



EXPLANATORY NOTES

WESTERN AUSTRALIAN NATIVE TITLE (STATE PROVISIONS) BILL

The Western Australia *Native Title (State Provisions) Bill* has been drafted in accordance with the relevant provisions of the amended Native Title Act¹.

The Bill aims to establish a State Native Title Commission (Commission) which would be an equivalent body under section 207B of the Native Title Act (NTA). The Commission would also take on the role of arbitral body under the future act provisions.

The Bill is divided into 8 Parts.

PART 1 - PRELIMINARY

Addresses preliminary issues, including definitions, commencement and binding of the Crown. Proclamation is limited by the requirement that there first be a determination by the Commonwealth Minister and that the determination is not disallowed.

PART 2 - VESTING OF NTA FUNCTIONS IN AGENCIES OF THE STATE

Part 2 allows the Commission to be recognised as an equivalent State body under section 207B of the NTA and allows for the making of regulations for transitional provisions in connection with the Commission becoming an equivalent body. The State is also able to agree to a delegation under s.199F of the NTA.

PART 3 - CONSULTATION PROCEDURES FOR ALTERNATIVE PROVISION AREAS

Part 3 addresses the need for consultation procedures for “alternative provision areas” in accordance with section 43A of the NTA. This part allows for regulations in relation to transitional provisions.

The provisions deal with future acts which relate to an area of land or waters that is an “alternative provision area”. Clause 3.5 allows for future acts to be validly done only where there is consent under an ILUA, no objection lodged in relation to the future act, all objections are withdrawn or dismissed, an agreement is made, a determination is made that the act may be done (with or without conditions) and not overruled or a determination that the act may not be done is overruled by a State Minister.

¹ Unless other specified a reference to the Native Title Act means a reference to the Native Title Act as amended by the Native Title Amendment Act 1998.

Clause 3.11 provides for notification of the act to the public by advertisement in a newspaper circulating generally around the State and by written notice to registered bodies corporate, registered native title claimants and any representative bodies in accordance with s.43A(4)(a). The notices must nominate a closing date for objections which must not be less than 3 months after the notice is given.

The provisions allow for a notice to relate to more than one act (Cl. 3.13) and allow for the giving of notice in relation to a project (Cl 3.14). Notice is to be given by the proponent or, in the absence of any proponent, the Government party (Cl 3.15). The provisions allow for regulations to be made in relation to the giving of notice (Cl 3.16).

Under clause 3.17, any registered body corporate or native title claimant may object on the grounds that the doing of the act would affect the person's registered native title rights and interests in accordance with s.43A(4)(b). The objection must state the manner in which this act would affect the registered native title rights and interests (Cl 3.18(b)). Objections must be lodged prior to the closing date, except where the Minister is satisfied that exceptional circumstances apply and an application is made to extend the closing date prior to the nominated closing date (Cl 3.19). The Commission may dismiss an objection if it does not meet the necessary criteria (Cl 3.31).

The proponent or the Government party have the ability to withdraw their application prior to an agreement or determination and must notify the relevant parties of the withdrawal (Cl 3.21 and Cl 3.22).

Under Clause 3.23, the consultation parties are defined as being the objector/s and either the proponent or the Government party in accordance with s.43A(4)(c) and (d) of the NTA.

The consultation parties are required to consult about minimising the impact of the act on native title rights and interests, including about access to the land and waters or the way in which any thing authorised by the act may be done, as appropriate (Cl 3.24).

The provisions allow for the Commission to mediate (as required by s.43A(4)(c) and (d) of the NTA) if requested to do so by any of the parties and to request the parties to meet together if either of the parties are not making sufficient attempts to consult (Cl 3.25).

Any agreements would be lodged with the Commission and have the effect of a contract between the parties (Cl 3.27 and Cl 3.28). Objections may also be withdrawn by the native title parties (Cl 3.26).

Under Clause 3.29, if any objection/s are not withdrawn within 4 months of the closing date or if no agreement has been lodged, the Commission may give notice that it intends to hear and determine the objection in accordance with s.43A(4)(e) of the NTA. The Commission must attempt to make a determination within 4 months of the notice and the period may be extended at the Minister's discretion (Cl 3.32). The hearing of a matter by

the Commission does not prevent continuing consultation between the parties, until such time as a determination is made (Cl 3.30).

Clause 3.34 allows the Commission may make a determination or recommendation that the act may be done, may be done subject to conditions or may not be done. The Commission may also make a determination that compensation must be paid to an objector under this clause but must not determine that the objector is entitled to payments by reference to profits, income or things produced.

There are provisions for judicial review in clause 3.41 which are in accordance with s.43A(4)(f).

Under clauses 3.43, 3.44 and 3.45, the Minister may overrule the Commission's determination in the interests of the State after consultation with the Minister responsible for the administration of the *Aboriginal Affairs Planning Authority Act 1972* and after taking into account any recommendation or advice from that Minister. These provisions comply with the requirements of s.43A(4)(g).

Compensation provisions which comply with sections 43A(6), 49, 51 and 51A of the NTA apply.

PART 4 - RIGHT TO NEGOTIATE PROCEDURES FOR AREAS NOT COVERED BY PART 3

Part 4 deals with provisions for future acts in areas other than alternative provision areas, in accordance with section 43 of the NTA.

The provisions allow for future acts to be validly done only where there is consent under an ILUA, no objection lodged in relation to the future act, all objections are withdrawn or dismissed, an agreement is made, a determination is made that the act may be done (with or without conditions) and has not been overruled or a determination that the act may not be done is overruled by a State Minister (Cl 4.5).

The provisions provide for notification of the act to the public and by written notice to registered bodies corporate, registered native title claimants and any representative bodies in accordance with s.29(2) of the NTA. The notices must nominate a closing date for objections which must not be less than 3 months after the notice is given (Cl 4.11 and 4.12).

Under clause 4.17, any registered body corporate or native title claimant may object on the grounds that the doing of the act would affect the person's registered native title rights and interests. The objection must state the manner in which this act would affect the registered native title rights and interests. Objections must be lodged prior to the closing date, except where the Minister is satisfied that exceptional circumstances apply and an application is made to extend the closing date prior to the nominated closing date (Cl 4.19). The

Commission may dismiss an objection if it does not meet the necessary criteria (Cl 4.44).

The negotiation parties are defined as being the objector/s and the proponent (who may be the Government party) under clause 4.23.

Under clause 4.24, the negotiation parties are required to negotiate in good faith about the doing of the act or the doing of the act subject to conditions in accordance with s.43(2)(b) of the NTA.

The provisions allow for the Commission to mediate if requested to do so by any of the parties and to cause the parties to meet together if there is insufficient progress being made toward reaching an agreement (Cl 4.25).

Any agreements are to be lodged with the Commission and have the effect of a contract between the parties (Cl 4.27, 4.28 and 4.29).

Where any objection/s are not withdrawn within 4 months of the closing date or if no agreement has been lodged, the Commission may give notice that it intends to hear and determine the objection (Cl 4.42). The Commission must attempt to make a determination within 4 months of the notice and the period may be extended at the Minister's discretion (Cl 4.45).

The criteria to be taken into consideration in making a determination are listed in clause 4.48 and reflect s.39 of the NTA as required by s.43(2)(g).

Under clauses 4.30 - 4.41, the Minister is able to make a determination where the Commission has not done so within a reasonable timeframe, if it is in the State interests to do so, and after consultation with the Commonwealth Minister in accordance with s.43(2)(i) of the NTA.

The Minister may also overrule a determination of the Commission within 2 months of the decision if it is in the interests of the State to do so (Cl 4.55).

The time limits in Part 4 reflect those in Subdivision P in accordance with s.43(2)(e) and the appointment of Commissioners is in accordance with s.43(2)(f).

There are also compensation provisions consistent with s.43(2)(j).

PART 5 - INFRASTRUCTURE PROVISIONS (ADJUDICATION OF OBJECTIONS UNDER S.24MD(6B))

Part 5 implements a regime in accordance with s.24MD(6B) of the NTA.

The provisions apply to permissible lease etc renewals under s.24ID(4)(a) and (b), compulsory acquisitions under s.24MD(6B)(a) and creations or variations of a right to mine under s.24MD(6B)(b) of the NTA.

The independent body required in s.24MD(6B) is defined as being the Native Title Commission (established under Part 6) in the case of permissible lease etc renewals and compulsory acquisitions, and the Warden under the *Mining Act (WA) 1978* for creation or variation of a right to mine for the sole of purpose of infrastructure as defined in the NTA.

The provisions allow for objectors to apply to the relevant independent adjudicator to have their objection heard. The adjudicator is able to dismiss the objection, if it is not made on the grounds required in s.24MD(6B)(d). The adjudicator must take all reasonable steps to make the determination within 2 months, with the period able to be extended at the discretion of the Minister.

PART 6 - COMPENSATION HELD IN TRUST

Part 6 contains provisions which relate to the ability of a determination to be made that compensation be held in trust.

The provisions deal with situations where there is a determination that no native title exists, that the Government does not proceed with a proposed act or where there is a determination of native title and the parties agree to payment of the compensation held in trust.

PART 7 - NATIVE TITLE COMMISSION

Part 7 establishes a Native Title Commission which has functions under the *Native Title (State Provisions) Bill*, under ss.199F and 207B of the NTA, will assess objections, will hear objections in accordance with the NTA, can provide mediation as specified in the *Native Title (State Provisions) Bill*, is responsible for compiling and maintaining a database of information and is able to give assistance in connection with applications to the Federal Court. The maintenance of registers as discussed in s.207B(4)(f) is addressed in these provisions.

The Commission is obliged to perform its functions fairly, justly and expeditiously and ensure that its procedures are informal and accessible in accordance with s.207B(4)(b). A provision also reflects s.109(2) of the NTA in relation to the cultural and customary concerns of Aboriginal people.

The Commission comprises a full time Chief Commissioner and a number of other Commissioners who may be employed on a full or part time basis. There is to be a minimum of 3 Commissioners and at least one Commissioner is to be a member of the NNTT, as required by s.207B(4)(g) of the NTA. Members must either have been enrolled for at least 5 years as a legal practitioner of the Supreme Court of WA or another State or Territory or the High Court or have special knowledge in relation to Aboriginal people, land management or dispute resolution. There must be at least one member who has the legal qualifications and one with special knowledge of Aboriginal people. These provisions comply with the requirements of s.207B(4)(a) and the tenure of these positions reflects the requirements of s.207B(4)(ca).

The Commission will hold hearings in general accordance with the provisions of s.154 of the NTA. There are provisions in relation to matters such as offences, confidentiality, conflict of interest and use of interpreters which generally conform with those provisions in the NTA.

The Commission will also have an Executive Director and other staff

PART 8- MISCELLANEOUS

Part 8 allows for the making of regulations and deals with consequential amendments.