

Under both Commonwealth and WA laws Aboriginal people may have the right to access pastoral leases for traditional purposes. Please note that people’s rights of access under the Commonwealth Native Title Act are not covered in this brochure.

### THE LAND ADMINISTRATION ACT 1997 (WA)

Under Western Australia’s *Land Administration Act 1997 (WA)*, Aboriginal people can hunt and gather traditional bush foods on areas of ‘unenclosed and unimproved’ pastoral lease land.

Section 104 of this Act<sup>1</sup> reads as follows:

‘Aboriginal persons may at all times enter upon any unenclosed and unimproved parts of the land under a pastoral lease to seek their sustenance in their accustomed manner’ (emphases added).

### Applying the law

Section 104 of the Act means that Aboriginal people can hunt for and gather bush foods on areas of pastoral lease land that are not enclosed and have not been improved (it must be both of these things).

The rules are different if the pastoral lease was granted before 1934<sup>2</sup>. On these leases Aboriginal people can hunt and gather bush foods on all areas that are ‘unenclosed’. Even where an area is enclosed, but otherwise ‘unimproved’, Aboriginal people can still hunt and gather bush foods – refer to the table at right:

### What does ‘enclosed’ mean?

According to the Federal Court of Australia, ‘enclosed’ land means land that is ‘fenced’<sup>3</sup>.

### What does ‘improved’ mean?

According to the Federal Court of Australia, ‘improved’ land means land where someone has carried out an ‘improvement’<sup>4</sup> including, but not limited to, things like:

- Wells, reservoirs, tanks or dams that are permanent fixtures and available for the use of livestock;
- Fences, sheds and buildings erected for farm or shearing and station purposes; or
- Cultivation, clearing, grubbing, drainage, ring barking or any improvement for maintaining or improving the agricultural or pastoral capabilities of the land.

Note: This does not necessarily mean that the whole pastoral lease is off limits just because dams, sheds or windmills have been erected at certain points across the property.

For example, an area directly surrounding a dam would reasonably be considered ‘improved’ land, but land one kilometre away from the dam may *not* be considered ‘improved’ land.<sup>5</sup>

STATUS OF PASTORAL LEASE LAND			ABORIGINAL PEOPLE’S RIGHT OF ACCESS	
	Is land area enclosed?	Is land area improved?	Yes	No
Lease granted before 1934	No	No	✓	
	Yes	No	✓	
	No	Yes	✓	
	Yes	Yes		×
Lease granted after 1933	No	No	✓	
	Yes	No		×
	No	Yes		×
	Yes	Yes		×

### What does ‘seek sustenance’ mean?

Sustenance is another word for food. ‘Seek sustenance’ means hunting, fishing and gathering food for the purpose of satisfying personal, domestic or non-commercial communal needs.<sup>6</sup>

### What does ‘accustomed manner’ mean?

‘Accustomed manner’ includes the use of modern firearms and motor vehicles to obtain bush foods.

These are allowed because the High Court of Australia has said that traditional laws and customs of Aboriginal people can incorporate ‘contemporary modes of existence, sustenance and exploitation’<sup>7</sup> (eg, use of modern firearms and vehicles).

### Reasonableness

Where both Aboriginal people and holders of pastoral leases have mutual rights to be present on the same area of land, the law requires that each must exercise their rights in a reasonable manner and have regard to the interests of the other.<sup>8</sup>

For example, the holder of a pastoral lease or station manager can build a fence in order to prevent cattle from escaping the land, but cannot build a fence solely to prevent Aboriginal people from entering the land for lawful purposes.

### Inconsistency

Where there is any inconsistency between the rights of Aboriginal people and the rights of the lessee, the rights of the lessee will prevail.<sup>9</sup>

For example, where the lessee reasonably needs to build a fence to restrict cattle movements, with the result that the movements of Aboriginal people would also be restricted, the pastoral lessee is permitted to build the fence.

<sup>1</sup> replaced section 106 of the former *Land Act 1933 (WA)*

<sup>2</sup> pursuant to provisions of the former *Land Act 1898 (WA)*; in force until 1933

<sup>3</sup> *State of WA v Ward* (2000) FCA 191, at [321]

<sup>4</sup> As above, at [323]

<sup>5</sup> As above, at [324]

<sup>6</sup> *Neowarra v Western Australia* [2004] FCA 1092

<sup>7</sup> *Mabo v Queensland [No 2]* (1992) 175 CLR 1 Brennan J at 70 (CLR), see also Deane and Gaudron JJ at 110 (CLR)

<sup>8</sup> See *Boyle v Holcroft* [1905] 1 IR 245; *Peech v Best* [1931] 1 KB 1; and *Mason v Clarke* [1955] AC 778

<sup>9</sup> *Neowarra v State of Western Australia* [2003] FCA 1402; *Daniel v State of Western Australia* [2003] FCA 1425

## SUMMARY

- Aboriginal people have rights to hunt, fish and forage, for non-commercial purposes, on areas of pastoral leases that are unfenced and unimproved. On certain pre-1934 pastoral leases, the rights also extend to areas that are, either:
  - unfenced; or
  - fenced but unimproved.
- It is important that pastoral lease holders, including station managers, and Aboriginal people are respectful of each other's rights. Both need to be sure that actions towards each other are both reasonable and courteous.
- The main concern that most station owners/managers have about visitors is that their property and livestock are not damaged, and that the day-to-day management of their livestock and land is not disrupted.

Visitors should always leave gates as they find them (sometimes open; sometimes shut). Never leave a camp fire burning and always take any rubbish home with you. If you are using firearms for hunting, be extra careful that it is safe – you must be well away from the homestead and be sure that no livestock are nearby.

- It is always a good idea to inform the station manager when visiting a station. This will avoid people becoming concerned or alarmed if they hear or see firearms being used.

Giving the station manager the courtesy of knowing you are there will also help build better relationships between Aboriginal people and pastoralists. This will help ensure that your visit is enjoyable, while at the same time helping ensure that future visits by you and others will also be enjoyable.



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# The Rights of Aboriginal People on Pastoral Leases in WA

