Submission in response: Western Australia – Land and Public Works Legislation Amendment Bill 2022 (Diversification leases)

Land and Public Works Legislation Amendment Bill 2022 (Diversification leases)
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We welcome the opportunity to make a submission in response to the ***Land and Public Works Legislation Amendment Bill 2022***. The Bill introduces diversification leases as a new form of tenure on Crown land under the *Land Administration Act 1997* (WA) (LAA).

Reform of WA pastoral lease tenure can do much to support a rapid transition to net-zero emissions in Western Australia and globally. The Bill aims to facilitate economic diversification and activation to enable net zero by 2050 and the proposed reforms are suggested as underpinning a radical opportunity - to generate renewable energy for the downstream production of hydrogen for energy storage and low and zero emissions derivatives, including for export.

A fundamental prerequisite for renewable energy generation and storage at the required scale is access to large areas of land. In Western Australia much of the land necessary for hosting solar panels, wind turbines, electrolysers and associated infrastructure such as roads, laydown areas, storage and access to coastal shipping and pipelines, will be subject to First Nations rights and interests through native title. The proposed diversification leases introduce risks of social-economic, cultural and environmental impacts as well as potentially presenting opportunities for Aboriginal people to participate more effectively in the transition to a clean energy economy. It is crucial the Bill does not further contribute to marginalisation and harm, but instead, effectively legislates for the fair distribution of risk and gain if it is to deliver on promised transformative outcomes.

While large-scale renewable energy projects differ from extractive industries in a number of ways, many of the legal, economic, informational and political asymmetries identified in relation to extractive industries apply equally to renewable energy projects. Prioritizing the economic inclusion and participation of Traditional Owners in large scale projects must be a priority. In a context in which many developments are likely to be at the cutting edge of industry and technical innovation, it is a glaring omission that the Bill and the draft policy framework do not stipulate specified support or preference to native title parties in order that they can undertake their own due diligence of 'diversification' projects. The State government has an important role to play in 'levelling the playing field', such that First Nations are well resourced to lead a transition to renewable energy resources in

Western Australia. As part of conditions of proposed changes, the WA Government must require proponents acknowledge the time and cost commitments required of native title holders. Without such measures Aboriginal people will be exposed to unreasonable risk, cost and disadvantage from projects progressed by proponents for their commercial benefit, and which initiate processes, the costs of which (in time, money, organisational capacity) risk being externalized to native title holders.

The United Nations *Declaration of the Rights of Indigenous Peoples* (UNDRIP) and its provisions relating to 'free, prior and informed consent' (FPIC) provide the most suitable guide to engagement with Traditional Owners in relation to large scale projects involving their native title rights and interests and are the minimum requirements to operationalise self-determination because of their conformity with international human rights norms and standards and international law [1].

The UNDRIP expresses rights and by doing so explains how Indigenous peoples want nation-states (and others) to conduct themselves in relation to matters that may affect their rights and interests. In that sense, there is an expectation by Indigenous peoples and others that UNDRIP imposes obligations on States and third parties to conform to the standards expressed in the Declaration; and that as a consequence of endorsing UNDRIP (as Australia did in 2009) nation-states can no longer make decisions affecting Indigenous peoples' rights and interests by imposition, but rather have a duty to consult with Indigenous peoples on the basis of free, prior and informed consent (FPIC).

The right to FPIC is enshrined in several Articles of the UNDRIP, namely Articles 19 and 32 which detail what is entailed in enacting free, prior and informed consent.

Article 19.

1. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 32.

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impacts

Free, prior and informed consent provides the best framework for regulating large-scale development on the Indigenous Estate because it imposes relatively precise obligations on governments and developers, which distinguishes it from principles such as 'social licence' which are less precisely defined and rely on the goodwill of governments and industrial partners.

The grant of a diversification lease (whether over vacant Crown land or a pastoral lease) will foreseeably constitute a 'future act' under the *Native Title Act 1993* (Cth) and will likely require an applicant to enter into an Indigenous Land Use Agreement (ILUA) with the relevant native title party. This will need to occur prior to the state granting a diversification lease. Yet the Bill contains no detail as to protections for the rights of native title holders and provides little certainty in the event parties cannot reach an ILUA. A potential remedy to this

situation would be to include provisions clarifying steps to be taken should an ILUA not be progressed and to include provisions in the Bill that a diversification lease must not be granted by the Minister unless an ILUA has been registered pursuant to Subdivision E of Division 3 of Part 2 of the *Native Title Act 1993* (Cth).

The Bill is not ambitiously aligned with the WA State Government's existing Aboriginal Empowerment Strategy 2021-2029 (WA). This strategy aims to develop "partnerships, shared decision-making, and engagement, supporting Aboriginal led solutions, strengthening government accountability, investing in building strengths and expanding economic opportunities" and states clearly, that "Aboriginal people must have a defined and systematic role in decision-making, proportional to the potential impacts or opportunities for Aboriginal people". Yet, this language is nowhere in the Bill. Rather its guiding policy framework provides the Minister of the day with unspecified and discretionary powers to determine if 'the grant will provide social and economic opportunities to Aboriginal people or communities'.

- What metrics will be employed for determining meaningful engagement and on what basis is it intended prospective proponents are expected to provide opportunities to native title holders?
- That is to say what will constitute genuine engagement, mutual opportunity, and partnership, so as to satisfy the terms?

A clearer framework is provided in the *Electricity Infrastructure Investment Act 2020* (NSW) No. 44 which stipulates under s. 4:

(1) The Minister is to issue guidelines about consultation and negotiation with the local Aboriginal community in relation to relevant projects for the purposes of increasing employment and income opportunities for the local Aboriginal community

(2) *The Minister is to take the guidelines into account when exercising the Minister's functions under Part 5, Division 2.*

(3) *To give effect to the guidelines, the Minister may impose a condition on a direction under section 32 or an authorisation under section 36(2).*

(4) *The consumer trustee is to take the guidelines into account when exercising the consumer trustee's functions under Part 6, Divisions 3 and 4.*

(5) *To give effect to the guidelines, the consumer trustee may—*

(a) include, in a recommendation to the Minister under section 31(1)(a), a recommendation that a condition be imposed on the Minister's direction, and

(b) impose a condition on an authorisation under section 31(1)(b).

(6) *The guidelines are to be published on the Department's website.*

By explicitly legislating to prioritize projects that genuinely partner with native title holders by requiring the Minister consider responses through the lens of specified guidelines including reference to benefit sharing (i.e. *increasing employment and income opportunities)* the process for granting leases would be improved. A guiding framework for participants that adequately resources and ensures respect for First Nations rights and interests should by mandate give preference to native title holders, a 'first option' with respect to obtaining tenure under the relevant changes, provided they meet baseline criteria. The guidelines used in NSW also include an important role for a Consumer Trustee. It is important that any guidelines build upon but in no way replace or supersede any other requirements for consultation or agreement, or that proponents address cultural, environmental or planning impacts.

Lastly, since the proposed amendments to the Bill were first flagged in November 2021, Western Australia has undergone a period of unprecedented change, including ongoing challenges associated with Covid-19 as well as changes to cultural heritage protections which were rushed through Parliament prior to Christmas last year, and for which an extensive co-design process is currently underway. In this context, it must be considered that the level and pace of change underway has the potential to prohibit effective engagement, co-design and decision-

making. This must be a serious consideration for the WA Government when pursuing their proposed timelines for the current reforms.

The Bill requires thorough consideration by stakeholders and the consultation window provided has been too short. It would be unfortunate for legislation of such importance to be introduced into Parliament without being properly considered by stakeholders, especially local Aboriginal organisations, given the importance of Indigenous voices in any reforms to land and energy transition policy in Western Australia. The WA Government may also consider it prudent to address how these reforms will interact with section 91 licences under the *Land Administration Act 1997* (WA) which have been used for preliminary investigations by renewables developers in Western Australia, and with the approval of the location of wind and solar infrastructure for the purposes of the *Mining Act 1978* (WA) (Mining Act) and for these reasons the *Standing Committee on Legislation* should apply scrutiny to the Bill as proposed.

We thank you for considering our submission to this policy issue and we would be pleased to discuss any questions you may have in relation to the matters covered.

1. Maynard, G. Renewable energy development and the Native Title Act 1993 (Cwlth): The fairness of validating future acts associated with renewable energy projects. *Centre for Aboriginal Economic Policy Research* **WP 143/2022**, (2022).