FEDERAL COURT OF AUSTRALIA

BP (Deceased) v State of Western Australia [2013] FCA 760

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| Citation: | BP (Deceased) v State of Western Australia [2013] FCA 760 |
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| Parties: | **BP (DECEASED) AND OTHERS v STATE OF WESTERN AUSTRALIA** |
|  |  |
| File number: |  |
|  |  |
| Judge: |  |
|  |  |
| Date of judgment: | 2 August 2013 |
|  |  |
| Catchwords: | **NATIVE TITLE** – section 47B *Native Title Act 1993* (Cth) – whether land subject to permission – whether land subject to resumption process – intention of the Crown  |
|  |  |
| Legislation: | *Conservation and Land Management Act 1984* (WA)*Land Administration Act 1997* (WA)*Native Title Act 1993* (Cth)  |
|  |  |
| Cases cited: | *Betty’s Cafes Ltd v Phillips Furnishing Stores Ltd* [1957] 1 All ER 1*Cunliffe v Goodman* [1950] 2 KB 237*Fleet Electrics Ltd v Jacey Investments Ltd* [1956] 3 All ER 99*King v Northern Territory* [2007] FCA 944; (2007) 162 FCR 89*Moses v State of Western Australia* [2007] FCAFC 78; (2007) 160 FCR 148*Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135; (2005) 145 FCR 442*Sue v Hill* [1999] HCA 30; (1999) 199 CLR 462 |
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| Date of hearing: | 15 July 2013 |
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| Place: |  |
|  |  |
| Division: | GENERAL |
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| Category: | Catchwords |
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| Counsel for the Applicant: | V Hughston SC with M D F Allbrook |
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| Solicitor for the Applicant: | Central Desert Native Title Services Ltd |
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| Counsel for the Respondent: | R M Mitchell SC with C I Taggart |
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| Solicitor for the Respondent: | State Solicitor for Western Australia |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| NEW SOUTH WALES DISTRICT REGISTRY |  |
| GENERAL DIVISION | WAD 241 of 2004 |

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| BETWEEN: | BP (DECEASED) AND OTHERSApplicant |
| AND: | STATE OF WESTERN AUSTRALIARespondent |

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| JUDGE: | JAGOT J |
| DATE OF ORDER: | 2 August |
| WHERE MADE: | SYDNEY |

THE COURT ORDERS THAT:

1. The parties are to confer and are to file agreed or competing proposed orders reflecting these reasons for judgment within 21 days.
2. The proceeding is to be listed for the making of final orders on a date within 14 days thereafter, such date to be determined in consultation with the parties.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
|  DISTRICT REGISTRY |  |
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| --- | --- |
| BETWEEN: | BP (DECEASED) AND OTHERSApplicant |
| AND: | STATE OF WESTERN AUSTRALIARespondent |

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| --- | --- |
| : |  |
| DATE: | 2 August |
| PLACE: |  |

**REASONS FOR JUDGMENT**

# ISSUES

The remaining question in this case is whether the extinguishment of native title resulting from the grant of pastoral leases over two areas of land must be disregarded in accordance with s 47B(2) of the *Native Title Act 1993* (Cth) (the **Native Title Act**).

Section 47B(2) provides that:

For all purposes under this Act in relation to the application, any extinguishment, of the native title rights and interests in relation to the area that are claimed in the application, by the creation of any prior interest in relation to the area must be disregarded.

The application to which s 47B(2) refers is a claimant application in accordance with s 47B(1). Section 47B(1) is in these terms:

(1) This section applies if:

(a) a claimant application is made in relation to an area; and

(b) when the application is made, the area is not:

(i) covered by a freehold estate or a lease; or

(ii) covered by a reservation, proclamation, dedication, condition, permission or authority, made or conferred by the Crown in any capacity, or by the making, amendment or repeal of legislation of the Commonwealth, a State or a Territory, under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose; or

(iii) subject to a resumption process (see paragraph (5)(b)); and

(c) when the application is made, one or more members of the native title claim group occupy the area.

It is common ground between the parties that ss 47B(1)(a), (b)(i) and (c) are satisfied in this case. Accordingly, the applicant made a claimant application on 28 October 2004 in accordance with s 61 of the Native Title Act. The claimant application covered land the subject of two earlier granted pastoral leases known as the Earaheedy pastoral lease and the Lorna Glen pastoral lease. These areas were not covered by a freehold estate or a lease as at 28 October 2004. One or more members of the native title claim group, the Wiluna people as identified in the claimant application, occupied the areas. However, the first respondent, the State of Western Australia (the **State**), contends that as at 28 October 2004 the negative stipulations in subss 47B(1)(b)(ii) and/or (iii) were not satisfied in that, as at 28 October 2004, the areas were covered by, relevantly, a “permission…under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose” and/or were “subject to a resumption process”.

To be “subject to a resumption process” as specified in s 47B(1)(b)(iii), s 47B(5) must be satisfied. Section 47B(5) is as follows:

(5) For the purposes of this section:

…

(b) an area is subject to a resumption process at a particular time (the test time ) if:

(i) all interests last existing in relation to the area before the test time were acquired, resumed or revoked by, or surrendered to, the Crown in any capacity; and

(ii) when that happened, the Crown had a bona fide intention of using the area for public purposes or for a particular purpose; and

(iii) the Crown still had a bona fide intention of that kind in relation to the area at the test time.

Although the parties agree that the “test time” in s 47B(5) is the time at which the claimant application was made (28 October 2004) they are at odds in respect of each of the requirements of s 47B(5)(i) – (iii).

It follows that the issues which must be resolved are:

1. As at 28 October 2004 were the areas covered by a “permission…under which the whole or a part of the land or waters in the area is to be used for public purposes or for a particular purpose”?
2. As at 28 October 2004:
	* + 1. were all interests last existing in relation to the areas before the test time acquired, resumed or revoked by, or surrendered to, the Crown in any capacity?
			2. if that happened (that is, all interests last existing in relation to the areas before the test time were acquired, resumed or revoked by, or surrendered to, the Crown), did the Crown then have a bona fide intention of using the area for public purposes or for a particular purpose?
			3. did the Crown still have a bona fide intention of that kind in relation to the area at the test time (that is, at 28 October 2004)?

# ADDITIONAL FACTS

For the purpose of resolving these issues all primary facts have been agreed between the parties other than an assertion by the State that a particular person (the Executive Director of the Department of Conservation and Land Management (**CALM**)) held an intention in respect of the future use of both areas of land at all relevant times. In addition to the agreed facts noted above, the undisputed facts include the following:

## Earaheedy pastoral lease area

1. The Earaheedy pastoral lease commenced on 29 May 1967.
2. On 17 March 1999 the Earaheedy pastoral lease was transferred to the Executive Director of CALM for the State.
3. On 2 February 2001 the Executive Director of CALM surrendered the Earaheedy pastoral lease to the State.

## Lorna Glen pastoral lease area

1. The Lorna Glen pastoral lease commenced on 16 November 1972.
2. On 1 August 2000 the Lorna Glen pastoral lease was surrendered to the State.

# SOME PRINCIPLES

Apart from s 47B(5)(b)(i), which involves an issue of construction only, the issues required to be resolved are primarily factual. Because the scope of the inquiry in respect of s 47B(1)(b)(ii) (area covered by a permission etc) is narrower than that for s 47B(5)(b)(ii) and (iii), most of the evidence relates to the latter issues, in particular the existence or not on the part of the Crown of a bona fide intention of the relevant kind. This is because, as explained in *Moses v State of Western Australia* [2007] FCAFC 78; (2007) 160 FCR 148 (*Moses*) at [165] referring to *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135; (2005) 145 FCR 442 (*Alyawarr*) at [185], s 47B(1)(b)(ii):

…raises two issues. The first is as to the nature of the purposes for which the land is to be used. The second is whether an intention to use the land for those purposes must be shown, as a matter of fact, to exist at the time the native title determination application is made or whether it is to be ascertained by reference to the terms of the proclamation and the legislation under which it is made.

At [169] and [170] the Full Court in *Moses* said:

[169] It is correct that there was no issue in *Alyawarr* (FC) regarding the admissibility of extraneous evidence establishing the Crown’s original purpose in proclaiming the relevant townsite. However, the construction propounded by the State is inconsistent with the Full Court’s emphasis on the terms of the particular instrument (in this case, a reservation) and its constating legislation, and draws attention away from the “objective basis” of determination approved by their Honours. …

[170] We respectfully agree with the approach to the construction of s 47B adopted by the Full Court in *Alywarr* (FC) at [187] (set out above), namely that having regard to its beneficial purpose the limitation upon its operation “should not be construed more widely than is necessary to achieve its purpose”. Indeed, in our view, the wording of s 47B(1)(ii) supports the conclusion there reached. The relevant use, whether for public purposes or for a particular purpose, must emerge from the reservation itself. It is “under” the reservation that the area is to be used for public purposes or for a particular purpose, as the word “which” is the relative pronoun for the reservation or other instrument made or conferred by the Crown. If the use of the word “under” was not intended to convey that the public purposes or the particular purpose could emerge in respect of the reserved area independently of the reservation itself, the words “under which” would not have been used and instead a simple conjunctive “and” would have been used. Consequently, although particular land may ultimately be used for a public purpose such as an airport site or a salt mine, such use cannot be regarded as occurring “under” a reservation authorised by s 276 of the Mining Act unless that section or the reservation made pursuant to that section and in its legislative context provide the necessary purposive character to the reservation.

At [175] in *Moses* the Full Court said the reservation in that case “may, but need not even, contemplate a ‘variety of potential but unascertained uses’ of the land: *Alyawarr* (FC) at 145 FCR 442 [187]”. As a result the reservation did not meet the description in s 47B(1)(b)(ii) of the Native Title Act.

Sections 47B(5)(b)(ii) and (iii), however, do not limit the relevant inquiry to the terms of the “reservation, proclamation, dedication, condition, permission or authority” and the legislation under which it is made. Subsections 47B(5)(b)(ii) and (iii) are concerned with the intention of the Crown at two times – first, when all interests last existing in relation to the areas before the test time were acquired, resumed or revoked by, or surrendered to, the Crown and, second, when the application was made. To ascertain the intention of the Crown a wide range of evidence may be relevant. Nevertheless, the intention must be that of the Crown, the intention must be bona fide, the intention must be of the requisite kind (an intention of using the area for public purposes or for a particular purpose) and the intention must exist at both of the relevant times.

It is true that the “Crown” might refer to different manifestations of the Crown in right of the State of Western Australia (*Sue v Hill* [1999] HCA 30; (1999) 199 CLR 462 at [84]-[90]) but, that said, I do not have much doubt that “the Crown” when used in s 47B means the Crown in right of (relevantly) the State of Western Australia. While evidence of the intentions and acts of Ministers, statutory office holders and government employees might be relevant to ascertaining the intention of the Crown it is the Crown’s intention which must be found (or not).

# sECTION 47B(1)(b)(ii) – THE PERMISSION ISSUE

## Introduction

The “permission … under which the whole…of the land or waters in the area is to be used for public purposes or for a particular purpose”, relevant to s 47B(1)(b)(ii) of the Native Title Act, is said by the State to be constituted by a memorandum of understanding between CALM and the Department of Land Administration first entered into in March 2000 (the **MOU**), before the dates of surrender of the two pastoral leases, and which continued in force until and after the date the claimant application was made.

## Statutory provisions

In order to understand the MOU it is necessary to identify some matters about Crown lands in Western Australia.

Under the *Land Administration Act 1997* (WA) (the **WA Land Act**) Crown land means all land except for alienated land. Alienated land means land held in freehold. Unallocated Crown land means Crown land (a) in which no interest is known to exist, but in which native title within the meaning of the Native Title Act may or may not exist; and (b) which is not reserved, declared or otherwise dedicated under this Act or any other written law (s 3(1)). The areas in this case are unallocated Crown land. The Crown is bound by the WA Land Act (s 4). The Minister for Lands is constituted as a corporation (s 7). The Minister may delegate functions including to the Department of Lands (s 9). By s 10 the Minister may exercise powers and perform duties in relation to land in accordance with the WA Land Act. By s 41(1) the “the Minister may by order reserve Crown land to the Crown for one or more purposes in the public interest”. Section 267 provides for offences on Crown land. Under s 267(2) a person who without either the permission of the Minister or reasonable excuse carries out certain acts (including, for example, erecting any structure, clearing or removing from Crown land any thing) is guilty of an offence.

The *Conservation and Land Management Act 1984* (WA) (the **WA Conservation Act**) specifies the land to which the Act applies in s 5(1). The land to which the Act applies includes State forest, timber reserves, national parks, conservation parks and nature reserves but not Crown land generally. The functions of the Department of CALM are set out in s 33(1) and include the conservation and protection of flora and fauna throughout the State. Insofar as it might have been submitted by the State, I do not accept that s 33(1) has the effect of placing all land in the State under the care, control and management of CALM. It is a very limited provision concerning flora and fauna only, not land generally. Section 33(2) enables the Governor, upon recommendation of the Minister, to place any Crown land under the WA Land Act under the management of CALM including (but not limited to) land reserved for a public purpose under Pt 4 of the WA Land Act. By s 34 the Executive Director of CALM (a body corporate by s 38) has power to do all things necessary or convenient to be done for or in connection with the functions of the Department of CALM.

## Facts

It is common ground between the parties that the areas of land in the present case had not at any relevant time been reserved for a public purpose under s 41 of the WA Land Act. Nor had the Governor placed the areas of land under the management of CALM under s 33(2) of the WA Conservation Act. Instead, at all relevant times after the transfer to CALM and/or surrender of the pastoral leases, CALM exercised de facto control over the land under the MOU.

Relevant provisions of the MOU include the following:

**1. Introduction**

This Memorandum of Understanding (MOU) formalizes arrangements between the Department of Conservation and Land Management (CALM) and the Department of Land Administration (DOLA) for the interim holding of land purchased or transferred under pastoral lease title by CALM to add to the conservation or forest estate. The MOU is made between CALM and DOLA. It recognizes the State’s commitment to establishing a comprehensive, adequate and representative (CAR) conservation reserve system in the rangelands of Western Australia through the acquisition of pastoral leases identified as containing land systems and vegetation types that are in good condition and are not represented or are poorly represented in the present conservation estate. The establishment and management of a CAR reserve system and the integration of nature conservation measures into pastoral land uses are key objectives in the Government’s *Managing the Rangelands Policy* and the Gascoyne-Murchison Strategy.

This document is an administrative document which sets out the intended outcome for pastoral leases purchased by CALM with both State and Commonwealth funds, or otherwise transferred to CALM. It applies to whole and part leases already acquired and future part and whole lease acquisitions.

**2. Background**

The Executive Director of CALM currently holds a number of pastoral leases (listed at Schedule 1) and with State funds allocated for the purpose of establishing a CAR reserve system is seeking to acquire further leases and part leases. These pastoral leases are not operated as pastoral operations by CALM and all livestock is removed when the property is purchased or within an agreed time following settlement. With the advent of the *Land Administration Act 1997* it is not normally appropriate for the Executive Director of CALM to hold the acquired pastoral leases as the conditions of the pastoral lease are not being met. Until all clearances/approvals are sought from Government agencies such as the Department of Minerals and Energy and from native title interests enabling the land to be set aside as a conservation reserve or State forest, an interim holding tenure is needed. Specifically this interim measure must:

 • clearly identify CALM control and management;

 • not impact on *Mining Act 1978*  provisions in relation to Crown land; and

 • be able to be achieved without reference to the ‘future acts’ requirements of the *Native Title Act 1993*.

The preferred interim tenure consists of reservation for a purpose not incurring the vesting provisions of the C*onservation and Land Management Act 1984* (*CALM Act)*, but without a management order issuing. However, such reservation would remove the affected land from the *Mining Act*’s definition of “Crown land”.

Until agreement has been reached with Department of Minerals and Energy on interim reservation, the interim tenure for acquired pastoral leases and part leases will consist of the land remaining as unallocated Crown land, but subject to a management arrangement under s 33(2) of the *CALM Act*.

**3. Scope**

This MOU covers:

 • all pastoral leases held in the name of the Executive Director of CALM and listed on Schedule 1;

 • leases and part leases acquired and surrendered prior to this agreement and listed on Schedule 1; and

 • all future pastoral leases and part pastoral leases acquired for inclusion in the conservation or forest estate.

**4. Agreed Interim Tenure Arrangements**

The Executive Director of CALM and the Chief Executive of DOLA acknowledge that pastoral leases acquired by CALM will ultimately be added to the conservation or forest estate and the following acquisition and interim holding arrangements will apply:

…

 • The preferred option is for the land to be reserved for an interim purpose, without a management order issuing to CALM. Such interim purpose should not incur the automatic vesting provisions of the *CALM Act*, and might consist of “conservation and recreation”, “land management”, “future conservation purposes”, or “use and requirements of the Department of CALM. However, as reservation for purposes other than “mining”, “common”, or public utility-related purposes excludes the subject land from the *Mining Act*’s definition of “Crown land”, prior agreement by Department of Minerals and Energy is required.

 • In the absence of agreement by the Department of Minerals and Energy to interim reservation, the acquired land will become UCL managed by CALM under section 33(2) of the *CALM Act* until it is reserved for conservation or forest estate.

…

**5. CALM Management**

On transfer and surrender of the purchased pastoral leases to the State of Western Australia, CALM will be responsible for the land as part of the lands managed by the Department for the conservation or forest estate. An agreement between the Minister for the Environment and Minister for Lands will be entered into for management of the lands to be placed by the Governor under CALM’s control under section 33(2) of the *CALM Act*.

CALM will manage the lands in accordance with CALM policies and major management goals. These are:

 • protection and conservation of indigenous plants and animals and their habitats;

 • protection and conservation of physical, cultural and scenic resources;

 • maintenance of scientific reference areas;

 • conservation and protection of groundwater resources;

 • control of feral animals and noxious weeds;

 • restoration of natural resources that have been degraded by past activities;

 • provision of sustainable, high quality nature-based recreation and tourism opportunities where appropriate;

 • facilitating public enjoyment through the provision of access and visitor facilities where appropriate; and

 • taking of forest produce (e.g. sandalwood) where appropriate on a sustainable yield basis.

## State’s submissions

The State contends that CALM was able to exercise de facto control over the areas of land because it had the permission of the Minister for Lands to do so by reason of the MOU without which the officers of CALM carrying out activities on the land would have been committing offences under s 267(2) of the WA Land Act. Further, the State submitted that although the MOU was executed by the Chief Executive of the Department of Land Administration, the function of the grant of permission under s 267 of the WA Land Act need not be exercised by the Minister personally. Accordingly, the permission from the Minister for Lands to CALM was a permission under which the whole of the areas of land were to be used for the public purposes of conservation and recreation. The State put the propositions this way:

While the MOU contemplated management arrangements being put in place under the CALM which were never in fact effected, it also constituted a permission by the Chief Executive of DLA for the lands to be managed for conservation and recreation and for the activities required for that purpose to be undertaken.

As such, the MOU operated as a permission by the Minister for Lands under s 267 of the LAA for activities required to manage the claim area for purposes of conservation and recreation to be undertaken. The permission, operating for that statutory purpose, and expressly providing for the use of the land for the purposes of conservation and recreation, operated as a permission conferred by the Crown under which the whole of the area was to be used for the public purpose of conservation and recreation. It operated as permission for the purposes of s 47B(1)(b)(ii) of the NTA.

## Discussion

It is not necessary to decide whether a permission under s 267 of the WA Land Act must be granted personally by the Minister absent some specific delegation of the Minister’s functions. It may be assumed (even inferred) that the Chief Executive of the Department of Land Administration had the requisite authority from the Minister for Lands to enter into the MOU. The question, however, is not whether the MOU constitutes permission for the purposes of s 267(2) of the WA Lands Act. The question is whether the MOU constitutes a permission in accordance with s 47B(1)(b)(ii) of the Native Title Act. Section 267 of the WA Land Act, in my view, is of marginal relevance to that question. A permission under s 267(2) of the WA Land Act may or may not be a permission of the required character for the purposes of s 47B(1)(b)(ii) of the Native Title Act. It all depends on the terms of the instrument.

Assuming the MOU constituted a “permission… made or conferred by the Crown in any capacity” I do not consider that the land in question “is to be used” for the public purposes of conservation and recreation under that permission. Assuming again in favour of the State that the MOU should be read as identifying that different areas as appropriate are to be added to either the “conservation or forest estate”, rather than that the one area of land might be added to either estate, it is clear from the terms of the MOU that it documents an informal interim arrangement for land the future of which is addition to the conservation or forest estate of the State if, but only if, all necessary approvals can be obtained to that occurring, including approvals from relevant Government departments (in particular, the Department of Minerals and Energy) and the holders of native title rights and interests. This is apparent from the MOU as a whole and many parts of it. For example:

* The land is “to add to” the conservation or forest estate. That contemplates that the land is not yet part of either estate and further action is required before it can become part of either estate.
* The MOU concerns the “intended outcome” only.
* The intended outcome is that the land will “ultimately be added to” the conservation or forest estate.
* In respect of the intended outcome of reservation of the land as a reserve or forest other approvals are required, both within and external to the State.
* The MOU is to apply only to the interim period up to the obtaining of those approvals if they can be obtained.
* The requirements of the interim regime have nothing to do with conservation and recreation in and of themselves. The requirements are identifying responsibility for the land (CALM being responsible), not impacting on mining legislation provisions, and not triggering the future act requirements of the Native Title Act.
* The MOU envisaged that this interim regime would be achieved in accordance with s 33(2) of the WA Conservation and Land Management Act but it is common ground that this never occurred. Nevertheless, the contemplated arrangement under s 33(2) was identified as one which might consist of “conservation and recreation”, “land management”, “future conservation purposes”, or “use and requirements of the Department of CALM”, but even these possible designations would require prior agreement of the Department of Minerals and Resources.

Having regard to these matters I am not satisfied that the uses of conservation and recreation emerge from the terms of the MOU. To the contrary what emerges from the MOU is nothing more than a holding arrangement pending the obtaining of all required approvals to add the land to the conservation estate at some indeterminate future time in circumstances where those required approvals, both from within and outside the government, might or might not be obtained. The objectives of the interim arrangement were to make CALM responsible for the land, avoid interfering with the application of the mining legislation, and avoid the future act provisions of the native title legislation. Beyond that any use for conservation or recreation purposes was to be worked out in the future after the required approvals had been obtained by an interim arrangement under s 33(2) of the WA Conservation and Land Management Act where the arrangement “might” be for conservation and recreation or might be for other purposes and, if possible thereafter, reservation under s 41 of the WA Lands Act for conservation purposes. By analogy to the reasoning in *King v Northern Territory* [2007] FCA 944; (2007) 162 FCR 89 at [247]-[249] the facts fall far short of a permission under which the land is to be used for conservation and recreation purposes.

I also accept the applicant’s submission that:

… looking at the terms of s 267(2) of the LAA, the clear purpose behind the sub-section is to create a criminal offence. It is not a source of power for the Crown to confer a “*permission*”, “*under which*” land or waters are to be used for public purposes or for a particular purpose. That power was and remains vested in the Minister for Lands under Part 4 of the LAA.

For these reasons s 47B(1)(b)(ii) is satisfied.

# Section 457B(5)(b) - THE RESUMPTION ISSUE

## Construction of s 47B(5)(b)(i)

Section 47B(5)(b)(i) requires that, at the test time (in this case, 28 October 2004), “all interests last existing in relation to the area before the test time were acquired, resumed or revoked by, or surrendered to, the Crown in any capacity”.

The State contends that s 47B(5)(b)(i) requires two questions to be asked. First, what were the interests last existing before the test time? Second, were those interests all acquired, resumed or revoked by, or surrendered to, the Crown in any capacity? On this approach interests which exist before the test time and continue to exist after the test time are irrelevant. Such interests are not interests “last existing before the test time”. For this reason the fact that the native title rights and interests of the claim group represented by the applicant existed before the test time and continued after the test time is irrelevant. What is relevant is that the interests last existing before the test time were the two pastoral leases. Those leases were acquired by (in one case) and surrendered to (in the other) the Crown. Accordingly, s 47B(5)(b)(i) is satisfied.

The applicant contends that s 47B(5)(b)(i) requires all interests last existing in relation to the area before the test time to have been acquired, resumed or revoked by, or surrendered to, the Crown in any capacity. On this construction the “interests last existing in relation to the area before the test time” are all interests in the land which existed before the test time irrespective of whether any such interest continues after the test time. If all such interests have been acquired, resumed or revoked by, or surrendered to, the Crown in any capacity then, but not otherwise, s 47B(5)(b)(i) is satisfied. In the present case the section is not satisfied because the native title rights and interests were interests last existing before the test time and have not been acquired, resumed or revoked by, or surrendered to, the Crown in any capacity.

As a matter of both text and context I prefer the State’s construction of s 47B(5)(b)(ii). As a matter of text, the words “interests last existing…before the test time” indicate an interest that has ceased to exist before that time. As a matter of context I am unable to see the logic in a provision which requires all interests to have been acquired, resumed or revoked by, or surrendered to, the Crown before it can said the land is subject to a resumption process. Interests in land are of a potentially vast scope. Some interests might interfere with the intended public purpose. Others might not. For example, in the present case the land was also subject to interests in the form of a road and a telecommunications site reservation. On the applicant’s construction those reservations would have had to be acquired, resumed or revoked by, or surrendered to, the Crown before it could be said that s 47B(5)(b)(i) was satisfied. The rationale for this is not apparent.

Accordingly, I accept the State’s submission that:

The concern of s 47B(5)(b)(i) of the NTA is that the limited class of interests to which it refers – those last existing in relation to the area before the test time – were dealt with by the Crown in a particular manner. The requirement is that those interests be acquired, resumed or revoked by, or surrendered to, the Crown. This excludes cases where last existing interests, such as a pastoral lease, may have simply expired due to the effluxion of time. In cases of acquisition etc, the Crown will have engaged in what may fairly be described as a “resumption process” in order to obtain the land which it intends to put to a particular use. It will ordinarily have paid a price or compensation in order to acquire the land for that use. The object of this part of s 47B is to ensure that the intended use is not frustrated in those circumstances. It can readily be understood why Parliament would have chosen to treat that situation differently from the situation where the State forms an intention in relation to unallocated Crown land on which the prior extinguishing interests existed but have simply expired without the Crown being required to take any action or incur any expense.

Section 47B(5)(b)(i) is thus satisfied.

## Sections 47B(5)(b)(ii) and (iii) – the intention of the Crown

### Evidence

It is necessary to identify more of the evidence to resolve these issues.

CALM considered the possible purchase of some part of the Earaheedy pastoral lease area as early as 1996 but it did not have the funds available.

In March 1997 the Gascoyne-Murchison Rangeland Strategy Steering Group submitted a report to a sub-committee of the WA Cabinet. The report identified a vision of comprehensive, adequate and representative conservation reserves in the Gascoyne-Murchison rangelands in which the areas of land are situated. The report noted that CALM was endeavouring to establish this reserve system by purchasing leased land, which would then need to be actively managed by CALM in terms of weed control, feral animal control, fire control, adequate fencing and the like.

An inter-governmental agreement between the Commonwealth and the State of Western Australia was executed on 29 July 1997. Funding for the creation of a national system of comprehensive, adequate and representative conservation reserves was contemplated by this agreement. In particular, funding for the establishment of such a system in the Gascoyne-Murchison rangelands was contemplated.

On 18 November 1997 the WA Cabinet decided as follows:

**CABINET**

1. supports the Gascoyne-Murchison Strategy Action Plan, **subject to any new resource allocations going through the Budget process;**

2. notes the Gascoyne-Murchison Strategy Action Plan being summarised and distributed as the “Gascoyne-Murchison Strategy”;

3. directs the Gascoyne-Murchison Strategy Cabinet Sub-Committee and the Gascoyne-Murchison Strategy Implementation Group to act on its behalf and work across government to implement the Gascoyne-Murchison Strategy Action Plan;

4. authorises the Gascoyne-Murchison Strategy Cabinet Sub-Committee to formalise a State/Commonwealth agreement for the Strategy Action Plan; and

5. directs that the Implementation group be broadened to include representation of biodiversity and conservation interests and expertise.

On 13 February 1998 the WA Cabinet decided in these terms:

**CABINET** approves the following arrangements:

• $2 million currently scheduled by CALM for debt repayment purposes be used instead to fund, during 1997/98 and 1998/99, land acquisitions which are part of the Gascoyne-Murchison Strategy Plan noting that CALM has made debt repayments of $10 million in advance of its required repayments;

• $2 million be paid to CALM from the consolidated fund in 1999/2000 for debt repayment purposes;

• from 1999/2000 the Consolidated Fund provides funds to CALM for capital purposes associated with the Gascoyne-Murchison Strategy Plan amounting to $1.2 million for each of four years with CALM absorbing the recurrent costs associated with implementing the plan;

By May 1998 the WA government had announced that there was $6.8 million available to establish comprehensive, adequate and representative conservation reserves in the Gascoyne-Murchison rangelands through the purchase of pastoral leases.

Thereafter, assessments of the conservation value of the Earaheedy pastoral lease area were carried out.

On 3 November 1998 the Executive Director of CALM offered to purchase the Earaheedy pastoral lease “for conservation purposes”. On 26 November 1998 the Executive Director of CALM sought Ministerial approval for the purchase “to add to the conservation estate”. On 15 January 1999 the Minister approved the purchase. On 18 February 1999 the Commonwealth and the State entered into a financial agreement for funding for the purchase of, amongst other lands, the Earaheedy pastoral lease to achieve the outcomes of the National Reserve System program.

In March 1999 the WA government released its policy on the rangelands. Provisions of the policy included that the environment would be protected by:

5.1 Identifying and establishing a comprehensive, adequate and representative conservation reserve system, representing the full range of land forms and biological communities.

5.2 Supporting the conservation of biological diversity through the strategic protection of native flora and fauna and representative habitats.

5.3 Establishing, and the monitoring of, environmental objectives for broad scale land use.

5.4 Developing multiple land use models that integrate nature conservation and other land uses while ensuring that public land is managed to best practice.

5.5 Facilitating Aboriginal involvement in the management of rangelands, including conservation reserves and Aboriginal lands, for conservation and/or cultural purposes.

5.6 Providing the community with further opportunities to enjoy the natural values of conservation reserves.

On 10 November 1999 CALM published interim management guidelines for the Earaheedy pastoral lease which stated that:

These guidelines cover the major management issues. They are:

• the conservation of biological, physical, cultural and landscape resources

• the facilitation of recreation in a safe and appropriate form in relation to the physical and climatic conditions of the area and the conservation objectives

• To seek a better understanding of the natural and cultural environment and the impacts of a range of management activities.

These interim guidelines also noted that:

Any future mining tenements will be granted in accordance with conditions agreed to between CALM and the Department of Minerals and Energy (DOME). Prior to any ground disturbing activity a detailed program will be prepared by the proponent and referred to CALM. This program will also address rehabilitation requirements.

The MOU, the terms of which are set out above, was entered into in March 2000.

Also in March 2000 the lessees of the Lorna Glen pastoral lease offered their lease to CALM for purchase. An assessment of the conservation value of that area was carried out.

The Executive Director of CALM offered to purchase the Lorna Glen pastoral lease “for conservation purposes” on 10 May 2000. The lessees agreed on 23 May 2000. The Executive Director of CALM sought and obtained Ministerial approval to the purchase and inclusion of the land into the conservation estate also on 23 May 2000. Approval was granted. On 1 August 2000 the lessees of the Lorna Glen pastoral lease surrendered the lease to the State.

On 16 January 2001 the Executive Director of CALM surrendered the Earaheedy pastoral lease to the Crown to enable the land to be “revested in the State of Western Australia and created as reserves for conservation purposes”.

On 10 May 2001 a financial agreement between the Commonwealth and the State was entered into to achieve the outcomes of the National Reserve System program which provided funding for the purchase of, amongst other land, the Lorna Glen pastoral lease.

On 13 June 2001, in response to a letter of 15 August 2000, the Department of Minerals and Energy provided CALM with advice about the mineral resources on the Lorna Glen pastoral lease, saying that there was “significant potential” for such resources with the result that “there is a need to consider a range of possible approaches for CALM’s ongoing management of the area”.

On 1 November 2001 interim management guidelines for the Lorna Glen pastoral lease were issued by CALM. Those interim guidelines are in much the same terms as those for the Earaheedy pastoral lease.

CALM provided Environment Australia (the relevant Commonwealth body) with progress reports about both areas of land. Those reports noted, for example, that various management works (destocking, fencing, feral animal control etc) were being carried out by CALM and that assessments of mineral resources were still being carried out.

On 20 November 2002 the WA Cabinet made the following decision:

**CABINET**

1. notes that Western Australia’s present terrestrial conservation reserve system does not meet the criteria of comprehensiveness, adequacy and representativeness;

2. endorses the policy to establish a comprehensive, adequate and representative conservation reserve system for Western Australia;

3. notes that the establishment of conservation reserves requires a coordinated approach involving all relevant agencies;

4. directs relevant agencies to give priority attention to:

a. establishing the 30 new national parks in accordance with the *Protecting our old-growth forests* policy and the forest management plan; and

b. converting pastoral leases **already** purchased for conservation reserve purposes into formal conservation reserves, resulting in the establishment of the proposed expanded Kennedy Range and Karijini National Parks and the reservation generally as conservation park of other areas;

5. notes the request for continued funding for land purchases and refers it to the Expenditure Review Committee (ERC) for the 2003/04 budget process;

6. directs the Department of Conservation and Land Management to report on progress in 6 months; and

7. notes that the program of bioregional surveys of the State is incomplete and will be the subject of a future Cabinet submission.

On 31 January 2003 CALM wrote to various government agencies seeking a response to the proposed reservation of land, including the areas in question, for conservation purposes.

On 28 February 2003 the Shire of Wiluna advised CALM that it opposed the reservation of the areas as conservation reserves. CALM responded as follows (in part):

In addressing this resolution I [Keiran McNamara] refer you to my letter of 31 January 2003 in which I advised that the lands purchased for conservation were acquired through a scientific assessment for suitability for addition to the reserve system. I confirm that Earaheedy and Lorna Glen were purchased for conservation purposes in their entirety after investigations into the conservation values of both leases.

…

Since purchase the Department has been approached by a neighbour for major boundary adjustments as a voluntary lease adjustment under the Gascoyne-Murchison Strategy with Earaheedy and Lorna Glen. The voluntary lease adjustment process, as its name implies, is a voluntary one between adjoining property owners. Given the under representation of the landforms and vegetation communities and other conservation values on Earaheedy and Lorna Glen in the existing conservation reserve system, none of Earaheedy and Lorna Glen are available for other uses. These lands have been purchased for conservation and reservation as part of the formal conservation system. Furthermore, funding support from the Commonwealth Government towards the purchases was provided on the understanding that these areas would be reserved and their values protected in perpetuity. Both the Department and the former Minister for the Environment have formally advised previous correspondents that none of these leases are available for voluntary lease adjustment, given that the vegetation types and landforms present are poorly or not represented in the conservation reserve system. This position remains unchanged and the whole of the former Earaheedy and Lorna Glen leases are proposed to be set aside as conservation parks in accordance with State and Commonwealth Government commitments to establish a comprehensive, adequate and representative system of conservation reserves representing the full range of biological values. Whilst there is a statutory requirement to consult with the Shire on the proposed reservations, there is no requirement for the consent of the local government authority to be obtained before the reservations can proceed under either the *Land Administration Act 1997* or the *Conservation and Land Management Act 1984.*

On 23 May 2003 the Department of Mineral Resources wrote to CALM. This letter annexed a map showing the Department of Mineral Resources’ position regarding each area of land. The map cannot be located. The letter said:

DoIR’s position is to minimize encroachment of nature reserves or national parks into areas that are assessed as prospective for either minerals or petroleum. This position is based on DoIR’s understanding of the Government’s position in relation to mining and petroleum resource access to lands reserved for conservation.

…

However, DoIR considers that ‘conservation park’ is not an appropriate tenure for areas of moderate to high mineral or petroleum potential, in that the additional conditions and restrictions on access would act as a disincentive for industry investment.

…

It should be noted that in addition to the nine properties (proposals) for which we have indicated ‘support’, there are 13 properties for which we have indicated ‘partial support’. There is scope for reservation of substantial parts of these properties as conservation park (or national park in the case of Mt Florance) with the remaining prospective portions becoming State Forest or some other appropriate tenure that allows mineral and petroleum resource access.

The table annexed to the letter indicated “partial support” as the final position of the Department of Mineral Resources for the reservation for conservation purposes of the Earaheedy and Lorna Glen pastoral leases, Earaheedy being noted as having moderate to high mineral resource potential and Lorna Glen as having moderate mineral potential. I infer from the terms of the communication that the missing map shows parts of both areas which the Department of Mineral Resources considered suitable for conservation reservation and parts which the Department considered should become State forest or some other appropriate tenure allowing mineral and petroleum resource access.

On 9 July 2003 CALM wrote to the native title claimants in respect of an application known as Wiluna No 1 saying that:

The current provisions of the CLM Act 1984 require management orders for conservation lands to be held by the Conservation Commission of Western Australia.

The Department acknowledges that the native title claimants have procedural rights under the Native Title Act 1993 and that mechanisms will need to be applied to protect native title rights and interests, perhaps through an Indigenous Land Use Agreement, enabling the creation of the reserves. It may be possible for Government to explore how it may be able to secure the future title for these proposed conservation reserves in the traditional owners when the CLM Act is amended.

The resolution of these matters will, by necessity, involve the Office of Native Title and the Department of Land Administration. However, it is important that we canvass your opinions at this early stage with the view to providing better conservation protection for ex-pastoral lands purchased for conservation purposes.

On 10 December 2004, after the test time but nevertheless relevant for showing the position as at the test time, the Department of Mineral Resources wrote to CALM saying:

On the 22nd April 1999 CALM requested a Section 16(3) Mining Act 1978 clearance for the purpose of creating “Conservation Reserves” of Muggon and Earaheedy Pastoral Leases which are now owned by CALM.

Our director general has no follow up on file, but from reading correspondence on file, the feeling was to “Oppose” this request. Last written correspondence was at 13th August 1999, on file.

This Department holds a reservation in our Tengraph database known as FNA 3028 to protect the proposed change in land use and an audit has shown that this request is outstanding.

The department can find no evidence of the proposed action being formalised.

Please advise if this action has been completed, is still pending or has lapsed.

In March 2005, also after the test time but relevant in the same way, the MOU was revised. Relevant revisions include:

1. **Background**

 …

(g) Interim tenure for the Pastoral Lease Land is required until all clearances and approvals are obtained from Government Agencies, including the Department of Industry and Resources (DOIR) and from native title interests, enabling the Pastoral Lease Land to be set aside as conservation or forest estate.

(h) It is recognised that the interim tenure must:

(i) clearly identify CALM control and management;

(ii) not impact on *Mining Act 1978* provisions in relation to Crown land; and

(iii) be able to be achieved as a valid ‘future act’ in compliance with the *Native Title Act 1993 (Cth)* (NTA).

(i) The preferred interim tenure, consists of reservation for a purpose not incurring the vesting provisions of the CALM Act but without a management order issuing. However, such reservation would remove the Pastoral Lease Land from the definition of Crown land in the Mining Act 1978.

(j) Until reservation under the LAA is achievable (having regard for the NTA’s requirements) an agreement has been reached with DOIR on interim reservation, the interim tenure for the Pastoral Lease Land will consist of unallocated Crown land (UCL) but subject to Management Services being provided under section 33(1)(f) of the CALM Act, or Management Placement under section 33(2) of the CALM Act.

…

5. **Acknowledgement**

The Executive Director of CALM and the Director General of DPI acknowledge that all pastoral lease land acquired by CALM for the purpose of this MOU will ultimately be added to the conservation or forest estate.

Clauses 6 and 7 of this MOU set out the process for acquiring Pastoral Lease Land and the interim tenure arrangements that will apply prior to Pastoral Lease Land being added to the conservation or forest estate.

…

8. **Interim Tenure Arrangements**

The parties agree that:

(a) Prior to and in the absence of:

(i) procedural requirements of the NTA being satisfied to enable reservation with the LAA, and

(ii) agreement by the Department of Industry and Resources to interim reservation,

The Pastoral Lease Land will be UCL subject to Management Services or a Management Placement until it is reserved for conservation or forest estate.

On 16 March 2005, also after the test time but relevant in the same way, an officer of CALM summarised the position including the following:

On 31 January 2003 CALM wrote to relevant government agencies (Department of Industry and Resources (DoIR)) and Water and Rivers Commission (WRC)), utilities (AlintaGas, Water Corporation; Western Power; Main Roads WA and Telstra), relevant local government authorities and native title representative bodies and claimants to seek their support for the reservation of the pastoral properties purchased for conservation.

• The attached spreadsheet summarises the responses. I make the following comments/observations on responses received:

* DoIR – supported 9 of the 43 areas being reserved as conservation park (subject to a 30 metre depth limit) and gave support for parts of a further 13 areas being reserved as conservation park. DoIRs concern with the reservation category of conservation park is that they consider that it is perceived as having a single use conservation purpose. They are seeking a tenure/purpose that provides them with protection for future resource exploration access over these tracts of land, much of which are largely unexplored. They wish to protect their right of access should Government policy prevent mining and exploration in conservation parks in the future. (Legally exploration and mining in conservation parks outside of the south-west land division requires the recommendation of the Minister for the Environment).
* A meeting was held in November 2003 between CALM (G Wyre, N Caporn, J Gilmour) and DoIR (I Roberts, M Freeman) to discuss DoIRs response.

…

* Native title representative bodies and claimants – opposed the reservations until such times as the CALM Act is amended to recognise the rights and interests of traditional owners.

…

**Summary**

The two main issues requiring resolution before these purchased lands can be reserved are mining access and native title.

…

With respect to mining, if CALM wishes to pursue the conservation park tenure then given current opposition by DoIR I believe that this may need to be resolved through Cabinet.

…

Given the work already done, I am not convinced a project team approach could overcome the impasses without Cabinet directives.

Cabinet made a further decision on 3 September 2007 but, in my view, that decision was made too long after the test time to disclose anything relevant about the intention of the Crown at the test time.

### Submissions

The State submitted that:

At all material times on and after the surrender dates, the Crown intended to use Earaheedy and Lorna Glen for the purposes of conservation and recreation, both of which are public purposes. Cabinet’s decision on 1 December 1997 and 14 April 1998 to implement and fund the Gascoyne-Murchison Regional Strategy Action Plan, including the purchase of pastoral lease for a Comprehensive, Adequate and Representative (CAR) reserve system, establish that intention at an early point in time. The purchase of the pastoral leases was proposed by the Executive Director of CALM and approved by the Minister for Environment for conservation purposes. Those purposes are reflected in the funding agreements between the State and Commonwealth, and media announcements made by the Minister for Environment. The intention to use the claim area for those purposes is also reflected in the consistent management of the land for conservation and recreation in accordance with the Interim Management Guidelines and the MOU. Although there was debate in relation to the kind of reserve which should be created, there was no debate as to its appropriate use for conservation and recreation.

The fact that the land has not been formally reserved as a conservation park does not preclude the use of Earaheedy and Lorna Glen for the purposes of conservation and recreation. The question posed by s 47B(5)(b)(ii) and (iii) of the NTA concerns the intended use of the area, rather than the according of a particular status to the area. Section 45B(5)(b)(ii) and (iii), unlike s 27B(1)(b)(ii), is not concerned with the reservation etc of an area for a purpose.

The applicant submitted that:

…the State has not shown that the Crown had a ‘bona fide” intention of using the claim area for public purposes or for a particular purpose, namely conservation and recreation, either at the date when the pastoral lease interests were acquired (s 47B(5)(ii)) or when the application was made (s 47B(5)(iii)). The Applicant further submits that the requisite intention must be the intention of the Minister for Lands, because it is that Minister who has a non-delegable power and function under s 41 of the LAA to reserve areas of Crown land “for one or more purposes in the public interest”.

… the qualification in s 47B(5)(ii) and (iii) that the Crown must have a “bona fide” intention of using the area for public purposes or for a particular purpose, sets a high standard. It is not enough to show that at some level within the executive the Government wants or may want, to use land for a particular public purpose or purposes, and has taken some steps towards achieving that goal. That would give the exception to the application of s 47B a very wide operation, inconsistent with the remedial purposes of the NTA.

… that in order to show that the Crown had the requisite intention on each of the relevant dates it must be demonstrated that it has taken firm steps to achieve the stated purpose such that it could be confidently said at that time, that the purpose would be achieved. It is submitted that the Crown’s intention to use an area for a particular purpose would not be “bona fide” if the purpose was vague or uncertain or if the achievement of that purpose was qualified or conditional upon the happening of future events.

…

… in this case, the actions of various public servants within CALM and the DLA as well as the actions of various Ministers from time to time, failed to demonstrate that the Crown had both the will and the wherewithal at the relevant dates, to reserve the whole of the claim area for the purposes of conservation and recreation. In particular:

(i) the opposition of various arms of the executive government to the reservation of the area as a conservation park;

(ii) the opposition of native title representative bodies and native title claimants; and

(iii) the elapse of time between when the pastoral leasehold interests were acquired or surrendered and the date when the claimant application was made,

support the conclusion that, at the relevant dates, there was no “bona fide intention of using” the claim area for conservation and recreation.

### Discussion

I do not accept the applicant’s submission that it is only the state of mind of the Minister for Lands which is relevant, given that the function of reserving land for conservation purposes is vested in that Minister. It is unrealistic to assume that the Minister for Lands would act unilaterally. The reservation of Crown land for conservation purposes raises issues that, almost inevitably, will require a whole of government approach. This would have been the reality at all times. That this was the reality is reflected in the terms of the MOU which expressly identified that the land could not be reserved for conservation purposes unless and until all intra-governmental approvals had been obtained (as well as external approvals, including from native title holders). The MOU pre-dates the acquisition and surrender of the pastoral leases (17 March 1999 for the Earaheedy pastoral lease and 1 August 2000 for the Lorna Glen pastoral lease) and the making of the claimant application (28 October 2004). The reality is also reflected in the Cabinet decision of 20 November 2002. Cabinet noted that the establishment of a conservation reserve “requires a co-ordinated approach involving all relevant agencies”. Although this decision was made after the pastoral leases were acquired and surrendered (as relevant), to this extent, the decision does no more than record what the position would always have been.

For these reasons, to ascertain whether the Crown had a bona fide intention of the requisite kind it is not only the Minister for Lands who might be relevant. The question is to be answered having regard to all available evidence about the intention of the State of Western Australia at the relevant times. For the same reasons I am not persuaded that the question is to be resolved by reference only to the state of mind of the Executive Director of CALM. I accept that the Executive Director’s state of mind, in his statutory rather than personal capacity, is relevant but the question remains that of the intention of the Crown, which is to be determined objectively on the whole of the evidence.

To the extent that the State submitted that the decisions of Cabinet in 1997 and 1998, and the release of its rangelands policy in 1999, followed by the further Cabinet decision in 2002, disclosed its clear intention with respect to these lands, I also do not accept the submission. All of that evidence is relevant, but it is not determinative. The reasons for this are twofold. First, the focus of s 47B(5) is the specific area the subject of the claimant application. Although the pastoral lease areas in question were specifically acquired to be added to the conservation estate, there are other relevant considerations. These include, in particular, that the Cabinet decisions of 1997-2002 and the rangelands policy concern larger areas of land and are expressed at a high level of generality in respect of that larger area. Further, and as already noted, the reality was always that a “whole of government” position would need to be resolved before any particular land could be reserved for conservation purposes. Second, there are two relevant times at which the intention of the Crown must be ascertained. It is necessary to recognise that an intention which might have existed at one relevant time may have altered or may no longer exist at another time. The evidence at each relevant time must be considered.

Two other observations should be made. One is that evidence of the Crown’s intention is effectively in the control of the Crown. A person in the position of the applicant has no real capacity to adduce evidence relevant to the Crown’s intention other than, perhaps, through the tender of public documents. The other is that it necessarily follows that, at least in terms of the provisions of s 47B(5)(b), the persuasive burden lies upon the State. The question is not whether the applicant has proved a lack of intention on the part of the Crown. In this regard, it must be recalled that in this case the applicant has discharged its onus of proof in respect of the existence of native title. The only issue is the application or not of s 47B(2) of the Native Title Act. When weighing up the evidence, and determining whether the Crown has a bona fide intention of the requisite kind, these considerations may be relevant.

Sections 47B(5)(b)(ii) and (iii) require the existence of a “bona fide intention” of the Crown.

At the least, the express requirement that the “intention” be “bona fide” performs the function of emphasising that the Crown must have an intention of the requisite kind which, on the whole of the evidence, warrants the characterisation of an intention in good faith. This suggests that cases where the evidence does not rise above the existence of some mere generalised desire or wish of the Crown, impossible or impractical to fulfil, the statutory requirement of a bona fide intention is unlikely to be satisfied.

While each case must turn on its own facts, the requirement of a bona fide intention of the Crown, insofar as any guideline considerations may be identified, indicates that:

(1) What must exist at the relevant times is the bona fide intention itself which, as noted, is a bona fide intention of the Crown, an issue to be determined objectively on the whole of the evidence.

(2) A generalised and vague desire or wish that land be used for a public or particular purpose at some indefinite future time, even if objectively attributable to the Crown, is unlikely to be able to be characterised as a bona fide intention of using the land for that public purpose.

(3) If there is a specific desire or wish, objectively attributable to the Crown, that land be used for a public or particular purpose, that desire or wish may still not be a bona fide intention if in fact the desire or wish is impossible or impractical to fulfil and the Crown knew or must be taken to have known of this impossibility or impracticality.

(4) The existence of desires or wishes to use the land for other purposes, rather than for a public or particular purpose, is likely to be relevant. The prospect of a multiplicity of potentially conflicting uses, for example, might confound any finding that the Crown had a bona fide intention of using the land for a public purpose or particular purpose at the relevant times.

(5) The firmness or permanency of the state of mind which can be attributed to the Crown is likely to be relevant. If the future use of the land is in a state of flux or indecision it might be that it cannot be found that the Crown had the requisite bona fide intention at the relevant times.

In a different context, landlord and tenant relations, “intention” has been said to require:

• “a firm and settled intention not likely to be changed” (*Fleet Electrics Ltd v Jacey Investments Ltd* [1956] 3 All ER 99);

• a proposal which has moved “out of the zone of contemplation… into the valley of decision” (*Cunliffe v Goodman* [1950] 2 KB 237);

• a “fixed and settled, as distinct from a provisional, purpose” (*Betty’s Cafes Ltd v Phillips Furnishing Stores Ltd* [1957] 1 All ER 1); and

• a purpose “reasonably capable of being carried into effect” (*Betty’s Cafes Ltd v Phillips Furnishing Stores Ltd* [1957] 1 All ER 1).

(see “Intention” in *Words and Phrases Legally Defined* Vol 1 ed David Hay (4th ed, LexisNexis, 2007) pp1247 – 1249).

These observations, while by no means definitive, are of some use in identifying the kinds of parameters which might be relevant to the identification of a bona fide intention of the Crown.

In the present case I propose to deal with the position “at that time” under s 47B(5)(b)(iii) first (that is, as at 28 October 2004). The reason for this is that I consider that the evidence relevant to that time clearly establishes the lack of an intention on the part of the Crown to use the land for the public purposes of conservation and recreation (and, in this regard, it must be recalled that the applicant does not have an onus to prove a lack of intention; the issue is whether the Crown had the required intention on the whole of the evidence).

First, although I accept that CALM was in fact carrying out management activities on the areas of land (and had been since it obtained control of the areas) which were not inconsistent with the future use of the land for conservation and recreation purposes, the evidence goes no further than this. CALM’s management of the land was the kind of management that any responsible owner would carry out (weed control, feral animal control, de-stocking, fencing, fire control etc) and was equally not inconsistent with any other future use of the land. Accordingly, CALM’s management activities do not carry the significance which the State attempted to place upon them.

Second, it cannot be said that the issues about the future of the areas of land related to tenure only and not use, as the State would have it. This characterisation does not reflect the facts. It is apparent that, although CALM had acquired the land for conservation purposes and undoubtedly wanted the land to be reserved for conservation purposes, CALM knew full well that it had to resolve not just the future tenure of the land, but also its future use, with not only the rest of government but also the native title holders. If the Cabinet decisions of 1997-2002 and the rangelands policy of 1999 had truly made plain that these areas of land were to be set aside and used for conservation and recreation purposes in the future, then the terms of the MOU would not have been framed as they were and the consultation between CALM and other departments, specifically the Department of Mineral Resources, would have been a mere formality. CALM, it might be inferred, did not understand the Cabinet decision or rangelands policy to determine the future use of the lands for conservation and recreation purposes, and nor do I.

Insofar as the intention of the Crown about use is concerned, moreover, the intention of CALM is not the end of the matter. In light of the whole of the evidence relevant to the position as at 28 October 2004, it is apparent that CALM’s intention about use was no more than a mere desire or wish.

This is because, in whole of government terms, even the interim holding arrangement established by the MOU was subject to the necessity of not interfering with the mining legislation’s application to the areas of land. Hence, no use of the land (not just the tenure arrangement) was to undermine the application of the mining legislation pending the whole of government resolution which Cabinet (and the rest of the WA government, including CALM) accepted would be required.

Otherwise, the reality was that CALM accepted that it needed the support of other government departments, including the Department of Mineral Resources, to enable the reservation of the land for conservation purposes. This is why CALM sought such support in its consultation with other departments. Contrary to the State’s submissions this was not merely a matter of land tenure, it was a matter also of use. This is apparent from the terms of the letter of 23 May 2003 from the Department of Mineral Resources. The Department of Mineral Resources did give “partial support” to the conservation reservation of the areas in question but, equally, it is obvious that it opposed the reservation of the balance of the areas because it wanted to ensure that they were able to be used for mineral resource extraction purposes. Hence, the State’s attempts to distinguish “reservation” from “use”, which is legally correct, founders on the facts. For the Department of Mineral Resources, tenure was relevant because it controlled use.

The problem for the State is that it is obvious that, as at 28 October 2004, an impasse had been reached. CALM desired the whole of the areas of land to be used for conservation purposes. The Department of Mineral Resources, it must be understood, opposed any tenure which would mean that the parts of the land which had moderate or high natural resource value could not be used for mining/extraction purposes. The impasse came into existence on 23 May 2003 (at the latest). It is plain that the impasse remained as at (and well beyond) 28 October 2004. That this is so is apparent from the letter of 10 December 2004 to CALM from the Department of Mineral Resources and the CALM internal report of 10 March 2005, which documents post-date 28 October 2004. They disclose the position as it existed – and as it was known to exist within the State government – as at 28 October 2004.

As at 28 October 2004, on this evidence, it cannot be said that the Crown had a bona fide intention of using the areas for public purposes of conservation and recreation. There was, at that time, no intention of the Crown to use the areas of land for any particular purpose. There were options as to use available in the future, and competing departmental views about these options, but no actual intention to use the areas of land for any purpose. The only intention that can be attributed to the Crown as at 28 October 2004 is an intention, one day, to bring the matter back to Cabinet so Cabinet could resolve all issues of tenure and use. In the interim, the holding arrangement would continue. That intention is not an intention of the requisite kind.

It was not suggested by the State that the areas of land could be notionally subdivided in terms of the Crown’s intention by referring to the letter from the Department of Mineral Resources of 23 May 2003. Nor, given my conclusions above, would this be persuasive. It is also not practical in this case as the map in question, showing the part of the land subject to “partial support”, cannot be located. As noted, the meaning of the Department’s letter is clear - the parts not subject to “partial support” were opposed from conservation reservation – and, I infer, conservation use to any extent that such use might in any way interfere with use for natural resource mining or extraction.

Finally, insofar as the native title holders are concerned, CALM’s knowledge of the need to deal with their rights is apparent from the terms of the MOU. Moreover, before 28 October 2004, CALM knew that the native title holders in this case opposed the reservation of the areas of land for conservation purposes. While I accept that some public purposes may be consistent with native title rights and interests, on the facts of the present case, the position of the native title holders was clear. It is difficult to characterise CALM’s undoubted desire to reserve and use the land for conservation purposes as reflecting an intention of the Crown when CALM (and the Crown) knew that any future use of this land would have to be resolved with the native title holders. This too indicates that CALM’s position is best characterised as a desire or wish to use the land for conservation purposes, which desire or wish CALM recognised could not be implemented unless and until Cabinet and the native title holders agreed. As at 28 October 2004 CALM had no way of knowing what might happen in the future. Use of the land for the purposes of conservation and recreation as at 28 October 2004 was very much in the realm of desire, wish, conjecture and speculation of CALM rather than an intention of the Crown.

For these reasons, s 47B(5)(b)(iii) is not satisfied. It follows that, on this basis, the negative stipulation in s 47B(1)(b)(iii), is satisfied. The result is that, irrespective of s 47B(5)(b)(ii), s 47B(2) applies. The native title determination to which the parties agree the applicant is entitled must reflect the terms of s 47B (2) of the Native Title Act.

Although it is not strictly necessary to resolve the issue under s 47B(5)(b)(ii), it is appropriate that I make some, limited, observations in this regard.

First, the dual time requirement in s 47B(5)(b) is an important safeguard for native title claimants. It is not difficult to imagine that land might often be acquired by a government agency, using a particular funding source, in circumstances where that agency at least holds a bona fide intention that the land be used for a public or particular purpose at the time of acquisition. Section 47B(5)(b), however, requires that intention also to exist when the native title claim is made. This protects native title claimants from the not uncommon position that intentions of government are not immutable, and intentions of one arm or agency of government may not reflect the intention of government as a whole. As here, genuine intentions of one agency of the government, CALM, might be subsequently confounded by practical and political realities.

Second, resolution of this factual issue would not be easy, which suggests caution is appropriate when, given my other findings, the issue is hypothetical. At the relevant times in question (17 March 1999 for the Earaheedy pastoral lease and 1 August 2000 for the Lorna Glen pastoral lease) there is not much doubt that, while CALM must have known a whole of government approach and agreement with native title holders would be required, CALM did not know of the actual position of either the Department of Mineral Resources or the native title holders. Moreover, CALM had the Cabinet resolution of 1997 and 1998, had the rangelands policy of 1999, and (most importantly of all in my view) had received both State and Commonwealth funding for the acquisition of these areas of land for conservation purposes. As at 2000 and 2001, the problems which CALM met in 2003 were in the future. On the other hand, CALM must be taken to have known that it would have to consult with other government agencies and those claiming native title rights and interests before it had any real prospect of fulfilling its wish to see the areas reserved for conservation purposes.

While it is possible that I would have been minded to find the existence of a bona fide intention of the relevant kind so as to satisfy s 47B(5)(b)(ii) of the Native Title Act on the facts of this case, the fact that CALM’s intention was always inherently hedged by the significant uncertainties of future positions of other government agencies and native title claimants would have weighed against that possibility. To say more when the issue is hypothetical would be inappropriate.

# CONCLUSIONS

For the reasons set out above s 47B(2) of the Native Title Act applies in relation to the claimant application in this case. The native title determination to which the applicant is entitled must reflect the terms of s 47B(2). Directions will be made accordingly.

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| I certify that the preceding eighty-eight (88) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Jagot. |

Associate:

Dated: 2 August 2013