



Yamatji Marlpa
ABORIGINAL CORPORATION



Submission on proposed *Amendments to the Aboriginal Affairs Planning Authority Act 1972*

Submission Date: 3 June 2022

Yamatji Marlpa Aboriginal Corporation Submission

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. YMAC is governed by an Aboriginal Board of Directors, representing several native title groups, each with its 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.

Following are YMAC's responses to questions asked in in the Department of Planning, Lands and Heritage (**DPLH**) online survey.

For ease of reference, YMAC has adopted the proposed amended terminology of the Act, including the term 'Aboriginal person' and 'Aboriginal entity'. Please note the term 'Aboriginal entity', for the purpose of this letter, refers to both registered native title bodies corporate (**RNTBC**) and any other group or corporation comprised of Aboriginal persons.

Question 4: What is your interest in the Aboriginal Land Trust Estate?

The Aboriginal Land Trust (**ALT**) and Aboriginal Affairs Planning Authority (**AAPA**) currently has management or ownership of fifty-five (55) composite properties within YMAC's area of representation. This comprises five (5) freehold properties, two (2) pastoral leases and forty-eight (48) reserves, of which nineteen (19) appear to be proclaimed under Part III of the Act.

As a native title representative body, YMAC's primary interest is to ensure native title holders within our regions can protect their native title rights and manage opportunities for Aboriginal people. YMAC therefore want to ensure the proposed amendments to the Act:

- progress the land, cultural and economic interests of Aboriginal people;
- recognise and protect all native title rights granted to Aboriginal people, in accordance with the *Native Title Act 1993 (Cth)* (**NTA**);
- recognise and protect any other land rights or interests that may have been granted to Aboriginal people by any other agreement entered into by the State; and
- create opportunities for Aboriginal people who do not have recognised land rights or interests, to endeavour to acquire an interest in ALT or AAPA estate land to progress their economic development.

Question 7: Do you support the proposal to broaden the objectives of the AAPA Act to include the divestment of ALT estate to Aboriginal people and Aboriginal entities and to recognise the requirements of the *Native Title Act 1993 (Cth)*?

YMAC strongly supports this amendment.

The divestment of ALT and AAPA estates to Aboriginal entities is vital for the cultural, social, and economic empowerment of Aboriginal people. The proposed amended objective aligns with the WA Aboriginal Empowerment Strategy 2021 – 2029

(**Empowerment Strategy**), page 22, which 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*’.

In supporting this amendment, YMAC notes that divestment of land must be in accordance with the desires and aspirations of Aboriginal people. Divestment should not diminish or extinguish native title, but rather, should strengthen native title rights through suitable tenure. In some circumstances, native title holders may determine that a higher degree of land tenure, such as freehold, is a better outcome. In these instances, the wishes of the native title holders should be respected, provided that any relevant native title holders have granted free, prior, and informed consent to any extinguishment of their native title rights and interests.

Question 8: Do you support the proposal to wind up the functions of the Aboriginal Lands Trust once all its land has been divested to Aboriginal people or Aboriginal entities?

YMAC agrees the ALT is redundant if there is no tenure held by ALT.

Question: Do you support the proposal to clarify the Aboriginal Lands Trusts’ duty to consult with Aboriginal people through including a definition of ‘Aboriginal stakeholder’ and prescribing a reasonable timeframe for those consultations to occur?

Definitions

YMAC agrees the terminology, including the definitions, used in the Act should be updated to reflect the modern and evolving structure of Aboriginal entities. Where feasible, the definitions should be consistent with the NTA.

Definition of ‘Aboriginal Stakeholder’

In accordance with Fact Sheet 2: Extended summary of proposed amendments to the *Aboriginal Affairs Planning Authority Act 1972 (Fact Sheet 2)*, the term ‘Aboriginal Stakeholder’ will be used to define which Aboriginal people and entities should be consulted by the ALT when determining the use, management and/or divestment of land which is held by the ALT or AAPA. The definition should include, but not be limited to:

- RNTBCs;
- in instances where there is no native title determination, other Aboriginal Corporations registered under the *Corporations (Aboriginal and Torres Strait Islander Act) 2006* (Cth) who identify as representing Aboriginal people for that area; and
- Aboriginal people who hold knowledge for that particular area of land and/or otherwise have connection to the land.

Consultation timeframes

YMAC submits the AAPA Act, or the *Aboriginal Affairs Planning Authority Act Regulations 1972 (WA) (Regulations)*, must provide a flexible time frame for consultations. As part of the broader consultation process, Aboriginal entities will need to undertake proper due diligence, including time to consult:

- professional advisors, such as lawyers, surveyors and undertake environmental assessments, as required;
- their members and Common Law Holders (as defined in the NTA); and
- the broader community.

The AAPA Act, or Regulations, must allow for generous extensions of time. For example, extensions should be readily granted when there is delay due to cultural responsibilities (such as funerals or lore business). This will ensure that Aboriginal entities are able to meaningfully engage in discussions about divestment.

Consultation obligations

Fact Sheet 5: Aboriginal Land Trust Divestment Guide, page 2, states the Aboriginal entity will need to *'show the state you have strong governance, money and are ready to own and manage the land.'* Before commencing the divestment process the State Government must be transparent in its 'assessment' criteria for divestment, and consult with the relevant Aboriginal entities to understand if divestment is a realistic option for that Aboriginal entity.

The AAPA Act, Regulations - or at the very least an internal policy document - should acknowledge that if an Aboriginal entity; in particular a RNTBC, is not ready for divestment at the date the Amended Act receives Assent, where feasible, the State Government will allow a reasonable time for an Aboriginal entity to work towards divestment.

Question 10: Do you support the proposal to provide the option to vest existing Part III reserves in an Aboriginal person or Aboriginal entity, while retaining existing protections, including trespass offences by non-Aboriginal people, permit requirements, and treatment under the *Mining Act 1978*?

YMAC agrees the protections afforded to Part III reserves under the AAPA Act, should be retained once land is divested. Of particular significance is the protection granted under s 24(1)(f) of the *Mining Act 1978 (WA)*.

As stated in Fact Sheet 3: Legislative Barriers to Divestment and Proposed Solutions, page 3, the divestment of a Part III reserve to an Aboriginal entity is subject to the protections of the AAPA Act. Therefore, YMAC submits it is logical that the divestment of the Part III reserves are provided for and actioned under the AAPA Act (i.e. the management order is granted to the Aboriginal entity under the AAPA Act).

YMAC further submits that any Aboriginal entity vested with the Part III reserves, must have the option - at its absolute discretion - to negotiate and grant leases, sub-leases,

licences, and profit a prendre, without the need to obtain consent of the AAPA, ALT or Minister for Lands.

This submission is consistent with the *Land Administration Act 1997 (WA) (LAA)*. As DPLH is aware, s 18(8) of the LAA provides that the Minister's consent to lease, sub-lease, licence, or sub-licence, if the land is vested for the purposes of an Act that is not the LAA. Therefore, s 33A of the AAPA Act should be amended as follows:

- replace references of the Authority with the relevant Aboriginal entity that has been vested the land; and
- include sub-leases, licences and profit a prendre, as well as leases.

YMAC submits that s 28 of the AAPA Act should be amended so that, when the tenure allows, all royalties, profits or revenue from the leases, sub-leases, licenses or profit a prendres is paid to the Aboriginal entity. This is vital to ensure economic development of the Aboriginal entities through land tenure, which is reflected in the State Government's Empowerment Strategy, page 20, '*Land tenure, native title, cultural heritage, land management, natural resources and regulation of land uses such as pastoral or mining, all have important implications for...economic development*'.

Question 11: Do you support the proposal to provide for a more streamlined process for divesting Part III reserves to an Aboriginal person or Aboriginal entity, without requiring a parliamentary process?

YMAC agrees with this amendment which will reduce the administrative burden and delay of divesting Part III reserves. However, as stated in paragraph 4, the AAPA Act and Regulations should contain a safeguard to ensure there is sufficient time for consultation with Aboriginal entities and people.

Question 12: Do you support the proposal to provide for a more streamlined process for changing the boundaries of Part III reserves to allow for the divestment of portions, without requiring a parliamentary process?

YMAC agrees in principle that the boundaries for Part III reserves can be altered without requiring a parliamentary process, on the proviso that:

- any sites of significance, either under the *Aboriginal Heritage Act 1972 (WA) (AHA)* or otherwise, are not unduly impacted; and
- the boundary changes do not undermine any determinations under NTA.

YMAC submits any land that is divided from the land being divested (**Remaining Land**), should not revert to unallocated Crown land. The Remaining Land should still be classified as a Part III reserve under the management of the ALT or AAPA. The Remaining Land should be subject to further consultation with the relevant Aboriginal people and entities to determine the most appropriate tenure moving forward.

As the DPLH is likely aware, amending boundaries of a Part III reserve, or any Crown land, is an expensive exercise. The cost should not be passed on to any Aboriginal people or entities.

Question 13: Do you support the proposal to streamline the process to change the boundaries of Part III reserves to excise public roads and public utilities to place them under the management of the agencies responsible for them, without requiring a parliamentary process?

In principle, YMAC has no issue with the amendment of the boundaries of Part III reserves to excise public roads and public utilities, on the basis that:

- the process outlined in the NTA is complied with;
- any sites of significance, either under the AHA or otherwise, are not unduly impacted. This may require heritage surveys to be conducted; and
- the cost of amending the boundaries of Part III reserves is not passed onto Aboriginal people or entities.

Question 14: Do you support the continuation of the existing parliamentary process for all other amendments to or cancellations of Part III reserves (outside of the circumstances provided for in questions 11, 12 and 13)?

YMAC has no further submissions on this proposal.

Question 15: Do you support the proposal to remove the Governor's power to declare any new Crown land to be reserved under Part III of the AAPA Act?

YMAC agrees in principle that the Governor should not have the power to declare new Crown land to be reserved. However, as outlined in Fact Sheet 2, YMAC acknowledges the proposed amendment goes further to state, *'there will be no further proclamation bringing land within the operation of Part III of the Aboriginal Affairs Planning Authority Act.'*

YMAC submits there should be opportunities for Aboriginal entities, where appropriate, to have an interest in Crown land. Presumably, moving forward this will be under the *Land Administration Act 1997 (WA) (LAA)*. While it is not the subject of this consultation, further thought should be given by the State Government as to how additional protections, such as those in the AAPA, could be afforded to Aboriginal entities under the LAA.

Question 16: Are there any other improvements to the AAPA Act that would assist with the divestment of the Aboriginal Lands Trust estate?

For completeness, and to ensure the AAPA Act remains consistent with the proposed amendments, YMAC submits the following sections should also be amended.

Entry to reserves

Section 28(b) of the AAPA Act states the Authority may '*authorise any person or body to enter any reserved lands and to remain thereon for any purpose*'. YMAC submits once land is divested to an Aboriginal entity, any mention of the 'Authority' in this section should be replaced with the Aboriginal entity.

Please see further discussion at paragraph 5.

Financial provisions

Section 43 of the AAPA Act as drafted, provides that the Authority may receive funds from a number of sources, including:

- money from the management of any land or property; and
- proceeds of the disposal of or dealing with any land, natural resource or other property that the Authority is authorised to effect under the Act.

YMAC submits, subject to the type of tenure divested, any profit derived from the above sources should be paid to the Aboriginal entity that has been divested the land.

Penalties

Section 50 of the Act as drafted, deals with penalties. YMAC requests further confirmation as to whether these penalties will be passed on to the Aboriginal entities. If penalties are passed on, the Aboriginal entity should be well informed.

Question 17: Are there any other initiatives the WA Government could take to facilitate and maximise the divestment of the Aboriginal Lands Trust estate?

Commencing divestment process

YMAC acknowledges that in some instances, the native title holder may not be the appropriate party for divestment. It is important that thorough research and consultation is conducted prior to divestment, to ensure the divestment is granted to the appropriate Aboriginal entity.

YMAC suggests that when commencing the divestment process, that in addition to other relevant Aboriginal entities, it also reaches out to the NTRB, as they can advise if any other constituents have an interest in the land and identify any potential liabilities relating to the divestment.

Divestment costs

As DPLH would be aware, there are several milestones to reach before divestment can take place, such as:

- contamination remediation;
- preparing the relevant Landgate documents, including locating original documents, obtaining original signatures and obtaining VOIs, when required;
- payment of Landgate fees;
- assessment and payment of stamp duty;
- consideration of GST implications; and
- dealing with any Landgate requisition notices.

YMAC submits the abovementioned work, and associated costs, should not be passed on to Aboriginal people or entities.

Consultation with third parties

YMAC understands that some of the land under the management or ownership of ALT is subject to leases, sub-leases, and licences. Before divestment can occur YMAC submits the DPLH will need to:

- identify the relevant interest holders;
- inform the interest holders of the change of land ownership/management;
- prepare any Deeds of assignments or Deeds novation that are required, including arranging execution;
- where required, obtain the Minister for Land's consent to any Deed of Novations;
- consider any caveats or mortgages registered on the Certificate of Title; and
- where required, lodge updated forms with Landgate.

The abovementioned work, and associated costs, should not be passed on to Aboriginal people or entities.

Aboriginal Advisory Council

YMAC submits the Aboriginal Advisory Council, established under s 18 of the AAPA Act, should continue to exist under the amendments and will be a critical part of any decision-making process.

Utilisation of s 83 of the LAA

YMAC acknowledges it is not the topic of consultation, however greater utilisation could be made of section 83 of the LAA. Section 83 of the LAA should be utilised when the Aboriginal entity determines freehold or a long-term Crown lease is the most appropriate tenure.

YMAC acknowledges the DPLH has previously been hesitant to utilise s 83 of the LAA. However, utilisation of s 83 will allow Aboriginal entities greater options to protect its cultural heritage and advance its economic interests. This is consistent with the Empowerment Strategy page 22, which states, '*Government agencies that are directly involved in using land or regulating land use, can make significant impacts – positive and*

negative – on Aboriginal people’s cultural identity and cultural continuity. The protection of Aboriginal cultural heritage is a key consideration for agencies in this regard... appropriate land tenure can facilitate culturally important use.’

Question 18: Do you have any other comments about the proposed legislative amendments aimed at removing the barriers to divestment of the Aboriginal Lands Trust estate?

YMAC raises the following issues and barriers to divestment of Part III reserves that have not yet been addressed by the proposed amendments to the Act:

- DPLH will need to be transparent with the Aboriginal entities as to whether the land that is being divested is serviced (i.e. connected to utilities such as gas and water). If the divestment is not serviced, and it is reasonably required to be serviced (for example, there are houses on the land), DPLH will need to provide funding and/or assistance to the Aboriginal entities to arrange for services;
- in many cases there is competing land uses and interests on Part III reserves, including leases, sub-leases, and mining tenements. Obtaining appropriate access to the land without disrupting these activities may be a concern for Aboriginal communities;
- once land has been divested to the relevant Aboriginal entity, there is a responsibility to undertake proper administration of the estate which could include management of a pastoral lease or mining tenements. Aboriginal entities will need assistance from the State Government to build capacity to manage such land; and
- for large areas of land, the State government will need to be actively involved in the process of handing over divested land, by ensuring there is open and honest information-sharing with the Aboriginal entity; otherwise, the Aboriginal entity could end up with land that it is not suitable for divestment (e.g., land with contamination).

Conclusion

Subject to the comments above, YMAC is generally supportive of the amendments, provided the appropriate time, resourcing and financial assistance is provided.

Definitions and Acronyms

AAPA Act	<i>Aboriginal Affairs Planning Authority Act 1972</i>
AAPA	Aboriginal Affairs Planning Authority
AHA	<i>Aboriginal Heritage Act 1972</i>
ALT	Aboriginal Lands Trust
CEO	Chief Executive Officer
DPLH	WA Department of Planning, Lands and Heritage
LAA	<i>Land Administration Act 1997 (WA)</i>
NNTC	National Native Title Council
NNTT	National Native Title Tribunal
NTA	<i>Native Title Act 1993 (Cth)</i>
PBCs	Prescribed Bodies Corporate
RATSIB	Representative Aboriginal/Torres Strait Islander Body
RNTBCs	Registered Native Title Bodies Corporate
WA	Western Australia
YMAC	Yamatji Marlpa Aboriginal Corporation

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