

Indigenous Joint Management of National Parks in Western Australia

Matt Porter* and Gary D Meyers**

Imagine that you are a Wunambal elder responsible for the power of Mitchell Falls, a senior traditional owner of Purnululu, or a Bunuba woman from Windjana Gorge. Imagine how it would feel if your country, which your family had looked after for hundreds of generations, is taken over by a government department that excludes you from decisions about its management, brings thousands of tourists to camp or drive on it, charges people to visit, then keeps the money for itself? Such is the experience of Aboriginal people in the Kimberly when CALM assumes control of their country for National Parks and Nature Reserves. It is an experience of anger, frustration, constant worry, and marginalization.¹

INTRODUCTION

In June of 2003, the (former) Department of Conservation and Land Management (CALM)² launched a Consultation Paper entitled “Indigenous Ownership and Joint Management of Conservation Lands in Western Australia.” The paper proposed legislative changes to the *Conservation and Land Management Act 1984* (WA) (CALM Act), to enable Aboriginal ownership and joint management of national parks and conservation lands. While the proposal generated heated debate – ranging from broad support³ to intense criticism⁴ and negative press coverage⁵- the joint management of national parks in Australia is not a new concept.

The first national park to be jointly managed by Aboriginal people and government is Kakadu in the Northern Territory established in 1978.⁶ The success of this

* Matt Porter, LLB, B.Sci (Env) is a litigation lawyer with a leading Australia law firm. He has a strong interest in environmental and indigenous law and policy and sits on the board of carbon offset provider Carbon Neutral.

** Gary D Meyers, BA (cum laude), JD, LLM is Professor of Law, University of Tasmania Faculty of Law. He retired as Emeritus Professor of Law, Murdoch University, in 2006.

¹ Yu P, ‘Conservation and Cultural Survival through Coexistence: The Democratisation of National Parks in Western Australia’. Keynote address to public forum: *The Reform of CALM: Are the New Conservation Laws adequate?* (11 March 2000, Alexander Library Theatre, Perth).

² Name changed to Department of Environment and Conservation on 7/1/08 under an amalgamation of the Department of Environment and Department of CALM. See: <http://wa.dec.wa.gov.au/>

³ All WA Native Title Representative Bodies supported the proposal, along with the Australian Conservation Foundation and the National Native Title Tribunal (NNTT).

⁴ *Parliamentary Debates*, Legislative Assembly, 16 September 2003, 11257c - 11258a / 1, Barnett / Gallop.

⁵ West Australian Newspaper, 22 July 2003

⁶ See: Department of Foreign Affairs and Trade, *Indigenous Australians: Management of National Parks and Protected Areas*, Commonwealth Government, http://www.dfat.gov.au/facts/indg_parksmgmt.html (accessed 23/4/05).

“experiment” led to many more jointly managed parks being set up in the Northern Territory and other States.⁷

Indeed, joint management is not a foreign concept in WA either. Currently, three parks are jointly managed. The State proposes to formalise these arrangements soon, when it implements a demonstration parks model, which will put into practice joint management of 12 national parks through WA, although no title will be transferred to indigenous owners.⁸

While Aboriginal joint management of national parks is not a new idea,⁹ the Consultation Paper brought the issue back into the spotlight. And while its introduction in 2003 caused sensations, little has been heard of it since, given its highly political nature. Even with the re-election of the State Labor Government in 2005, very little progress has been made in implementing the proposal.

This essay reviews WA’s proposal to jointly manage its national parks with traditional Aboriginal owners, specifically, the option to grant traditional owners inalienable freehold title over conservation lands which would then be leased back to the State. Part I briefly considers some of the issues leading up to the current proposal, in particular, how the High Court’s post-2000 native title jurisprudence provides an impetus for cooperative land management regimes between Aboriginal people and government. Part II critiques the WA proposal. The authors conclude that while there is a strong case for joint management of national parks in Western Australia, the proposal has not been adequately thought through nor properly explained in several crucial areas. Joint management experience in both Australia and overseas suggests that the overall key to success is a healthy relationship of respect and trust between all

⁷ Woenne-Green S, Johnston, R, Sultan R, & Wallis A, *Competing Interests: Aboriginal participation in national parks and conservation reserves in Australia*. Fitzroy (Australian Conservation Foundation, 1994).

⁸ Karijini National Park established joint management processes under a management plan in 1994. The process is very informal with no definitive rules. Purnululu (also known as the ‘Bungle Bungles’) national park established joint management through a deed of agreement between the traditional owners and the Minister for the Environment. Finally there is the area on the Burrup Peninsula. The land is freehold land owned by the 3 different Aboriginal groups, which had competing native title claims to the area. The land is leased back to the State for 99 years, with an option to renew for another 99 years, for management with CALM under a joint management agreement, endorsed by the Minister for the Environment. This model is the closest to what CALM is proposing. Worth noting, however, is that after 198 years, the traditional owners might not lease the land back to CALM for conservation purposes. See: Department of CALM, *Management Plan for the Burrup Peninsula Conservation Reserve: Discussion Paper* (2003).

⁹ The Royal Commission into Aboriginal Deaths in Custody of 1991 considered empowerment of Aboriginal people through a policy of self-determination to be the essential component in a mature relationship between Aboriginal and non-Aboriginal Australians. Amongst its recommendations in achieving greater self determination was the recommendation that Aboriginal Australians be given rights to traditional lands, and the full participation in the negotiation processes conducted between Aboriginal people, their representative organizations and national park management agencies. (See: Johnston, E. (Commissioner), *National Report, Royal Commission into Aboriginal Deaths in Custody*, Canberra, AGPS, 1991, in particular Recommendation 315. Recommendation 315 did not, however, originate with the Royal Commissioners. It was first discussed by Aboriginal representatives at a Conservation and Land Management meeting held at Millstream-Chichester National Park in the Pilbara, Western Australia in August 1990 and has become known as the Millstream recommendation. The Millstream meeting recommended encouragement of joint management arrangements between Aboriginal people and national park management agencies.

parties. Consequently, the proposal needs further consideration and detail to gain the confidence of all parties and the greater public, enable its successful implementation, and achieve the State government's goal of achieving a world class network of jointly managed national parks.

I. THE IMPETUS FOR THE WA JOINT MANAGEMENT PROPOSAL

The *Mabo* decision¹⁰ of 1992 recognized the existence of native title as part of Australian common law. Of particular relevance to this essay, the High Court's *Mabo* decision provided support for the proposition that cooperative management of national parks might well be encompassed within the ambit of native title rights.¹¹ Over the next seven years, *Mabo* was followed by a series of High Court decisions which were generally consistent with overseas jurisprudence¹² holding that: non-exclusive possession by non-Aboriginals (i.e., pastoral leases) did not necessarily extinguish all native title rights, thus paving the way for shared land rights;¹³ state legislation does not preclude the exercise of traditional hunting and fishing rights on lands not held by Aboriginal people;¹⁴ and that native title may include non-exclusive rights in marine areas and resources.¹⁵

In 2002, the High Court in *Ward*¹⁶ significantly departed from international jurisprudence on the content of native title, ruling that native title is "a bundle of rights," not a complete property right unto itself.¹⁷ More importantly, in relation to this essay, the Court held that lands reserved for conservation purposes and vested in a management body under section 33 of the *Land Act 1933* (WA) extinguished native title rights and interests in the reserve.

The effect of these decisions is three fold. First, while recognizing native title at common law in *Mabo*, the High Court decision in *Ward* dramatically decreased the content and accessibility of native title. Second, the earlier decisions of *Wik* and *Yarmirr* have given rise to potential agreements between Aboriginals and European Australians for the management of wildlife and resources. Third, and finally, the decision in *Ward* means that there is a reduced likelihood of successful native title claims across much of the conservation estate, and, a decreased likelihood of the

¹⁰ *Mabo and Others v Queensland* (No. 2) (1992) 175 CLR 1

¹¹ Meyers, GD and Mugambwa, J, "The Mabo Decision: Aboriginal Land Rights in Transition," 23 *Env L* 1203, 1223 (1992).

¹² See generally: Nettheim, G, Meyers, GD, & Craig, D, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights* 163-83 (Aboriginal Studies Press, 2002).

¹³ *The Wik Peoples v State of Queensland* (1996) 187 CLR 1.

¹⁴ *Yanner v Eaton* 8 HCA 53.

¹⁵ *Commonwealth v Yarmirr* [2001] HCA 56.

¹⁶ *Western Australia v Ward*[2002] HCA 28.

¹⁷ See generally, Pearson, N, "The High Court's Abandonment of the 'Time Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta," [2003] 7 (1) *Newcastle L Rev* 1-14.

gazettal of new protected areas¹⁸ on lands subject to native title claims and native title determination.¹⁹

Arguably, the third factor that is most decisive for the joint management proposal. In its Consultation Paper, the government notes that, until *Ward*, the state had expected that native title would co-exist with conservation lands and that joint management would be achieved progressively with the successful determination of native title claims lodged in the state²⁰. Consequently, the government states “it is imperative to amend State legislation to enable Aboriginal people to secure rights and interests in conservation lands and guarantee their future involvement in the joint management of those lands with CALM.”²¹

II. JOINT MANAGEMENT IN WA: WHAT IS PROPOSED?

There are various forms of joint management. Sometimes, as is currently the case in the majority of national parks in WA, the land is owned by the State. In other examples, such as Uluru and Kakadu national parks in the Northern Territory, Aboriginal people hold the land as inalienable freehold.²²

The Consultation Paper endorses the granting of inalienable freehold as the preferred option for joint management of parks in WA. In sum, reserved land will be given back to the traditional owners²³ as inalienable freehold. A lease will then be entered into with the state, providing that the land be leased back to the state for a specified length of time, for conservation and public purposes. Public access would be in accordance with an approved management plan, negotiated under the lease. Under the lease, Boards of Management would manage the park, consistent with state legislation. Little detail is given to the makeup of these Boards in the proposal. In its strongest form, such as in Uluru and Kakadu, Indigenous people and representatives of the conservation agencies share decision-making in a Board with a slight Aboriginal majority. The remainder of this essay considers the Consultation Paper’s preferred option of a grant of inalienable freehold/lease back arrangement.

A. Criticisms of the Proposal

Not surprisingly, CALM’s proposal has attracted criticism. Almost instantly, then opposition leader Colin Barnett promised to repeal any measures granting title to Aboriginals otherwise unavailable under the NTA and current common law interpretations. The mining industry, represented by the Chamber of Minerals and Energy (CME) and pastoralists, represented by the Pastoralists and Graziers Association (PGA), vehemently opposed the proposal. Even the Australian Conservation Foundation (ACF), and native title representative bodies such as

¹⁸ National Parks are one of the strongest forms of protected areas. See: IUCN Commission on National Parks and Protected Areas, *Guidelines for Protected Area Management Categories*, at 7 (IUCN, 1994).

¹⁹ Consultation Paper at 5.

²⁰ Id at 7.

²¹ Id.

²² This means that the land cannot be bought, acquired or mortgaged without prior consent of the Crown.

²³ Traditional Owners are defined as Aboriginal people with a customary or traditional association with the land, regardless of their common law title. See: Consultation Paper at 5.

Yamatji Land and Sea Council (Yamatji), ardent supporters of the proposal, have raised some concerns with the proposal. These criticisms and concerns are outlined below.

1. Freehold rights will impede development

First, it is argued that granting inalienable freehold to traditional owners will give them the same rights as other WA freehold title owners, namely the right to control access, including all aspects of exploration / mining in conservation lands. Decreased exploration is a major concern within the CME at present,²⁴ with native title process delays seen as a key contributing factor.²⁵ Experience in the Northern Territory with inalienable freehold title has demonstrated that it is a major impediment to infrastructure development and even causes problems for government in the provision of services for Indigenous communities.²⁶

Mining concerns outlined above largely relate to rights given under the *Mining Act 1978 (WA)*²⁷ (Mining Act), whereby freehold landowners have a right of veto over any mining proposal. Presumably this would apply to joint management of inalienable freehold lands controlled as national parks. Potentially, the Mining Act could be amended, removing the right of veto; however, this would foreseeably result in protests from non-Aboriginal freehold owners, because amending the Mining Act to remove these rights only in relation to national parks would most likely breach the Racial Discrimination Act (Cth) (RDA).

2. Flora and fauna management

Conflicting attitudes towards feral animals continues to be a source of debate within park administration in the Northern Territory.²⁸ Aboriginal people see the role of rangers as protecting animals, and consider that feral animals have a legitimate place in nature and belong to the country,²⁹ despite sound conservation principles supporting the removal of any feral animals to protect native fauna and flora.

While many conservation organizations support the right of Aboriginal people to hunt, fish and collect on Aboriginal land, they reserve the right to oppose practices that would lead to possible threats to endangered or protected species

3. Management Board Structure

The majority of submissions received were silent on the issue of how the parks administration process would work. The Consultation Paper is silent on the constitution of the Board. Presumably, the Board will consist of traditional owners

²⁴ Personal communication, James Bowie, Media Relations, Chamber of Minerals and Energy.

²⁵ Review of the Project Development Approvals System (Keating Review) available at <http://www.doir.wa.gov.au/investment/5112DFCB4FC04B158C7DDFD143883F4B.asp>, accessed 4/5/05.

²⁶ Sutherland, J, & Smyth D, *Investigating Conservation Partnerships with Indigenous Land Holders, phase one report: Legislative Options and Constraints*, Draft. Atherton, Smyth, & Bahrtdt Consultants (1995).

²⁷ *Mining Act 1978 (WA)* section 29.

²⁸ See: Lawrence, D, *Managing Parks/Managing "Country": Joint Management of Aboriginal Owned Protected Areas in Australia* (Parliamentary Library of Australia, 1997), available at <http://www.aph.gov.au/library/pubs/rp/1996-97/07rp2.htm> (accessed 22/4/05).

²⁹ Rose, B, *Land Management Issues: attitudes and perceptions amongst Aboriginal people of Central Australia* at 91 (Central Land Council, 1995).

and government representatives, with a potential slight majority of traditional owners. Serious concern is expressed by the CME, PGA and even the Australian Conservation Foundation (ACF) – a committed supporter of the proposal – that no provision is made mention for competing interests to be represented on the Board, or for any of those interest groups to have any role in the development of policies and administration of management plans.

Experience in America has shown that the most effective agreements are ones where all key interest groups have a say in the process.³⁰ One of the key lessons from joint management in Australia has been that it is often a day-to-day process of ongoing negotiation and co-operation.³¹ All parties need to be amicably involved in decision making.

4. Proposal not properly considered – money, bureaucracy, conflict

The CME suggests that, “[i]n its current form, the recommendations will very likely attract the same type of problems and uncertainties that have dogged the native title processes since inception; unclear rules, potential for conflict, extensive bureaucracy, costs and delays.”³² Additionally, previous experience indicates that the lack of Aboriginal funding to be a major impediment to successful agreement negotiation³³.

It is well documented that successful joint management requires large scale funding,³⁴ at least in the early stages. Funding for Aboriginal people to access information and implement management plans is a core component of its success.³⁵

5. Problems with the title granted, and increased control over Aboriginal people

A grant of inalienable freehold title means the title is effectively all but frozen. It cannot be sold or dealt with in any way. In essence, it is not true “freehold title,” and the proposal has been criticised by the Federal government and Aboriginal groups for this very reason.³⁶ The CME and PGA are totally opposed to the granting of inalienable freehold title to groups when they have not “earned” it under the NTA.

Joint management negotiations have also been criticised in that they “often result in ridiculous sacrifices of control and autonomy [by Aboriginal people] for the recognition of secure title.”³⁷ Moreover, some Aboriginal people believe joint management imposes land use and land management regimes that will undermine or

³⁰ Ross, H, *Prospects for Co-Management in Australia*, presented at “Crossing Boundaries”, the seventh annual conference of the International Association for the Study of Common Property, Vancouver, British Columbia, Canada (June 10-14, 1998).

³¹ Lawrence, above note 28.

³² Heaslip T, Chamber of Minerals and Energy WA Submission on CALM’s consultation paper: *Indigenous Ownership and Joint Management of Conservation Lands in Western Australia* (Chamber of Minerals and Energy WA, 2003) [hereinafter CME submission].

³³ Keating review, above note 25.

³⁴ Lawrence, above note 28; and Personal communication – Peter Sharpe, Policy Director, Department of Conservation and Land Management.

³⁵ This is a key feature of the NNTT submission, which notes in its executive summary ‘Co-management schemes will require significant resource allocations in order to achieve the desired and intended outcomes’. See also, ACF submission at 12, Yamatji submission at 18.

³⁶ Lawrence, above note 28; and Personal communication – Peter Sharpe, Policy Director, Department of Conservation and Land Management.

³⁷ Strelein, LM, ‘Indigenous people and protected landscapes in Western Australia’, [1003]10 (6) *EPLJ* 390.

sell out Aboriginal autonomy and control over land and resources, and lead to a reliance on non-Aboriginal expertise and management systems that devalue Aboriginal traditional knowledge and practices.³⁸

6. Achieving de facto Native Title without due process under NTA

The CME and PGA assert, that, given the High Court determined native title does not exist over vested reserves,³⁹ the WA initiative should not be a mechanism for creating a de facto native title where the traditional owners and the management rights granted to them are determined without due process such as exists under the NTA. The CME, at least, in its proposal supports the concept of greater Indigenous involvement in the management of conservation lands, but it argues that does not necessarily mean that the land must be owned or majority managed by an Indigenous group.

Added fears are expressed that the proposal could instigate a quasi right to negotiate. Currently, where lands are claimed or held by native title claimants / holders, industry is subject to the NTA procedural “right to negotiate.”⁴⁰ At present, given that native title has been extinguished by the vesting of reserves, mining companies, subject to state law, can operate in reserves without reference to the NTA. The right to negotiate does not apply.

7. Are Aboriginal groups really still traditional in their practices?

While the proposal makes explicit reference to World Conservation Union (“IUCN”) principles,⁴¹ the CME and PGA dispute the assumption in the IUCN principles that Indigenous people are inherently good land managers. They assert the “modern” use of vehicles, guns, chainsaws and dogs is inconsistent with traditional methods, and pose very real risks to biodiversity and conservation objectives in many parks. There are two limbs to this claim. First, they claim that Aboriginal people no longer carry out true traditional hunting methods as raised in *Yanner*,⁴² which exemplified the increasingly blurred line of what constitutes “traditional” hunting. The second claim should be rejected outright. Simply because an Aborigine has a vehicle, gun, chainsaw or dog does not mean he or she poses a risk to biodiversity.

8. No dispute resolution discussed

The paper is largely silent on how disputes would be settled. In Kakadu and Uluru, there have been and still are real tensions and differences between the Traditional Owners and park managers on land management and traditional practices.⁴³

³⁸ Australia, Parliament, House of Representatives, Standing Committee on Environment, Recreation and the Arts, *Biodiversity: the role of protected areas*, at 67 (AGPS, 1993); and Craig, D, “Environmental law and Aboriginal rights: legal framework for Aboriginal joint management of Australian national parks,” in Birkhead, J, De Lacy, T, & Smith, L (eds), *Aboriginal Involvement in Parks and Protected Areas*, at 147 (Aboriginal Studies Press, 1992).

³⁹ *Western Australia v Ward* [2002] HCA 28 at 259.

⁴⁰ *Native Title Act 1993* (Cth) section 29.

⁴¹ Beltran, J, (ed), *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies* (IUCN, Gland, Switzerland and Cambridge, UK and WWF International, 2000).

⁴² The Court considered whether or not attention should focus on the purpose of the activity, rather than on the methods or the technologies used, but ultimately reached its decision by finding s 7 of the *Fauna Conservation Act 1974* (Qld) did not vest absolute property in fauna in the Crown.

⁴³ For example, the use of fire. See Sultan, R, Craig, D, & Ross, H “Aboriginal joint management of Australian national parks: Uluru-Kata Tjuta: case study,” in *Inter-Commission Task Force on Indigenous Peoples: workshop papers: workshop 31 March-2 April 1993*, 1-18 (IUCN, 1993).

9. Increased layers of bureaucracy

The CME and PGA also raise concerns about amending legislation to provide for the preservation of Aboriginal heritage. They argue that the WA already has an Aboriginal Heritage Act that is intended to protect Aboriginal Heritage, and given that the Act applies to all land, including the conservation estate, it is unclear what purpose the proposed amendment would achieve, other than add an extra layer of bureaucratic process.

However, for the state to effectively facilitate its proposal, amending legislation to manage cultural heritage issues is imperative and serves two purposes: first, to enable cultural heritage to be considered in management plans developed between traditional owners and government; and second, to facilitate the acknowledgement that for Aboriginal people, their conception of “environment” or “country,” is not simply the tangible, but also the intangible.⁴⁴

10. Reviving native title

Perhaps the biggest concern expressed by the CME and PGA is that under the NTA, implementing WA’s proposals could revive native title over areas where it would otherwise be extinguished. A grant of inalienable freehold title for conservation reserves would mean that native title claims could then be made over these areas on the basis of s 47A of the NTA, thereby raising potential conflicts with other land uses

11. Who is a traditional owner?

Finally, the proposal is largely silent regarding the identification of correct traditional owners. Such a process is by no means easy, and is fraught with controversy.⁴⁵ Identifying the appropriate traditional owners and putting in place corporate entities that reflect traditional decision making processes is extremely difficult, time consuming and expensive. Perhaps, of greater concern to the CME and PGA, is that the paper defines traditional owners as “Aboriginal people with a customary or traditional association with the land, regardless of their common law native title.” Even the NNTT notes, “[i]t is critical that CALM adopt clear criteria upon which it can base an assessment of the identity of the appropriate traditional owners of any area of the conservation estate.”⁴⁶

B. Support for the Proposal

Despite the varied concerns with the Consultation Paper described above, the proposal has many benefits that appear to have been ignored by the main opponents of the proposal. The key advantages of the proposal are outlined below.

1. Cost Savings

Joint management will arguably result in greater self determination for Indigenous Peoples, which, *in the long term*, will lead to a greater self sufficiency and decreased

⁴⁴ See: ATSIC definition of Wilderness, Aboriginal and Torres Strait Islander Commission, *A Fine and Delicate Balance: a discussion paper on ATSIC’s environment policy*, at 17 (ATSIC, 1994).

⁴⁵ Brennan, S, *Native Title in the High Court of Australia a decade after Mabo*, available at <http://www.gtcentre.unsw.edu.au/Public-Law-Review-native-title-as-published.doc> (accessed 2/5/05).

⁴⁶ National Native Title Tribunal, Submission to the Western Australian Government’s Indigenous Ownership and Joint Management of Conservation Lands in Western Australia Consultation Paper, presented in July 2003, at 2 [hereinafter NNTT submission].

dependence on government welfare. The experience in the Northern Territory⁴⁷ has meant that traditional owners of jointly managed parks receive a share of the tourism income, which can then be spent as the people see fit. Moreover, joint management of parks gives rise to potential joint management of resources, further facilitating the economic independence of Indigenous peoples

2. Considering a greater scope of issues than under NTA

One of the biggest advantages that negotiated joint management agreements offer is that the agreement may well contain provision for important Aboriginal issues and interests in areas which are not claimable under the NTA. These include, but are by no means limited to: resource development; environmental protection; and cultural heritage matters, such as performing ceremonies and ensuring that cultural obligations are maintained.⁴⁸

3. Treats Aboriginal groups and issues individually, not collectively

Joint management can also address the diversity of Indigenous communities across the country (and their particular rights, practices and interests), where the NTA fails by being too broad based.⁴⁹ The uniqueness, diversity and historical experiences of Aboriginal communities across Australia is well documented.⁵⁰ Treating Aboriginals identically under the NTA reinforces Aboriginal beliefs that non-Aboriginal Australian's have little understanding, or respect, of Aboriginal culture and identity.⁵¹

4. Greater legal certainty, less delays

As the CME notes in its submission, the NTA process is dogged by uncertainty. While the WA proposal is light on detail, The NNTT notes that with more information, it potentially offers a solution to many native title claims in the state where conservation lands are concerned.⁵²

5. More Parks

One of the key effects of *Ward*, as suggested by the State government and ACF,⁵³ is that it may result in an overall decrease in the gazettal of new protected areas, and national parks. Clearly this is not in the interests of the State's conservation agenda. Many important areas that have been identified and recommended by the Conservation Commission and the Marine Parks and Reserve Authority for gazettal as nature conservation reserves and marine reserves are under native title claim. Successful implementation of the proposal will enable the state to create these reserves, and avoid any potential claims under the RDA or NTA for compensation.

⁴⁷ Gibson, S, "'This Rock is Sacred": the Northern Territory Government and the handback of Uluru (Ayers Rock-Mount Olga) National park, November 1983 May 1986'. Unpublished Graduate Diploma of Arts (History) thesis, Northern Territory University 1994.

⁴⁸ Lawrence, above note 28.

⁴⁹ Russell-Smith, J, "Flora", in Press, T, Lea, D, Webb, A, & Graham, A, (eds) *Kakadu: natural and cultural heritage and management*, 127-66 (Australian Nature Conservation Agency and the North Australia Research Unit, Australian National University, 1995).

⁵⁰ Johnston, above note 9; and Lawrence, above note 28.

⁵¹ Lawrence, above note 28.

⁵² NNTT Submission at 1.

⁵³ Consultation Paper at 5; and Hill, R, & Mann, M, *Indigenous Ownership and Joint management of Conservation lands in Western Australia Consultation Paper*, A Joint Submission from Environs Kimberly and the Australian Conservation Foundation, at 3 (December, 2003) [hereinafter ACF submission].

6. Social Justice: Aboriginal control of land

As the Consultation Paper notes, “one aspect of difficulty for Indigenous people has been their inability to gain secure access to, and reasonable authority over, their traditional lands.”⁵⁴ The paper also notes that, “[t]he State Government wishes to put in place joint management mechanisms that will allow for Indigenous aspirations... to be met... consistent with [the government’s] publicly stated position of achieving a level of land justice for the Indigenous citizens of the State.”⁵⁵

Clearly, the government recognizes the inherent difficulty Aboriginal people face, especially post-*Ward*, in obtaining any meaningful native title providing them with a reasonable degree of control over their traditional lands. The effect of the government’s proposal is two-pronged: first, to increase its conservation estate; and second, facilitate land rights and social justice for Aboriginal groups where they otherwise would not be able to do so under the NTA.

Aboriginal joint management of parks is not, however, a panacea for solving social justice issues. Experience shows that they have not yet, and will not in the foreseeable future, fundamentally alter chronic levels of Aboriginal poverty, and associated social consequences such as poor health, housing, and education.⁵⁶ While the Government’s proposal is a step in the right direction, it is not the ultimate solution for alleviating the plight of Aboriginal people.

7. Reconciliation

As touched on earlier, satisfactory arrangements with regards to joint management could potentially reduce points of tension within Australian society, contribute to the maintenance of viable indigenous cultures and land use traditions, and contribute to the goal of reconciliation.⁵⁷ By having Aboriginal people involved throughout the park’s management, non-aboriginal Australians will gain a greater appreciation of the cultural values of Aboriginal people.

8. Tourism

While greater Aboriginal involvement in national parks can occur without the granting of inalienable freehold title, it is very likely that tourism will benefit from more parks being jointly managed. For overseas tourists, Aboriginal culture and heritage is a major drawcard. If they do not see what they want, they will not come back. Moreover, it is unlikely Aboriginal communities will be committed to the process if they do not see joint management as a means for re-establishing control over traditional lands, as assisting in the maintenance of cultural and community identity, and as part of a wider social justice package.⁵⁸

Despite the potential advantages tourism brings, it is also a point of contention. Increased visitor numbers to both Kakadu and Uluru have also brought increased

⁵⁴ Consultation Paper at 5.

⁵⁵ *Id* at 1.

⁵⁶ Symth, D, Chapter 4, in Baker, R, Davies, J, and Young, E, (eds), *Working on Country – Contemporary Indigenous Management of Australia’s Lands and Coastal Regions* (Oxford University Press, 2001).

⁵⁷ Nettheim, Meyers & Craig, above note 12 at 377- 430.

⁵⁸ Lawrence, above note 28.

pressures. Heavily visited sites in Kakadu are seen as “sacrificial” areas, and Aboriginal people and park management are reluctant to approve access to other significant cultural sites.⁵⁹ Meanwhile, at Uluru, the refusal of a large majority of people to respect the traditional owners’ wishes not to climb Uluru is a simmering point of conflict.⁶⁰ Tourism remains the largest single issue of concern to both park management and traditional owners in these parks.⁶¹

9. Employment

The paper proposes to increase employment of Aboriginal people through all levels of park management. The plight of Aboriginal Australian’s unemployment is well documented.⁶² Increased Aboriginal employment in park management is an important step, though it should be noted that experience in the Northern Territory has shown the vast majority of positions held by Aborigines are low-end positions, and progress to higher management positions is hampered by poor literacy and numeracy skills.⁶³

10. Resolution of conflicting rights

Given the High Courts decisions in *Wik* and *Yarmirr*, there is now an increased need to negotiate environmental and resource issues between Aboriginal and non-Aboriginal Australians. An advantage of the proposal is that it offers a practical formula for resolving environmental management and resource use in situations where property regimes overlap, especially where native title rights co-exist with private property rights of other landholders.⁶⁴

11. Conformity with Commonwealth environmental legislation

The *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) (EPBCA) includes specific provisions regarding the role of Aboriginal Australians in the management of national parks. Implementation of the proposal in WA parks coming under the auspices of the EPBCA will ensure a smooth transition to these requirements, preventing potential conflicts between State and Federal conservation management regimes.

12. Reduced compensation claims

The High Court in *Ward* held that the vesting of reserves under section 33 of the *Land Act 1933* (WA) extinguishes native title, and that such extinguishment may entitle a native title claimant to seek compensation under the NTA.⁶⁵ Successful joint management negotiations can avoid these claims.⁶⁶

⁵⁹ Russell-Smith, above note 49.

⁶⁰ Willis, J, “Two laws, one lease: accounting for traditional Aboriginal law in the lease for Uluru National Park,” in Birckhead, J, De Lacy, T, & Smith, L (eds) *Aboriginal Involvement in Parks and Protected Areas* (Aboriginal Studies Press, 1992).

⁶¹ Lawrence, above note 28.

⁶² See further –*Indigenous employment in the Public Sector - Valuing the difference*, Office of Equal Employment Opportunity, Government of Western Australia, November 2002, available at http://www.oeeo.wa.gov.au/publications/Indigenous_Employment_Strategy.pdf#search='aboriginal%20employment%20australia' (accessed 13/5/05).

⁶³ Smyth, above note 56.

⁶⁴ Ross, above note 30.

⁶⁵ *Western Australia v Ward* [2002] HCA 28 at 222.

⁶⁶ Personal communication, Peter Sharpe, Policy Director, Department of Conservation and Land Management.

13. Weed management

Unlike feral animal control, Aboriginal people and conservation agencies share similar viewpoints on weed management.⁶⁷ In Kakadu and other jointly managed parks in the Northern Territory, continued emphasis on weed management by Aboriginal people reflects a concern that the “country” passed on to the next generation should be clean and well managed.⁶⁸

14. Aboriginal people know the land, and live on it

The ecological role of Indigenous People has only recently begun to be recognized.⁶⁹ Despite Aboriginal people being temporarily removed from their land in some circumstances, there is still a wealth of experience and knowledge traditional owners can bring to joint management arrangement. A co-operative approach combining thousands of years of rich and detailed knowledge in partnership with world-class data collection and scientific information, will ultimately lead to better managed national parks.⁷⁰

CONCLUSION

The impacts of the dispossession of Aboriginal Australian’s from their lands are well documented. WA’s joint management proposal is not the panacea to address all the issues that arise from this dispossession, but it is an important step in the right direction as first proposed by the Millstream recommendation.⁷¹ The potential of world class national parks jointly managed with traditional owners should be acknowledged as an exciting prospect by environmentalists and Aboriginal groups alike.

Nonetheless, serious concerns need to be addressed. First, government as social justice advocate for Aboriginal people on one hand, and manager of the conservation estate of WA on the other, raises a potential conflict of interest. There are conflicts between environmentalists, conservation agencies, and Aboriginal over feral animal control and differing attitudes to “traditional” hunting. And there are potential hurdles facing the mining and pastoral industries that arise from the proposal

Several important legal issues have been raised which warrant attention if the proposal is to work. Finally, the proposal has been heavily criticized by all groups for

⁶⁷ Weed control is a serious problem throughout Australia, threatening native biodiversity. See: CSIRO, *Weeds threaten Australia’s biodiversity and economic growth*, available at <http://www.csiro.au/index.asp?type=mediaRelease&id=Weeds&stylesheet=mediaRelease> (accessed 13/5/05).

⁶⁸ Davies, J *et al.*, *SUSTAINING EDEN: Indigenous community wildlife management in Australia*, available at <http://www.eniar.org/news/pdfs/Sustaining%20Eden.pdf>, (accessed 4/4/05).

⁶⁹ United Nations Conference on Environment and Development. *Outcomes of the Conference (Agenda 21) Rio de Janeiro*. [Rio de Janeiro], Ministry of External Relations and Trade & Ministry for Environment, 1992

⁷⁰ Craig, above note 38 at 147.

⁷¹ See above note 9.

its lack of detail in many key areas, not least its provisions for funding and management board operations.

Joint management is not simply a conservation agreement. It is part of the wider issue of social justice, community development and preservation of cultural identity for Aboriginal people. This is not fully understood nor recognized by key interest groups such as the PGA and CME, and, arguably, some environmental groups. For joint management to work, it requires “committed, sensitive and culturally aware players in the cooperating conservation agencies.”⁷²

It is time for the WA Government to act on the proposal instead of merely giving it lip service. However, clearly greater detail, education and explanation of the proposal is required, to give greater confidence and understanding to the key parties, as well as the public, enabling the joint management of WA’s national parks successful implementation.

⁷² De Lacy, T, “The Uluru/Kakadu model Anangu Tjukurrpa: 50,000 years of Aboriginal law and land management changing the concept of national parks in Australia,” *Society and Natural Resources*, 480-481, 493 (1994).