The Western Australian Government's Submission on the Exposure Drafts of the Native Title Legislation Amendment Bill 2018 and the Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018

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1 Introduction

The Western Australian Government (**WA**) is pleased to make a submission in response to the Attorney-General and Minister for Indigenous Affairs' Exposure drafts of the *Native Title Legislation Amendment Bill 2018* and the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018* (**Exposure Draft**). This submission provides WA's detailed response to the proposed clauses.

1.1 Background

Over the last six years the *Native Title Act 1993* (Cth) (**NTA**) has been the subject of a number of proposed reforms and proposed amendments, however for a number of reasons no broad based amendments have been made. The Exposure Draft is the result of previously considered but unimplemented amendments and reforms in relation to the NTA, which were set out in the background section of the WA Government's Submission to the Commonwealth Attorney-General and Minister for Indigenous Affairs on the *Reforms to the Native Title Act 1993 (Cth) Options Paper November 2017* of January 2018 (**Options Paper Submission**).

WA has now examined the Exposure Draft and makes the comments set out below.

1.2 Summary of the Western Australian Government's position

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

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

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

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

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

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

2 The Native Title Legislation Amendment Bill 2018

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

Item 11 – Duties of the applicant to the claim group

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

Item 21 – Conditions on the applicant's authority

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

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

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

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

Items 30-31 – Majority of Applicant as default

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

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

Item 42 – Changing the composition of the Applicant

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

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

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

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

Item 2 – Area of body corporate ILUAs

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

Item 3 – Requirement for the Registrar to notify an area ILUA

This amendment is supported as it alleviates unnecessary procedures for the Registrar, who is currently required to notify an area ILUA even if they form the view that it does not meet the requirements to be an ILUA.

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

Item 5, 6, 9 – Effect of removal of ILUAs from the Register

This amendment is supported. In addition, the amendments should also clarify that payment of compensation pursuant to an ILUA would also be similarly valid, and not affected by the removal of that ILUA from the Register.

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

Item 7 – Minor amendments to the ILUA

This amendment is supported. In addition, WA reiterates its support for a proposal in the Submissions to the Option Paper that an amendment for a variation to an ILUA can be agreed via a deed of variation between the parties, without undertaking a further authorisation process, which will assist with implementation of ILUAs and will reduce ongoing costs.

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

Item 2 – Disregarding historical extinguishment of park areas

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

(a) It is not appropriate to allow native title representative bodies to enter into an agreement with a State or the Territory regarding the operation of section 47C, without the input of the native title claimants. This should be removed.

(b) The amendments should clearly specify the form of an agreement between the parties that section 47C should apply, including whether it must be in the form of a registrable ILUA.

(c) The section should clarify the matters that can be included in a section 47C agreement and any specifically excluded matters. The amendments should specify that any agreement between the parties can include provision for an alternative future acts regime negotiated between the parties. Moreover, it is critical that section 47C protects all rights and interests that are currently permissible under the existing legislative framework for the relevant park area without the reintroduction of future act processes, including any current interest which enables other permissions to be granted in the future. Otherwise, this will act as a disincentive for States and the Territory to enter into agreements. The amendments should also specify that rights and interests in the area subject to section 47C are not interfered with if an agreement is made under the section, unless otherwise specified, and may be renewed without triggering the future acts regime of the NTA.

(d) In addition, WA notes that there may be existing ancillary agreement negotiated pursuant to subdivision P of the NTA between grantee parties and native title parties, which may either include or exclude arrangements between parties pertaining to the proposed section 47C area. The proposed amendments should take into consideration the potential effect of the section 47C regime on these prior arrangements.

(e) The reference to 'applicant' in section 47C(1)(b)(ii) should be to the person or persons who have been authorised by the native title claim group to make the proposed native title determination application to which section 47C applies. It is imperative that the provision makes it clear that an agreement must be reached between the parties, prior to the lodgement of a claimant application or revised native title determination application.

(f) Given the focus of section 47C as applying by agreement only, and that an agreement must be reached before a claimant application or revised native title determination application is made, WA suggests reordering section 47C(1)(a) and (b) for clarity.

(g) The proposed definition of 'park area' is broad and may create uncertainty. As currently proposed, a 'park area' may include *'an area...over which an*

interest is granted ...under a law of...a State...for purposes that include, preserving the natural environment of the area.' (underlining added). This would include interests granted where preservation of the natural environment is a secondary or ancillary purpose. WA suggests clarifying that the purposes set out in the proposed section 47C(2) must be the *primary* purpose for which the area is set aside or the interest is granted.

(h) With respect to the notification and opportunity to comment set out in section 47C(5), WA has concerns that giving any 'interested persons' the right to comment may be too expansive. It may be appropriate to restrict this to *'any persons whose interest may be affected by the proposed agreement'*.

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

Item 17 – Disregarding historical extinguishment over pastoral leases

WA is supportive of the amendment in the form proposed.

2.8 Schedule 3, Part 3 – historical extinguishment - future acts where prior extinguishment to be disregarded

Item 21 – Application of the future act regime to sections 47, 47A, 47B and 47C

WA is generally supportive of the principle of confirming the application of the future acts regime of the NTA in instances where sections 47, 47A, 47B and 47C apply. However, the application of these sections is often not straightforward at the point of lodgement of the claimant application, and remains unclear for some time afterwards. In a litigated claim, WA may not concede the application of these sections, and therefore whether they apply to an area would not be known until after the Court orders are made. As such, WA considers that further clarification is required in the drafting of the amended section 227.

2.9 Schedule 4 – Allowing a prescribed body corporate to bring a compensation application

Item 5 – Functions of RNTBCs

WA is supportive of amending section 58(f) to allow a RNTBC to be the applicant in respect of a compensation claim.

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

Items 3-4 – Parties to section 87 agreement
WA is supportive of this proposed amendment.

Item 6 – Signing consent determinations

WA is supportive of this proposed amendment.

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

Item 9 – Determination over part of an area

WA is supportive of this proposed amendment.

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

Item 1 – Objections process under section 24MD(6B)

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

Item 2 – Parties to inquiries about expedited procedure objection applications

WA is supportive of this proposed amendment.

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

Item 4 – Notification of ancillary agreements

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

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

Item 6 – Validation of existing agreements

WA is strongly supportive of this proposed amendment.

Items 7-8 – Government party's participation in negotiations

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

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

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

2.14 Schedule 7 – National Native Title Tribunal

Item 1 – Dispute resolution assistance of the Tribunal

WA has no issues with this proposal.

2.15 Schedule 8, Part 1 – Registered native title bodies corporate – Registrar oversight

Item 1-3 – Grounds for appointment of a special administrator

WA is generally supportive of this provision, but has some concerns about how a 'class' of the common law holders of native title is identified. It may be appropriate for this provision to apply only when different classes of members are provided for under the constitution of the RNTBC, pursuant to section 153-1 of the CATSI Act.

2.16 Schedule 8, Part 2 – Registered native title bodies corporate – Membership and common law holders

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

Item 4-5, 8-10 – Disputes resolution processes in RNTBC constitution

WA has no issues with this proposal, and notes that it may also be appropriate to broaden this provision to also require a process for resolving disputes between common law holders to be included in the constitution.

Item 5-7, 11, 12, 14 – eligibility requirements in RNTBC constitution

WA has no issues with this proposal.

Items 15-20 – Grounds for cancelling RNTBC membership

WA has no issues with this proposal.
Item 22 – Transition of CATSI Act amendments

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

Items 23-26 – Discretion of RNTBC directors to refuse membership

WA has no issues with this proposal.

2.17 Schedule 8, Part 3 – Registered native title bodies corporate – Jurisdiction of courts

Items 28-38 – Jurisdiction in relation to RNTBC matters

WA is supportive of this proposed amendment.

3 Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018

Item 3 – Registrar of Indigenous Corporations to assess certificate

It is unclear what the effect of the proposed provision would be, given that it also includes a note stating that the Registrar's opinion does not affect the operation of regulation 9(6) and (7) of the PBC Regulations, that a certificate is *prima facie* evidence that all relevant persons have been consulted with and consented. This uncertainty also extends to the effect of an adverse finding by the Registrar on the validity of grant of tenure. WA is of the view that this provision must be re-drafted to remove any ambiguity.

Items 18-20, 24-30 – Consultation and consent requirements

WA is generally supportive of this proposed amendment. However, the drafting should clarify whether a decision to enter into an agreement to facilitate the application of the proposed section 47C should be defined as a 'high level decision'.

Items 23, 30 – Consultation and consent for compensation applications

WA is supportive of this proposed amendment.

Item 25 – Consultation with native title representative bodies

WA is supportive of this proposed amendment.

Item 27 – Consultation with groups of common law holders

WA is supportive of this proposed amendment.

Items 30-35 – Certification requirements

WA is supportive of this proposed amendment.

4 Matters which are not dealt with in the Exposure Draft

WA is disappointed that a number of matters of importance to WA that it supported in the Options Paper Submission have not been included in the Exposure Draft. The

failure to include these matters is a lost opportunity that could provide for greater efficiency and effectiveness in the native title system, in particular:

1. Proposal B4 of the Options Paper to amend section 24LA of the NTA to allow low-impact future acts to be validly done following a positive determination of native title. Currently, land use activities that are statutorily undertaken, or currently rely on licences granted under section 91 of the *Land Administration Act 1997* (WA) (**LAA**) and the *Conservation and Land Management Act 1984* (WA), cannot be lawfully undertaken post-determination without an ILUA or compulsory acquisition of native title. The benefit of this proposal is that these activities can continue validly post-determination without interruption or re-negotiation, and will minimise costs and efficiency for all parties involved, as well as the National Native Title Tribunal. The need for review was broadly supported by the majority of stakeholders who participated in the Options Paper process.

2. Proposal G1 of the Options Paper Submission to amend the objection period in the expedited procedure to 35 days after notification of the proposed future act, where the entire area affected by the act is subject to a determination of native title and a RNTBC is already established. Given that there is no issue as to the identity of the native title holders, the 4-month notification and objection period is considered unnecessary, and contrary to the intention of the process specifically designed to be 'expedited'.

3. Proposal G9 of the Options Paper to amend section 24MD(3) in order to clarify that it applies to a compulsory acquisition of native title rights as if the taking of native title rights and the grant of the new interest in land are the same act. Under the LAA, there is always a gap in time between the taking of land for the purposes of conferring an interest, and the grant of the interest itself, such as it may appear that there are two separate future acts. WA is strongly supportive of the proposal to confirm that these are in fact one act, given that it streamlines processes, provides certainty for parties without abrogating rights, and avoids resource intensive challenges to validity of the creation of interests.

4. Proposal G2 of the Options Paper to amend the NTA to provide that a minor defect in a notice does not invalidate the notice if there is no detriment to the interest holder affected. This proposal is strongly supported, given that it promotes efficient and effective outcomes without prejudice to any parties.

5. Proposal C10 of the Options Paper to provide for and encourage the electronic transmission of notices, including amending sections 29 and 6(1) of the *Native Title (Notices) Determination 2011 (No 1)* to provide that notices can always be transmitted electronically.