Yamatji Marlpa
ABORIGINAL CORPORATION

Our Ref:
Your Ref:
Office: Perth
Date: 21 October 2022

To: Department of Planning, Lands and Heritage
140 William Street
Perth WA 6000

By email: LAA2022@dplh.wa.gov.au

To Whom It May Concern

RE: YMAC Submissions: Consultation Draft – *Land and Public Works Bill 2022* (WA)

1. Yamatji Marlpa Aboriginal Corporation (**YMAC**) is the Native Title Representative Body (**NTRB**) for what are described as the Pilbara (Marlpa) and Geraldton (Yamatji) regions of Western Australia. YMAC is run by an Aboriginal Board of Directors, representing several native title groups, each of whom has their own language, culture, traditions and protocols. YMAC provides a range of services, including native title claim and future act representation, heritage services, executive office, community, economic development assistance and natural resource management support.

2. YMAC refers to the email from Alison Gibson to Simon Hawkins, dated 7 October 2022, inviting submissions in regard to the consultation draft *Land and Public Works Legislation Amendment Bill 2022* (WA) (**Bill**). Please see YMAC's submissions below.

3. For the purpose of these submissions, the term 'Aboriginal entity' refers to Aboriginal people, registered native title bodies corporate (**RNTBCs**) and any other group or corporation comprised of Aboriginal persons.

Introductory comment

4. YMAC refers to its previous submissions in response to the Exposure Draft: Proposed Policy Framework guiding the use of Diversification Leases on Crown Land under the *Land Administration Act 1997* – June 2022 (**Draft Policy**), which was released on 28 June 2022 (**YMAC Policy Submission**). In the YMAC Policy Submission, on page 2, YMAC requested the Bill to be circulated for analysis and consultation before it was submitted to Parliament.

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5. YMAC acknowledges the Bill was released prior to its introduction to Parliament and welcomes the opportunity to provide submissions on the Bill. However, the changes proposed by the Bill are extensive and the total consultation period for the Bill is a mere 10 business days (7 October – 21 October 2022). YMAC submits this is insufficient time for a proper analysis of the proposed Bill. Any meaningful consultation is just not possible in this timeframe.

6. The Aboriginal Empowerment Strategy 2021-2029 published by the State Government (**Empowerment Strategy**), on page 27, states (emphasis added):

> *A core principle of the Strategy is that policy decisions about Aboriginal people cannot be made without Aboriginal people. For decisions with **high potential impact or opportunity for Aboriginal people, this means partnership and/or shared decision-making**. For other decisions, it means **genuine engagement** with affected Aboriginal people at a level proportional to the potential impact of opportunity.*

7. The amendments proposed by the Bill to the *Land Administration Act* (**LAA**) and *Public Works Act 1902* (WA) (**Public Works Act**) are significant. The Bill will shape the long-term renewable energy landscape, and permanently change the tenure composition of Western Australia. The Bill will have a 'high impact' on Aboriginal entities, in particular RNTBCs, which will be entering agreements with proponents for long-term, multi-generational land-disturbing projects. The Bill also presents 'an opportunity' for Aboriginal entities to secure tenure themselves.

8. YMAC acknowledges there has been some consultation in regard to the broad concept of diversification leases over the past 12 months. Importantly, however, those consultations did not:

   - allow any opportunities for 'partnership' or 'shared decision-making' with Aboriginal entities;
   - feature genuine engagement with Aboriginal entities, in which feedback was reflected upon and adopted; or
   - include discussions of the amendments to the Public Works Act or amendments to the pastoral lease provisions in the LAA.

9. The Bill has missed an opportunity to establish robust practices, from the outset for the renewable energy industry, to ensure decisions are not made ***for*** Aboriginal entities but rather ***with*** Aboriginal entities.

10. YMAC submits the State Government must delay the introduction of the Bill to allow for a co-design period, during which the State Government complies with the core principles of its Empowerment Strategy.

11. At a minimum, a further period of time prior to the Bill's introduction – in which meaningful consultation with Aboriginal entities can occur – is essential.

12. Notwithstanding the above, YMAC makes the below non-exhaustive submissions in relation to the draft Bill, and refers the State Government to the YMAC Policy Submissions in regard to policy considerations.

13. YMAC strongly supports the submissions made by the First Nations Clean Energy Network, titled 'Briefing Note – Western Australia – Land and Public Works Legislation Amendment Bill 2022 (Diversification leases)' (**FNCEN Submissions**). In particular, YMAC re-iterates the following, as summarised on page 3 of the FNCEN Submissions:

> *A fair and balanced process for the grant of diversification leases which is built on genuine co-design, partnership and engagement, and enshrined in the* Land Administration Act 1997, *will ensure that renewable energy developers can harness the unique opportunities that WA's renewable energy resources offer in a way that recognises and enables native title parties to participate as partners in this important economic development opportunity.*

Amendments to LAA – Diversification Lease

General comments

14. YMAC acknowledges the diversification lease provisions in the Bill are consistent with previously provided policy documents, and consultation presentations. However, the Bill still fails to clarify critical questions about the grant process of a diversification lease. For example:

- Specifically in regard to renewable energy projects, how will a proponent's feasibility study be connected to the eventual grant of a diversification lease? Will the State Government grant a section 91 licence under the LAA to anyone who applies (subject to approvals)? Will the State Government only grant a diversification lease to a proponent with a s 91 licence? If there are two proponents who have a section 91 licence over the same area and both apply for the grant of a diversification lease, how will the State Government choose the successful proponent? Will section 88 of the LAA (which provides the State Government the power to grant an option to lease) be utilised by the State Government to grant particular proponents the option of a diversification lease, even if they have not yet commenced feasibility studies?
- How will the State Government ascertain if a public tender or private treaty is appropriate? If the diversification lease is contingent on the surrender of a pastoral lease, will the grant be the subject of a private treaty? If the land is unallocated crown land, will it automatically be subject to a public tender? What are the criteria for a public tender?
- Is support from the RNTBC required before a grant of a diversification lease is awarded? If Indigenous Land Use Agreement (**ILUA**) negotiations breakdown, will the diversification lease be opened for public tender?
- Will Aboriginal entities be informed of the proposed terms, conditions and length of a diversification lease before deciding to negotiate an ILUA? Will other stakeholders, such as any communities on the land or other interest holders, be consulted during a public tender process?

15. The consequence of leaving these questions unanswered are as follows:

- Aboriginal entities are left to navigate the negotiation process with proponents, who are likely to have significantly more resources, without understanding the process; and
- Aboriginal entities may miss potential opportunities in the renewable energy space because they are not fully informed about the process.

16. The Empowerment Strategy, at page 31, notes the State Government should be:

> *publicly providing clear, honest and accessible information about the Government's actions and their outcomes… [and ensure] that opportunities exist for outside parties to engage with Government agencies about their actions and the outcomes, to ask for explanations and to seek future commitments.*

17. YMAC submits, before the Bill is introduced to Parliament, the State Government must meaningfully engage with Aboriginal entities on the above questions.

Free, prior and informed consent enshrined in the LAA

18. Where a diversification lease is to be granted on Country that is subject to native title rights and interests, it is fundamental there be proper consultation and agreement with Aboriginal entities.

19. Free, prior and informed consent (**FPIC**) refers to the rights of Indigenous persons to provide consent on a free and informed basis, prior to any developments on their Country. The principles of FPIC are enshrined in various articles of the United Nations Declaration on the Rights of Indigenous People (**UNDRIP**). Australia is a signatory to the UNDRIP and the principles of FPIC are expected to be followed in Australia.

20. Expert Mechanism Advice No.2, 2011 on the Rights of Indigenous Peoples defines FPIC as follows:

- 'Free' implies no coercion, intimidation, or manipulation;
- 'Prior' implies that consent is obtained in advance of the activity associated with the decision being made, and includes the time necessary to allow Indigenous peoples to undertake their own decision-making process;
- 'Informed' implies that Indigenous peoples have been provided all information relating to the activity and that the information is objective, accurate and presented in a manner and form understandable to Indigenous peoples; and
- 'Consent' implies that Indigenous peoples have agreed to the activity that is the subject of the relevant decision, which may also be subject to conditions.

21. The Juukan Gorge Enquiry considered the principles of FPIC in detail. Paragraph 7.52 of the report entitled *A Way Forward: Final Report into the destruction of Indigenous heritage sites at Juukan Gorge* states:

To address FPIC, the following must be observed:

- *the timing and method of consent timeframes and sign-offs must be culturally appropriate and reflect decision-making processes that abide by the traditional law and custom of an affected Aboriginal and Torres Strait Islander group*
- *ongoing consent issues – how to communicate and seek consent over the life of a project*
- *remediation processes*
- *processes for dealing with new information – if an agreement is already in place between a proponent and Traditional Owners and new information is unearthed, a clear process should be in place. Any new information about the significance of sites, or any associated knowledge that has potential to change Traditional Owners' consent, should be disclosed, and the consent decision should be able to be revoked or altered.*

22. In the aftermath of Juukan Gorge it is the responsibility of governments to lead the "way forward" and enshrine the principle of FPIC in legislation.

23. YMAC acknowledges that DPLH forums with industry and traditional owners have included presentations stating that proponents are required to obtain informed consent of native title parties to s91 licences, and a registered ILUA, before the grant of formal tenure.

24. Clearly the intention is there. However, a provision must be included in the LAA, ensuring Aboriginal entities are consulted in an appropriate manner to make certain their free, prior and informed consent is provided before the grant of a diversification lease. The legislation should be clear that, unless this has occurred, a diversification lease will not be granted.

Best Practice Guidelines and Policy

25. While the Empowerment Strategy reflects a whole-of-government policy, YMAC submits that a more specific and embedded framework is required (**Best Practice Guidelines**), given the importance and impact of the developing renewable energy industry in Western Australia. Best Practice Guidelines that set a standard of engagement with Aboriginal entities – to which proponents are required to comply – are essential in the renewable energy context.

26. A requirement to comply with Best Practice Guidelines should be incorporated into the Bill. This will evidence the State Government's commitment to growth of the renewable energy industry based on genuine partnerships with Aboriginal entities.

27. There is an opportunity for the State Government to get this right from the start and avoid the potential for Aboriginal entities to be casualties from the rush to clean energy.

28. YMAC notes the example at section 4 of the *Electricity Infrastructure Investment Act 2020* (NSW) (as stated in the FNCEN Submissions, at Table 1, item 2). This is an example of the inclusion of a process in legislation, to ensure that when making a decision whether to grant a project to a proponent, consideration is given as to how the applicant has engaged with Aboriginal entities.

29. YMAC submits that a clear framework is likely to be an approach supported by many renewable energy proponents, whose corporate practices are increasingly informed by environmental, social and corporate governance (ESG)principles and the need to obtain a social licence to operate on Country.

Criteria for tender – social impact

30. As reflected in the YMAC Policy Submission, page 2, and in the Draft Policy, one of the criteria used to assess applications for a diversification lease is if 'the grant will provide social and economic opportunities to Aboriginal people / communities'.

31. YMAC is in strong support of this criterion, and submits it should be incorporated into the Bill. To give effect to the Bill, the policy should require the Minister, when assessing a diversification lease, to seriously consider:

- if the proponent has engaged early and meaningfully with native title parties (or other Aboriginal entity interest-holders) based on the principle of free, prior and informed consent;
- if the opportunities have been developed with, and by, the native title parties (or other Aboriginal entity interest-holders);
- if native title holders (and other Aboriginal entities) have had experience working with the proponent before and the status of that working relationship (in particular, whether the proponent was compliant with their heritage agreement during the feasibility stage of the project); and
- if the opportunities proposed contribute to the long-term economic, financial and governance development of Aboriginal entities.

32. The Minister must take feedback on the above directly from Aboriginal entities, specifically RNTBCs. YMAC submits this approach is beneficial for all parties because:

- proponents will have a clear understanding, from the commencement of a project, of the standard expected of them in regard to community engagement;
- there is a dedicated space for the opinions of RNTBCs and other Aboriginal entities where stakeholders are to be heard and considered;
- the broader community can have comfort in the fact the proponents selected for these long-term projects have a social licence to operate and are operating to the highest possible standard; and
- the State is acting in accordance with the Empowerment Strategy and fulfilling its own policy directive, as stated in report published by the State Government, titled *Western Australia: An outstanding place for renewable Hydrogen Investment*, on page 10:

> *Western Australia is additionally committed to building capacity of Traditional Owners to engage with the industry and negotiate the outcomes they want to see*

from these projects – including protecting cultural heritage, Native Title rights and interests, as well as positive social and economic outcomes.

Criteria for tender – financial and technical capacity

33. YMAC acknowledges, when considering the grant of a diversification lease, the Minister is also likely to consider the technical and financial capabilities of proponents. YMAC is concerned the State Government will place too much emphasis on these criteria, which will create barriers for Aboriginal entities that may wish to apply for their own diversification lease.

34. The State Government must recognise that some Aboriginal entities may not have the same technical or financial capabilities as immediately available as other proponents. The State Government must assess an application by an Aboriginal entity holistically, noting the social benefits of such a project.

35. As set out in the FNCEN Submissions, the proposed amendments to the LAA provide a unique opportunity to place native title holders as key participants in the development of the renewable energy industry in WA – including as project proponents.

36. YMAC submits that providing native title holders with a priority opportunity to undertake economic development activities on their lands and waters is consistent with the Empowerment Strategy and should be a clear focus of government.

Term

37. The Bill should specify a maximum term for a diversification lease. YMAC acknowledges many projects conducted on diversification leases will be long-term projects – however, if a maximum term is not prescribed in the Bill, there is no certainty or consistency as to when the leases may be renewed. This is discouraging for Aboriginal entities seeking to enter into an agreement with a proponent.

38. Further, it is likely the industry standard for renewable projects will change over the next 20 years. Aboriginal entities need certainty as to when a diversification lease will expire to ensure, when appropriate, agreements can be re-negotiated to reflect the new industry standard.

Option to lease

39. Section 88 of the LAA states the Minister may grant an option to lease over any Crown land. As currently drafted the reference to ‘lease’ in this provision includes a diversification lease.

40. There is the potential for numerous large tracts of land to be locked up by proponents while they determine which projects might be more immediately viable. YMAC is concerned this will result in land banking by well-resourced proponents who may effectively warehouse land so it cannot be utilised by other proponents, including Aboriginal entities. There is the potential for this to result in a competitive advantage to anyone holding an option to a diversification lease.

41. Clearly, land banking is not in the interest of Aboriginal entities but, more broadly, also not in the public interest. Accordingly, YMAC submits that diversification leases should be excluded from the operation of section 88 of the LAA.

Unenclosed and unimproved

42. YMAC notes section 92E of the Bill allows for Aboriginal persons to access 'unenclosed and unimproved parts of the land under a diversification lease'. YMAC refers to page 3 of the FNCAN Submissions, particularly in relation to the following statement (emphasis added):

> *Given that renewable energy projects can, in theory, continue indefinitely, and also that such projects can require vast areas of land and* ***limit and inhibit access and use of that land in very different ways to pastoral activities,*** *there are a range of important legal, policy and regulatory issues associated with diversification leases.*

43. The wording in section 92E of the Bill is the same wording used at section 104 of the LAA, which governs the access of Aboriginal persons to land subject to a pastoral lease. However, access to land subject to a diversification lease and a pastoral lease are not comparable. In practice, a large renewable energy project may severely restrict the access of Aboriginal persons to land in a way that pastoral activities do not. The wording offered in section 92E is not nuanced enough to deal with the reality of such projects.

44. YMAC submits the State Government needs to further amend the drafting of the Bill to ensure:

- the drafting contemplates the possibility that proponents may construct large and dangerous structures on a diversification lease; and
- there are restrictions on the size of 'enclosures' that can be constructed on diversification leases. This will ensure that a diversification lease does not, in practice, become a grant of exclusive possession.

Aboriginal Cultural Heritage Act

45. YMAC submits section 92F of the Bill is amended to include a requirement that a diversification lessee must comply with the *Aboriginal Cultural Heritage Act 2021* (WA) (**ACHA**). If the diversification lessee breaches the ACHA, it should be at risk of losing its diversification lease.

Amendments to the Public Works Act

46. As stated above, before any renewable energy project commences on native title land, there must be an ILUA negotiated with the relevant Aboriginal entity in accordance with the principle of FPIC.

47. YMAC refers to the following amendments to the Public Works Act:

- a replacement definition of ‘public work’ to mean a work, facility, building, structure or other thing that is declared, or of a class declared, under section 2A or of a class described in Schedule 1;
- section 2A, which states the Governor, may by order, declare a work, facility, building, structure or thing specified in the order, as a public work;
- Schedule 1, which includes a number of additional ‘classes’ of public work.

48. Schedule 1 includes the following class of public work at tem 24:

    Works for or in connection with the production, generation, transmission, distribution or storage of electricity, gas or any other form or source of energy.

49. YMAC notes the proposed amendments would provide the State Government with the power to compulsory acquire land in a number of additional circumstances. The amendments would empower the State Government to, in theory, acquire land for a renewable energy project, circumventing the need for an ILUA to be obtained with native title holders. It is concerning that, as the Bill is currently drafted, there is nothing that expressly prevents the State taking land from native title holders for renewable energy projects.

50. The Draft Policy provides at paragraph 10:

    Where native title exists or may exist, the diversification lease proponent is required to negotiate an Indigenous Land Use Agreement (ILUA) with the relevant native title party to which the State is a party, unless another provision of the Native Title Act 1993 (Cth) *applies. All of the land uses for which the diversification lease is to be granted must be expressly permitted by the ILUA.*

51. YMAC submits the Bill must give effect to the policy position that an ILUA be obtained, as well as the principle of free, prior and informed consent to ensure the rights and interests of native title holders are respected and adequately protected. It is foreseeable that, in the rush to meet net zero emissions targets and address global climate change concerns, the State will be under pressure from proponents and its own goals, in relation to renewable energy. While this may be well-intentioned, it is critical that the rights of native title holders are not compromised in the process.

52. Further, YMAC has concerns that having a potential compulsory acquisition ‘fallback position’ contained in State legislation will result in an imbalance of power, in relation to negotiations between project proponents and Aboriginal entities. If, as the Draft Policy states – ‘all of the land uses for which the diversification lease is to be granted must be expressly permitted by the ILUA’ – there must not be any default situation available to proponents to potentially undermine the position of native title holders. YMAC submits the proposed legislation must ensure it is clear there will be no recourse available to compulsory acquisition in circumstances where an ILUA cannot be negotiated. To not do so jeopardises the rights of native title holders to ensure appropriate management of their Country.

53. The State Government must not resort to compulsory acquisition noting the social, economic and cultural consequences it has on Aboriginal entities – particularly native title holders who already have suffered the inter-generational trauma of dispossession followed by many years of struggle in seeking recognition of their rights to Country. For the State to inflict further inter-generational trauma by dispossessing traditional owners of their Country again through compulsory acquisition is unthinkable. Compulsory acquisition is not only heart-breaking and traumatic for Aboriginal entities it also hinders the potential for capacity-building and utilisation of that land, by future generations. It is acknowledged the State Government is likely very mindful of these implications and appropriately wary of taking land or relying on the compulsory acquisition process. While that might be the case, YMAC submits the very existence of the ability to do so cuts across a level negotiation landscape and hinders the empowerment of Aboriginal entities.

54. Most importantly, compulsory acquisition is the very opposite of agreement with native title holders on a free, prior and informed consent basis. Post-Jukaan Gorge, that consent is the standard that governments must meet. Accordingly, the LAA must expressly state that compulsory acquisition will not be an option where diversification lease applicants have not agreed to an ILUA with native title holders.

Concluding comments

55. If there are any questions or concerns with YMAC's submission, please do not hesitate to contact me via Executive Assistant Dionne Lamb (P: 08 9268 7000; E: dlamb@ymac.org.au).

Yours sincerely,

Simon Hawkins

Chief Executive Officer