

**Proposed Section 47C amendment
to the *Native Title Act 1993* (Cth)**

**The Western Australian Government
Submission**

Introduction

When circulating the proposal to amend the *Native Title Act 1993* (NTA) to 'enable the historical extinguishment of native title to be disregarded in certain circumstances', the Commonwealth Attorney-General draws specific attention to Western Australia's circumstances. He states that the 'proposed reform could go towards ameliorating the effect of case law that found that Crown reserves extinguished native title at common law'.

It is presumed that this is a reference to the High Court's 2002 *Western Australia v Ward* decision. In *Ward*, the High Court found that the vesting of reserves (including nature reserves and national parks) under s33 of the *Land Act 1933* (WA) prior to 23 December 1996 completely extinguished native title.

The Western Australian Government welcomes this opportunity to comment on the proposed amendment.

The impact on Western Australia of the proposed s47C is potentially significant, with an estimated eighty per cent of the State's conservation estate being identified as areas where native title has been extinguished.

Two areas were specifically identified as being affected by the decision in *Ward*. The first are national parks and reserves vested in the National Parks Authority prior to the *Conservation and Land Management (CALM) Act 1984* WA coming into operation (e.g. Karijini, Rudall River and Drysdale River National Parks). It is estimated that approximately 4.4 million hectares of the State fall under this category.

Nature reserves that were vested in the Western Australian Wildlife Authority prior to the CALM Act coming into operation (e.g. Gibson Desert, Great Victoria Desert and Prince Regent Nature Reserves) are a second category affected by *Ward*. It is estimated that these nature reserves cover approximately 9.9 million hectares.

Since s23B (9A) of the NTA refers to areas set aside to preserve the natural environment, it is also possible that other reserved areas of the State will be affected by the proposal.

Assessment of proposal

The Western Australian Government notes the view expressed by the Commonwealth Attorney-General that the proposed amendment 'could provide opportunities for more claims to be settled by negotiation rather than litigation'.

However, the Western Australian Government considers it necessary to take into account the following factors in assessing its potential impact on the State.

Impact on claims settlement

The proposed amendment is likely to introduce some significant delays in Western Australia in the settlement of native title claims currently in substantive negotiations. Where claimants expect to be able to seek to disregard the prior extinguishment of an area covered by the proposed s47C, and they are currently in claim negotiations, they are likely to seek to amend their applications so that the opportunity provided by the amendment can be taken into account prior to a native title determination.

It is also likely that the amendment will slow down the settlement of native title claims more generally as a result of the lodgement of additional applications under s47C and the consequent burden upon the State to respond to these applications.

Furthermore, some previous determinations may also have to be revisited as native title holders lodge applications under s47C for areas that could not be recognised under the NTA as it existed at the time of the determination of their applications.

The State's compensation liability

Another factor concerns the ability of the proposed amendment to assist the State in addressing the compensation claims that may arise under the *Racial Discrimination Act 1975* (Cth) (RDA).

Following *Ward* it is clear that the reservation or vesting of national parks under the provisions of the *Land Act 1933* (WA) wholly extinguishes native title. By contrast, conservation reserves vested under the provisions of the CALM Act have the effect of extinguishing native title only to the extent of inconsistency with the vesting. The CALM Act commenced operation on 22 March 1985.

Legal advice is that the State will be required to address any compensation claims made on the grounds that such extinguishment was contrary to the RDA. The NTA makes provision for applicants to lodge claims for compensation with the Federal Court.

The majority of conservation reserves in the State were created after 31 October 1975, the date when the RDA came into operation. Acts that reserved or vested these areas under either the *Land Act 1993* (WA) or the CALM Act are therefore expected to incur a compensation liability for the State.

However, the proposed amendment provides limited assistance in addressing the State's outstanding compensation liability beyond that arising in relation to the conservation estate.

Moreover, the Western Australian Government is concerned that it will adversely impact on existing and future negotiations by broadening claimant

expectations about the preparedness of the State to address compensation more generally in those negotiations.

Management of national parks and reserves

The third factor to consider is the impact of the proposed amendment on the State's general management of national parks and reserves and their day-to-day operations, with responsibilities carried out by the Department of Environment and Conservation (DEC).

The CALM Act established the Conservation Commission as an independent statutory authority and vesting body for lands, including the State's terrestrial conservation estate. DEC manages these lands and prepares management plans on behalf of the Conservation Commission, which the Commission then monitors and audits.

If enacted, the proposed amendment will have a significant impact on the State's general management of national parks and reserves and their day-to-day operations, with responsibilities carried out by DEC and the Conservation Commission.

Currently the State is not obliged to put in place joint management arrangements with native title holders and Aboriginal people more generally. However, if the amendment proceeds a consequence is likely to be the increased use of joint management arrangements for those areas of the conservation estate affected. The implementation of joint management arrangements would have substantial cost implications that are as yet unquantified.

Conclusion

In conclusion, if enacted, the proposed amendment would affect Western Australia by:

- adversely impacting on the claims settlement process and heightening claimant expectations about compensation and negotiations;
- providing limited assistance in addressing the State's compensation liability; and
- probably resulting in significant additional costs and complexity in managing the conservation estate.

For these reasons the Western Australian Government opposes the proposed amendment.