

Western Australia

**Titles (Validation) and Native Title (Effect of
Past Acts) Act 1995**

As at 11 Feb 2000

Version 01-a0-07

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Titles (Validation) and Native Title (Effect of Past Acts) Act 1995

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Notes

Titles (Validation) and Native Title (Effect of Past Acts) Act 1995

An Act to make provision in relation to native title as permitted by the *Native Title Act 1993* of the Commonwealth, namely —

- **under sections 19 and 22F of that Act, to validate past acts and intermediate period acts attributable to the State and to provide for the effects of the validation;**
- **under sections 23E and 23I of that Act, to confirm the effect on native title of acts attributable to the State done on or before 23 December 1996; and**
- **under section 212 of that Act, to confirm certain rights relating to natural resources and public access.**

[Long title inserted by No. 9 of 1999 s.4.]

Part 1 — Preliminary

1. Short title

This Act may be cited as the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995*¹.

[Section 1 amended by No. 9 of 1999 s.5.]

2. Commencement

This Act comes into operation on the day on which it receives the Royal Assent¹.

3. Act binds the Crown

This Act binds the Crown in right of Western Australia and, so far as the legislative power of the Parliament permits, in all its other capacities.

4. Interpretation

(1) In this Act the *Native Title Act 1993* of the Commonwealth is referred to as the NTA.

(2) Unless the contrary intention appears, a word or expression used in this Act has the same meaning as it has in the NTA.

Note: Section 222 of the NTA lists and shows the location of all of the words and expressions defined in the NTA. There is a list at the end of this reprint showing the location in the NTA of definitions of words and expressions used in this Act.

(3) Notes in this Act are provided to assist understanding and do not form part of the Act.

Part 2 — Validation of past acts

5. Validation of past acts attributable to the State (*s. 19 NTA*)

Every past act attributable to the State is valid and is taken always to have been valid.

6. Effect of validation — category A past acts that are not public works (*ss. 19 & 15(1)(a) NTA*)

A category A past act, other than a past act to which section 229(4) of the NTA applies, extinguishes the native title concerned.

Note: In the NTA “category A past act” is defined in section 229 to mean (with exceptions and qualifications) —

- (a) freehold grants;
- (b) some leasehold grants (commercial, agricultural, pastoral and residential leases and, in certain circumstances, mining leases so far as they apply to certain developed land); and
- (c) public works.

7. Effect of validation — category A past acts that are public works (*ss. 19 & 15(1)(b) NTA*)

- (1) A category A past act to which section 229(4) of the NTA applies extinguishes native title in relation to the land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated.
- (2) If section 229(4)(a) of the NTA applies to the past act, the extinguishment is taken to have happened on 1 January 1994.

Note: Section 229(4)(a) of the NTA applies to a past act consisting of the construction or establishment of any public work if the work commenced to be constructed or established before 1 January 1994 and the construction or establishment had not been completed by that day.

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8. Effect of validation — inconsistent category B past acts
(*ss. 19 & 15(1)(c) NTA*)

A category B past act that is wholly or partly inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests concerned extinguishes the native title to the extent of the inconsistency.

Note: In the NTA “category B past act” is defined in section 230 (with exceptions and qualifications) as leasehold grants, other than leases that are category A past acts and mining leases.

9. Effect of validation — category C and category D past acts
(*ss. 19 & 15(1)(d) NTA*)

The non-extinguishment principle applies to all category C and category D past acts.

Note: In the NTA —

- “category C past act” is defined in section 231 to mean the grant of a mining lease;
- “category D past act” is defined in section 232 as a past act that is not in category A, B, or C; and
- the effect of the non-extinguishment principle is set out in section 238.

10. Extinguishment does not confer right to eject or remove Aboriginal persons (*ss. 19 & 15(2) NTA*)

The extinguishment effected by this Act does not by itself confer any right to eject or remove any Aboriginal persons who reside on or who exercise access over land or waters covered by a pastoral lease the grant, re-grant or extension of which is validated by this Act.

11. Preservation of beneficial reservations and conditions
(*ss. 19 & 16 NTA*)

If —

- (a) a past act attributable to the State contains a reservation or condition for the benefit of Aboriginal peoples; or

- (b) the doing of the act would affect rights or interests (other than native title rights and interests) of Aboriginal peoples (whether arising under legislation, at common law or in equity and whether or not rights of usage),

nothing in this Act affects that reservation or condition or those rights or interests.

12. Compensation (ss. 20 & 17 NTA)

- (1) Under section 20 of the NTA native title holders are entitled to compensation because of the validation under this Act of a past act attributable to the State if they would be entitled to compensation under section 17(1) or (2) of the NTA on the assumption that that section applies to acts attributable to the State.
- (2) The compensation is payable by the State.
- (3) Compensation is to be determined in accordance with the principles contained in Division 5 of Part 2 of the NTA.

[Section 12 amended by No. 9 of 1999 s.6.]

Part 2A — Validation of intermediate period acts

[Heading inserted by No. 9 of 1999 s.7.]

12A. Validation of intermediate period acts attributable to the State (s. 22F NTA)

Every intermediate period act attributable to the State is valid and is taken always to have been valid.

Notes The expression “intermediate period act” is defined in section 232A of the NTA as an act that took place between 1 January 1994 and 23 December 1996 and that meets the various conditions set out in that section. Under section 22H of the NTA the State must within 6 months of the commencement of this Act notify specified details relating to certain acts to the public and to native title bodies and claimants in relation to the affected land or waters. The details relate to mining rights granted between 1 January 1994 and 23 December 1996 in respect of land and waters that are or were the subject of a freehold or leasehold grant or public work.

[Section 12A inserted by No. 9 of 1999 s.7.]

12B. Effect of validation — category A intermediate period acts consisting of grant of freehold and certain leases or vesting of land or waters (ss. 22F & 22B(a) NTA)

- (1) A category A intermediate period act to which section 232B(2), (3) or (4) of the NTA applies extinguishes all native title in relation to the land or waters concerned.
- (2) Subsection (1) has effect subject to section 24EBA(6) of the NTA.

Notes: The expression “category A intermediate period act” is defined in section 232B of the NTA to mean (subject to that section) —

- the grant or vesting of a freehold;
- the grant or vesting of a Scheduled interest;
- the grant or vesting of certain leaseholds (commercial leases exclusive agricultural leases, exclusive pastoral leases, residential leases, community purposes)

leases, other leases (other than mining leases) that confer a right of exclusive possession, and in certain circumstances mining leases so far as they apply to certain developed land); and

- the construction or establishment of a public work (see section 12C of this Act).

This section does not apply to an act if section 12I of this Act applies to it.

The effect of this section can be changed by an agreement that complies with section 24EBA of the NTA (see subsections (1)(a)(iii) and (6) of that section).

[Section 12B inserted by No. 9 of 1999 s.7.]

12C. Effect of validation — category A intermediate period acts involving public works (ss. 22F & 22B(b) NTA)

- (1) A category A intermediate period act to which section 232B(7) of the NTA applies extinguishes the native title in relation to the land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated.
- (2) The extinguishment is taken to have happened when the construction or establishment began.
- (3) Subsection (1) has effect subject to section 24EBA(6) of the NTA.

Note: This section does not apply to an act if section 12J of this Act applies to it.
The effect of this section can be changed by an agreement that complies with section 24EBA of the NTA (see subsections (1)(a)(iii) and (6) of that section).

[Section 12C inserted by No. 9 of 1999 s.7.]

12D. Effect of validation — inconsistent category B intermediate period acts (ss. 22F & 22B(c) NTA)

- (1) A category B intermediate period act that is wholly or partly inconsistent with the continued existence, enjoyment or exercise

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of the native title rights and interests concerned, extinguishes the native title to the extent of the inconsistency.

- (2) Subsection (1) has effect subject to section 24EBA(6) of the NTA.

Notes: The expression “category B intermediate period act” is defined in section 232C of the NTA as the grant of a lease that is not a category A intermediate period act; but the definition does not include —

- mining leases; and
- certain leases for the benefit of Aboriginal peoples and subleases derived from such leases.

This section does not apply to an act if section 12I or 12M of this Act applies to it.

The effect of this section can be changed by an agreement that complies with section 24EBA of the NTA (see subsections (1)(a)(iii) and (6) of that section).

[Section 12D inserted by No. 9 of 1999 s.7.]

12E. Effect of validation — category C and category D intermediate period acts (ss. 22F & 22B(d) NTA)

- (1) The non-extinguishment principle applies to all category C and category D intermediate period acts.

- (2) Subsection (1) has effect subject to section 24EBA(6) of the NTA.

Notes: The expression “category C intermediate period act” is defined in section 232D of the NTA as the grant of a mining lease; and the expression “category D intermediate period act” is defined in section 232E of that Act as an intermediate period act that is not in category A, B or C.

This section does not apply to an act if section 12M of this Act applies to it.

The effect of this section can be changed by an agreement that complies with section 24EBA of the NTA (see subsections (1)(a)(iii) and (6) of that section).

[Section 12E inserted by No. 9 of 1999 s.7.]

12F. Preservation of beneficial reservations and conditions (ss. 22F & 22C NTA)

If —

- (a) an intermediate period act attributable to the State contains a reservation or condition for the benefit of Aboriginal peoples; or
- (b) the doing of an intermediate period act attributable to the State would affect rights or interests (other than native title rights and interests) of Aboriginal peoples (whether arising under legislation, at common law or in equity and whether or not rights of usage),

nothing in section 12B, 12C, 12D or 12E affects that reservation or condition or those rights or interests.

[Section 12F inserted by No. 9 of 1999 s.7.]

12G. Compensation

- (1) Under section 22G of the NTA native title holders are entitled to compensation because of the validation by this Act of an intermediate period act attributable to the State.
- (2) The compensation is payable by the State.
- (3) Compensation is to be determined in accordance with the principles contained in Division 5 of Part 2 of the NTA.

[Section 12G inserted by No. 9 of 1999 s.7.]

12H. Requirement to notify: tenures and reserves under the *Land Act 1933*

- (1) This section applies to an intermediate period act attributable to the State —
 - (a) consisting of —
 - (i) the grant of a fee simple;
 - (ii) the grant of a lease, licence or easement; or
 - (iii) the creation, vesting or amendment of a reserve, under the *Land Act 1933*²; and

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- (b) that took place at any time during the period from the beginning of 1 January 1994 until the end of 23 December 1996.
- (2) The State must, before the end of 6 months after the commencement of the *Titles Validation Amendment Act 1999*¹, give notice containing the details set out in subsection (3) in respect of each act to which this section applies to any —
 - (a) registered native title body corporate;
 - (b) registered native title claimant; and
 - (c) representative Aboriginal/Torres Strait Islander body,in relation to any of the land or waters affected by the act.
- (3) The details are —
 - (a) the date on which the act was done;
 - (b) sufficient information to enable the area affected by the act to be identified; and
 - (c) information about the way in which further details about the act may be obtained.

[Section 12H inserted by No. 9 of 1999 s.7.]

Part 2B — Confirmation of past extinguishment of native title by certain valid or validated acts

[Heading inserted by No. 9 of 1999 s.7.]

12I. Confirmation of extinguishment of native title by previous exclusive possession acts of State, other than public works (ss. 23E & 23C(1) NTA)

(1) In this section —

relevant act means a previous exclusive possession act —

- (a) under section 23B(2)(a), (b) and (c)(ii) of the NTA (including because of section 23B(3)); or
- (b) under section 23B(2)(a), (b) and (c)(i), (iii), (iv), (v), (vi), (vii) or (viii) of the NTA if the Scheduled interest or lease concerned was still in force on 23 December 1996.

(1a) If a relevant act is attributable to the State —

- (a) the act extinguishes any native title in relation to the land or waters covered by the freehold estate, Scheduled interest or lease concerned; and
- (b) the extinguishment is taken to have happened when the act was done.

(2) If this section applies to the act, sections 6, 8 and 12B do not apply to the act.

Note: Under section 23B(2) and (3) of the NTA, the estates and interests to which this section applies (subject to the limitation in paragraph (b) of the definition of “relevant act”) are those validly granted or vested on or before 23 December 1996 and consisting of —

- a Scheduled interest;
- a freehold estate (including what is taken by section 23B(3) to be a freehold estate); and
- certain leaseholds (commercial leases, exclusive agricultural and pastoral leases, residential leases, community purpose leases, other leases (other than

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mining leases) that confer a right of exclusive possession, and in certain circumstances mining leases so far as they apply to certain developed land).

[Section 12I inserted by No. 9 of 1999 s.7; amended by No. 55 of 1999 s.4.]

12J. Confirmation of extinguishment of native title by previous exclusive possession acts of State consisting of public works (ss. 23E & 23C(2) NTA)

- (1) If an act is a previous exclusive possession act under section 23B(7) of the NTA (which deals with public works) and is attributable to the State —
 - (a) the act extinguishes native title in relation to the land or waters on which the public work concerned (on completion of its construction or establishment) was or is situated; and
 - (b) the extinguishment is taken to have happened when the construction or establishment of the public work began.
- (2) If this section applies to the act, sections 7 and 12C do not apply to the act.

Note: Under section 23B(7) of the NTA, the public works to which this section applies are those validly undertaken and commenced to be constructed or established on or before 23 December 1996.

[Section 12J inserted by No. 9 of 1999 s.7; amended by No. 55 of 1999 s.5.]

12K. Preservation of beneficial reservations and conditions (ss. 23E & 23D NTA)

If —

- (a) a previous exclusive possession act attributable to the State contains a reservation or condition for the benefit of Aboriginal peoples; or

- (b) the doing of a previous exclusive possession act attributable to the State would affect rights or interests (other than native title rights and interests) of Aboriginal peoples (whether arising under legislation, at common law or in equity and whether or not rights of usage),

nothing in section 12I or 12J affects that reservation or condition or those rights or interests.

[Section 12K inserted by No. 9 of 1999 s.7.]

12L. Confirmation of validity of use of certain land held by Crown etc. (ss. 23E & 23DA NTA)

To avoid doubt, if an act is a previous exclusive possession act because of paragraph (b) of section 23B(9C) of the NTA (which deals with grants to the Crown etc.), the use of the land or waters concerned as mentioned in that paragraph is valid.

[Section 12L inserted by No. 9 of 1999 s.7.]

12M. Confirmation of partial extinguishment of native title by previous non-exclusive possession acts of State (ss. 23I & 23G NTA)

- (1) Subject to subsection (2), if a previous non-exclusive possession act (see section 23F of the NTA) is attributable to the State —
 - (a) to the extent that the act involves the grant of rights and interests that are not inconsistent with native title rights and interests in relation to the land or waters covered by the lease concerned, the rights and interests granted, and the doing of any activity in giving effect to them, prevail over the native title rights and interests but do not extinguish them;
 - (b) to the extent that the act involves the grant of rights and interests that are inconsistent with native title rights and interests in relation to the land or waters covered by the lease concerned —

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- (i) if, apart from this Act, the act extinguishes the native title rights and interests, the native title rights and interests are extinguished; and
 - (ii) in any other case, the native title rights and interests are suspended while the lease concerned, or the lease as renewed, re-made, re-granted or extended, is in force;
- and
- (c) any extinguishment under this subsection is taken to have happened when the act was done.
- (2) If the act is the grant of a pastoral lease or an agricultural lease to which section 6 applies, this section does not apply to the act.
- (3) If this section applies to the act, sections 6, 8, 9, 12D and 12E do not apply to the act.

Note: Under section 23F of the NTA, the estates and interests to which this section applies are those arising from —

- non-exclusive agricultural leases and non-exclusive pastoral leases validly granted on or before 23 December 1996;
- legally enforceable rights to the grant of such leases created on or before that date but exercised after that date; and
- arrangements for the grant of such leases completed after that date but made on or before that date in good faith and evidenced in writing.

[Section 12M inserted by No. 9 of 1999 s.7.]

12N. Preservation of beneficial reservations and conditions
(ss. 23I & 23H NTA)

If —

- (a) a previous non-exclusive possession act attributable to the State contains a reservation or condition for the benefit of Aboriginal peoples; or
- (b) the doing of a previous non-exclusive possession act attributable to the State would affect rights or interests (other than native title rights and interests) of Aboriginal

peoples (whether arising under legislation, at common law or in equity and whether or not rights of usage), nothing in section 12M affects that reservation or condition or those rights or interests.

[Section 12N inserted by No. 9 of 1999 s.7.]

12O. Notification (ss. 23I & 23HA NTA)

In the case of a previous non-exclusive possession act to which section 23F(3)(c)(ii) of the NTA applies —

- (a) notice must be given, in the way determined in writing by the Commonwealth Minister, to any —
 - (i) representative Aboriginal/Torres Strait Islander bodies;
 - (ii) registered native title bodies corporate; and
 - (iii) registered native title claimants,

in relation to the land or waters that will be affected by the act, about the doing or proposed doing of the act, or acts of that class, in relation to the land or waters concerned; and

- (b) they must be given an opportunity to comment on the act or class of acts.

Note: The acts to which section 23F(3)(c)(ii) of the NTA applies are those giving effect after 23 December 1996 to arrangements made on or before that date in good faith, and evidenced in writing, for the grant of non-exclusive agricultural leases or non-exclusive pastoral leases.

[Section 12O inserted by No. 9 of 1999 s.7.]

12P. Compensation

- (1) Under section 23J of the NTA native title holders are entitled to compensation for any extinguishment under this Part of their native title rights and interests by an act, but only to the extent (if any) that the native title rights and interests were not extinguished otherwise than under this Act.

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- (2) The compensation is payable by the State.
- (3) Compensation is to be determined in accordance with the principles contained in Division 5 of Part 2 of the NTA.

[Section 12P inserted by No. 9 of 1999 s.7.]

Part 2C — Validation of future acts by agreement

[Heading inserted by No. 9 of 1999 s.7.]

12Q. How future acts of State may be validated by agreement

Section 12R applies if —

- (a) details are on the Register of Indigenous Land Use Agreements of an agreement that includes a statement to the effect that the parties agree to —
 - (i) the validating of a particular future act (other than an intermediate period act), or of future acts (other than intermediate period acts) included in classes, that have already been done invalidly; or
 - (ii) the validating, subject to conditions, of a particular future act (other than an intermediate period act), or of future acts (other than intermediate period acts) included in classes, that have already been done invalidly;
- (b) the future act or class of acts is attributable to the State;
- (c) the State is a party to the agreement; and
- (d) where, whether under the agreement or otherwise, a person other than the Crown in right of the Commonwealth or the State, is or may become liable to pay compensation in relation to the act or class of acts, that person is a party to the agreement.

[Section 12Q inserted by No. 9 of 1999 s.7.]

12R. Validation

If the requirements of section 12Q are satisfied in respect of a future act or class of future acts —

- (a) the act is valid and is taken always to have been valid; or

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- (b) all acts included in the class are valid and are taken always to have been valid,

as the case may require.

- Note: If an invalid future act is validated by section 12R —
- under section 24EBA(4) of the NTA, the non-extinguishment principle applies unless the act is the surrender of native title and the agreement includes a statement to the effect that the surrender is intended to extinguish native title; and
 - under section 24EBA(5) of the NTA, the compensation entitlements are determined in accordance with subsection (4), (5) or (6) and subsection (7) of section 24EB of the NTA.

[Section 12R inserted by No. 9 of 1999 s.7.]

Part 3 — Confirmation of certain rights

Note: Under section 212(3) of the NTA, the confirmation made by this Part does not extinguish native title rights and interests and does not affect a conferral of land or waters, or an interest in land or waters, under a law that confers benefits only on Aboriginal peoples.

13. Confirmation of ownership of natural resources etc.
(s. 212(1) NTA)

- (1) The existing ownership of all natural resources owned by the Crown is confirmed.
- (2) All existing rights of the Crown to use, control and regulate the flow of water are confirmed.
- (3) All existing fishing access rights under State law are confirmed to prevail over any other public or private fishing rights.

14. Confirmation of access to certain places *(s. 212(2) NTA)*

Existing public access to and enjoyment of the following places is confirmed —

- (a) waterways;
- (b) beds and banks or foreshores of waterways;
- (c) coastal waters;
- (d) beaches;
- (da) stock routes;
- (e) areas that were public places at the end of 31 December 1993.

[Section 14 amended by No. 9 of 1999 s.8.]

Notes

- ¹ This is a compilation of the *Titles (Validation) and Native Title (Effect of Past Acts) Act 1995* and includes all amendments effected by the other Acts referred to in the following Table.

Compilation table

Short title	Number and year	Assent	Commencement
<i>Titles Validation Act 1995</i>	16 of 1995	4 Jul 1995	4 Jul 1995 (see section 2)
<i>Titles Validation Amendment Act 1999</i>	9 of 1999	5 May 1999	5 May 1999 (see section 2)
<i>Titles (Validation) and Native Title (Effect of Past Acts) Amendment Act 1999</i>	55 of 1999	13 Dec 1999	13 Dec 1999 (see section 2)

- ² References to the *Land Act 1933* are to be construed as being references to the *Land Administration Act 1997* (No. 30 of 1997) according to section 281(3) of that Act.