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Date: 9 September 2022

To: Land and Public Works Legislation Amendments
Department of Planning, Lands and Heritage
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By email: LAA2022@dplh.wa.gov.au

To Whom It May Concern

**REF: YMAC Submission: Exposure Draft – Proposed Policy Framework
Guiding the use of Diversification Leases on Crown land**

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

YMAC refers to the media statement released by the Minister for Lands on 28 June 2022, titled 'Draft policy framework for diversification leases released for public consultation', which asked for feedback on the Exposure Draft: Proposed Policy Framework guiding the use of Diversification Leases on Crown land under the *Land Administration Act 1997* – June 2022 (**Exposure Draft**). Please see YMAC's submissions below.

YMAC's submissions address the following two questions from the online survey:

1. comments on the proposed policy framework; and
2. gaps in the proposed policy framework.

For ease of reference, our submissions reflect the structure adopted in the Exposure Draft.

1. Introductory comment

The WA Government has announced the draft bill to amend the *Land Administration Act 1997* (**LAA**) (**Draft Bill**) will be introduced to WA Parliament in the second half of 2022. As the WA Government is aware, the amendments

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proposed by the Draft Bill are significant, and will have a large impact on Aboriginal entities (including native title parties) and Traditional Owners.

YMAC is concerned the WA Government has provided the Exposure Draft for consultation in replacement of the Draft Bill. The Exposure Draft is a useful tool; however, it is only a short document that broadly discusses some of the proposed amendments.

YMAC submits the Draft Bill must also be circulated for analysis and consultation before it is submitted to Parliament.

2. Purpose of a diversification lease

YMAC acknowledges the need for alternative tenure under the LAA and therefore generally accepts the purpose of a diversification lease. However, the purpose stated at paragraph 1 of the Exposure Draft is very broad. YMAC requires further clarity as to whether the Draft Bill will provide a list of 'purposes' that a diversification can be used for (such as the list provided at Slide 6 of the presentation titled 'Land and Public Works Legislation Amendment Bill 2022 – Aboriginal Groups Session'). Until the Draft Bill is provided, YMAC cannot make any further comments regarding the purpose of a diversification lease.

3. Minimum considerations

'Case-by-case' assessment

Paragraph 3 of the Exposure Draft states diversification lease applications will be considered by the Minister for Lands, on a case-by-case basis. YMAC requests further information regarding the assessment policy. For example: if there are two proponents applying for a diversification lease over the same area, with contradictory land uses, will the WA Government preference one type of land use over another? Paragraph 8 of the Exposure Draft suggests this will be the case, however further insight is requested as to, at least initially, the WA Government's preference of land uses.

Economic opportunities for Aboriginal people

YMAC notes paragraph 3(d) of the Exposure Draft states one of the criteria used to assess applications for a diversification lease, if applicable, is if 'the grant will provide social and economic opportunities to Aboriginal people / communities'. YMAC agrees any application for a diversification lease should address how the proponent intends to provide opportunities to native title parties, or other Aboriginal entities. However, YMAC submits the WA Government must ensure this criterion is not treated as a 'tick-box' activity for proponents. The WA Government must critically analyse the proponent's submission to determine:

- if they have engaged early and meaningfully with native title parties (or other Aboriginal entities); and
- if the opportunities have been developed with, and by, the native title parties (or other Aboriginal entities).

In YMAC's experience, similar criteria have been satisfied by proponents stating they have 'engaged' or are 'in discussions' with a native title party. However, proponents must be willing to work with native title parties to develop opportunities, rather than dictating terms and benefits to the native title parties. This is consistent with page 33 of the Aboriginal Empowerment Strategy

2021-2029 (**Empowerment Strategy**), which states a key element of the strategy is ‘partnerships, shared decision-making and engagement.’

The proponent must be willing to meaningfully engage with the native title parties. The ‘opportunities’ proposed by the proponent must be useful and beneficial to native title parties.

Appropriate tenure

Paragraph 4 of the Exposure Draft foreshadows that the WA Government will consider what is the most appropriate tenure for an activity (for example, a lease under s 79 of the LAA will be more appropriate if the proponent requires exclusive possession). In line with this policy approach, YMAC submits the WA Government should also consider granting native title parties (or other Aboriginal entities) freehold or leasehold interests under s 83 of the LAA (**Section 83 Tenure**). The grant of Section 83 Tenure to Aboriginal entities allows those entities to secure a substantial revenue stream, either through their use of the land, or through a sub-lease or license to a third party. This is consistent with the Empowerment Strategy, page 22, which states ‘appropriate land tenure can facilitate culturally important use’.

YMAC notes for completion that Section 83 Tenure can impact on native title rights and interests. Any impact on these rights should be investigated and addressed with native title parties before a grant is made.

4. Granting the diversification lease

Influx of applications

YMAC understands the expansion of renewables is a WA Government priority. However, YMAC is concerned that once the Draft Bill is passed by WA Parliament there will be a large influx of applications by proponents to secure diversification leases. This will undoubtedly create the situation in which proponents put pressure on native title groups to enter quick, and likely sub-par, agreements so proponents can secure tenure. This is not in line with the Empowerment Strategy, is not consistent with free, prior and informed consent principles, and it does not create a good working precedent for this developing industry. YMAC sees this as an opportunity for the WA Government to create strong practices, from the start, to ensure native title groups are not ‘steamrolled’ by proponents.

YMAC re-iterates the following passage on page 20 of the Empowerment Strategy:

Rather than treating land-related activities in isolation or as purely a technical or legal matter, Government agencies are encouraged to see the connections between their land-related activities and the broader goals and elements of the Strategy.

YMAC attended the ‘Hydrogen Forum’ hosted by the Minister for Hydrogen on 20 July 2022, in Perth (**Forum**). There was a resounding call from Traditional Owners at the Forum for the WA Government to implement an ‘engagement protocol’ and best practice engagement guidelines, to be entered into by native title parties and proponents. YMAC submits the policy framework must incorporate a requirement for proponents to enter into the proposed engagement protocol before the WA Government assesses its application for a diversification lease. The engagement protocol must require the proponent to obtain the native title party’s free, prior and informed consent to any diversification lease. The engagement protocol and engagement guidelines should be co-designed by the WA Government and native title parties.

The draft diversification lease policy makes no mention of providing support to native title parties so they can undertake their own due diligence into a proposed project. YMAC notes that, at the Forum, Traditional Owners discussed the imbalance of power and resources between proponents and native title parties. YMAC supports, and reiterates, the request from Traditional Owners for dedicated government funding to ensure native title parties can engage in diversification lease negotiations on equal footing with proponents.

Grant of tenure through treaty or competitive process

Paragraph 5 of the Exposure Draft states diversification leases can either be granted through private treaty or a competitive public tender process. YMAC submits all diversification leases should be granted through a public tender process.

In YMAC's experience, native title parties are not included in private treaty discussions and, therefore, agreements are completed before native title parties are even informed. This forces native title parties to engage with proponents regardless of the proponent's attitude towards the native title party or whether there have been any previous relationship breakdowns. In practice, proponents will not meaningfully engage with native title parties if they have already secured a private treaty with the WA Government.

Diversification leases will be granted over large areas of land so, therefore, it is in the public interest the tender process is public. As part of the tender process, the native title party needs to be able to put in submissions in relation to its preferred applicant. For example: if a proposed proponent has consistently breached previous heritage agreements with the native title party, it is in the WA Government's interest, and the public interest, for this to be considered as part of the tender process.

In addition, YMAC submits that any grant of a diversification lease through the process outlined at paragraph 5 of the Exposure Draft must either be:

- subject to the successful completion of an Indigenous Land Use Agreement (ILUA); or
- granted as an 'option to lease' under s 88 of the LAA, with the option subject to the completion of an ILUA.

As part of these conditions, the WA Government must require proponents to acknowledge the time and cost commitments required of that proponent to reach an ILUA with the native title party.

Grant to Aboriginal entities

The Empowerment Strategy, on page 22, states:

There are enormous possibilities for government to support Aboriginal economic development including divesting land, and flexible approaches to land tenure that are capable of meeting Aboriginal people's commercial aspirations and cultural priorities.

YMAC welcomes the WA Government's proposed policy approach that acknowledges native title parties may be interested in being granted, in their own right or in partnership with third parties, a diversification lease.

YMAC submits native title parties or Aboriginal entities with an interest in obtaining a diversification lease (or other type of land tenure) should be given preference or incentives, provided they meet the essential criteria, to reach their land tenure goals.

YMAC is concerned the assessment criteria outlined in paragraph 3(e) of the Exposure Draft may act as a barrier to native title parties and Aboriginal entities being able to apply for a diversification lease. For example: paragraph 3(e) states ‘the rigor behind a proponent’s submission is needed to reflect the intensity, significance and expected investment required.’ The WA Government must assess an application by a native title party holistically and be prepared to invest time in the proposed project to ensure the project is feasible, also ensuring the native title parties have the resources they require.

YMAC submits, if an Aboriginal entity surrenders their pastoral lease, and Section 83 Tenure is not available, the Minister of Lands must have the discretion to grant a diversification lease directly to that Aboriginal entity without the need for any private treaty, or competitive process, consistent with the Empowerment Strategy.

Areas of substantial structures

Paragraph 11 of the Exposure Draft states the Minister for Mines must approve the location of any ‘substantial structure’. YMAC submits the following:

- ‘substantial structure’ is not defined. It is unclear how ‘substantial structure’ relates to ‘improved parts’ and ‘enclosed parts’ of the diversification lease. Further clarification is required; and
- the location of substantial structures must also be approved by the native title party, and this will require heritage surveys to determine.

Use of sub-leases

Paragraph 14 of the Exposure Draft states a diversification lease can have ‘multiple subleases to different sub-lessees for different purposes’. However, s 18 of the LAA states a person may not grant a sublease without the Minister’s approval. Further, a sub-lease cannot be granted for a purpose that is inconsistent with the purpose of a head lease. YMAC requires further clarification as to how paragraph 14 will be reconciled with the other provisions of the LAA.

Paragraph 19 of the Exposure Draft states permitted land uses can be varied and flexible to include multiple uses on one diversification lease. Therefore, YMAC assumes the ‘permitted use’ of a diversification lease will be broad, to encompass several uses on the lease. YMAC also notes the following statements:

- paragraph 10 of the Exposure Draft states ‘all of the land uses for which the diversification lease is to be granted must be expressly permitted by the ILUA’;
- the WA Government website, under FAQs, states the ILUAs must be in ‘full and final satisfaction of any compensation claim for the effect on native title by the grant of the tenure’; and
- paragraph 31 of the Exposure Draft states diversification leases can be granted for ‘any length of term’.

Based on the above, native title parties may have to draft and enter into ILUAs (including compensation provisions) that:

- consider all possible uses of the land;
- apply to all possible third parties that may be granted an interest to the land; and
- for an undefined period time (presumably, long term).

This is not feasible and not compliant with the principles of free, prior, and informed consent.

YMAC submits the diversification lease must clearly state what the land is intended for and, if this is amended, then further consent and negotiations are required with the native title party.

Diversification leases are required to comply with other legislation

Paragraph 16 of the Exposure Draft states that a proponent who is granted a diversification lease must comply with the *Bushfires Act 1954*, *Agriculture and Related Resources Protection Act 1976*, *Biosecurity and Agriculture Management Act 2007*, *Soil and Land Conservation Act 1945* and *Environmental Protection Act 1986*. YMAC submits, in addition to the above-mentioned legislation, the diversification lease must be subject to compliance with the *Aboriginal Cultural Heritage Act 2021 (WA)*.

In relation to the proponent's compliance with the *Environmental Protection Act 1986*, large-scale projects to be conducted on diversification leases will be subject to the environmental impact assessment process. YMAC submits the engagement protocol, referred to in paragraph 4, should require a proponent to substantively engage with native title parties regarding the environmental approval process for a project. For example, a proponent should be required, at a minimum, to engage:

- in workshops with native title parties throughout each environmental approval stage to explain the environmental approvals process, environmental studies undertaken, environmental risks identified and mitigation strategies proposed;
- in a social surrounds consultation with native title parties to ascertain the cultural, spiritual and heritage values that would be impacted by the project; and
- in the co-design of a Social Cultural Heritage Management Plan for the project, informed by the result of the social surrounds consultation.

5. Access

Paragraph 3 and paragraph 27 of the Exposure Draft states that Aboriginal persons will have the right to enter any unenclosed and unimproved parts of the land under the diversification lease.

YMAC submits that 'improved' needs to be clearly defined. Arguably, a stock fence could be considered an improved part of the land. If improvements are minor, or not consistent with the purpose of the lease, access for Aboriginal persons should not be restricted, noting that a diversification lease does not grant exclusive possession.

YMAC also notes, for completeness, that 'improvements' to the land has different meanings to different groups. A number of native title groups would interpret 'improvement' to the land as the restoration of biodiversity or other environmental improvements. Further clarity is required regarding the use of this term.

YMAC acknowledges there may be small areas containing substantial structures that need to be fenced for safety or other legitimate reasons. However, proponents should not be granted the right to fence large areas of land or fence areas where it is not required (e.g. if the lease is used for grazing stock, then native title-holders should still have access rights to the land). There is currently no limit on how much land can be enclosed. YMAC submits there should be clear policy provisions that deal with the maximum amount of land that can be enclosed. For example, no

more than 10% of the land should be enclosed, without the relevant native title party's written consent.

6. Term

Paragraph 33 of the Exposure Draft states that lease renewal will be considered on a case-by-case basis. As part of this assessment, the WA Government should consult the native title party as to whether the proponent has complied with the ILUA and its other heritage obligations. This will ensure the proponent is held accountable and not rewarded for poor compliance.

7. Post diversification lease arrangements

Paragraph 41 of the Exposure Draft states that improvements made to the land need to be left 'in a state of repair or condition'. YMAC submits that any improvements or structures remaining on the land, at the conclusion of the lease, should be removed unless otherwise directed by an incoming lessee or the native title party. Native title parties should not be inhibited or impeded with unviable or undesirable improvements remaining on the land.

YMAC submits that native title parties must be actively involved in the remediation of any environmental harm caused by the activities undertaken on the diversification lease.

8. Further comments

YMAC notes, as stated at paragraph 29 of the Exposure Draft, a pastoral lease or part of a pastoral lease, can be surrendered for a diversification lease. YMAC requests the WA Government confirm if the same principle can apply to reserves. For example: could a management body surrender part of the management order over a reserve and then apply for a diversification lease?

There are large parcels of land currently set aside as reserves for the 'use and benefit of aboriginal inhabitants', under the *Aboriginal Affairs Planning Authority Act 1972 (WA) (AAPA Act)*. YMAC understands it is the WA Government's intention to commence divestment of these parcels to Aboriginal entities. If land is divested under the AAPA Act, YMAC submits the LAA should allow Aboriginal entities to voluntarily surrender a management order, to apply for a diversification lease or Section 83 Tenure, as appropriate.

In addition, YMAC submits any divested land that is surrendered for alternative tenure should still be subject to the protections granted under Part 3 of the AAPA Act.

Should this response generate any questions or concerns, please contact my Executive Assistant, Dionne Lamb, in our Perth office on 08 9268 7000 or email dlamb@ymac.org.au.

Yours sincerely,

Signature supplied with submission

Simon Hawkins

Chief Executive Officer