

Fact sheet 3: Legislative Barriers to Divestment and Proposed Solutions

BARRIER

LEGISLATIVE CHALLENGE

LEGISLATIVE SOLUTION

<p>The <i>Aboriginal Affairs Planning Authority Act 1972</i> does not reflect contemporary objectives of the State Government or Aboriginal people</p>	<p>The initial objective of the <i>Aboriginal Affairs Planning Authority Act 1972</i>, which was to control and oversee the welfare of Aboriginal people, is no longer fit for purpose nor reflective of the contemporary objectives of the State Government and the <i>Aboriginal Empowerment Strategy – Western Australia 2021-2029</i>.</p> <p>In addition, the Act pre-dates the <i>Commonwealth Native Title Act 1993</i> and has not been updated to reflect this.</p>	<p>Include as a purpose of the <i>Aboriginal Affairs Planning Authority Act 1972</i> the objectives of meeting the economic, social and cultural aspirations of Aboriginal people through the divestment of the Aboriginal Lands Trust estate (ALT estate).</p> <p>Express that the <i>Aboriginal Affairs Planning Authority Act 1972</i> is cognisant of the requirements of the <i>Native Title Act</i> and the rights of native title holders and claimants in any divestment outcome.</p>
<p>The current operation of Part III of the <i>Aboriginal Affairs Planning Authority Act 1972</i> precludes Part III reserved lands from being under the control and management of a body other than the Aboriginal Affairs Planning Authority or the Aboriginal Lands Trust</p>	<p>Ninety-three per cent of the ALT estate is reserves proclaimed under Part III of the <i>Aboriginal Affairs Planning Authority Act 1972</i> (Part III reserved lands).</p> <p>Part III reserved lands can only be vested in the Aboriginal Affairs Planning Authority or be under the control and management of the Aboriginal Lands Trust.</p> <p>Therefore, the divestment of Part III reserved lands necessitates its 'de-proclamation' thus removing its special protections.</p> <p>The protections afforded to Part III reserved lands are:</p> <ul style="list-style-type: none"> • creating an offence of trespass where a non-Aboriginal person enters or remains on Part III reserved lands without Ministerial permission granted via a permit 	<p>Allow the vesting of existing Part III reserved lands to be placed with entities (native title holders or other Aboriginal entities) other than the Aboriginal Affairs Planning Authority or the Aboriginal Lands Trust.</p> <p>Retain the section 31 offence of non-Aboriginal people accessing Part III reserved lands without a permit.</p> <p>Amend regulation 8 to provide the Aboriginal person or entity in which the Part III reserved lands are divested (divestee) with the power to issue its own permits.</p> <p>Retain the same treatment under the <i>Mining Act 1978</i>.</p> <p>Provide that, in certain situations, a divestee will have the ability to grant leases and licences without the procedural constraint of obtaining the consent of the Aboriginal Affairs Planning Authority.</p> <p>Remove the ability to place Part III reserved lands under the control and management of the Aboriginal Lands Trust once they have been divested.</p>

Fact sheet 3: Legislative Barriers to Divestment and Proposed Solutions

BARRIER

LEGISLATIVE CHALLENGE

LEGISLATIVE SOLUTION

- a requirement that alterations to the boundaries, variations to the operation of Part III or compulsory acquisitions are not permitted without the proposal being tabled before Parliament for 14 days and a proclamation made by the Governor
- a requirement for the Minister for Mines and Petroleum to consult with the Minister for Aboriginal Affairs before granting mining tenement holders a 'consent to mine'
- a requirement for the Aboriginal Affairs Planning Authority to approve the grant of any interest in Part III reserved lands under any Act (excluding mining and petroleum).

These protections are used by native title holders, Aboriginal communities and lessees to:

- regulate access and activities in and around communities
- safeguard the privacy of communities
- negotiate with mining tenement holders or tourism operators, providing an income stream
- protect cultural heritage sites of significance and preserve and manage heritage and culture
- preserve the natural environment.

As a result, in some areas there is little incentive for native title holders or Aboriginal communities to give up the protections afforded by Part III.

There is currently no form of tenure available under the *Land Administration Act 1997* that provides the protections afforded to Part III reserved lands to the same degree and under the same conditions as Part III.

Fact sheet 3: Legislative Barriers to Divestment and Proposed Solutions

BARRIER

LEGISLATIVE CHALLENGE

LEGISLATIVE SOLUTION

Lengthy and inefficient parliamentary procedures

Where there is a willingness of native title holders or Aboriginal communities to remove Part III reserved lands from the operation of Part III to enable a divestment in an alternative form of tenure (eg. freehold or leasehold), the lengthy parliamentary procedures create an impediment to divestment.

Current parliamentary procedures do not allow for the staged divestment of portions of Part III reserved lands without going back to Parliament each time a portion is proposed to be divested.

Public utility services and roads are located on Part III reserved lands creating public access and servicing difficulties.

The alteration of the boundaries of Part III reserved lands to excise public utility services and roads, so they can be placed under the responsibility of an appropriate agency or service provider to guarantee continued service, requires the same parliamentary procedures.

Provide for a more streamlined process for declaring that land shall cease to be reserved for persons of Aboriginal descent that does not require a parliamentary process, where the declaration is made to enable divestment of Part III reserved lands to native title holders or other Aboriginal entities.

Provide for a more streamlined process for altering the boundaries of Part III reserved lands that does not require a parliamentary process to facilitate divestment of a portion of Part III reserved lands.

Provide for a more streamlined process for altering the boundaries of Part III reserved lands that does not require a parliamentary process to excise existing or future public utility services and roads.

Existing protections under the *Aboriginal Affairs Planning Authority Act 1972*, requiring:

- Aboriginal Lands Trust approval
- Ministerial approval
- Aboriginal Lands Trust to consult with Aboriginal stakeholders and use and manage the land in accordance with the wishes of those Aboriginal stakeholders

will continue to apply to these actions.

The existing parliamentary procedures will continue to apply to actions outside of divestment or excisions for public utilities and roads.

Fact sheet 3: Legislative Barriers to Divestment and Proposed Solutions

BARRIER	LEGISLATIVE CHALLENGE	LEGISLATIVE SOLUTION
<p>Uncertain consultation requirements under section 23</p>	<p>The functions of the Aboriginal Lands Trust under the <i>Aboriginal Affairs Planning Authority Act 1972</i> include ensuring the use and management of the ALT estate accords with the “wish of the Aboriginal inhabitants of the area so far as that can be ascertained and is practicable”.</p> <p>The <i>Aboriginal Affairs Planning Authority Act 1972</i> does not define the Aboriginal inhabitants of the area nor what is practicable creating a lack of clarity in how the Aboriginal Lands Trust should exercise its function.</p> <p>The language used in the <i>Aboriginal Affairs Planning Authority Act 1972</i> in reference to Aboriginal people is outdated and requires modernisation.</p>	<p>More clearly define the Aboriginal Lands Trust’s obligation to consult under section 23(c) by including a definition of ‘Aboriginal stakeholder’ limited to a geographic area.</p> <p>Prescribe a timeframe for the provision of responses to the Aboriginal Lands Trust’s request for comment on a proposal to use or manage the ALT estate and, if a response is not received within the prescribed timeframe, the Aboriginal stakeholder shall be deemed to have no comment.</p> <p>All existing leasehold interests to be preserved.</p> <p>The State’s current operational practice of consulting with all relevant Aboriginal stakeholders and pursue agreement on divestment outcomes wherever possible will continue.</p>
<p>Numerous and sometimes conflicting interests across the ALT estate</p>	<p>In any divestment proposal there is a need for the Aboriginal Lands Trust to understand, balance and attempt to reconcile the various Aboriginal interests in a complex, culturally and historically sensitive environment.</p> <p>Depending on the land in question, Aboriginal stakeholders may include those with traditional rights and interests (eg. native title claimants and holders), those with historical connections to the land (e.g. former residents), those who have existing legal interests (e.g. lessees and sub lessees), and those who are current residents.</p>	<p>More clearly define the Aboriginal Lands Trust’s obligations to consult under section 23(c) by including a definition of ‘Aboriginal stakeholder’ limited to a geographic area.</p> <p>Investigate broadening the scope of funding for Aboriginal stakeholders to fully participate in divestment discussions in a timely manner and to ensure they can provide free prior and informed consent to divestment.</p> <p>Investigate implementation of a facilitation/mediation model to resolve competing divestment proposals.</p> <p>Offer flexible tenure outcomes where large reserves can be subdivided to allow a staged approach to divestment or for portions to be divested to different Aboriginal people or entities.</p>