issued a perpetual lease over the land, under section 83 of the *Land Administration Act 1997*). Crown land is open to mining (in accordance with section 18), subject to some limited protections found in section 20 of the *Mining Act 1978*. On the other hand, for land that is in a class A nature reserve:

- mining can only occur with the consent of the Minister for Mines and Petroleum who must consult with, and gain the concurrence of the responsible Minister (section 24(1)(a) and (1)(b)(iii) of the *Mining Act 1978*); and
- to grant a mining lease or general purpose lease, a resolution giving consent by both Houses of Parliament is required (section 24(4) of the *Mining Act 1978*).

As things stand currently, the Tjuntjuntjara Community is located within the Class A Nature Reserve such that, the protections under the *Mining Act 1978* discussed above continue to apply to the land on which the Community stands. When the area to be leased to the Tjuntjuntjara Community (Lot 9) is excised out of the Nature Reserve, it will no longer have those protections under the *Mining Act 1978*. Clause 9 makes provision for the land on which the Tjuntjuntjara Community is situated, to continue to be afforded a degree of protection from mining, post-excision.

The Lot 9 consultation process would be similar to the procedure set out in section 24(5A) and (5B) of the *Mining Act 1978* for land reserved under Part 4 of the *Land Administration Act 1997*. It is not otherwise intended to alter how the provisions of the *Mining Act 1978* would apply to Lot 9 after it is excised from the Nature Reserve.

The Department of Mines, Industry Regulation and Safety (DMIRS) will implement internal procedures to bring attention to this regime including the placement of a file notation of the Lease area in TENGRAPH. This would alert proponents (and DMIRS staff) to the existence of the condition, that they would not be granted access to the Tjuntjuntjara Community for mining purposes, without the formal approval of the Minister for Mines. Any failure to

comply with such a condition would give rise to forfeiture of any title that may have been issued.

Clause 10 Petroleum and geothermal energy operations on Tjuntjuntjara Community land

Under the *Petroleum and Geothermal Energy Resources Act* (PGER Act), a class A nature reserve is 'Crown land' as defined in that Act but, under section 15A, there is a consultation process before exploration or recovery operations can occur on Crown reserves. In summary, the process is:

- a permittee, holder of a drilling reservation, access authority or special prospecting authority, lessee or licensee (resource authority) is not to access land to which their resource authority applies for the purposes of exploring for petroleum or geothermal energy resources, or carrying out operations for the recovery of those resources unless the consent of the Minister administering the PGER Act has been obtained,
- the Minister administering the PGER Act may consent subject to conditions to be included in the resource authority, and
- before giving that consent, the Minister administering the PGER Act must consult with the responsible Minister (currently the Minister for Environment) and obtain that Minister's recommendation on conditions, if any, that should be included in the resource authority.

As the TJ Community is currently within the Nature Reserve, the protections discussed above under the PGER Act apply to this land. When Lot 9 is excised out of the Nature Reserve it is unlikely that the consultation process in section 15A of the PGER Act will apply. Along similar lines to the objective of clause 9, clause 10 makes provision for the land on which the Tjuntjuntjara Community is situated, to continue to be afforded a degree of protection from exploration for petroleum or geothermal energy resources, or operations for the recovery of those resources, post-excision.

It is not otherwise intended to alter how the provisions of the PGER Act would apply to Lot 9 after it is excised from the Nature Reserve.

The Department of Mines, Industry Regulation and Safety (DMIRS) will implement internal procedures to bring attention to this regime including the placement of a file notation of the Lease area in TENGRAPH. This would alert proponents (and DMIRS staff) to the existence of the condition, that they would not be granted access to the Tjuntjuntjara Community for the purposes of exploration for petroleum or geothermal energy resources, or operations for the recovery of those resources, without the formal approval of the Minister administering the PGER Act. Any failure to comply with such a condition would give rise to cancellation of any title that may have been issued.