

Land and Public Works Legislation Amendments  
Department of Planning, Lands and Heritage  
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**By Email : [LAA2022@dplh.wa.gov.au](mailto:LAA2022@dplh.wa.gov.au)**

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Dear Land and Public Works Legislation Amendments team

## **Department of Planning, Heritage and Lands - Exposure Draft - Proposed Policy Framework Guiding the Use of Diversification Leases on Crown Lands - NELA(WA) Comments**

Set out below are the comments made on behalf of the West Australian division of the National Environmental Law Association (**NELA(WA)**), and endorsed by the national NELA board, regarding the Western Australian Department of Planning, Lands and Heritage (**DPLH**)'s Exposure Draft on its Proposed Policy Framework Guiding the Use of Diversification Leases on Crown Lands (**Exposure Draft**).

### **About NELA**

NELA is a peak body for environmental lawyers in Australia. We are Australia's only national, multidisciplinary, member-based association focused on environmental law and sustainability. NELA serves the needs of practitioners in law, planning, natural resources and environmental science and management. NELA obtains and exchanges information on issues relevant to environmental law and policy.

One of NELA's objectives is to provide a forum for, and otherwise assist in the discussion, consideration and advancement of, environmental law among the legal profession and the wider community.

## **1 Executive Summary**

### **1.1 In summary NELA(WA)**

- (a) supports the introduction of diversification leases on Crown land, and is of the view that they have the potential to support the development of renewable energy projects which are critical for leading the energy transition, and have the capacity to assist Western Australia in meeting the objectives of its Climate Policy, including the target of net-zero greenhouse gas emissions by 2030;
- (b) suggests that the final Policy Framework should include further transparency around the circumstances that would trigger a diversification lease to be granted by private treaty as opposed to by competitive processes, and that if the lease would affect lands where Traditional Owners hold or may hold native title rights and interests they should be consulted; and give their free, prior and informed consent to the grant of the lease;

- (c) submits that that in considering whether to vary or renew a diversification lease, the Minister should be required to consider the environmental track record of the lessee;
- (d) submits further clarity is required about the interaction between diversification leases and native title rights and interests, and about the timing for ILUA negotiation with native title parties;
- (e) recommends that in defining the minimum or maximum allowable area of land for a diversification lease, the Minister should be required to have regard to the environmental footprint and impact of the permitted uses under the diversification lease;
- (f) submits that further clarity is required as to what the 'permitted uses' under a diversification lease are; and
- (g) submits that the final Policy Framework should clarify that a project proposed to be carried out pursuant to a diversification lease will still be required to comply with all relevant legislation and obtain relevant approvals under state and Commonwealth environmental laws such as the Environmental Protection Act (the EP Act).

## **2 Introduction**

- 2.1 In this submission, NELA(WA) has set out its comments on the Exposure Draft, including aspects that it is supportive of, and suggestions for improvement.
- 2.2 In general, NELA(WA) supports the introduction of diversification leases on Crown land. Diversification leases have the potential to support the development of carbon farming, wind and solar energy projects, and green hydrogen projects, all of which will build capacity for meeting the objectives of Western Australia's Climate Policy (**Climate Policy**), including its aspiration to achieve net zero greenhouse gas emissions by 2050. NELA(WA) considers that the policy framework set out in the Exposure Draft has the potential to unlock Crown land, or land held under pastoral leases, for a variety of purposes and projects (such as those identified above) that are essential for leading the energy transition and for storing carbon and caring for our landscapes, consistent with the Climate Policy.
- 2.3 While there are aspects of the Exposure Draft that NELA(WA) supports, it has several comments and suggestions for improvement, which are outlined below.

## **3 Submissions**

### **Granting diversification leases**

- 3.1 According to Paragraph 5 of the Exposure Draft, the Minister for Lands may grant a diversification lease by either private treaty, or a competitive process (such as a public auction or public tender) to provide an equal opportunity for participation, to all interested parties.
- 3.2 In NELA(WA)'s view, further transparency is needed around which circumstances would trigger a diversification lease to be granted by private treaty, as opposed to by competitive process.
- 3.3 Without further information about the circumstances in which a diversification lease would be granted in a private treaty, NELA(WA) is concerned that such an arrangement could be inconsistent with the WA Procurement Rules, which apply to all State agencies, as defined in the *Procurement Act 2020* (WA).
- 3.4 Paragraph 5 of the Exposure Draft also anticipates the Minister being empowered to grant 'an option to lease' in circumstances where the 'specific project details and/or the affected land

area(s) are yet to be confirmed'. While a diversification lease must be used within a reasonable period of time (paragraph 17, Exposure Draft), the Exposure Draft does not provide any indication of a time limit on the duration of an 'option to lease'. Without such a deadline, a potential lessee may be able to prevent alternative uses of a particular area of Crown land – including for commercial or competitive advantage – without being forced to progress their own formal proposal.

- 3.5 Further, any grant of a diversification lease is currently in the sole discretion of the Minister for Lands. NELA(WA) submits that, at a minimum, if the lease would affect lands over which Traditional Owners hold or may hold native title rights and interests, they should be consulted.
- 3.6 A consultation provision should be included, and framed in a way that ensures that Traditional Owners have given free, prior and informed consent to the grant of the diversification lease.

### **Variation and renewal of diversification leases**

- 3.7 NELA(WA) submits that in considering whether to vary or renew a diversification lease, the Minister should be required to consider the environmental track record of the lessee. Particular regard should be given to the lessee's compliance with any environmental conditions that have been imposed, the environmental impact of the permitted uses that are pursued by the lessee and whether a less environmentally harmful use could be pursued.
- 3.8 Before deciding on a proposed variation (in particular, expansion of a use under a diversification lease) the Minister should be required to undertake a balancing exercise to determine whether the environmental benefit to be gained from a project (such as a renewable energy project) outweighs the environmental benefits of not pursuing that project – for example, because it would avoid the clearing of good condition native vegetation, avoid impacts on native species and avoid impacts on Aboriginal sites.

### **Interaction with native title interests**

- 3.9 Paragraph 10 of the Exposure Draft provides that 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(s). It also provides that the State must be a party to the ILUA unless another provision of the *Native Title Act 1993* (Cth) (**NTA**) applies, and that such ILUA must expressly permit all of the land uses for which the diversification lease is to be granted.
- 3.10 NELA(WA) acknowledges that an ILUA between the proponent, the State and the relevant native title party is a potential solution to a future act process which will determine the interaction between the diversification lease rights with relevant native title rights and interests. However, NELA(WA) is concerned that the cost and time associated with the authorisation and certification of an ILUA may be a barrier to the successful grant of these leases. Alternative options should also be explored, which balance the need to efficiently grant tenure, with the right to negotiate to ensure that native title rights and interests and Aboriginal cultural heritage are afforded appropriate protection.
- 3.11 It is unclear from the Exposure Draft when, in the diversification lease grant process, an ILUA is required to be negotiated. It is also unclear whether (similar to the expedited process under the *Mining Act 1978* (WA) for the grant of mining tenure) the ILUA negotiations will be required before the tenure is granted, or whether the leaseholder is required to undertake ILUA negotiations after the diversification lease is granted. As the ILUA negotiation process can be lengthy and complex, in NELA(WA)'s view this important question of timing requires further – explicit – clarification.

NELA (WA) also submits that questions as to the priority of rights must be clarified. That is, clarification should be included in the Exposure Draft as to what happens if native title rights

and interests are not extinguished by a diversification lease – in particular, what happens if there is a conflict of rights between native title holders and a diversification permit holder?

### **Environmental footprint and impacts**

- 3.12 In terms of defining the minimum or maximum allowable area of land for a diversification lease, the Minister should be required to have regard to the environmental footprint and impact of the permitted uses under the diversification lease. The Minister should also be required to consider whether the environmental impacts can be minimised by limiting the area for the diversification lease, and ensure that the mitigation hierarchy is used in decision-making regarding the grant of diversification leases.

### **Clarity regarding permitted uses**

- 3.13 In NELA(WA)'s view, further clarity is needed as to what the 'permitted uses' under a diversification lease are.
- 3.14 At present, paragraph 20 of the Exposure Draft notes the uses for which a diversification lease will not be granted, but the Exposure Draft lacks any actual guidance on the uses for which such a lease will be granted.
- 3.15 This is an important question to be clarified, as it is questionable whether all permitted uses will be able to "co-exist" with native title, and in particular, provide adequate protection for Aboriginal culture and heritage. For example, certain uses may require the construction of large-scale structures (for example large renewables projects) and care should be taken to ensure that these do not impact significant cultural heritage sites. This process of seeking feedback on the Exposure Draft represents an important opportunity to clarify the rules and procedures around Aboriginal cultural heritage protection in a proactive way to minimise the risk of conflict, the destruction of cultural heritage, and confusion for landholders and potential lessees.
- 3.16 NELA(WA) submits that, in relation to the above, the Exposure Draft should refer to the *Aboriginal Cultural Heritage Act 2021 (WA)* as relevant legislation that must be considered.

### **Interaction with other approvals**

- 3.17 We presume, but it should be clarified, that a project that is proposed to be carried out pursuant to a diversification lease will still need to comply with all relevant legislation, including to obtain relevant approvals under state and Commonwealth environmental laws such as the EP Act. This is unclear from the current drafting.
- 3.18 The final section of the Exposure Draft addresses 'Post-diversification lease arrangements', anticipating that rehabilitation obligations could be imposed on lessees and improvements on the land will vest in the Crown unless otherwise expressly addressed in the lease. However, NELA(WA) notes that carbon offsetting arrangements under the Federal Government's Emissions Reduction Fund include permanence obligations, which require a land manager to maintain the offset so that it does not release stored carbon for which the land manager has received carbon credits or payments, for up to 100 years. There is no detail in the Exposure Draft about whether the Department could claim an ongoing 'management fee' or rent from a diversification lessee that terminates a diversification lease (or simply allows the lease to expire) during the period after which carbon offset payments for the activity on the land have ceased, but before the permanence period for the offset activity has expired. If the land reverts to Crown land during that period, the WA Government may be taking on a legal obligation to maintain the offset (such as an area of restored native vegetation, which could not then be managed differently by a new diversification lessee), as well as a legal risk of incurring a Commonwealth penalty if the offset area is damaged, including by a new lessee or a natural disaster, before the permanence period expires.

We would be happy to provide additional information about the issues we have raised in this submission. NELA(WA) is grateful for the opportunity to provide these comments on the Exposure Draft.

Yours sincerely

**Western Australian Division of the National  
Environmental Law Association**

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