

INDIGENOUS CONSERVATION TITLE BILL 2007

INDIGENOUS CONSERVATION TITLE BILL 2007

EXPLANATORY MEMORANDUM

INTRODUCTION

On 27 September 2002, Justice French of the Federal Court made a consent determination of exclusive possession native title in respect of the Martu native title determination application. In his reasons for decision, Justice French noted that Rudall River National Park (Reserve 34607) was excluded from the land the subject of the determination of native title, on the basis that native title has been extinguished by operation of the *Native Title Act 1993* (NTA) and/or by operation of the common law, given that the area was the subject of a vesting order pursuant to s33 of the *Land Act 1933*. Exclusive possession native title would have been determined over Rudall River National Park but for the extinguishing event.

Following this determination, the Martu people expressed their disappointment that the Rudall River National Park was not included in the determination. Soon after, the State announced that it would enter into negotiations with the Martu people towards the establishment of a joint management regime for the land. The State also announced its intention to transfer an appropriate form of title to the Martu People for Rudall River National Park.

On 29 June 2005, Chief Justice Black made a determination (by consent) of exclusive possession native title in respect of the Ngaanyatjarra Lands native title determination application. With respect to the Gibson Desert Nature Reserve (Reserve 34606), the determination provided that this area was excluded on the basis that it had been the subject of a vesting order pursuant to s33 of the *Land Act 1933* and, accordingly, native title had been extinguished by operation of the NTA. Exclusive possession native title would have been determined over Gibson Desert Nature Reserve but for the extinguishing event.

At the Ngaanyatjarra Lands determination, the State announced its intention to transfer an appropriate form of title to the Ngaanyatjarra Lands People for Gibson Desert Nature Reserve. The State also announced that additional funding was available to supplement and enhance the Department of Conservation and Land Management's joint management funding allocated for the Gibson Desert Nature Reserve and Rudall River National Park (the **Parks**).

As both of these Parks were vested by the State after the proclamation of the *Racial Discrimination Act, 1975* (Cth) and prior to the proclamation of the NTA (1 January 1994), the State has a compensation liability for the extinguishment of native title under the NTA.

Since the Federal Court has yet to determine any compensation applications under the NTA, there is very little guidance as to the extent of the State's compensation liabilities in relation to these Parks. However, a litigated determination (with the Federal Court ultimately deciding the State's compensation liability) of compensation would most likely be an expensive and time-consuming exercise for all parties concerned. The State has a long-standing policy of resolving native title matters (including compensation liabilities under the NTA) by agreement wherever possible.

In light of the preceding paragraphs, the *Indigenous Conservation Title (ICT) Bill 2007* has been drafted to achieve a number of key objectives, which include:

INDIGENOUS CONSERVATION TITLE BILL 2007

- to acknowledge, in a practical sense, the land aspirations of the traditional owners of the Parks. These long held aspirations are based on their undeniable rights in relation to this land;
- to realise the Government's commitment to facilitate the transfer of an appropriate form of title by creating a framework for the transfer of a unique form of estate in fee simple known as ICT;
- to settle the State's compensation liability under the *Native Title Act 1993*, for the complete extinguishment of native title in the Parks;
- to provide the foundations for the negotiation of joint management agreements that can be negotiated between the State and the traditional owners for mutual benefit;
- to facilitate the management of the Parks, in such a way as to ensure a balance between preserving the indigenous cultural and heritage values of the land and preserving the conservation values of the land; and
- to formally recognise and provide tenure for two (2) communities within Rudall River National Park.

The transfer of ICT is one element of a broader package that will assist the State to meet the objectives outlined above. The broader package consists of the following elements (in sequential order):

- the negotiation of lease arrangements between the traditional owners and the State to allow the majority of the ICT areas (except for community living areas) to be jointly managed as national park or nature reserve (this is negotiable, except the leases must be for a minimum term of ninety nine [99] years). This land is to be known as a conservation area;
- the negotiation of joint management agreements with the Chief Executive Officer under the *Conservation and Land Management Act 1984*, for the conservation areas;
- the traditional owners filing claimant applications for compensation in the Federal Court under section 61 of the NTA. The State and the traditional owners negotiate the terms of consent determinations of compensation. Once settled, the Federal Court makes an order under section 87(2) of the NTA; and
- the allocation of funding by the State for the joint management of the conservation areas.

The first three of these elements constitutes a pre-condition to the transfer of ICT.

In drafting the ICT Bill the State Government has consulted extensively with a range of internal and external stakeholders in order to protect existing interests in the land subject to ICT and to ensure that ICT resembles an estate in fee simple (albeit conditioned) to the fullest extent possible.

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 1

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 1 – Preliminary Matters

Clause 1 Short title

This clause formally titles the Bill.

Clause 2 Commencement

This clause states when the various Parts of the Bill come into effect. With the exception of the short title and the commencement provisions, the remainder of the provisions of the Bill come into effect on a day fixed by proclamation. The clause provides for different dates to be fixed for different provisions.

Clause 3 Terms used in the Act

This clause sets out the definitions of some of the terms used in the Act.

Clause 4 Community areas

This clause defines what a community area is. A community area is ICT land that the State and the ICT holder agree be used as an Aboriginal community living area. The Bill sets out two areas, which are taken to be the community areas until it is agreed differently.

The Punmu community living area for the Rudall River ICT is located in the northern part of Rudall River National Park. It comprises an area of 78.5 square kilometres, which is approximately 0.61% of the total land area of the Rudall River ICT. Refer to the map at Schedule A.

The Parnngurr (Cotton Creek) community living area for the Rudall River ICT is located on the southern boundary of Rudall River National Park. It comprises an area of 78.5 square kilometres, which is approximately 0.61% of the total land area of the Rudall River ICT. Refer to the map at Schedule A.

There are no community living areas in the Gibson Desert Nature Reserve that will be subject to ICT. Refer to the map at Schedule B.

The community areas and the conservation areas will both be the subject of a survey prior to the transfer of ICT.

A number of provisions of the Bill refer to or apply specifically to community areas.

Clause 5 Act Binds the Crown

This clause states that the Act binds the Crown.

Clause 6 Inconsistency with other written laws

This clause provides for the Bill to prevail in the event of any inconsistency between the provisions of the Bill and any other written law.

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 1

Clause 7 Intent

This clause states that the Bill is part of a package of measures intended to address:

- the State's compensation liability under the *Native Title Act 1993* for the Act that extinguished native title in the conservation area (being the Rudall River National Park and the Gibson Desert Nature Reserve);
- the Government's commitment to transfer appropriate title for the Rudall River National Park and the Gibson Desert Nature Reserve to the Martu and Gibson Desert People respectively;
- the lease back of the land comprised in each of the Rudall River National Park and the Gibson Desert Nature Reserve to the State (through its Department of Environment and Conservation) with the exception of the two community living areas comprised within Rudall River National Park;
- the establishment of a regime for joint management by the Department of Environment and Conservation and the respective traditional owners for the management of those portions of the Rudall River National Park and the Gibson Desert Nature Reserve, which are to be leased back to the State once the land has been transferred to the respective traditional owners. The joint management regime is to be established with the objectives of:
 - preserving and enhancing the Aboriginal culture and heritage values of the area;
 - preserving and enhancing the natural and environmental values of the land; and
 - in so far as is consistent with the objectives set out above, enabling access to, and the enjoyment of, the land by members of the public for recreational purposes.

Part 2 – Cancellation of Reserves

Clause 8 Terms used in this Part

This clause defines "appointed day" and "compensation application". The term "compensation application" means an application under section 50(2) of the *Native Title Act 1993* (Cth) for a determination of the compensation payable for the act, which extinguished native title in an area. The term "appointed day" is used in clause 8 and 9, and is the day upon which the existing reserves over the Rudall River National Park and the Gibson Desert Nature Reserve are to be cancelled to allow for the transfer of an estate in fee simple. The appointed day is to be determined by reference to the date upon which the Federal Court makes an order under section 87(2) of the *Native Title Act 1993* (Cth) in relation to the compensation application. The effect of this is to create a linkage between the making of an order by the Federal Court in relation to the payment of compensation and the transfer of the estate in fee simple to the traditional owners.

Clause 9 Reserve No. 34606 (Gibson Desert Nature Reserve)

This clause provides for the cancellation of the existing class A reserve known as the Gibson Desert Nature Reserve on the appointed day.

Clause 10 Reserve No. 34607 (Rudall River National Park)

This clause provides for the cancellation of the existing class A reserve known as the Rudall River National Park on the appointed day.

Part 3 – ICT: Incidents of Title

Division 1- Preliminary

Clause 11 Terms used in this Part

This clause sets out the necessary definitions for Part 3 of the Bill.

Division 2– Incidents of Title

Clause 12 Estate in fee simple

This clause states that ICT is an estate in fee simple in land, and that except to the extent that this clause provides otherwise, the law of the State applies accordingly.

The clause then sets out a number of incidents of title and restrictions in relation to the title conferred by ICT. These are as follows:

- the estate can only be held by a PBC in trust for the benefit of the traditional owners of the reserve area in respect of which the estate is transferred;
- the estate is to be transferred to the PBC free of all encumbrances other than:
 - any mining and petroleum interests that:
 - were in force over any part of the reserve area immediately before the date of the transfer; or
 - are granted over the area on or after that date on applications made but not determined immediately before that date;
 - any leases to Telstra or a Telstra body that were in force over any part of the reserve area immediately before the date of the transfer (there are currently 3 such leases in place within Rudall River National Park);
- the estate can not be sold and can only be transferred to another PBC in trust for the benefit of the traditional owners of the reserve area in respect of which the estate is created;
- the estate can not be mortgaged, charged or otherwise encumbered as security for the payment of money or the performance of an obligation;
- the estate can be leased and subleased and any lease or sublease can be mortgaged, charged or otherwise encumbered as security for the payment of money or the performance of an obligation;
- an easement can be granted in, over, through or under a community area or a conservation area (provided it is in accordance with clause 13);
- the estate is held subject to the requirements of clauses 13 – 20 of the Bill; and

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 3

- the estate can only be surrendered in accordance with clause 16(1)(d) of the Bill.

Any act that is done in breach of the requirements of the clause is void from the beginning.

The clause states that the *Transfer of Land Act 1893* applies to ICT.

The clause further provides that on and from the date of the transfer of ICT, the PBC becomes the lessor of any Telstra lease to which the estate is subject and the rights and liabilities of the lessor arising from or in connection with that lease pass to the PBC.

Clause 13 Use of a conservation area

This clause provides that the use of the conservation area is subject to the condition that the natural, heritage, cultural, environmental, wildlife and plant life value of the land will be protected, preserved, conserved, maintained, enhanced restored or kept in its natural or existing state, and must be in accordance with the lease referred to in clause 23 of the Bill, the joint management agreement and the management plan applying to the conservation area. This is intended to help ensure that the conservation areas continue to be used essentially as a national park (Rudall River) and nature reserve (Gibson Desert), but allows flexibility for the exercise of traditional pursuits, which might not otherwise be permitted to be carried out within a national park or nature reserve.

The clause extends the application of section 35 of the *Land Administration Act 1997* to the use of a conservation area in contravention of the requirements of this clause as if a contravention were a breach of condition or covenant to which that section applies. The effect of this is that in the event of a breach of the conditions of use set out in this clause, the Minister for Lands may be entitled to cause the ICT land to be forfeited. Prior to a right to forfeiture arising, the Minister is required to do a number of things, including giving notice of the nature of the breach to the ICT holder and the ICT holder will be entitled to exercise the rights of appeal set out under Part 3 of the *Land Administration Act 1997*. Part 3 of the *Land Administration Act 1997* requires the appellant to lodge a notice of appeal with the Minister. That appeal is then referred by the Minister to the Governor for determination.

Clause 14 Use of a community area

This clause sets out the uses to which a community area may be put. A community area may only be used for the purposes of an Aboriginal community living area and for activities that are consistent with or beneficial to that purpose and which do not affect a conservation area in a way that contravenes clause 13 of the Bill.

The clause also extends the application of section 35 of the *Land Administration Act 1997* to the use of a community area in contravention of the requirements of this clause as if a contravention were a breach of condition or covenant to which that section applies. The effect of this is that in the event of a breach of the conditions of use set out in this clause, the Minister for Lands may be entitled to cause the ICT land to be forfeited. Prior to a right to forfeiture arising, the Minister is required to do a number of things, including giving notice of the nature of the breach to the ICT holder and the ICT holder will be entitled to exercise the rights of appeal set out under Part 3 of the *Land Administration Act 1997*. Part 3 of the *Land Administration Act 1997* requires the appellant to lodge a notice of appeal with the Minister. That appeal is then referred by the Minister to the Governor for determination.

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 3

Clause 15 Grant of easements over a conservation area

This clause permits the ICT holder to grant an easement in relation to the conservation area with the consent of the CALM Act Minister, and provided that:

- the proposal has been laid before each house of parliament;
- at least 30 days prior to being laid before Parliament, the intention to grant the easement has been advertised in a newspaper circulating throughout the State; and
- the proposal may be implemented under section 43(1) of the *Land Administration Act 1997* as set out in subclause 3 of clause 15 the Bill.

Subclause 3 then provides that section 43 of the *Land Administration Act 1997* applies in relation to a proposal to grant an easement as if a reference in that section to a proposal included a reference to a proposal laid before Parliament pursuant to clause 15(2)(a) of the Bill and as if a reference in that section to the implementation of the proposal by order included a reference to the implementation of a proposal by way of grant by the ICT holder of the area.

These provisions are modelled on sections 42 and 43 of the *Land Administration Act 1997*. The effect of this is that the grant of an easement over a conservation area is subject to the same special procedures, including tabling in Parliament, as apply to certain changes to Class A reserves.

Clause 16 Addition to, amendment of or excision from ICT land

This clause sets out the process for addition to, amendment of or excision from ICT land. Such an order may only be made with the consent of the CALM Act Minister and ICT holder (except in the case of a surrender). In the case of adding Crown land to the ICT land, amending the boundaries of the ICT land in a way that does not result in the reduction of the land area by more than 5% and excising land from the ICT land where the area to be excised is less than 5% of the area of the ICT land, the Minister is required to advertise the proposal in a newspaper circulating throughout the State. In the case of an excision of part of the ICT land that amounts to more than 5% or one hectare of the ICT land (whichever is less), including for the purposes of a road, and in the case of excision of the whole or part of the ICT land at the request of the ICT holder (i.e. a surrender of the land) there are additional conditions that must be complied with, including laying the proposal before each House of Parliament after advertising the intention to excise the area in a newspaper circulating throughout the State.

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 3

If an order is made that an area of Crown land be added to the ICT land, then that land is taken to have been transferred to the ICT holder on the date of the making of the order. If an order is made excising an area of land from the ICT land, then the land becomes Crown land on the making of the order. Where an excision of part of the ICT land amounts to the excision of more than 5% or one hectare of the ICT land (including where such land is excised for the purposes of a road), then the excised land is to be treated as if it were land taken under Part 9 of the *Land Administration Act 1997* and the compensation provisions set out in Part 10 of the *Land Administration Act* apply as if a reference to a taking order were a reference to an order made under this clause.

The process is modelled on the similar processes set out in the *Land Administration Act 1997*. The intended effect of this is that additions or amendments to, and excisions from, ICT land are dealt with in the same way as additions or amendments to, and excisions from Class A nature reserves and national parks.

Clause 17 Application of the Mining Act 1978 to conservation areas

This clause provides for the manner in which the conservation areas are to be treated for the purposes of the *Mining Act 1978*. The clause is intended to create a balance between the protection and preservation of the conservation values of the area and the recognition of the unique rights and interests of the ICT holder.

In relation to the Gibson Desert ICT land, the Bill provides for the *Mining Act 1978* to apply to the land as if it were land referred to in section 24(1)(b)(ii) (i.e. a nature reserve) of the *Mining Act 1978*. In relation to the Rudall River ICT land, the clause provides for the *Mining Act 1978* to apply to the land as if it were land referred to in section 24(1)(b)(i) (i.e. a national park) of the *Mining Act 1978*. Essentially, in respect of both the Rudall River and Gibson Desert ICT land, this means that no mining or general purpose lease may be granted unless both Houses of Parliament by resolution consent thereto, and then only on such terms and conditions as are specified in the resolution, but that otherwise mining may be carried out on the land with the written consent of the Minister, who may refuse his consent or who may give his consent subject to such terms and conditions as the Minister specifies in the consent. Before giving consent, whether conditionally or unconditionally, the Minister is required to first consult with, and obtain the concurrence thereto, of the responsible Minister.

The Bill provides that the responsible Minister for the purposes of the ICT land is the Minister responsible for the administration of the *Conservation and Land Management Act 1984*. The Bill further provides that the responsible Minister is not able to concur with the grant of consent by the Minister to mining activity without first having consulted the ICT holder and the joint management body for the area. This is a right to be consulted only, not a right of veto.

The clause further provides that in addition to the other terms and conditions that may be imposed upon consent to carry out mining, a consent to carry out mining on ICT land must also be made subject to a condition that compensation to be assessed in accordance with the Act must be paid to the ICT holder for the area for any loss or damage caused by mining operations in the area.

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 3

The clause also clarifies that notwithstanding that the conservation area is to be treated as if it were a national park (Rudall River) or a nature reserve (Gibson Desert) for the purposes of the *Mining Act 1978*, certain of the rights ordinarily accorded to owners of private land under the *Mining Act 1978* are also extended to the ICT holder. The clause then clarifies that except as otherwise provided, the ICT holder, any lessee or sublessee of the area and the CALM Act Minister are not to be treated as if they were an owner or occupier of the conservation area. In this regard, it is relevant to note that the effect of the grant of the lease back to the State as provided for in the Bill would be to place the State and not the ICT holder in the position of an occupier. The purpose of excluding the State from the operation of these provisions is to ensure that the State is not given superior rights to the ICT holder by virtue of the grant of the lease.

Clause 18 Application of the Mining Act 1978 to community areas

This clause provides that the community areas are to be treated as if they were private land for the purposes of the *Mining Act 1978* and the ICT holder for the relevant community area is both the owner and occupier of that area for the purposes of the *Mining Act 1978*. This is intended to recognise the unique nature of the community areas and their significance to the traditional owners.

Clause 19 Application of *Petroleum Act 1967* to conservation areas

This clause provides that the conservation areas are to be treated as if they were crown land for the purposes of the *Petroleum Act 1967*. Section 15A of the *Petroleum Act 1967* is expressly stated to apply to the conservation areas. The effect of this is that the consent of the Minister to whom the administration of the *Petroleum Act 1967* is committed is required before petroleum exploration and activities are carried out on the land. Before giving consent, the Minister must consult with the responsible Minister for the land and obtain his or her recommendations in relation to any conditions, which are to be attached to the grant of consent. The Bill expressly provides that the responsible Minister for the purposes of the ICT land is the Minister responsible for the administration of the *Conservation and Land Management Act 1984*. The Bill further provides that the responsible Minister is not able to provide his or her recommendations without first having consulted the ICT holder and the joint management body for the area. This is a right to be consulted only, not a right of veto.

In recognition of the interests of the ICT holders, the Bill provides for the payment of compensation to the ICT holders for any loss or damage resulting from petroleum exploration activities as if the ICT holder was the owner of private land for the purposes of the *Petroleum Act 1967*.

The clause also clarifies that notwithstanding that the conservation areas are to be treated as if they were crown land for the purposes of the *Petroleum Act 1967*, certain of the rights ordinarily accorded to owners of private land under the *Petroleum Act 1967* are also extended to the ICT holder.

The clause then clarifies that except as otherwise provided, the ICT holder, any lessee or sublessee of the area and the CALM Act Minister are not to be treated as if they were an owner or occupier of the conservation area. In this regard, it is relevant to note that the effect of the grant of the lease back to the State as provided for in the Bill would be to place the State and not the ICT holder in the position of an occupier. The purpose of excluding the State from the operation of these provisions is to ensure that the State is not given superior rights to the ICT holder by virtue of the grant of the lease.

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 3

Clause 20 Application of *Petroleum Act 1967* to community areas

This clause provides that the community areas are to be treated as if they were private land for the purposes of the *Petroleum Act 1967* and the ICT holder for the relevant community area is both the owner and occupier of that area for the purposes of the *Petroleum Act 1967*. This is intended to recognise the unique nature of the community areas and their significance to the traditional owners.

Part 4 – ICT: Transfer, registration and dealings

Clause 21 Terms used in this Part

This clause defines the essential terms for the purposes of Part 4. The defined terms include "dealing", "Registrar" and "register". Each are defined by way of reference to the *Transfer of Land Act 1893*.

Clause 22 Transfer and registration of ICT

This clause provides for the transfer of the ICT in each of the relevant reserve areas as soon as practicable after the cancellation of the existing reserves over those areas. The clause imposes an obligation upon the Registrar to take the steps necessary to register the cancellation of the reserves and the transfer.

Clause 23 Pre-conditions for transfer

This clause specifies the pre-conditions to the transfer of the ICT. Specifically, it provides that the ICT must not be transferred until the terms of the lease back of the conservation areas to the State have been agreed between the State and the ICT holder of the relevant area and the terms of the joint management agreement have been agreed. The clause sets out certain conditions of the lease, which include:

- the lease must be for at least 99 years;
- the lease purposes must include the use of the land the subject of the lease as a national park or nature reserve under the *Conservation and Land Management Act 1984*; and
- the terms of the lease must be consistent with the terms of the joint management agreement.

The lease may operate concurrently with the lease over any area currently subject to a lease to Telstra or a Telstra body that continues following transfer of the ICT.

Clause 24 Dealings with title

This clause prevents the Registrar of Titles from registering any dealing in relation to ICT (required to be registered under the *Transfer of Land Act 1893*), which is not done in accordance with the Bill. Any dealing that does not comply with the requirements of the Bill is deemed to be void from the beginning.

Clause 25 Memorial

This clause creates a requirement for the Minister for Lands to lodge a memorial with the Registrar in relation to the title, which sets out the following:

- the land is land in which ICT land is held;
- ICT is an estate in fee simple;
- ICT is held subject to this Bill;
- a dealing in relation to ICT must be in accordance with the Bill; and

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 4

- a dealing in relation to ICT that is not in accordance with the Bill is void from the beginning.

The memorial may also include a description of the community areas.

The clause imposes an obligation upon the Registrar to register the memorial upon payment of any prescribed fee. The Minister for Lands is able to lodge, in an approved form, a variation or withdrawal of the memorial, and the Registrar must register the variation or withdrawal upon payment of any prescribed fee.

Part 5 – Management of conservation areas

Division 1 – Preliminary matters

Clause 26 Terms used in this Part

This clause defines the essential terms for the purposes of Part 5. The defined terms include "CALM regulations", "Conservation Commission" and "management plan".

Division 2- Joint management agreements

Clause 27 Agreements for joint management of conservation areas

This clause provides for the Chief Executive Officer under the *Conservation and Land Management Act 1984* to enter into an agreement with the ICT holder of a conservation area for the management of the area as a national park or nature reserve under the *Conservation and Land Management Act 1984*.

The clause sets out certain requirements, which must be addressed in the joint management agreement. These include:

- the establishment of a body to manage the area (i.e. the establishment of the joint management body referred to throughout the Bill);
- the membership of the body, which must include at least one person representing the Chief Executive Officer under the *Conservation and Land Management Act 1984* and at least one representative of the traditional owners of the area; and
- the procedures of the body.

Division 3– Application of CALM Act and Regulations

Clause 28 Application of CALM Act and Regulations generally

This clause provides that the *Conservation and Land Management Act 1984* and the *Conservation and Land Management Regulations 2002* apply in relation to jointly managed land (i.e. a conservation area that is under a joint management agreement) that is agreed under clause 27 of the Bill to be managed as a national park or nature reserve as if the area were that category of land under section 6 of the *Conservation and Land Management Act 1984*. The clause expressly provides that section 17 of the *Conservation and Land Management Act 1984* does not apply.

Clause 29 Role of Conservation Commission

This clause provides that jointly managed land is taken to be land vested in the Conservation Commission for the purposes of section 19(1)(c), (d), (f), (g), (k) and (l) of the *Conservation and Land Management Act 1984*. The effect of this amendment is to confer power under the Conservation Commission to continue to:

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 5

- develop policies applicable to jointly managed land in relation to the preservation of the natural environment of the State and the provision of facilities for the enjoyment of that environment by the community for promoting the appreciation of flora and fauna and the natural environment, and to achieve or promote the objectives referred to in section 56(1)(a), (b), (c), (d) and (e);
- to advise the Minister on the development of policies for the conservation and management of biodiversity and biodiversity components throughout the State;
- to submit proposed management plans to the Minister as provided in Part V;
- in relation to management plans –
 - to develop guidelines for monitoring and assessing the implementation of the management plans by the CEO;
 - to set performance criteria for assessing and auditing the performance of the CEO and the Forest Products Commission in carrying out and complying with the management plans;
 - to assess and audit the performance of the CEO and the Forest Products Commission in carrying out and complying with the management plans;
 - to provide advice, upon request, on matters relating to land and waters vested in the Conservation Commission, whether solely or jointly with an associated body, to any body or person, if the provision of the advice is in the public interest and it is practicable for the Conservation Commission to provide it; and
 - with the approval of the Minister, to cause study or research to be undertaken for the purposes of the development of policies as set out above.

The clause then clarifies that nothing in the preceding sub-clause (which extends the powers set out above) otherwise limits the functions of the Chief Executive Officer under section 33 of the *Conservation and Land Management Act 1984* or the powers of the joint management body for the land under the joint management agreement for the land.

Clause 30 Management Plans

This clause provides that despite section 54(3) of the *Conservation and Land Management Act 1984* (which sets out the persons who are to be involved in the preparation of a management plan and the timeframe for that preparation), a management plan for jointly managed land must be prepared on behalf of the Conservation Commission by the joint management body for the land in accordance with the joint management agreement for the land.

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 5

The clause then provides that the management plan is required to be prepared within such period after the joint management agreement is entered into as is reasonably practicable having regard to the resources of the joint management body available for the purpose. This requirement reflects the timing obligations imposed on the Conservation Commission by section 54(3) of the *Conservation and Land Management Act 1984*.

The clause then goes on to provide that in addition to the objectives set out in section 56(1)(c) or (d) of the *Conservation and Land Management Act 1984*, a management plan for jointly managed land must make provision for:

- the traditional owners of the land to carry out cultural activities under the land using traditional and contemporary measures, including:
- hunting and gathering of fauna and flora;
- collecting flowing and subterranean water for personal, domestic and non-commercial communal use;
- collecting and using natural resources other than minerals as defined in the *Mining Act 1978* or petroleum as defined in the *Petroleum Act 1967* (for example, collecting and using ochre, stones, soil and wood);
- maintaining and protecting areas of cultural significance;
- trading fauna, flora and other natural resources;
- ceremonial activities;
- traditional forms of land management (for example, setting fires);
- camping and otherwise living on or traveling through the land; and
- infrastructure for the use of the traditional owners of the land and members of the general public to be provided in the area as required.

Finally, the clause provides that section 58(1) of the *Conservation and Land Management Act 1984* applies to a proposed management plan for jointly managed land as if a reference in that subsection to the CEO was a reference to the joint management body for the land. This means that the public is entitled to make written submissions on the proposed management plan for jointly managed land within the period set by the joint management body (being not less than two months from the date of publication of a notice in the *Government Gazette* inviting submissions).

Clause 31 Activities of traditional owners

This clause provides that a person does not commit an offence under sections 103(1) or 104(1) of the *Conservation and Land Management Act 1984* if the person is a traditional owner of a conservation area and the act or omission which would otherwise constitute an offence is done in relation to the conservation area of which he or she is a traditional owner. Pursuant to clause 3 of the Bill, a traditional owner of ICT land means the traditional owners for whose benefit ICT in the land is held under clause 12(2)(a).

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 5

The offence in section 103 of the *Conservation and Land Management Act 1984* relates to the taking of forest produce and the offence in section 104 relates to the lighting of fires. Each of these activities forms part of the traditional pursuits of the traditional owners and accordingly this clause is intended to provide greater scope than would otherwise exist for the continuation of these traditional pursuits.

The clause then provides that a person does not commit an offence under sections 106(b) or (c) of the *Conservation and Land Management Act 1984* if the person is a traditional owner of a conservation area and the act or omission which would otherwise constitute an offence is authorised by, and is done or made in accordance with, the management plan for the area. The offence in section 106(b) relates to hunting, shooting, destroying or setting snares for the purposes of capturing indigenous fauna. The offence in section 106(c) relates to occupying land, clearing land or breaking up land for cultivation or any other purpose. Again, as these activities form part of the traditional pursuits of the traditional owners, the clause is intended to create greater scope for the exercise of those activities. The inclusion of a requirement that the activities be authorised by, and done or made in accordance with, the management plan for the area ensures that appropriate environmental and conservation measures can be put in place.

Clause 32 Joint management agreements may provide differently

This clause provides that a joint management agreement for jointly managed land may provide differently from the *Conservation and Land Management Act 1984*, the *Conservation and Land Management Regulations 2002* or both. However, the clause expressly provides that the agreement must not provide differently from clause 28(2), 29, 30 or 31 of the Bill. The clause expressly provides for the inclusion of provisions in the joint management agreement which limit the rights of the Chief Executive Officer of the Department of Environment and Conservation (or any successor or replacement entity) to exercise a power under the *Conservation and Land Management Act 1984* or the *Conservation and Land Management Regulations 2002* without the consent of the joint management body.

Division 4 - Application of *Wildlife Conservation Act 1950*

Clause 33 Activities of traditional owners

This clause provides that a person does not commit an offence against the *Wildlife Conservation Act 1950* if the person is a traditional owner of jointly managed land and the act or omission which would otherwise constitute an offence is authorized by and is done in accordance with the management plan and is done or made for one of the following purposes:

- preparing or consuming food;
- medicinal purposes;
- carrying out ceremonial activities;
- artistic and other cultural purposes; and
- a purpose incidental to one of the above purposes.

Part 6

Part 6 – Miscellaneous matters

Clause 34 Delegation by Lands Minister

This clause provides for the delegation of the powers conferred by the Bill on the Minister for Lands to a named officer of the Lands Department, or to a person within the Lands Department holding a particular office or to a prescribed person or a person belonging to a prescribed class of persons. "Lands Department" is defined to mean the Public Sector agency principally assisting the Minister for Lands with the administration of the *Land Administration Act 1997*. A person to whom a power is delegated under this clause is not entitled to sub-delegate the power. The instrument of delegation must be published in the Government Gazette. The clause is similar to the delegation provision contained in section 10 of the *Land Administration Act 1997*.

Clause 35 Regulations

This clause provides for the making of regulations by the Governor prescribing matters required or permitted to be described pursuant to the terms of the Bill or which are necessary or convenient to be prescribed for giving effect to the Bill.

Part 7

Part 7 – Consequential amendments to *Land Administration Act 1997*

Clause 36 The Act amended

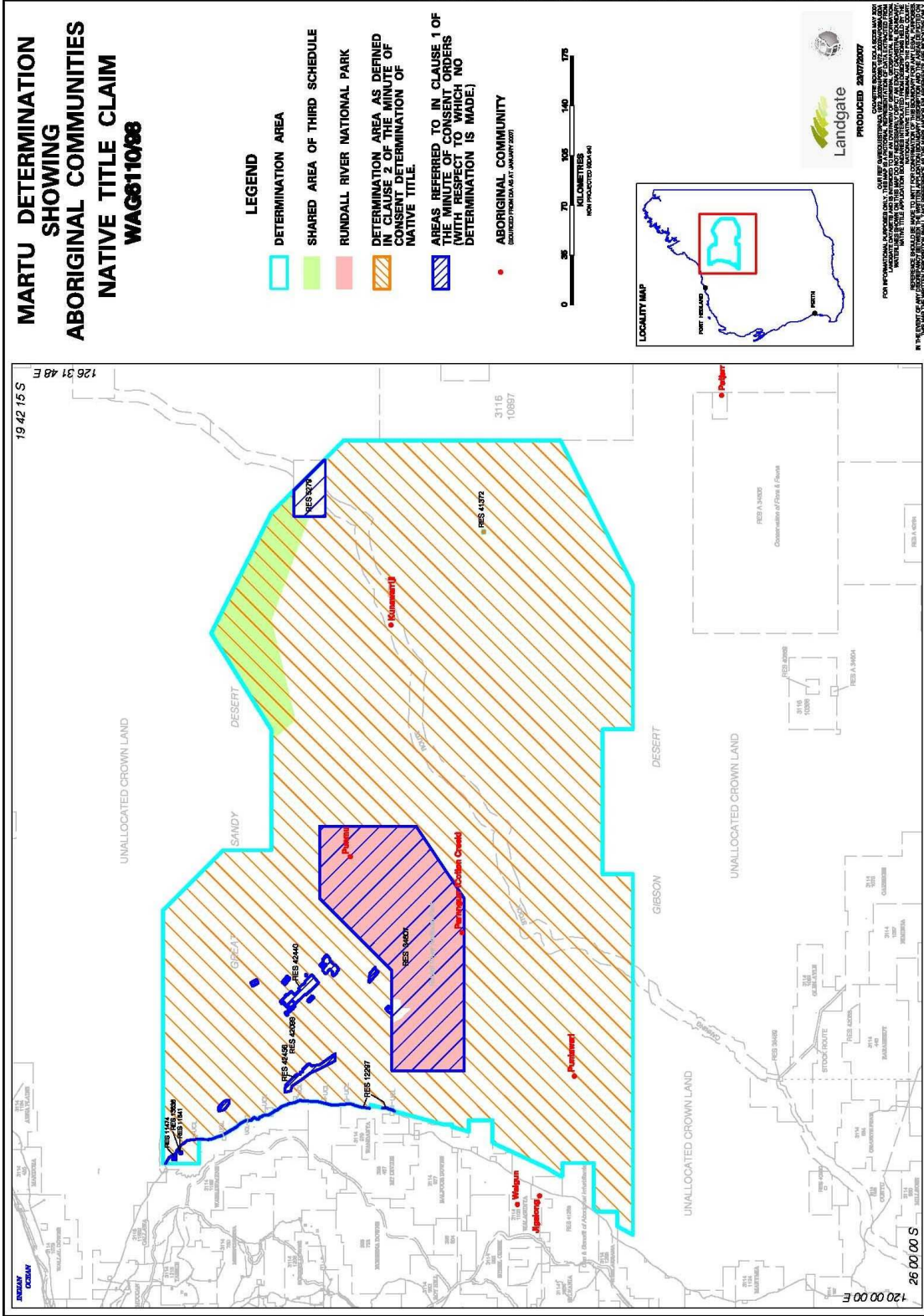
This clause provides that the amendments set out in this Division are to the *Land Administration Act 1997*.

Clause 37 Section 10 amended

This clause amends section 10 of the *Land Administration Act 1997* by inserting a new paragraph empowering the Minister for Lands to exercise powers and perform the duties in relation to land in accordance with the Bill.

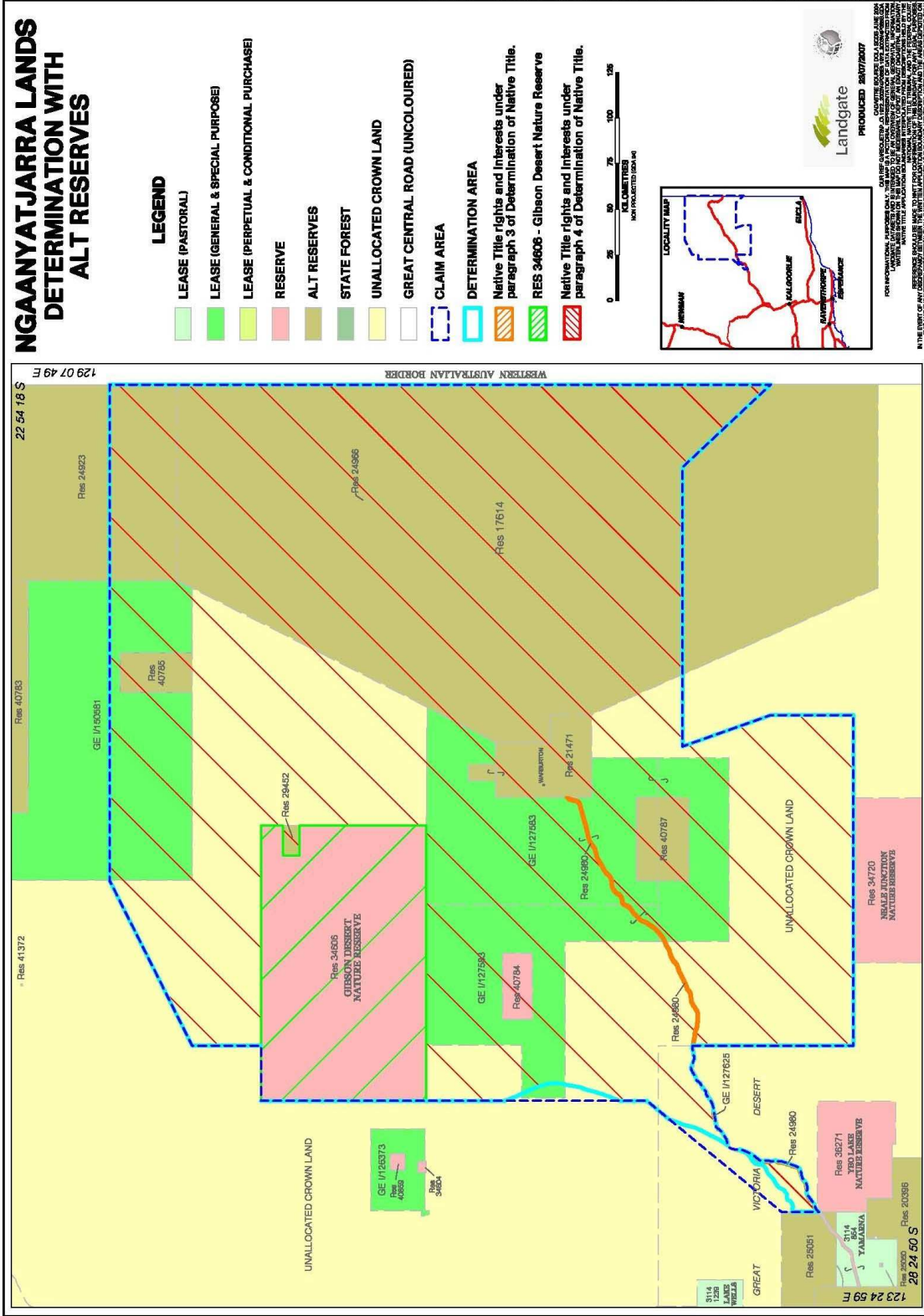
Schedule A

INDIGENOUS CONSERVATION TITLE BILL 2007



Schedule B

INDIGENOUS CONSERVATION TITLE BILL 2007



17/2 2007/06/05/8 AM Prepared by NATIVE TITLE SPATIAL SERVICES, LANDGATE

INDIGENOUS CONSERVATION TITLE BILL 2007

INDIGENOUS CONSERVATION TITLE BILL 2007

EXPLANATORY MEMORANDUM

INTRODUCTION

On 27 September 2002, Justice French of the Federal Court made a consent determination of exclusive possession native title in respect of the Martu native title determination application. In his reasons for decision, Justice French noted that Rudall River National Park (Reserve 34607) was excluded from the land the subject of the determination of native title, on the basis that native title has been extinguished by operation of the *Native Title Act 1993* (NTA) and/or by operation of the common law, given that the area was the subject of a vesting order pursuant to s33 of the *Land Act 1933*. Exclusive possession native title would have been determined over Rudall River National Park but for the extinguishing event.

Following this determination, the Martu people expressed their disappointment that the Rudall River National Park was not included in the determination. Soon after, the State announced that it would enter into negotiations with the Martu people towards the establishment of a joint management regime for the land. The State also announced its intention to transfer an appropriate form of title to the Martu People for Rudall River National Park.

On 29 June 2005, Chief Justice Black made a determination (by consent) of exclusive possession native title in respect of the Ngaanyatjarra Lands native title determination application. With respect to the Gibson Desert Nature Reserve (Reserve 34606), the determination provided that this area was excluded on the basis that it had been the subject of a vesting order pursuant to s33 of the *Land Act 1933* and, accordingly, native title had been extinguished by operation of the NTA. Exclusive possession native title would have been determined over Gibson Desert Nature Reserve but for the extinguishing event.

At the Ngaanyatjarra Lands determination, the State announced its intention to transfer an appropriate form of title to the Ngaanyatjarra Lands People for Gibson Desert Nature Reserve. The State also announced that additional funding was available to supplement and enhance the Department of Conservation and Land Management's joint management funding allocated for the Gibson Desert Nature Reserve and Rudall River National Park (the **Parks**).

As both of these Parks were vested by the State after the proclamation of the *Racial Discrimination Act, 1975* (Cth) and prior to the proclamation of the NTA (1 January 1994), the State has a compensation liability for the extinguishment of native title under the NTA.

Since the Federal Court has yet to determine any compensation applications under the NTA, there is very little guidance as to the extent of the State's compensation liabilities in relation to these Parks. However, a litigated determination (with the Federal Court ultimately deciding the State's compensation liability) of compensation would most likely be an expensive and time-consuming exercise for all parties concerned. The State has a long-standing policy of resolving native title matters (including compensation liabilities under the NTA) by agreement wherever possible.

In light of the preceding paragraphs, the *Indigenous Conservation Title (ICT) Bill 2007* has been drafted to achieve a number of key objectives, which include:

INDIGENOUS CONSERVATION TITLE BILL 2007

- to acknowledge, in a practical sense, the land aspirations of the traditional owners of the Parks. These long held aspirations are based on their undeniable rights in relation to this land;
- to realise the Government's commitment to facilitate the transfer of an appropriate form of title by creating a framework for the transfer of a unique form of estate in fee simple known as ICT;
- to settle the State's compensation liability under the *Native Title Act 1993*, for the complete extinguishment of native title in the Parks;
- to provide the foundations for the negotiation of joint management agreements that can be negotiated between the State and the traditional owners for mutual benefit;
- to facilitate the management of the Parks, in such a way as to ensure a balance between preserving the indigenous cultural and heritage values of the land and preserving the conservation values of the land; and
- to formally recognise and provide tenure for two (2) communities within Rudall River National Park.

The transfer of ICT is one element of a broader package that will assist the State to meet the objectives outlined above. The broader package consists of the following elements (in sequential order):

- the negotiation of lease arrangements between the traditional owners and the State to allow the majority of the ICT areas (except for community living areas) to be jointly managed as national park or nature reserve (this is negotiable, except the leases must be for a minimum term of ninety nine [99] years). This land is to be known as a conservation area;
- the negotiation of joint management agreements with the Chief Executive Officer under the *Conservation and Land Management Act 1984*, for the conservation areas;
- the traditional owners filing claimant applications for compensation in the Federal Court under section 61 of the NTA. The State and the traditional owners negotiate the terms of consent determinations of compensation. Once settled, the Federal Court makes an order under section 87(2) of the NTA; and
- the allocation of funding by the State for the joint management of the conservation areas.

The first three of these elements constitutes a pre-condition to the transfer of ICT.

In drafting the ICT Bill the State Government has consulted extensively with a range of internal and external stakeholders in order to protect existing interests in the land subject to ICT and to ensure that ICT resembles an estate in fee simple (albeit conditioned) to the fullest extent possible.

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 1

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 1 – Preliminary Matters

Clause 1 Short title

This clause formally titles the Bill.

Clause 2 Commencement

This clause states when the various Parts of the Bill come into effect. With the exception of the short title and the commencement provisions, the remainder of the provisions of the Bill come into effect on a day fixed by proclamation. The clause provides for different dates to be fixed for different provisions.

Clause 3 Terms used in the Act

This clause sets out the definitions of some of the terms used in the Act.

Clause 4 Community areas

This clause defines what a community area is. A community area is ICT land that the State and the ICT holder agree be used as an Aboriginal community living area. The Bill sets out two areas, which are taken to be the community areas until it is agreed differently.

The Punmu community living area for the Rudall River ICT is located in the northern part of Rudall River National Park. It comprises an area of 78.5 square kilometres, which is approximately 0.61% of the total land area of the Rudall River ICT. Refer to the map at Schedule A.

The Parnngurr (Cotton Creek) community living area for the Rudall River ICT is located on the southern boundary of Rudall River National Park. It comprises an area of 78.5 square kilometres, which is approximately 0.61% of the total land area of the Rudall River ICT. Refer to the map at Schedule A.

There are no community living areas in the Gibson Desert Nature Reserve that will be subject to ICT. Refer to the map at Schedule B.

The community areas and the conservation areas will both be the subject of a survey prior to the transfer of ICT.

A number of provisions of the Bill refer to or apply specifically to community areas.

Clause 5 Act Binds the Crown

This clause states that the Act binds the Crown.

Clause 6 Inconsistency with other written laws

This clause provides for the Bill to prevail in the event of any inconsistency between the provisions of the Bill and any other written law.

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 1

Clause 7 Intent

This clause states that the Bill is part of a package of measures intended to address:

- the State's compensation liability under the *Native Title Act 1993* for the Act that extinguished native title in the conservation area (being the Rudall River National Park and the Gibson Desert Nature Reserve);
- the Government's commitment to transfer appropriate title for the Rudall River National Park and the Gibson Desert Nature Reserve to the Martu and Gibson Desert People respectively;
- the lease back of the land comprised in each of the Rudall River National Park and the Gibson Desert Nature Reserve to the State (through its Department of Environment and Conservation) with the exception of the two community living areas comprised within Rudall River National Park;
- the establishment of a regime for joint management by the Department of Environment and Conservation and the respective traditional owners for the management of those portions of the Rudall River National Park and the Gibson Desert Nature Reserve, which are to be leased back to the State once the land has been transferred to the respective traditional owners. The joint management regime is to be established with the objectives of:
 - preserving and enhancing the Aboriginal culture and heritage values of the area;
 - preserving and enhancing the natural and environmental values of the land; and
 - in so far as is consistent with the objectives set out above, enabling access to, and the enjoyment of, the land by members of the public for recreational purposes.

Part 2 – Cancellation of Reserves

Clause 8 Terms used in this Part

This clause defines "appointed day" and "compensation application". The term "compensation application" means an application under section 50(2) of the *Native Title Act 1993* (Cth) for a determination of the compensation payable for the act, which extinguished native title in an area. The term "appointed day" is used in clause 8 and 9, and is the day upon which the existing reserves over the Rudall River National Park and the Gibson Desert Nature Reserve are to be cancelled to allow for the transfer of an estate in fee simple. The appointed day is to be determined by reference to the date upon which the Federal Court makes an order under section 87(2) of the *Native Title Act 1993* (Cth) in relation to the compensation application. The effect of this is to create a linkage between the making of an order by the Federal Court in relation to the payment of compensation and the transfer of the estate in fee simple to the traditional owners.

Clause 9 Reserve No. 34606 (Gibson Desert Nature Reserve)

This clause provides for the cancellation of the existing class A reserve known as the Gibson Desert Nature Reserve on the appointed day.

Clause 10 Reserve No. 34607 (Rudall River National Park)

This clause provides for the cancellation of the existing class A reserve known as the Rudall River National Park on the appointed day.

Part 3 – ICT: Incidents of Title

Division 1- Preliminary

Clause 11 Terms used in this Part

This clause sets out the necessary definitions for Part 3 of the Bill.

Division 2– Incidents of Title

Clause 12 Estate in fee simple

This clause states that ICT is an estate in fee simple in land, and that except to the extent that this clause provides otherwise, the law of the State applies accordingly.

The clause then sets out a number of incidents of title and restrictions in relation to the title conferred by ICT. These are as follows:

- the estate can only be held by a PBC in trust for the benefit of the traditional owners of the reserve area in respect of which the estate is transferred;
- the estate is to be transferred to the PBC free of all encumbrances other than:
 - any mining and petroleum interests that:
 - were in force over any part of the reserve area immediately before the date of the transfer; or
 - are granted over the area on or after that date on applications made but not determined immediately before that date;
 - any leases to Telstra or a Telstra body that were in force over any part of the reserve area immediately before the date of the transfer (there are currently 3 such leases in place within Rudall River National Park);
- the estate can not be sold and can only be transferred to another PBC in trust for the benefit of the traditional owners of the reserve area in respect of which the estate is created;
- the estate can not be mortgaged, charged or otherwise encumbered as security for the payment of money or the performance of an obligation;
- the estate can be leased and subleased and any lease or sublease can be mortgaged, charged or otherwise encumbered as security for the payment of money or the performance of an obligation;
- an easement can be granted in, over, through or under a community area or a conservation area (provided it is in accordance with clause 13);
- the estate is held subject to the requirements of clauses 13 – 20 of the Bill; and

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 3

- the estate can only be surrendered in accordance with clause 16(1)(d) of the Bill.

Any act that is done in breach of the requirements of the clause is void from the beginning.

The clause states that the *Transfer of Land Act 1893* applies to ICT.

The clause further provides that on and from the date of the transfer of ICT, the PBC becomes the lessor of any Telstra lease to which the estate is subject and the rights and liabilities of the lessor arising from or in connection with that lease pass to the PBC.

Clause 13 Use of a conservation area

This clause provides that the use of the conservation area is subject to the condition that the natural, heritage, cultural, environmental, wildlife and plant life value of the land will be protected, preserved, conserved, maintained, enhanced restored or kept in its natural or existing state, and must be in accordance with the lease referred to in clause 23 of the Bill, the joint management agreement and the management plan applying to the conservation area. This is intended to help ensure that the conservation areas continue to be used essentially as a national park (Rudall River) and nature reserve (Gibson Desert), but allows flexibility for the exercise of traditional pursuits, which might not otherwise be permitted to be carried out within a national park or nature reserve.

The clause extends the application of section 35 of the *Land Administration Act 1997* to the use of a conservation area in contravention of the requirements of this clause as if a contravention were a breach of condition or covenant to which that section applies. The effect of this is that in the event of a breach of the conditions of use set out in this clause, the Minister for Lands may be entitled to cause the ICT land to be forfeited. Prior to a right to forfeiture arising, the Minister is required to do a number of things, including giving notice of the nature of the breach to the ICT holder and the ICT holder will be entitled to exercise the rights of appeal set out under Part 3 of the *Land Administration Act 1997*. Part 3 of the *Land Administration Act 1997* requires the appellant to lodge a notice of appeal with the Minister. That appeal is then referred by the Minister to the Governor for determination.

Clause 14 Use of a community area

This clause sets out the uses to which a community area may be put. A community area may only be used for the purposes of an Aboriginal community living area and for activities that are consistent with or beneficial to that purpose and which do not affect a conservation area in a way that contravenes clause 13 of the Bill.

The clause also extends the application of section 35 of the *Land Administration Act 1997* to the use of a community area in contravention of the requirements of this clause as if a contravention were a breach of condition or covenant to which that section applies. The effect of this is that in the event of a breach of the conditions of use set out in this clause, the Minister for Lands may be entitled to cause the ICT land to be forfeited. Prior to a right to forfeiture arising, the Minister is required to do a number of things, including giving notice of the nature of the breach to the ICT holder and the ICT holder will be entitled to exercise the rights of appeal set out under Part 3 of the *Land Administration Act 1997*. Part 3 of the *Land Administration Act 1997* requires the appellant to lodge a notice of appeal with the Minister. That appeal is then referred by the Minister to the Governor for determination.

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 3

Clause 15 Grant of easements over a conservation area

This clause permits the ICT holder to grant an easement in relation to the conservation area with the consent of the CALM Act Minister, and provided that:

- the proposal has been laid before each house of parliament;
- at least 30 days prior to being laid before Parliament, the intention to grant the easement has been advertised in a newspaper circulating throughout the State; and
- the proposal may be implemented under section 43(1) of the *Land Administration Act 1997* as set out in subclause 3 of clause 15 the Bill.

Subclause 3 then provides that section 43 of the *Land Administration Act 1997* applies in relation to a proposal to grant an easement as if a reference in that section to a proposal included a reference to a proposal laid before Parliament pursuant to clause 15(2)(a) of the Bill and as if a reference in that section to the implementation of the proposal by order included a reference to the implementation of a proposal by way of grant by the ICT holder of the area.

These provisions are modelled on sections 42 and 43 of the *Land Administration Act 1997*. The effect of this is that the grant of an easement over a conservation area is subject to the same special procedures, including tabling in Parliament, as apply to certain changes to Class A reserves.

Clause 16 Addition to, amendment of or excision from ICT land

This clause sets out the process for addition to, amendment of or excision from ICT land. Such an order may only be made with the consent of the CALM Act Minister and ICT holder (except in the case of a surrender). In the case of adding Crown land to the ICT land, amending the boundaries of the ICT land in a way that does not result in the reduction of the land area by more than 5% and excising land from the ICT land where the area to be excised is less than 5% of the area of the ICT land, the Minister is required to advertise the proposal in a newspaper circulating throughout the State. In the case of an excision of part of the ICT land that amounts to more than 5% or one hectare of the ICT land (whichever is less), including for the purposes of a road, and in the case of excision of the whole or part of the ICT land at the request of the ICT holder (i.e. a surrender of the land) there are additional conditions that must be complied with, including laying the proposal before each House of Parliament after advertising the intention to excise the area in a newspaper circulating throughout the State.

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 3

If an order is made that an area of Crown land be added to the ICT land, then that land is taken to have been transferred to the ICT holder on the date of the making of the order. If an order is made excising an area of land from the ICT land, then the land becomes Crown land on the making of the order. Where an excision of part of the ICT land amounts to the excision of more than 5% or one hectare of the ICT land (including where such land is excised for the purposes of a road), then the excised land is to be treated as if it were land taken under Part 9 of the *Land Administration Act 1997* and the compensation provisions set out in Part 10 of the *Land Administration Act* apply as if a reference to a taking order were a reference to an order made under this clause.

The process is modelled on the similar processes set out in the *Land Administration Act 1997*. The intended effect of this is that additions or amendments to, and excisions from, ICT land are dealt with in the same way as additions or amendments to, and excisions from Class A nature reserves and national parks.

Clause 17 Application of the Mining Act 1978 to conservation areas

This clause provides for the manner in which the conservation areas are to be treated for the purposes of the *Mining Act 1978*. The clause is intended to create a balance between the protection and preservation of the conservation values of the area and the recognition of the unique rights and interests of the ICT holder.

In relation to the Gibson Desert ICT land, the Bill provides for the *Mining Act 1978* to apply to the land as if it were land referred to in section 24(1)(b)(ii) (i.e. a nature reserve) of the *Mining Act 1978*. In relation to the Rudall River ICT land, the clause provides for the *Mining Act 1978* to apply to the land as if it were land referred to in section 24(1)(b)(i) (i.e. a national park) of the *Mining Act 1978*. Essentially, in respect of both the Rudall River and Gibson Desert ICT land, this means that no mining or general purpose lease may be granted unless both Houses of Parliament by resolution consent thereto, and then only on such terms and conditions as are specified in the resolution, but that otherwise mining may be carried out on the land with the written consent of the Minister, who may refuse his consent or who may give his consent subject to such terms and conditions as the Minister specifies in the consent. Before giving consent, whether conditionally or unconditionally, the Minister is required to first consult with, and obtain the concurrence thereto, of the responsible Minister.

The Bill provides that the responsible Minister for the purposes of the ICT land is the Minister responsible for the administration of the *Conservation and Land Management Act 1984*. The Bill further provides that the responsible Minister is not able to concur with the grant of consent by the Minister to mining activity without first having consulted the ICT holder and the joint management body for the area. This is a right to be consulted only, not a right of veto.

The clause further provides that in addition to the other terms and conditions that may be imposed upon consent to carry out mining, a consent to carry out mining on ICT land must also be made subject to a condition that compensation to be assessed in accordance with the Act must be paid to the ICT holder for the area for any loss or damage caused by mining operations in the area.

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 3

The clause also clarifies that notwithstanding that the conservation area is to be treated as if it were a national park (Rudall River) or a nature reserve (Gibson Desert) for the purposes of the *Mining Act 1978*, certain of the rights ordinarily accorded to owners of private land under the *Mining Act 1978* are also extended to the ICT holder. The clause then clarifies that except as otherwise provided, the ICT holder, any lessee or sublessee of the area and the CALM Act Minister are not to be treated as if they were an owner or occupier of the conservation area. In this regard, it is relevant to note that the effect of the grant of the lease back to the State as provided for in the Bill would be to place the State and not the ICT holder in the position of an occupier. The purpose of excluding the State from the operation of these provisions is to ensure that the State is not given superior rights to the ICT holder by virtue of the grant of the lease.

Clause 18 Application of the Mining Act 1978 to community areas

This clause provides that the community areas are to be treated as if they were private land for the purposes of the *Mining Act 1978* and the ICT holder for the relevant community area is both the owner and occupier of that area for the purposes of the *Mining Act 1978*. This is intended to recognise the unique nature of the community areas and their significance to the traditional owners.

Clause 19 Application of *Petroleum Act 1967* to conservation areas

This clause provides that the conservation areas are to be treated as if they were crown land for the purposes of the *Petroleum Act 1967*. Section 15A of the *Petroleum Act 1967* is expressly stated to apply to the conservation areas. The effect of this is that the consent of the Minister to whom the administration of the *Petroleum Act 1967* is committed is required before petroleum exploration and activities are carried out on the land. Before giving consent, the Minister must consult with the responsible Minister for the land and obtain his or her recommendations in relation to any conditions, which are to be attached to the grant of consent. The Bill expressly provides that the responsible Minister for the purposes of the ICT land is the Minister responsible for the administration of the *Conservation and Land Management Act 1984*. The Bill further provides that the responsible Minister is not able to provide his or her recommendations without first having consulted the ICT holder and the joint management body for the area. This is a right to be consulted only, not a right of veto.

In recognition of the interests of the ICT holders, the Bill provides for the payment of compensation to the ICT holders for any loss or damage resulting from petroleum exploration activities as if the ICT holder was the owner of private land for the purposes of the *Petroleum Act 1967*.

The clause also clarifies that notwithstanding that the conservation areas are to be treated as if they were crown land for the purposes of the *Petroleum Act 1967*, certain of the rights ordinarily accorded to owners of private land under the *Petroleum Act 1967* are also extended to the ICT holder.

The clause then clarifies that except as otherwise provided, the ICT holder, any lessee or sublessee of the area and the CALM Act Minister are not to be treated as if they were an owner or occupier of the conservation area. In this regard, it is relevant to note that the effect of the grant of the lease back to the State as provided for in the Bill would be to place the State and not the ICT holder in the position of an occupier. The purpose of excluding the State from the operation of these provisions is to ensure that the State is not given superior rights to the ICT holder by virtue of the grant of the lease.

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 3

Clause 20 Application of *Petroleum Act 1967* to community areas

This clause provides that the community areas are to be treated as if they were private land for the purposes of the *Petroleum Act 1967* and the ICT holder for the relevant community area is both the owner and occupier of that area for the purposes of the *Petroleum Act 1967*. This is intended to recognise the unique nature of the community areas and their significance to the traditional owners.

Part 4 – ICT: Transfer, registration and dealings

Clause 21 Terms used in this Part

This clause defines the essential terms for the purposes of Part 4. The defined terms include "dealing", "Registrar" and "register". Each are defined by way of reference to the *Transfer of Land Act 1893*.

Clause 22 Transfer and registration of ICT

This clause provides for the transfer of the ICT in each of the relevant reserve areas as soon as practicable after the cancellation of the existing reserves over those areas. The clause imposes an obligation upon the Registrar to take the steps necessary to register the cancellation of the reserves and the transfer.

Clause 23 Pre-conditions for transfer

This clause specifies the pre-conditions to the transfer of the ICT. Specifically, it provides that the ICT must not be transferred until the terms of the lease back of the conservation areas to the State have been agreed between the State and the ICT holder of the relevant area and the terms of the joint management agreement have been agreed. The clause sets out certain conditions of the lease, which include:

- the lease must be for at least 99 years;
- the lease purposes must include the use of the land the subject of the lease as a national park or nature reserve under the *Conservation and Land Management Act 1984*; and
- the terms of the lease must be consistent with the terms of the joint management agreement.

The lease may operate concurrently with the lease over any area currently subject to a lease to Telstra or a Telstra body that continues following transfer of the ICT.

Clause 24 Dealings with title

This clause prevents the Registrar of Titles from registering any dealing in relation to ICT (required to be registered under the *Transfer of Land Act 1893*), which is not done in accordance with the Bill. Any dealing that does not comply with the requirements of the Bill is deemed to be void from the beginning.

Clause 25 Memorial

This clause creates a requirement for the Minister for Lands to lodge a memorial with the Registrar in relation to the title, which sets out the following:

- the land is land in which ICT land is held;
- ICT is an estate in fee simple;
- ICT is held subject to this Bill;
- a dealing in relation to ICT must be in accordance with the Bill; and

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 4

- a dealing in relation to ICT that is not in accordance with the Bill is void from the beginning.

The memorial may also include a description of the community areas.

The clause imposes an obligation upon the Registrar to register the memorial upon payment of any prescribed fee. The Minister for Lands is able to lodge, in an approved form, a variation or withdrawal of the memorial, and the Registrar must register the variation or withdrawal upon payment of any prescribed fee.

Part 5 – Management of conservation areas

Division 1 – Preliminary matters

Clause 26 Terms used in this Part

This clause defines the essential terms for the purposes of Part 5. The defined terms include "CALM regulations", "Conservation Commission" and "management plan".

Division 2- Joint management agreements

Clause 27 Agreements for joint management of conservation areas

This clause provides for the Chief Executive Officer under the *Conservation and Land Management Act 1984* to enter into an agreement with the ICT holder of a conservation area for the management of the area as a national park or nature reserve under the *Conservation and Land Management Act 1984*.

The clause sets out certain requirements, which must be addressed in the joint management agreement. These include:

- the establishment of a body to manage the area (i.e. the establishment of the joint management body referred to throughout the Bill);
- the membership of the body, which must include at least one person representing the Chief Executive Officer under the *Conservation and Land Management Act 1984* and at least one representative of the traditional owners of the area; and
- the procedures of the body.

Division 3– Application of CALM Act and Regulations

Clause 28 Application of CALM Act and Regulations generally

This clause provides that the *Conservation and Land Management Act 1984* and the *Conservation and Land Management Regulations 2002* apply in relation to jointly managed land (i.e. a conservation area that is under a joint management agreement) that is agreed under clause 27 of the Bill to be managed as a national park or nature reserve as if the area were that category of land under section 6 of the *Conservation and Land Management Act 1984*. The clause expressly provides that section 17 of the *Conservation and Land Management Act 1984* does not apply.

Clause 29 Role of Conservation Commission

This clause provides that jointly managed land is taken to be land vested in the Conservation Commission for the purposes of section 19(1)(c), (d), (f), (g), (k) and (l) of the *Conservation and Land Management Act 1984*. The effect of this amendment is to confer power under the Conservation Commission to continue to:

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 5

- develop policies applicable to jointly managed land in relation to the preservation of the natural environment of the State and the provision of facilities for the enjoyment of that environment by the community for promoting the appreciation of flora and fauna and the natural environment, and to achieve or promote the objectives referred to in section 56(1)(a), (b), (c), (d) and (e);
- to advise the Minister on the development of policies for the conservation and management of biodiversity and biodiversity components throughout the State;
- to submit proposed management plans to the Minister as provided in Part V;
- in relation to management plans –
 - to develop guidelines for monitoring and assessing the implementation of the management plans by the CEO;
 - to set performance criteria for assessing and auditing the performance of the CEO and the Forest Products Commission in carrying out and complying with the management plans;
 - to assess and audit the performance of the CEO and the Forest Products Commission in carrying out and complying with the management plans;
 - to provide advice, upon request, on matters relating to land and waters vested in the Conservation Commission, whether solely or jointly with an associated body, to any body or person, if the provision of the advice is in the public interest and it is practicable for the Conservation Commission to provide it; and
 - with the approval of the Minister, to cause study or research to be undertaken for the purposes of the development of policies as set out above.

The clause then clarifies that nothing in the preceding sub-clause (which extends the powers set out above) otherwise limits the functions of the Chief Executive Officer under section 33 of the *Conservation and Land Management Act 1984* or the powers of the joint management body for the land under the joint management agreement for the land.

Clause 30 Management Plans

This clause provides that despite section 54(3) of the *Conservation and Land Management Act 1984* (which sets out the persons who are to be involved in the preparation of a management plan and the timeframe for that preparation), a management plan for jointly managed land must be prepared on behalf of the Conservation Commission by the joint management body for the land in accordance with the joint management agreement for the land.

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 5

The clause then provides that the management plan is required to be prepared within such period after the joint management agreement is entered into as is reasonably practicable having regard to the resources of the joint management body available for the purpose. This requirement reflects the timing obligations imposed on the Conservation Commission by section 54(3) of the *Conservation and Land Management Act 1984*.

The clause then goes on to provide that in addition to the objectives set out in section 56(1)(c) or (d) of the *Conservation and Land Management Act 1984*, a management plan for jointly managed land must make provision for:

- the traditional owners of the land to carry out cultural activities under the land using traditional and contemporary measures, including:
- hunting and gathering of fauna and flora;
- collecting flowing and subterranean water for personal, domestic and non-commercial communal use;
- collecting and using natural resources other than minerals as defined in the *Mining Act 1978* or petroleum as defined in the *Petroleum Act 1967* (for example, collecting and using ochre, stones, soil and wood);
- maintaining and protecting areas of cultural significance;
- trading fauna, flora and other natural resources;
- ceremonial activities;
- traditional forms of land management (for example, setting fires);
- camping and otherwise living on or traveling through the land; and
- infrastructure for the use of the traditional owners of the land and members of the general public to be provided in the area as required.

Finally, the clause provides that section 58(1) of the *Conservation and Land Management Act 1984* applies to a proposed management plan for jointly managed land as if a reference in that subsection to the CEO was a reference to the joint management body for the land. This means that the public is entitled to make written submissions on the proposed management plan for jointly managed land within the period set by the joint management body (being not less than two months from the date of publication of a notice in the *Government Gazette* inviting submissions).

Clause 31 Activities of traditional owners

This clause provides that a person does not commit an offence under sections 103(1) or 104(1) of the *Conservation and Land Management Act 1984* if the person is a traditional owner of a conservation area and the act or omission which would otherwise constitute an offence is done in relation to the conservation area of which he or she is a traditional owner. Pursuant to clause 3 of the Bill, a traditional owner of ICT land means the traditional owners for whose benefit ICT in the land is held under clause 12(2)(a).

INDIGENOUS CONSERVATION TITLE BILL 2007

Part 5

The offence in section 103 of the *Conservation and Land Management Act 1984* relates to the taking of forest produce and the offence in section 104 relates to the lighting of fires. Each of these activities forms part of the traditional pursuits of the traditional owners and accordingly this clause is intended to provide greater scope than would otherwise exist for the continuation of these traditional pursuits.

The clause then provides that a person does not commit an offence under sections 106(b) or (c) of the *Conservation and Land Management Act 1984* if the person is a traditional owner of a conservation area and the act or omission which would otherwise constitute an offence is authorised by, and is done or made in accordance with, the management plan for the area. The offence in section 106(b) relates to hunting, shooting, destroying or setting snares for the purposes of capturing indigenous fauna. The offence in section 106(c) relates to occupying land, clearing land or breaking up land for cultivation or any other purpose. Again, as these activities form part of the traditional pursuits of the traditional owners, the clause is intended to create greater scope for the exercise of those activities. The inclusion of a requirement that the activities be authorised by, and done or made in accordance with, the management plan for the area ensures that appropriate environmental and conservation measures can be put in place.

Clause 32 Joint management agreements may provide differently

This clause provides that a joint management agreement for jointly managed land may provide differently from the *Conservation and Land Management Act 1984*, the *Conservation and Land Management Regulations 2002* or both. However, the clause expressly provides that the agreement must not provide differently from clause 28(2), 29, 30 or 31 of the Bill. The clause expressly provides for the inclusion of provisions in the joint management agreement which limit the rights of the Chief Executive Officer of the Department of Environment and Conservation (or any successor or replacement entity) to exercise a power under the *Conservation and Land Management Act 1984* or the *Conservation and Land Management Regulations 2002* without the consent of the joint management body.

Division 4 - Application of *Wildlife Conservation Act 1950*

Clause 33 Activities of traditional owners

This clause provides that a person does not commit an offence against the *Wildlife Conservation Act 1950* if the person is a traditional owner of jointly managed land and the act or omission which would otherwise constitute an offence is authorized by and is done in accordance with the management plan and is done or made for one of the following purposes:

- preparing or consuming food;
- medicinal purposes;
- carrying out ceremonial activities;
- artistic and other cultural purposes; and
- a purpose incidental to one of the above purposes.

Part 6

Part 6 – Miscellaneous matters

Clause 34 Delegation by Lands Minister

This clause provides for the delegation of the powers conferred by the Bill on the Minister for Lands to a named officer of the Lands Department, or to a person within the Lands Department holding a particular office or to a prescribed person or a person belonging to a prescribed class of persons. "Lands Department" is defined to mean the Public Sector agency principally assisting the Minister for Lands with the administration of the *Land Administration Act 1997*. A person to whom a power is delegated under this clause is not entitled to sub-delegate the power. The instrument of delegation must be published in the Government Gazette. The clause is similar to the delegation provision contained in section 10 of the *Land Administration Act 1997*.

Clause 35 Regulations

This clause provides for the making of regulations by the Governor prescribing matters required or permitted to be described pursuant to the terms of the Bill or which are necessary or convenient to be prescribed for giving effect to the Bill.

Part 7

Part 7 – Consequential amendments to *Land Administration Act 1997*

Clause 36 The Act amended

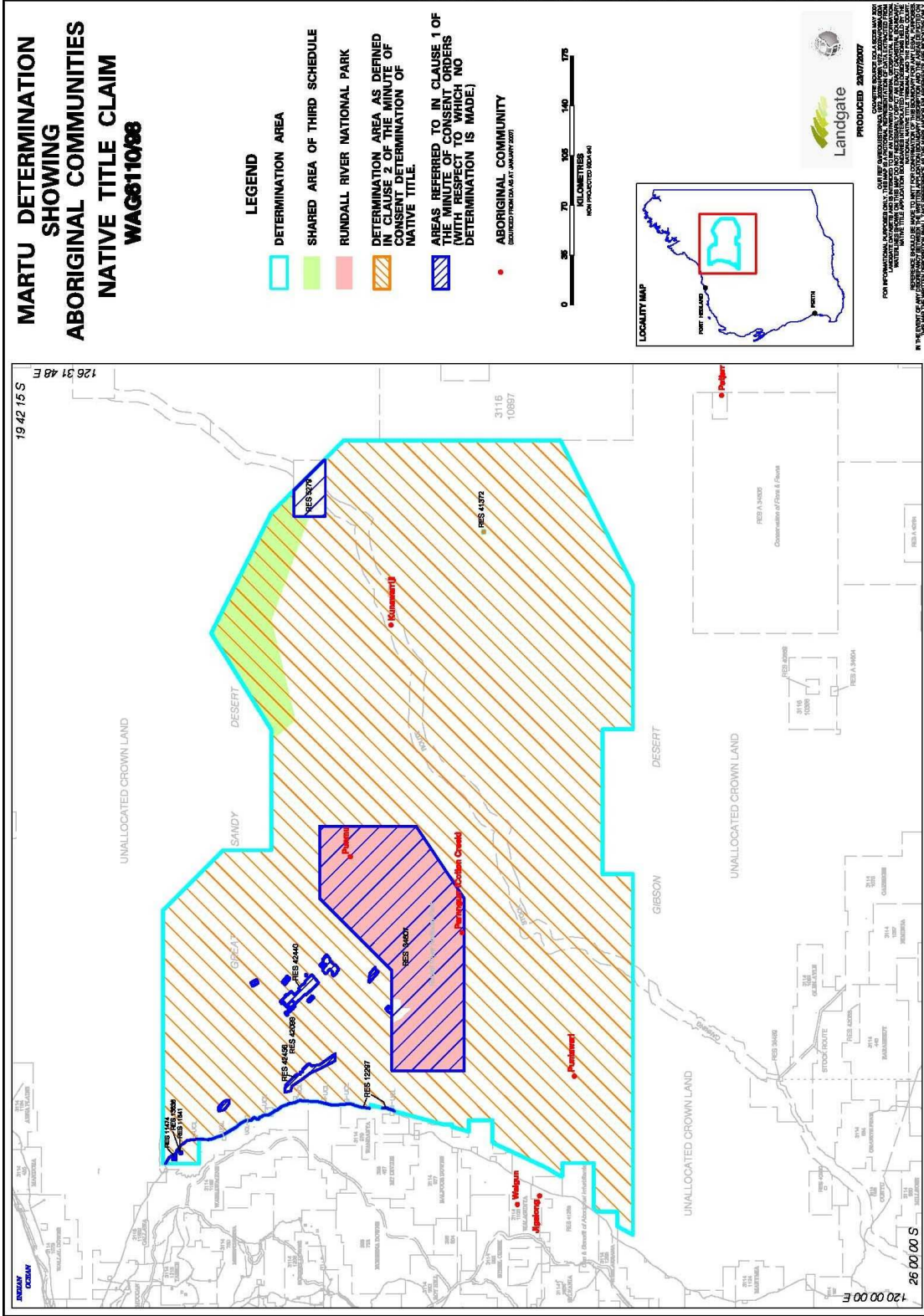
This clause provides that the amendments set out in this Division are to the *Land Administration Act 1997*.

Clause 37 Section 10 amended

This clause amends section 10 of the *Land Administration Act 1997* by inserting a new paragraph empowering the Minister for Lands to exercise powers and perform the duties in relation to land in accordance with the Bill.

Schedule A

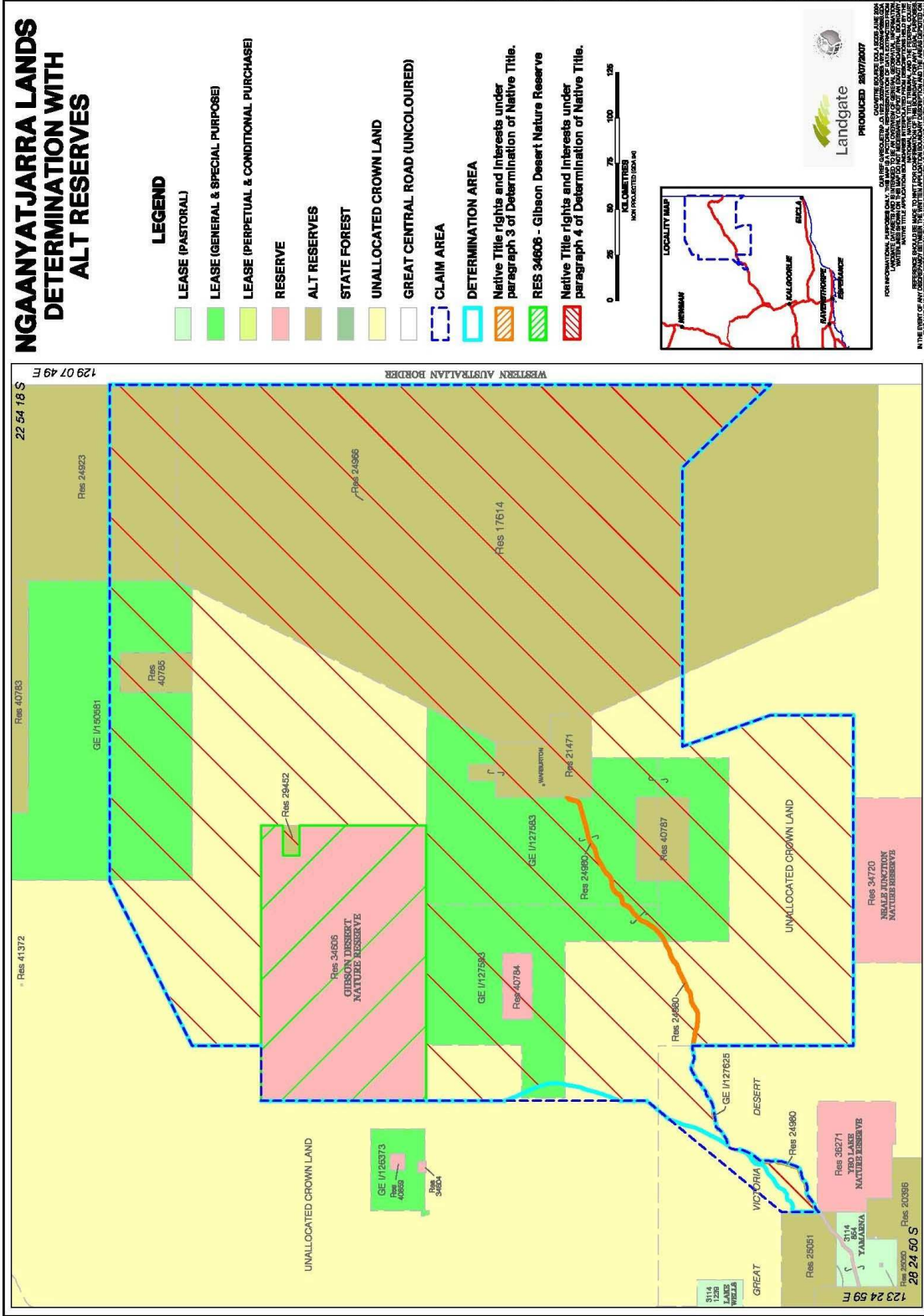
INDIGENOUS CONSERVATION TITLE BILL 2007



17/2-20034/0634 A.M. Prepared by NATIVE TITLE SPATIAL SERVICES, LANDATA

Schedule B

INDIGENOUS CONSERVATION TITLE BILL 2007



17/2 2007/06/05/8 AM Prepared by NATIVE TITLE SPATIAL SERVICES, LANDgate