THIRTY-NINTH PARLIAMENT

REPORT 41

STANDING COMMITTEE ON ENVIRONMENT AND PUBLIC AFFAIRS

PETITION NO. 42 – REQUEST TO REPEAL THE *ENVIRONMENTAL PROTECTION (ENVIRONMENTALLY SENSITIVE AREAS) NOTICE 2005*

Presented by Hon Simon O'Brien MLC (Chairman)

August 2015

STANDING COMMITTEE ON ENVIRONMENT AND PUBLIC AFFAIRS

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

"**2. Environment and Public Affairs Committee**

2.1 An *Environment and Public Affairs Committee* is established.

2.2 The Committee consists of 5 Members.

2.3 The functions of the Committee are to inquire into and report on –

(a) any public or private policy, practice, scheme, arrangement, or project whose implementation, or intended implementation, within the limits of the State is affecting, or may affect, the environment;

(b) any bill referred by the Council; and

(c) petitions.

2.4 The Committee, where relevant and appropriate, is to assess the merit of matters or issues arising from an inquiry in accordance with the principles of ecologically sustainable development and the minimisation of harm to the environment.

2.5 The Committee may refer a petition to another Committee where the subject matter of the petition is within the competence of that Committee.

2.6 In this order **"environment"** has the meaning assigned to it under section 3(1), (2) of the *Environmental Protection Act 1986*."

Members as at the time of this inquiry:

Hon Simon O'Brien MLC (Chairman)

Hon Stephen Dawson MLC (Deputy Chair)

Hon Brian Ellis MLC

Hon Paul Brown MLC

Hon Samantha Rowe MLC

Staff as at the time of this inquiry:

Irina Lobeto-Ortega (Advisory Officer (Legal)

Amanda Gillingham (Research Officer)

Margaret Liveris (Committee Clerk)

Suzanne Veletta (Advisory Officer (Legal))

Address:

Parliament House, Perth WA 6000, Telephone (08) 9222 7222
lcco@parliament.wa.gov.au
Website: http://www.parliament.wa.gov.au
ISBN 978-1-925149-28-9

Government Response

This Report is subject to Standing Order 191(1):

> Where a report recommends action by, or seeks a response from, the Government, the responsible Minister or Leader of the House shall provide its response to the Council within not more than 2 months or at the earliest opportunity after that time if the Council is adjourned or in recess.

The two-month period commences on the date of tabling.

CONTENTS

GLOSSARY

Clearing Regulations	*Environmental Protection (Clearing of Native Vegetation) Regulations 2004*
Committee	Standing Committee on Environment and Public Affairs
Delegated Legislation Committee	Joint Standing Committee on Delegated Legislation
Department	Department of Environment Regulation (and, where relevant, its predecessors)
Draft Guide to Grazing	Department of Environment Regulation draft *A guide to grazing, clearing and native vegetation under Part V Division 2 of the Environmental Protection Act 1986* (January 2015)
EM	Explanatory Memorandum
EP Act	*Environmental Protection Act 1986*
ESA	An environmentally sensitive area declared by the ESA Notice
ESA Notice	*Environmental Protection (Environmentally Sensitive Areas) Notice 2005* gazetted on 8 April 2005
Landowner	A landowner, occupier or person responsible for the care and maintenance of ESA land
Minister	Hon Albert Jacob MLA, Minister for Environment
Petition	Petition tabled in the Legislative Council by Hon Mark Lewis MLC on 17 June 2014 seeking the repeal of the ESA Notice
PGA	Pastoralists and Graziers' Association of Western Australia
Principal Petitioner	Murray Nixon, President, Gingin Property Rights Group (Inc)
Semeniuk mapping of wetlands	V & C Semeniuk Research Group "Mapping and Classification of Wetlands from Augusta to Walpole in the South West of Western Australia" (1997)
Swan coastal plain policy	*Environmental Protection (Swan Coastal Plain Lakes) Policy 1992*
TLA	*Transfer of Land Act 1893*
WAFF	Western Australian Farmers Federation (Inc) (WAFarmers)

EXECUTIVE SUMMARY, FINDINGS AND RECOMMENDATIONS FOR THE

REPORT OF THE STANDING COMMITTEE ON ENVIRONMENT AND PUBLIC AFFAIRS

IN RELATION TO

PETITION NO. 42 – REQUEST TO REPEAL THE *ENVIRONMENTAL PROTECTION (ENVIRONMENTALLY SENSITIVE AREAS) NOTICE 2005*

EXECUTIVE SUMMARY

1 On 17 June 2014, Hon Mark Lewis MLC tabled a petition in the Legislative Council seeking the repeal of the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* (**ESA Notice**). The ESA Notice, delegated legislation made under section 51B of the *Environmental Protection Act 1986* (**EP Act**), declares an environmentally sensitive area (**ESA**). There are a vast number of ESAs in this State – 98,042 parcels of land that are not Crown Reserves or State Forest include an ESA.

2 The EP Act establishes a clearing of native vegetation regime that prohibits the 'clearing' of 'native vegetation' (as these terms are defined in the EP Act) in this State unless an exemption applies or the Chief Executive Officer (**CEO**) of the Department of Environment Regulation (**Department**) grants a permit to clear. The legal effect of the ESA Notice is that the well-known day to day land clearing exemptions in the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (**Clearing Regulations**) do *not* apply to an ESA. Therefore, a permit must be granted to clear *any* native vegetation in an ESA.

3 The Committee considered the range of arguments raised in support of the request in the Petition to repeal the ESA Notice including the complexity and uncertainty of the land clearing laws, the validity of the ESA Notice, the lack of consultation prior to making the ESA Notice, the broad scope of the ESA Notice, and scale and impact of ESAs, and the lack of awareness about ESAs. The Committee also considered measures to reduce the impact of ESAs, while maintaining appropriate protection to areas of special environmental sensitivity.

4 There is significant confusion and concern about ESAs and their impact on landowners, occupiers and persons responsible for the care and maintenance of ESA land. The impact of ESAs is of particular concern to our farmers and graziers, as wetlands, which are ESAs, are prime agricultural land. Wetlands cover large areas of this State. Landowners not aware of an ESA may be subject to significant fines. Being denied the ability to clear native vegetation on an ESA can have a significant financial impact on landowners and on the value of the land.

5 It is extraordinary that the Government, when passing the ESA Notice, did not formally notify affected landowners. The Committee recommends that the Department formally notify each landowner of the law and its impact.

6 While accepting that areas of special environmental sensitivity should be afforded protection, the Committee recommends a review of the ESA Notice and of the seemingly all-encompassing but untested inclusion of wetlands captured by the ESA Notice.

7 The Committee recommends that the grazing exemption in regulation 5, item 14 of the Clearing Regulations, which permits maintaining existing cleared land, should apply to ESAs.

8 The Committee also recommends that the Minister for Environment introduce an effective mechanism of Departmental review where a landowner disputes the Department's decision that their land includes an ESA. This review should include a Departmental officer visiting the land in question.

9 Hon Albert Jacob MLA, Minister for Environment, has proposed amendments to the clearing of native vegetation regime to '*greatly assist in remedying concerns relating to any negative impact of ESAs*'.[1] In the Committee's view, the proposed 'referral model' may provide some administrative convenience to the Department but will not resolve the substantial issues identified by the Committee.

10 Land clearing laws involve a complex web of interrelated laws centred on an offence provision in section 51C of the EP Act. Murray Nixon, a former Member of this House and the Principal Petitioner, described land clearing laws as '*some of the most complicated and difficult to interpret of any legislation ever*',[2] and added that it '*is becoming an absolute can of worms to try to sort out what your property rights are.*'[3] Legislation should be clear and certain, particularly when it directly affects many Western Australians. The Committee recommends that section 51C of the EP Act be redrafted to state in clear, direct and positive language the circumstances in which a person is authorised to clear native vegetation.

11 If the Minister for Environment implements the recommendations in this report (noted in full below), there is likely to be a reduced impact of ESAs on landowners. The Committee also trusts that this report will clarify issues relating to ESAs and inform debate in the Legislative Council when the amendments proposed by the Government are debated.

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1 Submission from Hon Albert Jacob MLA, Minister for Environment, 2 October 2014, p5.

2 Submission from Murray Nixon, Principal Petitioner, received 15 July 2014, p1.

3 Murray Nixon, Principal Petitioner, *Transcript of Evidence*, 11 March 2015, p6.

FINDINGS AND RECOMMENDATIONS

12 The Committee's Findings and Recommendations are grouped as they appear in the text at the page number indicated:

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Recommendation 4: The Committee recommends that the Minister for Environment amend land clearing laws to provide that the grazing exemption at regulation 5, item 14 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* apply to ESAs declared in *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*.

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Recommendation 5: The Committee recommends that the Minister for Environment ensures that the Department of Environment Regulation conducts broad consultation with the public and Members of Parliament on the draft *A guide to grazing, clearing and native vegetation under Part V Division 2 of the Environmental Protection Act 1986.*

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Recommendation 6: The Committee recommends that the Minister for Environment (in the Government response to this report) advises the Legislative Council of the details of consultation undertaken, or to be undertaken, and the outcome of the public consultation process.

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Finding 5: The Committee finds that between July 2005 and November 2014, 924 permits to clear native vegetation within an ESA were granted. It is not known what percentage of applications for a permit to clear in an ESA have been refused, and how many applications have been refused, because the land was an ESA.

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Finding 6: The Committee finds that the then Department of Environment limited its consultation in relation to the draft *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* to only seven days (and for peak stakeholder bodies only) before the Notice was published in the *Government Gazette*. This consultation was so limited as to be pointless and was merely undertaken to 'technically' comply with legislative requirements.

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Finding 7: The Committee finds that the Explanatory Memorandum to the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* was inadequate. The Explanatory Memorandum:

- **Did not alert the Joint Standing Committee on Delegated Legislation to the scale and far reaching impacts of ESAs declared by regulation 6 (a transitional measure).**
- **Did not clearly advise of consultation undertaken in relation to the Clearing Regulations and ESAs.**

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Finding 8: The Committee finds that the Explanatory Memorandum to the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* was inadequate. The Explanatory Memorandum did not alert the Joint Standing Committee on Delegated Legislation to the scale of ESAs, the far reaching impacts of the Notice, and to significant concern raised regarding ESAs.

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Recommendation 7: The Committee recommends that the Minister for Environment directs the Department of Environment to provide a link to the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* and documents referred to in that Notice on its website.

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Finding 9: The Committee finds that:

- **There is limited information available to the public on ESAs. Printed maps are not readily available and it remains a challenge for landowners to identify an ESA using the Government's internet resource WA Atlas.**
- **Landowners have not been adequately advised that a law has been introduced that restricts their land use.**

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Finding 10: The Committee finds that the 'referral model' the Minister for Environment proposes to introduce to amend land clearing laws may provide some administrative convenience to the Department but it will not resolve the substantial issues identified in this report.

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Finding 11: The Committee finds that the proposed amendments to land clearing laws presents an opportunity for the Minister for Environment, following full and wide consultation, to introduce clearer laws that can be more easily understood by the public.

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Recommendation 8: The Committee recommends that section 51C of the *Environmental Protection Act 1986* be redrafted to state in direct positive language the circumstances in which a person is authorised to clear native vegetation.

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Finding 12: The Committee finds that noting an ESA on a Certificate of Title would notify the landowner or another party (after a title search) of the existence of an ESA but would not notify that person of the impact of the ESA.

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Finding 13: The Committee finds that if the Government introduces a law that impacts on property owners and may potentially devalue property, the Government should formally notify each landowner of the law and the impact of the law.

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Recommendation 9: The Committee recommends that the Minister for Environment directs the Department of Environment Regulation to write to each affected landowner to advise of the existence of the ESA and its impact.

REPORT OF THE STANDING COMMITTEE ON ENVIRONMENT AND PUBLIC AFFAIRS

IN RELATION TO

PETITION NO. 42 – REQUEST TO REPEAL THE *ENVIRONMENTAL PROTECTION (ENVIRONMENTALLY SENSITIVE AREAS) NOTICE 2005*

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1 REFERENCE AND PROCEDURE

1.1 On 17 June 2014, Hon Mark Lewis MLC tabled a petition in the Legislative Council seeking the repeal of the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* (**ESA Notice**).[4] The ESA Notice declares many areas of the State to be an environmentally sensitive area (**ESA**).

1.2 The Petition was referred to the Standing Committee on Environment and Public Affairs pursuant to the Legislative Council's Standing Order 102(6).

1.3 The Principal Petitioner is Murray Nixon, a former Member of the Legislative Council and President of the Gingin Private Property Rights Group (Inc). The Petition is attached at Appendix 1. The ESA Notice is attached at Appendix 2.

1.4 The Principal Petitioner and Hon Mark Lewis MLC provided submissions to the Committee. Hon Albert Jacob MLA, Minister for Environment (**Minister**), Hon Terry Redman MLA, Minister for Lands, and the Department of Environment Regulation (**Department**) also provided submissions and responded to Committee requests prior to and after the public hearings. Extracts from these documents are quoted in this report. Full submissions and correspondence are posted on the Committee's website at www.parliament.wa.gov.au/env.

1.5 On 11 March 2015, the Committee conducted public hearings with:

- Murray Nixon, Principal Petitioner, and Milan Zaklan representing the Gingin Private Property Rights Group (Inc).
- Jason Banks, Director General, and Sarah McEvoy, Executive Director, Strategic Policy and Programs, the Department.

1.6 The Committee thanks all submitters and witnesses for their assistance.

1.7 The Standing Committee on Delegated Legislation (**Delegated Legislation Committee**) also referred its concerns about the ESA Notice to the Committee for its

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[4] Tabled Paper 1508, Legislative Council, 17 June 2014.

consideration. That Committee noted that '*many otherwise law abiding landowners are not aware that their land is an ESA*'.[5]

1.8 On 21 August 2014, the Legislative Council debated a motion by Hon Rick Mazza MLC to (among other things) repeal regulation 6 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (**Clearing Regulations**), a transitional law that declared ESAs (which predated the ESA Notice).[6] While the motion was defeated, views expressed by Members informed the Committee's consideration of the Petition.

2 THE PETITION AND MATTERS CONSIDERED BY THE COMMITTEE

2.1 The Petition requests that the Legislative Council recommend repeal of the ESA Notice. The ESA Notice is delegated legislation made under section 51B of the *Environmental Protection Act 1986* (**EP Act**), which declares an ESA. Section 51B is attached at Appendix 3.

2.2 The Principal Petitioner's concerns about particular categories (the wetland categories) of ESAs declared by the ESA Notice are noted at paragraphs 4.12 to 4.19. The Principal Petitioner added that '*the Act and Clearing Regulations require review … however it is the* [ESA] *Notice that requires urgent attention and repeal*'.[7]

2.3 In support of the argument to repeal the ESA Notice, the Petition submits that:

- The ESA Notice is invalid. The Petition states that '*we believe that the Government failed to fulfil the* [consultation] *requirements of the* [EP Act] *as spelt out in section 51B*'.
- Owners of land with an ESA are unaware of the impact of the ESA Notice on their properties because:
  - there was no consultation as required by section 51B of the EP Act;
  - there was no '*subsequent contact since the publishing of the Notice*'; and
  - there was no '*detailed requirements made available in print form by Law Print or are reasonably assessable*'.
- Owners of land with an ESA (who may be unaware that their land includes an ESA) are at risk of criminal prosecutions for clearing of native vegetation on an ESA with large fines and/or imprisonment.

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5 Letter from Peter Abetz MLA, Chairman, Joint Standing Committee on Delegated Legislation, 3 April 2014, p2. The Delegated Legislation Committee's dealing with the ESA Notice arose out of its consideration of amendments to the Clearing Regulations considered by that Committee.

6 Regulation 6 is similar in its terms to the ESA Notice. As noted at paragraphs 3.9 to 3.13, regulation 6 of the Clearing Regulations is of no legal effect.

7 Submission from Murray Nixon, Principal Petitioner, received on 11 March 2015, p1.

- If the ESA Notice was '*fully implemented it would destroy the livelihood of an estimated 3,000 to 4,000 property owners and their communities from Kalbarri through to the South West corner to east of Esperance*'.

2.4 This report canvasses a range of issues raised during the Committee's consideration of the Petition including:

- The legislative framework in which the ESA Notice operates and the complexity of clearing of native vegetation legislation and the ESA Notice.
- The validity of the ESA Notice and Parliamentary scrutiny of the ESA Notice.
- The broad scope of the ESA Notice, and the number of ESAs and wetlands that are an ESA.
- The impacts of ESAs on landowners, occupiers and persons responsible for the care and maintenance of ESA land (**landowners**)[8] and the confusion and uncertainty about the law.
- Landowners not being aware of the ESA on their land, and the potential for owners of an ESA to be subject to prosecution and fines for unauthorised clearing of native vegetation on ESA land.
- The impact of the ESA Notice on farmers' and graziers' ability to graze, clear and use wetlands, which are prime agricultural land, and the law failing to distinguish between trivial and other clearing in an ESA.
- The Department's engagement and communication with ESA landowners.
- The likely effect of repealing the ESA Notice and the Government's likely response to repealing the ESA Notice.
- The Government's proposed amendments to the law.
- The option of noting an ESA on the Certificate of Title.
- The option of providing State compensation to owners with an ESA.

2.5 Committee Members are aware of the considerable community passion surrounding the issue of ESAs and property rights. Too many landowners, here and in other jurisdictions, clearing laws represent an erosion of property rights.[9] To some extent, the concern about property rights underlies concerns about the ESA Notice. A level of concern about property rights was reflected in the debate in the Legislative Council on 21 August 2014.

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8 This report uses the term 'landowner' to denote, as stated in the ESA Notice, the '*owner, occupier or person responsible for the care and maintenance of the* [ESA] *land*': Clause 4(5) of the ESA Notice.

9 In July 2014, the passion caused by land clearing laws led to the tragedy of a New South Wales environment compliance officer being shot and killed by an elderly landowner near Moree.

2.6 The Committee notes that while the ESA Notice is the focus of the Petition, the effect of the clearing laws on farmers and graziers is broader than the issue of ESA land. The clearing laws have the effect of 'locking up' native vegetation on uncleared land (whether ESA land or otherwise) by prohibiting clearing unless a permit or exemption applies. Committee Members are aware that prior to the current clearing laws farmers often cleared large areas of native vegetation. After the law was amended, a farmer required an exemption or the Department's approval to clear native vegetation.

2.7 While some landowners may consider property rights indivisible,[10] the State has the power to legislate an environment policy that impacts on landowners' use and enjoyment of the land. Clearing of native vegetation laws ultimately reflect the Government's policy, which involves consideration of the principles of protecting the environment and permitting landowners to use and enjoy their land.

3 THE CLEARING OF NATIVE VEGETATION FRAMEWORK

3.1 Consideration of the ESA Notice involves an understanding of the legislative framework in which it operates. The ESA Notice is only one part of the clearing of native vegetation framework set out in the EP Act.[11]

3.2 The legislative framework for the clearing of native vegetation is centred on the offence provision in section 51C of the EP Act, inserted as part of the Part V, Division 2 amendments to the EP Act which came into operation on 8 July 2004.[12] Section 51C, which applies to all State land and waters regardless of tenure and to the Crown, is copied below.

Box *1* *Section 51C of the EP Act*

51C. Unauthorised clearing of native vegetation

A person who causes or allows clearing commits an offence unless the clearing —

(a) is done in accordance with a clearing permit; or

(b) is of a kind set out in Schedule 6; or

(c) is of a kind prescribed for the purposes of this section ***and is not done in an environmentally sensitive area****.* [Committee emphasis]

10 For example, the Principal Petitioner stated this during his evidence at hearing: see Murray Nixon, Principal Petitioner, *Transcript of Evidence*, 11 March 2015, p7.

11 Commonwealth laws, which may impact on a landowner's use and enjoyment of land in this State, are not considered in this report.

12 Part V, Division 2 was introduced by section 110 of the *Environmental Protection Amendment Act 2003*.

3.3 Section 51C legislates a clearing regime with a presumption against the clearing of native vegetation. A person may only legally clear native vegetation if an exemption applies or the CEO of the Department issues a permit to clear the native vegetation. There are two categories of exemptions—exemptions under the Clearing Regulations and the exemptions in Schedule 6 of the EP Act. The Department's diagram of the framework for regulation of clearing under the EP Act is attached at Appendix 4.

3.4 In positive terms, section 51C of the EP Act provides that a person can clear native vegetation in the following circumstances:

Box 2 ***When a person can clear native vegetation***

A person can clear native vegetation in any of the following three circumstances:

- **The clearing is done in accordance with a clearing permit (s51C(a))**
  - Part V, Division 2, from section 51E of the EP Act, sets out when clearing permits may be granted by the CEO of the Department.
  - Regard must be had to the Clearing Principles set out in Schedule 5 of the EP Act, which include the principle that native vegetation should not be cleared if '*it is growing in, or in association with, an environment associated with a watercourse or wetland*' (Schedule 5, item1(f)).
- **The clearing is of a kind set out in Schedule 6 of the EP Act (s51C(b))**
  - Schedule 6 lists many exemptions including clearing under a written law, clearing in accordance with an approved policy, clearing by the Department in the performance of certain functions, clearing by the grazing of stock on land under a pastoral lease and clearing authorised under named licences or legislation. Schedule 6 is attached at Appendix 5.
- **The clearing is permitted by the Clearing Regulations. However, the Clearing Regulations do *not* apply to an ESA (s51C(c))**
  - Regulation 5 of the Clearing Regulations lists 26 items which prescribe when a person may clear land—but these prescribed clearing exemptions, described as '*routine low impact land management practices*',[13] do not apply to ESAs.
  - An ESA is declared by the ESA Notice, which refers to further legislation, policies and other documents (see paragraphs 3.18 to 3.23).
  - Regulation 6 of the Clearing Regulations, a transitional provision declaring ESAs, is now of no legal effect (see paragraphs 3.9 to 3.13).

[13] Submission from Hon Albert Jacob MLA, Minister for Environment, 2 October 2014, p4.

3.5 As the above may clarify, ESAs are relevant to the exemptions in the Clearing Regulations in that the exemptions in the Clearing Regulations do *not* apply to an ESA. Therefore, a landowner does not have the right to clear any native vegetation on an ESA, even if this clearing would otherwise be authorised by an exemption in the Clearing Regulations, and a landowner must apply to the CEO of the Department and be granted a permit to legally clear *any* native vegetation on an ESA. The Department has issued permits to clear an ESA (see paragraph 5.3).

3.6 It is important to note that the law prohibits conduct that involves the 'clearing' of 'native vegetation' as these terms are defined in the EP Act. 'Native vegetation' includes indigenous, aquatic or terrestrial vegetation but excludes vegetation grown in a plantation.[14] The meaning of 'clearing', especially as it applies to grazing, has caused some uncertainty. 'Clearing' requires substantial damage and, of particular significance to farmers and graziers, includes the grazing of stock. Section 51A of the EP Act defines 'clearing' to mean:

> *(a) the killing or destruction of, or*
>
> *(b) the removal of, or*
>
> *(c) the severing or ringbarking of trunks or stems of, or*
>
> *(d) the doing of any other substantial damage to, some or all of the native vegetation in the area, and includes the draining or flooding of land, the burning of vegetation, the grazing of stock, or any other act or activity, that causes —*
>
> *(e) the killing or destruction of, or*
>
> *(f) the severing of trunks or stems of, or*
>
> *(g) any other substantial damage to, some or all of the native vegetation in the area.*

3.7 The Department is endeavouring to clarify the practical effect of the current law as it applies to graziers in its Draft *A guide to grazing, clearing and native vegetation under Part V Division 2 of the Environmental Protection Act 1986* (see paragraphs 4.24 to 4.29).

3.8 An offence against section 51C of the EP Act carries the significant maximum penalty of $250,000 for an individual and $500,000 for a body corporate, and a daily maximum penalty for each day the offence continues after a notice of the alleged

[14] Section 3 of the EP Act provides that 'Native vegetation' is defined to mean '*indigenous aquatic or terrestrial vegetation, and includes dead vegetation unless that dead vegetation is of a class declared by the regulations to be excluded from this definition but does not include vegetation in a plantation*', and section 51A adds that this term does not include vegetation that is intentionally sown, planted or propagated.

offence under the EP Act is given of $50,000 and $100,000 respectively.[15] (See paragraphs 4.30 to 4.34 for further details on enforcement).

Regulation 6 of the Clearing Regulations

3.9 It is confusing that regulation 6 of the Clearing Regulations, a transitional measure that declared an ESA prior to the ESA Notice (which is very similar to the ESA Notice) remains part of the Clearing Regulations even though it is of no legal effect and has been of no legal effect since April 2005.[16]

3.10 Regulation 6 is of no legal effect because section 110 of the *Environmental Protection Amendment Act 2003*, which introduced Part V, Division 2 into the EP Act, included transition provisions at sections 100(3) and (4) which provided that the Governor may make regulations declaring an ESA but these regulations shall expire nine months after Part V, Division 2 came into operation. Section 110 recognised that transitional regulations to declare ESAs were required because it would take time to draft the ESA Notice. Regulation 9 of the Clearing Regulations also provides that regulation 6 ceases to have effect on the day the ESA Notice comes into operation.

3.11 Nothing on reading regulation 6 identifies that it is of no legal effect. It would be very difficult for a person reading the law to identify that this was a transitory law. The Legislative Council debating a motion to repeal regulation 6 of the Clearing Regulations demonstrates the confusion caused by regulation 6 remaining in the Clearing Regulations.[17] When asked at the hearing why regulation 6 had not been repealed, the Department, who describe this regulation as a '*drafting artefact*',[18] responded that this '*is a parliamentary counsel drafting convention. If it is not actually repealed, they do not write "repealed". It is expired, rather than repealed.*'[19]

3.12 The law should be certain and precise. The law must be accessible to the public and, so far as possible, be intelligible and clear. Having two laws which, on their face, appear to declare an ESA, is undesirable. Legislation of no legal effect is confusing. These principles are especially important when the law relates to an area of the law that impacts on thousands of Western Australians.

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15 Sections 99Q, 99R and Schedule 1, Divisions 1 and 2, item 8D of the EP Act.

16 Regulation 6 of the Clearing Regulations commenced on 30 June 2004. The clearing provisions of the EP Act commenced on 8 July 2004: Explanatory Memorandum (EM) to the Clearing Regulations, p2. Regulation 6 of the Clearing Regulations expired nine months after 8 July 2004 (see paragraph 3.10), on 7 April 2005. The ESA Notice was gazetted and commenced on 8 April 2005.

17 Hon Rick Mazza MLC's motion debated on 21 August 2014 sought, among other matters, a repeal of regulation 6 of the Clearing Regulations.

18 Sarah McEvoy, Executive Director, Strategic Policy and Programs, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p4.

19 Ibid.

3.13 As delegated legislation, regulation 6 could be repealed by another instrument of delegated legislation published in the *Government Gazette*. The Government moving the proposed amendments to the EP Act provides a timely opportunity to repeal regulation 6.

Finding 1: The Committee accepts that regulation 6 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* is of no legal effect. The *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* in effect replaced regulation 6 in declaring land to be an ESA.

Recommendation 1: The Committee recommends that the Minister for Environment repeals regulation 6 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004*.

The Clearing Regulations

3.14 Regulation 5(1) of the Clearing Regulations prescribes 26 clearing exemptions which authorise the clearing of native vegetation without a permit on all land except an ESA. These prescribed exemptions have been described as 'day to day' clearing exemptions or, by the Minister, as '*routine low impact land management practices*'.[20] Regulation 5 is copied at Appendix 6.

3.15 These exemptions include the clearing of native vegetation to construct a building, for fire hazard reduction, for fencing and for farm materials within the limits prescribed in regulation 5.[21] The exemption at item 14, most relevant to the Petition, authorises the owner or occupier of the land to clear native vegetation on land (but not in an ESA) in the following circumstances:

> ***14. Clearing to maintain existing cleared areas for pasture, cultivation or forestry***
>
> *Clearing of land that was lawfully cleared within the 20 years prior to the clearing if —*
>
> *(a) the land has been used as pasture or for cultivation or forestry within those 20 years; and*
>
> *(b) the clearing is only to the extent necessary to enable the land to be used to the maximum extent to which it was used in those 20 years.*[22]

20 Submission from Hon Albert Jacob MLA, Minister for Environment, 2 October 2014, p4.

21 In many circumstances, the Clearing Regulations provide that clearing must not exceed five hectares (increased from one hectare by amendments made in December 2013). The landowner must comply with the terms of the particular exemption for that exemption to apply.

22 Item 14 of regulation 5 was amended in December 2013 to increase the permitted clearing of land from land lawfully cleared within the last 10 years, to land lawfully cleared within the last 20 years.

3.16 The Principal Petitioner is of the view that the item 14 exemption should apply to all wetlands whether they are ESAs or not (see paragraph 4.19).

3.17 A landowner who wants to clear native vegetation *in excess* of an exemption prescribed in item 14 or any other item in regulation 5 must apply for and obtain a permit authorising that clearing (this assumes that a Schedule 6 exemption does not apply). This contrasts with an ESA landowner, who must obtain a permit for *any* clearing of native vegetation on the ESA land. Therefore, ESA land has greater protection than other land.

The ESA Notice

3.18 Section 51B of the EP Act provides the Minister with the power to declare, by notice, ESAs for the purposes of Part V, Division 2 of the EP Act. The ESA Notice declares ESAs. (The ESA Notice is copied at Appendix 2).

3.19 The purpose of ESAs is to protect incremental degradation of important assets and areas of special environmental sensitivity or value. As the Minister advised:

> *ESAs are in place in the context of the low impact land management practices contained in the regulations. They are intended to prevent incremental degradation of important assets such as declared rare flora, threatened ecological communities or high value wetlands. The intent of listing areas or classes as ESAs is to ensure that clearing that is allowed by exemption in regulations cannot be undertaken without consideration though a permit application, and therefore potentially degrade areas of special environmental sensitivity or value.*[23]

3.20 Clause 4(1) of the ESA Notice declares ten categories[24] of land an ESA, including:

> *(a) a declared World Heritage property* [defined in legislation] …
>
> *(b) an area that is included on the Register of the National Estate …*
>
> *(c)* ***a defined wetland and the area within 50 m of the wetland;*** ['defined wetland' is defined in clause 3 – see paragraph 4.8]
>
> *(d) the areas covered by vegetation within 50 m of rare flora*[25] …
>
> *(e) the area covered by a threatened ecological community*[26] …

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23 Submission from Hon Albert Jacob MLA, Minister for Environment, 2 October 2014, p2.

24 While the ESA Notice refers to ten categories of ESAs, the tenth category provided in clause 4(1)(j) refers to the *Environmental Protection (Swan and Canning Rivers) Policy 1998* which has been repealed: Submission from Hon Albert Jacob MLA, Minister for Environment, 2 October 2014, p4.

25 'Rare flora' is defined in clause 3 of the ESA Notice. This definition references other legislation.

> *(f) a Bush Forever site* [with some exceptions]…
>
> *(g) the areas covered by the following policies —*
>
> *i. The Environmental Protection (Gnangara Mound Crown land) Policy 1992;*
>
> *ii. The Environmental Protection (Western Swamp Tortoise) Policy 2002;*
>
> *(h)* ***the areas covered by the lakes to which the Environmental Protection (Swan Coastal Plain Lakes) Policy 1992 applies;***
>
> (i) ***protected wetlands as defined in the Environmental Protection (South West Agricultural Zone Wetlands Policy 1998.*** [Committee emphasis]

3.21 The terms of the ESA Notice are broad and sweeping. The above terms demonstrate the complexity of what is an ESA, including wetlands that are an ESA (the bolded categories above), as the notice refers to terms defined in the ESA Notice and other legislation, as well as government policies and documents in prescribing what land is an ESA. This is a difficult law for a landowner to interpret and apply to his or her own circumstances.

3.22 The Principal Petitioner objects to the ESA Notice, noting that policies referred to in the ESA Notice could stand alone and dictate land management practices, but accepts that protection of some land is appropriate (see paragraph 4.18). The Principal Petitioner accepts the ESAs declared in clauses 4(1)(a) and (b), in relation to clauses 4(1)(d) and (e) accepts that rare flora should be protected but it need not be included in the ESA Notice (he says that if not adequately protected in the EP Act, they should be included in the Clearing Regulations or a special policy), and that ESAs declared in clauses 4(1)(f) to (j) '*are all covered in other legislation and don't require mention in this Notice*'.[27]

3.23 The ESA Notice's declaration of wetlands, of most relevance to the Petition, and the Principal Petitioner's objections to the 'defined wetlands' declared ESAs by clause 4(1)(c) are canvassed at paragraphs 4.5 to 4.23.

Finding 2: The Committee finds that the purpose of ESAs is to protect incremental degradation of important assets and areas of special environmental sensitivity or value. The law provides that the 'day to day' clearing exemptions in the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* do *not* apply to ESA land. A permit is required to lawfully clear any native vegetation on ESA land.

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[26] 'Threatened ecological community' is also a defined term. This definition references a Ministerial determination and other legislation.

[27] Submission from Murray Nixon, Principal Petitioner, 8 February 2015, pp1-2.

4 THE SCALE AND IMPACT OF ESAS

4.1 The impact of ESAs is significant, in part because of the vast number of landowners in this State with an ESA on their property. A primary concern of the Petition is that many landowners, including farmers and graziers with a wetland ESA, are not aware of the ESA.

4.2 Despite Committee inquiries, it is not possible to advise how many parcels of land with an ESA have native vegetation on that ESA, and how many landowners are affected by the ESA Notice. However, it is clear that a vast number of parcels of land include an ESA and many thousands of Western Australians are potentially impacted by ESAs. In particular:

- The Department advised that a '*spatial search of cadastral parcels in Western Australia found 102,792 parcels of land that include an area mapped as an ESA*'.[28] Of those titles 98,042 titles are not Crown Reserves or State Forest. It is not known how many of the 98,042 titles include native vegetation, and how many landowners want to clear native vegetation on this land.

- The Petition noted the impact of ESAs between Kalbarri though to Esperance as follows:

  [If] *fully implemented it* [the ESA Notice] *would destroy the livelihood of an estimated 3,000 to 4,000 property owners and their communities from Kalbarri through to the South West corner to east of Esperance.*

4.3 The impacts of an ESA on landowners include:

- A landowner may not be aware that his or her property includes an ESA. As Milan Zaklan from the Gingin Private Property Rights Group (Inc) advised the Committee:

  > [When] *we first became aware of* [the ESA Notice], [it] *became evident that there was not a lot of people who knew about the notice or understood the notice or, in fact, were aware of the ramifications of the notice.*[29]

- A landowner may be confused and uncertain about the impact of the ESA on his or her property as the law is not easily understood. It is difficult for a landowner to know his or her responsibilities. In particular, there is confusion as to what extent a landowner can permit grazing on an ESA, and about the scope of the definition of 'clearing'.

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[28] Letter from Jason Banks, Director General, Department of Environment Regulation, 31 March 2015, Attachment 3.

[29] Milan Zaklan, Gingin Private Property Rights Group (Inc), *Transcript of Evidence*, 11 March 2015, p7.

- An ESA landowner must rely on the Department exercising its discretion to grant a permit in its favour to legally clear native vegetation on the ESA land and to use and enjoy their land for commercial or other purposes. An owner does not have the right to enjoy and use that land as he or she wishes. The Principal Petitioner submitted that '*many normal farm practices require a permit*'[30] and having to rely on the Department's discretion to grant a clearing permit makes planning business activities difficult. It is a reasonable argument that the prospects of a permit being refused, and the uncertainty about being granted a permit, are increased where an application relates to ESA land compared to other land. The Clearing Principles must be considered when determining a permit application and many of these principles promote conservation.

- An ESA may cause financial loss to landowners because an application to clear may be refused.

- A person purchasing land who is not aware of the ESA may suffer financial loss as a result of the ESA. The Principal Petitioner advised that native vegetation clearing laws have '*caused and continue to cause severe financial loss to landowners who had purchased undeveloped land with the object of turning it into productive farms*'.[31] For example, it has been reported that Peter Swift, who was unsuccessfully prosecuted for an offence contrary to section 51C, would never have purchased his property in Manjimup, which he thought at the time of purchase he could farm as a retirement option,[32] nor would his lender have loaned him the money if he knew there were significant restrictions on the property.[33] The Principal Petitioner added that he knew of '*three farmers who have been badly affected. Peter Swift is the most recent one.*' [34]

- A warning or prosecution for clearing an ESA, or a visit from a Departmental officer, may cause personal and financial costs to an ESA owner. A primary

30 Submission from Murray Nixon, Principal Petitioner, 8 February 2015, p1.

31 Submission from Murray Nixon, Principal Petitioner, received on 11 March 2015, p1.

32 Don Randall MP, House of Representatives, Parliament of Australia, *Parliamentary Debates (Hansard)*, 23 June 2014, p7098.

33 Comment from Peter Swift as reported in J Barrett, 'Don Randall says Bill Marmion the 'most weak and timid minister' in the Barnett government', *Australian Financial Review* online, 23 March 2015. Mr Swift was prosecuted for an offence contrary to sections 51C and 99Q (the penalty provision) of the EP Act in relation to a cleared area that substantially fell within an ESA. Mr Swift was acquitted of the charge that he caused or allowed clearing of native vegetation to occur without authorisation following a hearing conducted over three days in the Manjimup Magistrates Court. See *Department of Environment and Conservation v Peter Robert Swift*, in the Manjimup Magistrates Court sitting commencing on 6 December 2012, Prosecution Notice MJ 92/12. The Principal Petitioner advised that '*Of course, Peter won the case, but at the end of the day it has destroyed the man and the bank is about to foreclose on his property*': Murray Nixon, Principal Petitioner, *Transcript of Evidence*, 11 March 2015, p3.

34 Murray Nixon, Principal Petitioner, *Transcript of Evidence*, 11 March 2015, p3.

concern of the Petition is that landowners with an ESA may be unwittingly breaking the law. As Hon Mark Lewis MLC stated in the Legislative Council:

> *Anyone who grazes livestock on a property that is covered by an ESA, but that they do not know is covered by an ESA, commits a criminal offence and is subject to a fine of up to $250,000, and also will obviously have a criminal record. That is untenable. That is an injustice. The natural justice of that is a lay-down misere. … The problem I have is that these people are unwittingly committing a criminal offence, because they just do not know.*[35]

The Principal Petitioner advised that Mr Swift was '*financially, physically and mentally exhausted*' by the prosecution[36] and it has been reported that he '*is now $360,000 out of pocket and severely physically and mentally drained – wrecked - by this experience*'.[37] Another person who received a warning for clearing, who was not aware they had an ESA, '*had a severe impact on his health and interfered with his ability to use and enjoy his property*'.[38] The Principal Petitioner noted that a person charged with a clearing offence against the EP Act may plead guilty because this is the cheapest option.[39]

4.4 Also, financial institutions and real estate agents may not be aware of the ESA Notice and therefore may not advise owners of the ESA at the time of purchase (even though ESAs are noted on Landgate's WA Atlas). It has been argued that lenders have yet to come to terms with the implications of an ESA on property value[40] and the sellers of the land may potentially face significant risk of commercial litigation.[41]

Finding 3: The Committee finds that around 98,042 parcels of land in Western Australia, that are not Crown Reserves or State Forest, include land that is an ESA.

35 Hon Mark Lewis MLC, Legislative Council, *Parliamentary Debates (Hansard)*, 21 August 2014, p5674-75.

36 Submission from Murray Nixon, Principal Petitioner, received 15 July 2014, p1.

37 Don Randall MP, House of Representatives, Parliament of Australia, *Parliamentary Debates (Hansard)*, 23 June 2014, p7098.

38 Submission from Murray Nixon, Principal Petitioner, received on 15 July 2014, p1. During the hearing the Principal Petitioner also referred to an elderly gentlemen charged with mechanically clearing and added that this case '*put him into a state of depression and although in the end he was let off, that man has been destroyed. I have seen this happen, and that is why I am very concerned about it*': Murray Nixon, Principal Petitioner, *Transcript of Evidence*, 11 March 2015, p4.

39 Submission from Murray Nixon, Principal Petitioner, received on 15 July 2014, p1.

40 Ibid, p2.

41 P Henderson, 'Property rights in Parliament', *Farm Weekly*, 28 August 2014, p170.

The impact of ESAs on farmers and graziers—wetlands declared ESAs

4.5 The impact of ESAs on graziers is the central concern of the Petition as wetlands are prime agricultural land.[42]

4.6 One issue raised is that the law does not distinguish between trivial and significant clearing. As the Principal Petitioner submitted:

> *I do not think it was the intention of the drafters of the legislation to prevent people grazing rushes and reeds, but the black-and-white ruling is that any farmer who is grazing wetlands with rushes and reeds is committing a criminal offence.*[43]

4.7 Wetlands are given enhanced protection in being declared ESAs. In 2006, the then Minister for Environment, Hon Mark McGowan MLA, noted that wetlands were '*a dwindling asset*' and at least 80 per cent of wetlands that existed before European settlement have been cleared, filled or developed.[44] The Department recently added:

> *there has been substantial loss of wetlands since European settlement, so the other side of wetlands is that they are high value for conservation and they have a number of significant environmental value features and, where they are in the original condition, they have particular conservation values.*[45]

4.8 The following wetland categories of ESAs are most relevant to farmers and graziers:

- ***'A defined wetland and the area within 50 m of the wetland'*** (clause 4(1)(c) of the ESA Notice);

  Clause 3 defines 'defined wetland' to mean –

  (a) a wetland included in the List of Wetlands of International Importance kept under the Ramsar Convention;

  (b) a nationally important wetland as defined in "A Directory of Important Wetlands in Australia" (2001), 3rd edition, published by the Commonwealth Department of the environmental and Heritage, Canberra;

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42 Submission from Murray Nixon, Principal Petitioner, received on 15 July 2014, p1.

43 Murray Nixon, Principal Petitioner, *Transcript of Evidence*, 11 March 2015, p10.

44 Hon Mark McGowan MLA, Minister for the Environment, Legislative Assembly, *Parliamentary Debates (Hansard)*, 23 August 2006, p5079.

45 Sarah McEvoy, Executive Director, Strategic Policy and Programs, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p12.

> ***(c) a wetland designated as a conservation category wetland in the geomorphic wetland maps held by, and available from, the Department;***
>
> ***(d) a wetland mapped in Pen, L. "A Systematic Overview of Environmental Values of the Wetlands, Rivers and Estuaries of the Busselton-Walpole Region"*** *(1997), published by the Water and Rivers Commission, Perth; and*
>
> **(e)** ***a wetland mapped in V & C Semeniuk Research Group "Mapping and Classification of Wetlands from Augusta to Walpole in the South West of Western Australia" (1997), published by the Water and Rivers Commission, Perth*** **[the Semeniuk mapping of wetlands]**

- '*the areas covered by the lakes to which the Environmental Protection (Swan Coastal Plain Lakes) Policy 1992 applies*' (clause 4(1)(h)).

- '*protected wetlands as defined in the Environmental Protection (South West Agricultural Zone Wetlands Policy 1998*' (clause 4(1)(i)). [Committee emphasis].

4.9 It is obvious to the Committee from the above terms that identifying whether you have an ESA on your property from the terms of the ESA Notice is a very difficult task. As the Principal Petitioner states '*With this act there is the act, the policies, and the regulations, and they are not particularly clear*'.[46] It is also obvious to the Committee that the ESA Notice declares a significant number of wetlands and lakes ESAs, thereby placing restrictions on the right to clear this land.

4.10 The Department advised that the ESA Notice declares:

> *some (but not all) of the wetlands commonly known as the "geomorphic wetland dataset" which stretches from Cervantes to Walpole.*[47]

4.11 The Department added in relation to the *Environmental Protection (Swan Coastal Plain Lakes) Policy 1992* (**Swan coastal plain policy**) and '*protected wetlands*' categories of ESAs:

> *The wetlands to which the petitioner refers, namely those covered by the Environmental Protection (Swan Coastal Plain Lakes) and the Environmental Protection (South West Agricultural Zone Wetlands)*

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46 Murray Nixon, Principal Petitioner, *Transcript of Evidence*, 11 March 2015, p2.

47 Submission from the Department of Environment, 6 March 2015, p3.

> *Policy are restricted to a small area of the south-west, and in the case of the latter do not include the majority of wetlands types. The number of wetlands protected by these policies is a small subset of the high value wetlands of the south-west.*[48]

4.12 In relation to the Swan coastal plain policy alone, a category of ESA, the Principal Petitioner stated the following on the impact of ESAs on graziers.

> [B]*asically from Armadale to Dunsborough, you will find that all the blue is environmentally sensitive area* [the witness is referring to the area in blue on the below map[49]] *This indicates that perhaps 90 per cent of the best grazing country in Western Australia is covered by the notice; that it is illegal to graze stock on ESAs. I am aware of one farmer in that area who had a 100 acre block with a few trees on it—of course, most of those blocks have trees in them—for normal shade and shelter. I think he was probably dobbed in by somebody. He received a letter from the department that unless he removed his stock from that kikuyu paddock with shade and shelter in it, he would be charged.*[50]

48 Ibid.

49 Western Australian Planning Commission, Wheatbelt Regional Profile, 'Native Vegetation on Wetlands'.

50 Murray Nixon, Principal Petitioner, *Transcript of Evidence*, 11 March 2015, pp3-4.

4.13 In relation to the areas covered by the last two categories of wetlands noted above, the lakes to which the Swan Coastal Plain policy applies and the protected wetlands as defined in the *Environmental Protection (South West Agricultural Zone Wetlands Policy 1998* (clauses 4(1)(h) and (i) of the ESA Notice), the Principal Petitioner is of the view that these policies '*appear to be effective and have good community support*'.[51]

4.14 On the inclusion of the 'defined wetlands' in the ESA Notice (clause 4(1)(c) and the definition of 'defined wetland' in clause 3), the Principal Petitioner advised:

> *although we had been arguing for something like six years about the Swan coastal plains wetland policy, no-one became aware that in April 2005 a notice had been published in the Government Gazette, which declared not only the wetlands on the Swan coastal plain but basically all the wetlands throughout the south west land division in Western Australian environmentally sensitive areas. The mapping was probably started by the Water and Rivers Commission, who were in charge of it in those days. They were mainly aerial photographs and desktop studies and they were not proven. …*[52]

> *the notice lists a defined wetland that includes, for instance, wetlands of international importance—well, no-one can object to that—and nationally important wetlands, well, nobody can object to that, but (c) tacked on the bottom reads—a wetland designated as a conservation category wetland in the geomorphic wetland maps … available from, the Department;*

> *It says "a wetland", it does not say "the wetland". Anyone reading the notice would think that yes, a wetland would be assessed and if it was of great importance it would be declared an environmentally sensitive area.*[53]

4.15 The Principal Petitioner and Milan Zaklan take issue with the breadth of wetlands included in the ESA Notice and, in particular, to categories of 'defined wetlands' in the ESA Notice. Milan Zaklan gave evidence that:

> *We cannot see where there was any ground proofing done of the wetlands that they included in the ESA … The areas of wetland that we are talking about were included in bulk as ESAs. That is why there is a lot of confusion out there. I am sure that most of the operators of*

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51 Submission from Murray Nixon, Principal Petitioner, received on 11 March 2015, p1.

52 Ibid.

53 Ibid, p2.

> *the land there to this day would not be aware that they are on an ESA until such time as there is a prosecution.*[54]

4.16 The Principal Petitioner added the following objections to the 'defined wetlands' categories of ESA being '*tacked on*' to the ESA Notice:

> [Clause 4(1)(c)] *Is in dispute … It is dreadful that a person's property rights, income and land value (collateral) can be destroyed on such inaccurate maps for no proven environmental reason. In addition, the inclusion of a 50 metre buffer puts petrol in the fire. Low lying land in high rainfall areas (our best grazing land) can have many wetlands indicated on the maps. In many cases these would join with the inclusions of the buffer zone.*[55]
>
> *These were mainly desk top studies, were never listed never verified and are certainly not accurate. Normally EPPs* [environmental protection policies] *have a long and detailed public comment period before being tabled in Parliament, in this case they were TACKED onto the other established Policies.*[56]

4.17 The Principal Petitioner's concerns about the 'defined wetlands' relates to the categories of 'defined wetlands' declared by paragraphs (c), (d) and (e) of the definition in clause 3 (in bold at paragraph 4.8).[57]

> *It is the wetlands defined by V and C Semeniuk in (c) and (d) and (e) on page 2 that are in dispute. These were mainly desktop studies from aerial maps, were never field tests, are not accurate and should not be used to destroy a person's property rights. Much of the property claimed to be a conservation category wetland is called "Palus Plain," from the Latin, Palus – Marsh) a great exaggeration, most have never been marsh.*[58]
>
> [In relation to the Semeniuk mapping of wetlands] *I think what happened is that the Waters and Rivers Commission correctly had the Semeniuks do maps. There is nothing wrong with that; it is a very responsible action. But those maps were never designed to be an all-embracing environmentally sensitive area; it was just so that people could understand it as a geomorphic area.*

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54 Milan Zaklan, Gingin Private Property Rights Group (Inc), *Transcript of Evidence*, 11 March 2015, p8.

55 Submission from Murray Nixon, Principal Petitioner, 8 February 2015, p2.

56 Submission from Murray Nixon, Principal Petitioner, 2 March 2015, p1.

57 In relation to the clause (a) and (b) categories of 'defined wetland', the Ramsar and nationally important wetlands, the Principal Petitioner accepted these categories noting that these wetlands are defined in other legislation: Submission from Murray Nixon, Principal Petitioner, 8 February 2015, p2.

58 Ibid.

> *What should have happened is that if there was a wetland there that was not covered by the Swan coastal plain lakes policy, and it was not a Ramsar lake, if they wanted to protect it, yes, there was nothing wrong with that. But if, by the protection, it meant that the farmer, acting lawfully, was unable to continue to farm the property, it should have been purchased.*[59]

4.18 The Principal Petitioner is of the view that the policies referred to in the ESA Notice should dictate land management conduct.

> *I am of the view that because the geomorphic maps were tacked on to existing policies, the existing policies would stand in their own right. Effectively, it would remove automatic listing of all the wetlands across the state without any field proof as ESAs. In other words, if you are operating under the Swan coastal plain lakes policy, you operate under that policy. If you are operating under the Ramsar agreement, you operate under that policy. But from a practical point of view, the important thing is to remove those clauses that include the geomorphic maps.*[60]

4.19 The Principal Petitioner also expressed the view that landowners should not be subject to prosecution for grazing land that has been grazed in the past[61] and that the grazing exemption at regulation 5, item 14 of the Clearing Regulations *should* apply to all wetlands whether they are ESAs or not.

> *Under the rules, if you are farming an area that is not environmentally sensitive and if it has native bush on it, as most grazing properties have for shade and shelter, you could continue to graze it to the extent it has been grazed in the past* [this is referring to item 14]*; in other words, in a sustainable manner. In my view the same thing should apply to wetlands. You need to have shade and shelter for the stock and as long as they are not damaging it and destroying it, I think it should continue. Fortunately in the higher rainfall country, of which most is affected, it grows very well. You are battling to keep it clear, rather than trying to keep it low. I must admit, this notice presumably also includes most of the salt lakes of the wheatbelt. Samphire is native vegetation, and farmers are grazing it.*[62]

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59 Murray Nixon, Principal Petitioner, *Transcript of Evidence*, 11 March 2015, p4.

60 Ibid, p3.

61 Submission from Murray Nixon, Principal Petitioner, 8 February 2015, p3.

62 Murray Nixon, Principal Petitioner, *Transcript of Evidence*, 11 March 2015, p10.

4.20 While some land should have enhanced protection, the Committee is concerned about the seemingly all-encompassing but untested inclusion of wetlands captured by the ESA Notice. The Committee is also concerned that a Department assessment of whether land is an ESA may be based on desktop studies and maps, without a Departmental officer visiting the land in question to assess whether the land is environmentally sensitive.

4.21 The Committee also questions why the clearing exemption in regulation 5, item 14 of the Clearing Regulations should not apply to ESAs, including wetlands. This item promotes sustainable land practices of limited damage to the environment as it authorises (for non ESA land) the clearing of land that has been lawfully cleared in the past 20 years (without the requirement of a permit). Applying this exemption to ESAs would involve a simple amendment to section 51C(c) of the EP Act.

4.22 The Committee also notes the sweeping scale of wetlands declared an ESA. The Committee acknowledges that the historical use of these ESA wetlands did not result in a substantial negative impact to the environment.

4.23 The Committee acknowledges the Principal Petitioner's concern that 'defined wetlands' declared by clause 4(1)(c), (d) and (e) of the ESA Notice may be open to dispute.

Finding 4: The Committee finds that, while some important assets and areas of special environmental sensitivity or value should be afforded enhanced protection, it remains concerned about the seemingly all-encompassing but untested inclusion of wetlands captured by the ESA Notice.

Recommendation 2: The Committee recommends that the Minister for Environment review the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* and the scope of land declared an ESA with a focus on wetland ESAs.

Recommendation 3: The Committee recommends that the Minister for Environment introduce an effective mechanism of Departmental review where a landowner disputes the Department's decision that their land includes an ESA. This review should include a Departmental officer visiting the land in question.

Recommendation 4: The Committee recommends that the Minister for Environment amend land clearing laws to provide that the grazing exemption at regulation 5, item 14 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* apply to ESAs declared in *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*.

The draft *A guide to grazing, clearing and native vegetation under Part V Division 2 of the Environmental Protection Act 1986*

4.24 There is uncertainty about the scope and definition of the term 'clearing' (see paragraph 3.6) in the EP Act, and what grazing is considered 'clearing' and is therefore prohibited. The Principal Petitioner advised the Committee that:

> *The big problem in the act is that they define clearing, amongst other things, as grazing. Obviously, I believe the reason they did it is that they did not want people buying 10 000 goats and putting them on 100 acres and clearing it by that manner, so to protect it the object was to declare grazing as clearing. That is the problem because for any property that is listed as an ESA on the geomorphic maps, the law says that you are not allowed to graze it.*[63]

4.25 The Department has issued, in draft, *A guide to grazing, clearing and native vegetation under Part V Division of the Environmental Protection Act 1986* (January 2015) (**Draft Guide to Grazing**) to clarify the existing law and provide guidance on what grazing the Department considers 'clearing' under the EP Act.

4.26 The Draft Guide to Grazing notes that under the definition of 'clearing' in the EP Act it is '*necessary to determine when grazing causes substantial damage, and is therefore clearing for the purposes of the* [EP Act]'[64] and includes the following guidance:

> [The Department] *will apply the following guidance in determining whether or not the grazing of stock constitutes substantial damage and is therefore clearing:*
>
> 1. *Grazing that involves the severing of stems of taking leaves or minor branches, but does not compromise the long term health of the native vegetation is not considered clearing.*
> 2. *Sustainable grazing at levels that are consistent with existing, historic grazing practices where such grazing does not result in significant modification of the structure and composition of the native vegetation is not considered to be clearing.*
> 3. *Grazing that compromises the ability of native plants to recover and regrow causes substantial damage to native vegetation and is considered clearing.*[65]

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63 Murray Nixon, Principal Petitioner, *Transcript of Evidence*, 11 March 2015, p2.

64 Department of Environment Regulation, Draft *A guide to grazing, clearing and native vegetation under Part V Division 2 of the Environmental Protection Act 1986*, January 2015, p3.

65 Ibid, p4.

4.27 The Principal Petitioner described the Draft Guide to Grazing as '*very handy but the problem with it is, like all these documents, that it clearly says that it is not a legal document and that you should seek advice*'.[66]

4.28 The Department has forwarded the draft to the Pastoralists and Graziers' Association (**PGA**) and WA Farmers' Federation (**WAFF**) for their comment.[67] During the hearing with representatives from the Department, Hon Paul Brown MLC asked why the Department did not undertake broader consultation. The Department suggested that they may conduct '*broader whole of public consultation*'. This hearing exchange follows:

> ***Hon PAUL BROWN****: Why just WAFF and the PGA?*
>
> ***Mr Banks****: Primarily because it directly impacts their members.*
>
> ***Hon PAUL BROWN****: Why not the Gingin Private Property Rights Group? Why not a whole host of other groups along the coastal plains that are directly impacted? They have different membership to WAFF and the PGA and their membership is actually directly impacted. They are actively campaigning on this issue. I would suggest that perhaps there would be a wider list. Perhaps a better way to do that would be for the local members of Parliament, both upper house and lower house, to be notified because most members of Parliament are in direct conversation with all of those groups. We can probably give you a better understanding of who you should be asking for submissions from.*
>
> ***Mr Banks****: I am happy to take that on board and probably happy to look at doing a broader whole-of-public consultation process on it.*
>
> ***Hon PAUL BROWN****: That would be very appreciated by all those groups.*
>
> ***Mr Banks****: Fair enough. We will take that statement on board.*
>
> ***Hon PAUL BROWN****: Thank you.*[68]

4.29 The Committee supports the Department better engaging with the public to ensure an understanding of clearing laws. The Committee highlights the Department's intention to also engage with Members of Parliament in relation to the Draft Guide to Grazing as stated in evidence to the Committee. The Department's engagement with the community is further canvassed at paragraphs 8.1 to 8.19.

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66 Murray Nixon, Principal Petitioner, *Transcript of Evidence*, 11 March 2015, p3.

67 Sarah McEvoy, Executive Director, Strategic Policy and Programs, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p13.

68 Hon Paul Brown MLC, Member of the Committee, and Jason Banks, Director General, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, pp13-14.

Recommendation 5: The Committee recommends that the Minister for Environment ensures that the Department of Environment Regulation conducts broad consultation with the public and Members of Parliament on the draft *A guide to grazing, clearing and native vegetation under Part V Division 2 of the Environmental Protection Act 1986*.

Recommendation 6: The Committee recommends that the Minister for Environment (in the Government response to this report) advises the Legislative Council of the details of consultation undertaken, or to be undertaken, and the outcome of the public consultation process.

Enforcement

4.30 As previously noted, an offence against section 51C of the EP Act carries the significant maximum penalty of $250,000 for an individual and $500,000 for a body corporate, and a daily maximum penalty for each day the offence continues after a notice of the alleged offence is given of $50,000 and $100,000 respectively.[69]

4.31 The Department often elects to issue a warning, rather than prosecute in accordance with its *Enforcement and Prosecution Policy*. Between 8 July 2004 and 4 March 2015:

- The Department issued seven letters of warning for clearing that was contrary to section 51C(c) (the clearing within an ESA was clearing of a '*prescribed kind*', prescribed in the Clearing Regulations), mostly within the Perth metropolitan area.[70]
- There were 30 prosecutions for an offence against section 51C with fines within the range of $1,000 and $50,000 being:[71]

Year	Number of prosecutions	Fine range
2004-05	0	
2005-06	1	$1,000
2006-07	1	$2,000
2007-08	4	$1,000 - $10,000
2008-09	7	$2,000 - $15,000
2009-10	3	$12,000 - $40,000
2010-11	3	$4,000 - $10,000 (one acquittal)
2011-12	7	$5,000 - $50,000 (two acquittals)
2012-13	4	$7,500 - $12,000
Total	30	

69 Sections 99Q, 99R and Schedule 1, Divisions 1 and 2, item 8D of the EP Act.

70 Submission from the Department of Environment Regulation, 6 March 2015, p5, and Sarah McEvoy, Executive Director, Strategic Policy and Programs, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p12.

71 Ibid.

4.32 It is not known how many of the section 51C prosecutions involved clearing in an ESA.[72] The Department advised that no one had been prosecuted for grazing in an ESA.[73]

4.33 Not only is the penalty for an offence against section 51C significant, the prosecution may rely on provisions in section 51R of the EP Act to prove certain evidentiary matters. These deeming or averment provisions effectively reverse the onus of proof by placing the onus on the accused to refute certain matters. For example, section 51R(3) of the EP Act provides:

> *Where, in a prosecution for an offence under this Division involving clearing it is proved that clearing has taken place on land —*
>
> *(a) the person who was the occupier of the land at the time of the clearing is to be regarded as having caused the clearing in the absence of evidence to the contrary; and*
>
> *(b) the person who was the owner of the land at the time of the clearing is to be regarded as having allowed the clearing in the absence of proof to the contrary.*

4.34 Given the potentially significant impact of clearing an ESA, it is particularly important that owners of ESA land are aware that it is ESA land.

5 PERMITS TO CLEAR ESAS

5.1 A landowner with an ESA may apply to the CEO of the Department for a permit to clear native vegetation on ESA land. An application may seek clearing within or in excess of the exemptions (that apply to other lands) noted in the Clearing Regulations.

5.2 The Department must consider the Clearing Principles at Schedule 5 of the EP Act when determining whether to grant or refuse a permit to clear native vegetation which (again) includes the principle that native vegetation should not be cleared if '*it is growing in, or in association with, an environment associated with a watercourse or wetland*'.[74] The Department advised that the clearing permit process is intended to ensure that permitted clearing is environmentally acceptable, and added:

> *Where significant environmental impacts would occur as a result of a clearing permit application, wherever possible* [the Department]

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[72] Although a table provided by the Department noted 30 prosecutions under section 51C but no prosecutions under section 51C(c) (the section that refers to ESAs), this appears to reflect how prosecutions relating to ESAs are charged or recorded by the Department as it is known, for example, that Peter Swift was prosecuted for an offence contrary to sections 51C and 99Q (the penalty provision) of the EP Act and his matter involved clearing in an ESA (see footnote 33).

[73] Sarah McEvoy, Executive Director, Strategic Policy and Programs, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p12.

[74] Schedule 5, clause 1(f) of the EP Act.

works with applicants to reduce or amend the application, or apply conditions to the permit, to ensure that the impact of the clearing is acceptable.[75]

5.3 Unfortunately, it not possible from permit data to determine the impact of ESAs. Based on records provided by the Department,[76] the Committee can advise that:

- Between July 2005 and November 2014, 924 permits have been granted within an ESA.[77] Permits within ESAs represent around 14 per cent of the total of permit applications.

- A small proportion of permits granted appear to involve a purpose relating to farming or grazing. It is difficult to extrapolate with precision from the Department's records, but permits with the purpose that could be related to farming or grazing represent less than 20 per cent of the permits granted.[78]

- The Committee has been unable to ascertain what percentage of applications for permits to clear in an ESA have been declined. (It is not known how many applications for permit within an ESA were made, only how many were granted between July 2005 and November 2014).

- In 2014 (the last complete year), 160 of the 516 applications for a permit related to areas that included an ESA. Of these 160 applications, 114 were granted (71 per cent), 16 were withdrawn, 3 did not meet the requirements of a valid application and 27 were at various stages of assessment (as at March 2015).[79]

5.4 It has been argued that the impact of ESAs is limited to where an application to clear an ESA is refused when the application sought clearing within the range of the exemptions in the Clearing Regulations. For example, when the Department advised about the number of warning letters for clearing within an ESA, it advised of warning letters relating to clearing of a '*prescribed kind*' (in the Clearing Regulations) contrary

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75 Submission from the Department of Environment Regulation, 6 March 2015, p4.

76 Letter from Jason Banks, Director General, Department of Environment Regulation, 31 March 2015, Attachment 2.

77 Ibid. The Department also advised that application fees for clearing permits are low ranging from $50 to a maximum of $200: Submission from the Department of Environment Regulation, 6 March 2015, p3.

78 The permits with a purpose of apiculture (13), aquaculture (2), cropping (3), dam construction or maintenance (6), drainage (16), flora harvesting (1), grazing and pasture (26), horticulture (21), miscellaneous (52), pastoral diversification (1), plantation (1) and timber harvesting (11) amount to 153 permits of the 938 records (because permits may have more than one purpose the total is more than the 924 permits issued): Letter from Jason Banks, Director General, Department of Environment Regulation, 31 March 2015, Attachment 2.

79 Submission from the Department of Environment Regulation, 6 March 2015, p4.

to section 51C(c) of the EP Act.[80] The Minister also advised the Committee of the number of permits refused where item 14 of regulation 5 *would have* exempted the land (if it was not an ESA):

> *noting the Standing committee's particular interest in grazing within ESAs, I requested an analysis of refused clearing permits which include a purpose of grazing. This analysis indicates that none would be exempt under item 14, regulation 5 of the* [Clearing Regulations] *… even if they were not in an ESA.*[81]

5.5 However, it is arguable that the impact of an ESA on a landowner is not only that a permit must be sought to clear any land, but whether an application to clear an ESA (either within or beyond the clearing prescribed by the Clearing Regulations) is refused because the land is an ESA. That is, would the application for a permit to clear have been refused if the land was not an ESA? Information received does not address this question.

Finding 5: The Committee finds that between July 2005 and November 2014, 924 permits to clear native vegetation within an ESA were granted. It is not known what percentage of applications for a permit to clear in an ESA have been refused, and how many applications have been refused, because the land was an ESA.

6 THE LIKELY EFFECT OF REPEALING THE ESA NOTICE

6.1 The Government opposes repealing the ESA Notice and has proposed amending the law to respond to issues arising from ESAs (as noted at paragraphs 9.3 to 9.7).

6.2 If the ESA Notice is repealed, as sought in the Petition, there are broader consequences as it is one part of the clearing of native vegetation framework, and the scope of the exemptions in the Clearing Regulations were drafted in the context of ESA provisions. As the Department commented, '*I am not sure that lifting of the notice of itself is a simple solution to what is a complex problem*'.[82]

6.3 The legal effects of the ESA Notice being repealed include:

- *All* ESAs would be subject to the exemptions in the Clearing Regulations and reduced protection. This is clearly contrary to the Government's policy objective to protect land of special environmental sensitivity.

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80 Submission from the Department of Environment Regulation, 6 March 2015, p5 and Sarah McEvoy, Executive Director, Strategic Policy and Programs, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p12.

81 Letter from Hon Albert Jacob MLA, Minister for Environment, 13 April 2015, pp1-2.

82 Jason Banks, Director General, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p11.

- Native vegetation on land formerly an ESA could only be cleared lawfully if one of the three categories of clearing in section 51C applied—either a permit was granted or a Clearing Regulation or Schedule 6 exemption applied. It is not the case that repealing the ESA Notice will authorise any clearing on this land.

- The Government would amend the exemptions in the Clearing Regulations to protect ESA land, which would impact on all landowners.[83] These likely amendments to the Clearing Regulations would effectively protect ESA land though another legislative instrument—the Clearing Regulations. The Department advised that:

  > *If the ESA notice were repealed, in order to provide the same level of environmental protection, the scope of clearing under exemptions in regulations would need to be restricted. This would adversely affect the majority of landowners who do not have ESAs on their properties.*[84]

6.4 The Committee does not recommend repealing the ESA Notice. As noted in Finding 4, the Committee is of the view that some important assets and areas of special environmental sensitivity or value should be afforded the enhanced protection of an ESA Notice, but questions the scope of the ESA Notice, particularly as it relates to wetlands.

7 THE VALIDITY OF THE ESA NOTICE

7.1 The Petition questions the validity of the ESA Notice. It has been argued by those supporting the Petition that:

- Consultation was not undertaken as required by section 51B of the EP Act and owners of ESAs were not consulted prior to the Notice being made (see the Petition at Appendix 1).

- Parliament's scrutiny of the ESA Notice was inadequate.

7.2 Even though the ESA Notice replaced the very similar (and transitional) regulation 6 of the Clearing Regulations, the ESA Notice had a significant and long-term impact on landowners with an ESA.

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83 The Minister for Environment advised that if the ESA Notice was repealed, the Clearing Regulations would need to be reviewed '*with a view to removing the exemptions for routine low impact land management practices, due to their potential environmental impacts in ESAs*': Submission from Hon Albert Jacob MLA, Minister for Environment, 2 October 2014, p4.

84 Submission from the Department of Environment Regulation, 6 March 2015, p4.

7.3 Unfortunately, the Department's view that one law was simply replacing another appears to have impacted on the level of consultation the Department considered appropriate in relation to the ESA Notice.

Consultation prior to making the ESA Notice

The law

7.4 Section 51B(4) sets out what consultation is required prior to making the ESA Notice:

> ***51B. Environmentally sensitive areas, declaration of***
>
> *(4) Before a notice is published under this section the Minister shall —*
>
> *(a) seek comments on it from the* [Environmental Protection] *Authority and from any public authority or person which or who has,* ***in the opinion of the Minister****, an interest in its subject matter; and*
>
> *(b) take into account any comments received from the Authority or such a public authority or person.* [Committee emphasis]

7.5 If the Minister did not comply with the consultation requirement in section 51B(4), the ESA Notice would be invalid. However, *only a Court* can declare the ESA Notice invalid at this time.[85] Parliament has no power to disallow the ESA Notice because the time for tabling the Notice of Motion to disallow has passed.[86] The ESA Notice, which came into operation on 8 April 2005, remains valid law unless a Court declares it invalid or the ESA Notice is repealed.

What consultation occurred?

7.6 The Principal Petitioner is of the view that landowners were not consulted as required by section 51B(4) of the EP Act. The Minister is of the view that the (then) Minister complied with the EP Act.[87]

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85 A person must have standing to seek a declaratory order from the Supreme Court of Western Australia. Section 43(3) of the *Interpretation Act 1984* legislates a presumption of regularity in providing that '*It shall be presumed, in the absence of evidence to the contrary, that all conditions and preliminary steps precedent to the making of subsidiary legislation have been complied with and performed.*' An applicant must rebut this presumption of regularity to succeed in any application.

86 The notice of motion to disallow the ESA Notice must be tabled within 14 days from the date of the tabling of the ESA Notice in the Legislative Council: Section 42 of the *Interpretation Act 1914*.

87 Letter from Hon Albert Jacob MLA, Minister for Environment, 2 October 2014, p5.

7.7 As the Explanatory Memorandum (**EM**) to the ESA Notice (copied at Appendix 7)[88] notes, the Department circulated the ESA Notice and sought submissions on the ESA Notice from 17 stakeholders by way of a fax sent on 1 April 2005. However:

- The initial consultation letter was forwarded on Friday, 1 April 2005, only seven days before the ESA Notice was published in the *Government Gazette* (on 8 April 2005).
- Submissions were requested within three business days, by Wednesday, 6 April, two days before the ESA Notice was published.

7.8 It appears that it was important that the ESA Notice be published on 8 April 2005 because regulation 6 would cease to have effect on 7 April 2005 (nine months after the amendments to the EP Act commenced on 8 July 2004 - see footnote 16).

7.9 The stakeholders whose views on the ESA Notice were sought (noted in the EM) were all organisations, committees and associations, and included the Environmental Protection Authority, Conservation Council of Western Australia, PGA and WAFF.

7.10 The Department received 11 submissions,[89] including submissions from the PGA and WAFF. A few submissions indicated issues, including 'substantive issues', with the ESA Notice. For example:

- The PGA submitted:

  > *I have already contacted your office voicing our organisation's concern over the extremely short time frame for comment on this notice, especially in light of the incorrect draft of the notice being circulated. … The PGA has thoroughly expressed its opposition to the Environmental Regulations in their current form, due to the fact that they have been demonstrated to be unworkable. Members of our association are still awaiting clarification from the Government on the rights of producers to clear native vegetation to erect new fencing in agricultural and pastoral area, which is an essential farming practice.*[90]

- WAFF submitted:

  > *The main concern that we have with documents such as the notice is the lack of plain English and to a degree I understand the legal reasons behind that, however, the average farmer really has some*

88 The Minister has no objection to the EM to the ESA Notice being published. See footnote 106.

89 Submission from Department of Environment, Regulation, 6 March 2015, p2.

90 Submission from the PGA, 5 April 2005, p1.

> *difficulty in coming to terms with the terminology and lack of definition in the working which leaves them open to interpretation and potential abuse by agency people.*[91]

7.11 However, the EM to the ESA Notice described the submissions as:

> *generally supportive or neutral, and no substantive issues were raised. Most of the issues were raised during the consultation of the Regulations and some of the submissions have explicitly acknowledged this. These issues were considered during the development of the regulations.*[92]
>
> [And added that] [g]*iven that no additional areas are defined, and that the environmentally sensitive areas have been operating for nine months without significant incident, it is not anticipated that the notice will be contentious or sensitive.*[93]

7.12 Private citizens were not directly consulted on the ESA Notice. The Principal Petitioner advised that '*None of us seem to be aware that it* [the ESA Notice] *had any public consultation*', despite wetlands being a source of contention for many years.[94] The Principal Petitioner added:

> *it is surprising that* [the ESA Notice] *did not have any major public discussion* [given that there had been arguments about the Swan coastal plain policy for five years and the ESA Notice has the same impact over a greatly expanded area] … *I would have thought that the most important people to consult were those who were actually going to suffer the consequences of the change of law … you would have thought that at least they would have gone to the rural press and announced the intention of the notice.*[95]

7.13 The Department provided the following explanation as to why private citizens who may be impacted by the ESA Notice were not consulted:

> *The view was that it was more practical to consult with peak bodies and that is a common practice, and still is.*[96]

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91 Submission from WAFF, 6 April 2005, p1.

92 EM to ESA Notice, p2.

93 Ibid, p1.

94 Murray Nixon, Principal Petitioner, *Transcript of Evidence*, 11 March 2015, p2.

95 Murray Nixon, Principal Petitioner, *Transcript of Evidence*, 11 March 2015, pp5-6.

96 Sarah McEvoy, Executive Director, Strategic Policy and Programs, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p3.

> *There was an expectation during consultation, as there always is with these kinds of things, that peak bodies will discuss these issues and disseminate information to their members.*[97]

7.14 Not all landowners are members of the peak bodies from whom submissions were sought, and a three day consultation period gives limited opportunities to consult with members in any event.

7.15 Hon Mark Lewis MLC asked Departmental officers during the hearing if '*those with a property right, also have an interest*' in the ESA Notice.[98] The Department's view (that they did not) is possibly influenced by the presumption against clearing in the EP Act. The Department advised:

> *It depends on how you look at the way the legislation works, because it is actually a prohibition, as Mr Banks said previously, on clearing without a permit unless an exemption arises, you could say that in effect all people with native vegetation on their property, whether or not it is an environmentally sensitive area, are affected by that legislation.*[99]
>
> *Clearly, at the time the view was that they were not, because otherwise they would have needed to be consulted.*[100]

7.16 In not consulting other bodies of interest and the wider community, the Department appears to have chosen a path of least resistance.

7.17 The Department's engagement with stakeholders on the ESA Notice was rushed and limited. The Department's view is that consultation had previously occurred in relation to other legal instruments. As the Department and the EM to the ESA Notice advised:

> [The Department at hearing] *there was substantial consultation at the time that the legislation was introduced, including writing to all of the landholders on the Department of Agriculture and Food database of farmers, and including radio and television advertisements. Because the regulations*

97 Ibid, p10.

98 Hon Mark Lewis MLC, *Transcript of Evidence*, 11 March 2015, p3.

99 Sarah McEvoy, Executive Director, Strategic Policy and Programs, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p4.

100 Jason Banks, Director General, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p4.

> *referred to substantially the same environmentally sensitive areas there was not an additional belief that there was additional consultation required.*[101]
>
> [The EM to the ESA Notice] *Extensive consultation was undertaken on the regulations, including the environmentally sensitive areas, over a period between August 2003 and June 2004. Stakeholders have been aware of the review of the environmentally sensitive areas, which commenced in August 2004, for some time prior to the letter being circulated.*[102]
>
> [Consultation on the Clearing Regulations included] *in the order of 30 workshops and information sessions to a variety of government, industry, agricultural and environmental stakeholders … conducted between December 2003 and June 2004. In addition a working group chaired by Hon. Ken Travers MLC of key stakeholders, including the Pastoralists and Graziers Association and the WA Farmers Federation, considered the draft regulations.*[103]
>
> [At the time of the introduction of the Clearing Regulations] *the then Department of Environment wrote to all agricultural and pastoral landholders in the Department of Agriculture and Food WA's database to advise them of the new legislation and its key features. Radio and television advertising was conducted, and regional roadshows were presented, throughout the State in 2003 and 2004.*[104]

7.18 It is not known to what extent regulation 6 (the predecessor to the ESA Notice) was discussed during earlier consultation on the Clearing Regulations or the native vegetation amendments to the EP Act. The ESA Notice repeating what regulation 6 provided does not diminish the importance of consultation. The Committee also notes that Parliament legislated the consultation requirement in relation to *the ESA Notice* fully aware that regulations declaring ESAs may be in force when the ESA Notice was drafted. The ESA Notice was to have an ongoing impact, while the regulation was only temporary.

7.19 The Department's engagement process and timeframe on the ESA Notice suggests a cursory, 'tick the box' approach to public engagement.

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101 Sarah McEvoy, Executive Director, Strategic Policy and Programs, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p10.

102 EM to ESA Notice, p2.

103 Ibid, p1. At hearing, Ms Sarah McEvoy also commented on this consultation for the regulations when asked about consultation on the ESA Notice: Sarah McEvoy, Executive Director, Strategic Policy and Programs, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p3.

104 Submission from Department of Environment, 6 March 2015, p2.

Finding 6: The Committee finds that the then Department of Environment limited its consultation in relation to the draft *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* to only seven days (and for peak stakeholder bodies only) before the Notice was published in the *Government Gazette*. This consultation was so limited as to be pointless and was merely undertaken to 'technically' comply with legislative requirements.

Parliament's scrutiny of the ESA Notice

7.20 The ESA Notice is subsidiary legislation, subject to disallowance, and the Committee assumes that it was therefore considered by the Delegated Legislation Committee.[105] The Department provided an EM to the ESA Notice to the Delegated Legislation Committee. This is copied at Appendix 7.[106]

7.21 It has been argued that Parliament's scrutiny of the ESA Notice was inadequate because there was no 'report' of the Delegated Legislation Committee on the ESA Notice.[107] The Principal Petitioner commented that the ESA Notice '*snuck through*' and questions why there was never a Delegated Legislation Committee Report on the law or debate in the House.

> *there appears to have been no report to Parliament by the Delegated Legislation Committee. Surely strange for a document that has the force of law and deprives thousands of land owners of the right to continue using their property as before. To do so would be to commit a criminal act!*[108]

7.22 It appears to the Committee that Parliament's review of the ESA Notice followed the usual process of oversight of delegated legislation in that the (then) Minister did provide the Delegated Legislation Committee with an EM in relation to the ESA Notice. The Delegated Legislation Committee need not, and does not, provide a separate report to Parliament on each instrument of delegated legislation it considers.

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105 The Committee understands that it would require an order of the Legislative Council in accordance with Legislative Council Standing Order 225(2) to release the minutes of a meeting of the Delegated Legislation Committee prior to the 39th Parliament.

106 While the usual practice is for an EM relating to delegated legislation (unlike EMs relating to Bills) to remain private, given the questions about Parliamentary scrutiny of the ESA Notice and Clearing Regulations, the Committee has published the EMs to these instruments. This decision was made after the Minister for Environment advised that he has no objection to the EMs being published: Letters from Hon Albert Jacob MLA, Minister for Environment, 10 April 2015, p1, and 4 May 2015, p1.

107 Submission from Murray Nixon, Principal Petitioner, received on 15 July 2014, p2. Don Randall MP repeated the allegation that the ESA Notice bypassed the scrutiny of this Delegated Legislation Committee in the Commonwealth of Australia, House of Representatives: Don Randall MP, House of Representatives, Parliament of Australia, *Parliamentary Debates (Hansard)*, 23 June 2014, p7099.

108 Submission from Murray Nixon, Principal Petitioner, 11 March 2015, p2.

This would be a particularly onerous task given that in 2005 that Committee considered 523 instruments of delegated legislation.[109]

7.23 It is also apparent that the EMs to the Clearing Regulations and ESA Notice did not bring to the attention of the Delegated Legislation Committee the significant and far reaching impacts of ESAs.

7.24 The clear message in the EM to the ESA Notice was only that this law was simply one law replacing another. In these circumstances, it would be difficult for the Delegated Legislation Committee to identify the real and far reaching impacts and concerns about the ESA Notice.

7.25 The EM to the Clearing Regulations was also inadequate. This EM is attached at Appendix 8. Regulation 6, a nine month transitional measure, declared ESAs on a vast number of Western Australian properties with the effect that clearing restrictions were imposed on those properties. However, the EM only states in relation to ESAs that the Clearing Regulations:

- *Define clearing of a prescribed kind, which is exempt from the requirement for a clearing permit unless done in an environmentally sensitive area.*
- *Define environmentally sensitive areas.*

7.26 The EM to the Clearing Regulations gives no indication of the scope and impact of ESAs. It is also difficult from the EM to ascertain if any of the 'consultation' noted in this EM occurred in relation to the Clearing Regulations or ESAs because the EM relates to three instruments of delegated legislation.

7.27 There has also been the suggestion that the ESA Notice (or parts of it) are not valid because interrelated documents (for example, the referenced government policies or geomorphic maps) are not published in the *Government Gazette* or printed by State Law Publisher (previously State Print).[110] Section 51B(1) of the EP Act provides the Minister with the power to make an ESA Notice which declares '*an area of the State specified in the notice*' or '*an area of the State of a class specified in the notice*' an ESA. It does not restrict the Minister to referring to only other legislation or material published by State Law Publisher. The Parliament (for Bills) and Executive (for delegated legislation) have, with appropriate caution, made laws that refer to or adopt

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109 Joint Standing Committee on Delegated Legislation, Report 14, *Annual Report 2005*, 24 November 2005, p3.

110 For example, the Principal Petitioner said that '*Law print gave evidence and they clearly said that the only legal document is something that we have printed … by putting the wetlands onto the bottom of established policies and not making it subject to public consultation there is a problem*': Murray Nixon, Principal Petitioner, *Transcript of Evidenc*e, 11 March 2015, p3. Also, the Principal Petitioner said '*I was* [previously] *advised that only legislation in print form from Law Print was legal*': Submission from Principal Petitioner, 2 March 2015, p6.

documents that are not themselves law. For example, Australian Standards are often adopted in legislation. However, it is best practice that the Department makes available to the public documents referenced or adopted in a law.

Finding 7: The Committee finds that the Explanatory Memorandum to the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* was inadequate. The Explanatory Memorandum:

- **Did not alert the Joint Standing Committee on Delegated Legislation to the scale and far reaching impacts of ESAs declared by regulation 6 (a transitional measure).**
- **Did not clearly advise of consultation undertaken in relation to the Clearing Regulations and ESAs.**

Finding 8: The Committee finds that the Explanatory Memorandum to the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* was inadequate. The Explanatory Memorandum did not alert the Joint Standing Committee on Delegated Legislation to the scale of ESAs, the far reaching impacts of the Notice, and to significant concern raised regarding ESAs.

8 DEPARTMENT COMMUNICATION AND ENGAGEMENT

8.1 The Petition states that owners of an ESA are not aware of the impact of the ESA Notice on their property because there was no '*subsequent contact since the publishing of the Notice' and no 'detailed requirements made available in printed form by Law Print or* … [made] *reasonably accessible*'.

8.2 The Department is of the view that '*there is a high understanding in the affected community of the fact that there are clearing laws*'.[111]

8.3 The legal communication requirement in the ESA Notice, required for land to be an ESA, is at clause 4(5) of the ESA Notice (set out at paragraph 8.5). There is no legal requirement that details of an ESA be '*reasonably accessible*' or available in Law Print (State Law Publisher).

8.4 The ESA Notice is available on the State Law Publisher site at www.slp.wa.gov.au but not under the tab for 'Subsidiary legislation in force' as one would expect. Instead, users must access the relevant *Government Gazette*,[112] which is a more difficult task for anyone not familiar with researching legislation. Given the significance of ESAs to

111 Jason Banks, Director General, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p7.

112 A person is able to print the ESA Notice from the State Law Publisher site. State Law Publisher, at cost provides a hard copy of laws. The State Library of Western Australia also holds a copy of *Government Gazettes*.

landowners, the Department should provide a link to the ESA Notice on its website at a self-evident location (perhaps on the 'Native Vegetation' or 'Native Vegetation Map Viewer' pages) with links to relevant policies and documents. Although these documents are often difficult to interpret, easy public access may assist landowners understand the law and how it applies to them.

Recommendation 7: The Committee recommends that the Minister for Environment directs the Department of Environment to provide a link to the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* and documents referred to in that Notice on its website.

The legal requirement in the ESA Notice for an ESA to be '*made public*' or, for rare flora and threatened ecological community ESAs only, notified to the landowner

8.5 Clause 4(5) of the ESA Notice provides two legal requirements for communicating ESAs. It states:

> *An area that would otherwise be an environmentally sensitive area because of this clause is not an environmentally sensitive area unless—*
>
> *(a) the determination*[113] *of the flora, ecological community, site or area has been* ***made public****; or*
>
> *(b) in the case of an area referred to in subclause (1)(d) or (e)* [rare flora and threatened ecological community ESAs[114]] *— the owner, occupier or person responsible for the care and maintenance of the land has been notified of the area* [Committee emphasis]

8.6 Therefore, for an area to be an ESA, the land must fall under a category of ESA in clause 4(1) of the ESA Notice, and the relevant determination must be '*made public*' or the owner must be notified of the ESA if the ESA is a rare flora and threatened ecological community ESA.[115]

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113 'Determination' is defined in clause 4(7) of the ESA Notice to include a '*declaration, determination, designation, registration, listing, mapping or other description of the flora, ecological community, site or area*'.

114 The reason for the legal requirement to notify an owner of a rare flora and threatened ecological community ESA is that '*no spatial information* [and online map] i*s publicly available for threatened ecological communities or rare flora in order to protect the location of these highly significant values*'. The Minister added that the general practice for notification is that the owner, occupier or person responsible for the land is notified in writing by a hand delivered letter from the Department of Parks and Wildlife: Submission from Hon Albert Jacob MLA, Minister for Environment, 2 October 2014, p4.

115 Not meeting the requirements of clause 4(5) has the legal consequence of the land not being an ESA.

8.7 The intended effect of clause 4(5)(a) is that an owner is legally not required to be notified of most ESAs. The practical effect of the ESA Notice is that the public bears the onus of ascertaining if there is an ESA on their land. This is not a simple task.

8.8 ESAs are made available and 'public' on Landgate's Shared Land Information Platform (known as SLIP) viewable through the internet map WA Atlas. WA Atlas is accessible from the Department's 'Native Vegetation Map Viewer' internet page.[116] Instructions on viewing an ESA on WA Atlas are provided at http://www.der.wa.gov.au/your-environment/native-vegetation/28-native-vegetation-map-viewer.[117] The Department acknowledges that the dataset is not perfect, in that areas will be shaded as an ESA where there is no native vegetation (and therefore, the clearing of native vegetation laws have no practical application to that land). The Department added that it is a huge task to maintain the currency of the dataset.[118]

8.9 While the searching of property for an ESA on WA Atlas requires care, computer skills and the installation of Java software, in the Committee's view ESA information being available on WA Atlas appears to satisfy the legal requirement of ESAs being '*made public*'.

The Department's communication and engagement with the public

8.10 While that legal requirement for publication may be met, the question remains whether ESA information is 'reasonably accessible', or if the Department should improve its engagement and communication with ESA landowners to better inform landowners that they have an ESA and of the legal implications of an ESA.

8.11 The Department's engagement with landowners impacted by the ESA Notice was of particular concern to those supporting the Petition and Members of the Committee. Given the scale of ESAs, the number of wetlands being grazed in this State and the potential of being prosecuted for unlawfully clearing an ESA (which involves a significant fine), it is particularly important that the Department engages with the community about the clearing laws.

8.12 It remains a challenge for a member of the public to be aware of and identify an ESA on their land. The Department does not distribute printed maps. Hon Mark Lewis MLC commented on the accessibility of the internet maps as follows:

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116 The Minister describes the internet location of publicly available information relating to each category of ESA in his letter dated 2 October 2014 at pages 2 to 4.

117 This page is the first result if the terms 'ESA department of environment' are searched on Google. Using this map requires a Certificate of Title number, street or Lot address: Jason Banks, Director General, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, pp7- 8.

118 Jason Banks, Director General, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p8.

> *If a property owner wants to find out whether an ESA has been placed on their property, good luck. I have been involved in geographic information systems … and modelling … so I can work my way around a computer fairly well and I can interrogate geographic information systems. But even I struggle to find out whether an ESA has been placed on my property.*[119]

8.13 The Principal Petitioner is of the view that ESAs being available on the internet, and the onus being on the landowner to make his or her own inquiries, is not sufficient to make people aware of their legal responsibilities. The Principal Petitioner submits that:

> *little if any public information was published. There are no printed maps readily available to land owners, who are expected to make their own enquiries on the Net. Most people would find it difficult if not impossible to determine their responsibility under the law. Ignorance may be no excuse, however the law must be readily available.*[120]

8.14 On the Department's engagement with the public, the Department advised that, in addition to WA Atlas, it:[121]

- Provides guidance and fact sheets on the operation of the Clearing Regulations and ESAs on its website. The Department also has a general telephone number for clearing.[122]
- Has an engagement approach that '*also includes participation in forums and conferences, field days, and meeting with key stakeholders*'.
- Encourages people intending to clear land to contact the Department if uncertain about whether or not a clearing permit is required, although '*some stakeholders have indicated that there is a reluctance to do so, through a perceived consequence of self-identification for investigation*'.

8.15 The Department noted that writing to all owners of all ESAs would be an '*extensive task*',[123] as is apparent from the number of ESAs. The Department acknowledged some confusion about the application of the ESAs, a degree of public lack of trust

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119 Hon Mark Lewis MLC, Legislative Council, *Parliamentary Debates (Hansard)*, 21 August 2014, pp5674-75.

120 Submission from Murray Nixon, Principal Petitioner, received 15 July 2014, p2.

121 Sourced from the submission from the Department of Environment Regulation, 6 March 2015, p2, unless otherwise noted.

122 Sarah McEvoy, Executive Director, Strategic Policy and Programs, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p8.

123 Jason Banks, Director General, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p9.

with the Department, and commented on its engagement with the public when it advised the Committee that:

> *we are certainly cognisant of some confusion around the application of the ESAs, even in the context of the prosecution that has been raised* [Mr Swift's prosecution] *and referred to and its relevance to that. … The Department is endeavouring to try and build credibility in the relationship with the affected stakeholders, and I guess I am happy to continue to work and try and do that. I am not sure a cold letter from me is necessarily going to resolve that. I guess it would be keen (sic) if we moved to a point where there was confidence between the landowners and the department and we are able to provide advice, and so if they are not technically skilled to access the* [internet map] *they are quite comfortable giving us a call and having us fire a letter out to their property, but the commentary I have received is that there is quite a degree of scepticism and a lack of trust with the department and that is something that we need to work to rebuild …*
>
> *I think there is a broader issue than just firing a letter to people saying here is the ESA on your property. To the extent we are going to have controls over clearing land in this state, there needs to be a workable—administratively and also operationally from the land manager's perspective—relationship between the two.*[124]

8.16 The Committee's views on the Draft Guide to Grazing, to clarify the clearing laws as they apply to graziers, are noted at paragraph 4.29 and Recommendations 5 and 6 of this report.

8.17 The Committee supports any Departmental efforts to improve its engagement and communication with the public about ESAs. Department communication with the public to date has been inadequate. This exposes ESA land to illegal clearing practices and ESA landowners to being prosecuted with an offence carrying a maximum penalty of $250,000.

8.18 The (then) Department for Environment and Conservation should have consulted with landowners impacted by the law when drafting the ESA Notice.

8.19 If the Government is going to make a land clearing law that impacts on the property rights of a landowner, the Government must:

- consult with the landowners when drafting the law; and
- when the law is operational, advise the landowner of the effect of the law.

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124 Ibid, p11.

Finding 9: The Committee finds that:

- **There is limited information available to the public on ESAs. Printed maps are not readily available and it remains a challenge for landowners to identify an ESA using the Government's internet resource WA Atlas.**
- **Landowners have not been adequately advised that a law has been introduced that restricts their land use.**

9 MEASURES TO ADDRESS PUBLIC CONCERN AND THE IMPACT OF ESAS

9.1 As previously noted, the Government does not support repealing the ESA Notice.

9.2 The Committee considered a number of legislative and other measures that may address issues identified. The measures noted below are in addition to the Committee's:

- comments on the Department's communication and engagement with public noted above; and
- Recommendations to review the ESA Notice, amend the law to provide that the grazing exemption at regulation 5, item 14 of the Clearing Regulations applies to ESAs, and introduce an effective review of the ESA status of land (Recommendations 2 to 4).

The Government's proposed amendments to the law

9.3 The Government proposes to amend the EP Act. The Minister has advised that these amendments will '*greatly assist in remedying concerns relating to any negative impact of ESAs, while retaining their value in protecting small but high value areas*'.[125]

9.4 The Committee is not aware of the precise terms of the proposed amendments, what provisions in the EP Act or other laws will be amended or when the amendments will be tabled in Parliament, although this may be in 2015.[126]

9.5 The amendments propose to legislate what is described as a 'referral model'. The Minister advised that the amendments will provide the CEO of the Department with the power to reasonably quickly approve (with 21 days) clearing on an ESA with a

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125 Submission from Hon Albert Jacob MLA, Minister for Environment, 2 October 2014, p5.

126 When asked about the status of the Bill at hearing, the Department advised that it is still in draft form that they preferred not to articulate their timeframe: Sarah McEvoy, Executive Director, Strategic Policy and Programs, Department of Environment Regulation, Jason Banks, Director General, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p13. On the other hand, a Department submission stated that '*The Government intends to introduce these amendments in the 2015 Autumn session of Parliam'ent*': Submission from the Department of Environment Regulation, 6 March 2015, p5.

'trivial impact', without the need for a permit. The Minister described the proposed amendments as follows:

> *Under a referral model, the applicant will be required to refer all proposed clearing activities, which are not subject to an exemption, to the CEO. The CEO will then determine, having regard to the specified criteria, whether or not the proposed clearing requires a permit. The CEO will be required to make a decision on whether a clearing permit is required within a prescribed time limit of 21 calendars days.*
>
> *The referral model will ensure that clearing within ESAs can be evaluated without undue delay or cost and when the impact is trivial, no permit would be required. A referral based system provides appropriate flexibility for dealing with trivial clearing, without compromising environmental outcomes. It also gives an avenue for those who are unsure whether their clearing is exempt to obtain a defence against the offences of unlawful clearing.*
>
> *There will remain cases where the impact of clearing within an ESA is significant, and may require either conditions to mitigate the impact or may not be acceptable.*[127]

9.6 The Department considers that the proposed amendments will add '*administrative flexibility*', while retaining the current policy settings of the law:

> *A new referral system will require that any clearing not exempt under the* [EP Act] *is to be referred to the CEO for a determination of whether a clearing permit is required, having regard to specified criteria such as the size of the area, known or likely environmental values, scientific knowledge and whether conditions are likely to be required to manage environmental impacts. The adoption of this referral-based system will have the effect of ensuring that resources and assessments focus on clearing that has a significant effect on the environment.*
>
> *The clearing provisions have strict regulatory requirements, including a set of clearing principles against which clearing must be assessed, even where the impact of the clearing is not significant. The proposed referral system will provide a robust process method to determine whether the clearing should be subject to a permit against the specified criteria, with the decision of the CEO being published.*[128]

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127 Submission from Hon Albert Jacob MLA, Minister for Environment, 2 October 2014, p5.

128 Submission from the Department of Environment Regulation, 6 March 2015, p5.

> *Because the act is quite strict in its application in relation to needing either a clearing permit or an exemption, the degree of administrative flexibility the CEO has in administering that is limited, and the intention is to broaden that so there is greater capacity to provide a streamlined process to enable people to undertake clearing that is not going to have an material adverse impact on the environment.*[129]
>
> *This is without changing the policy setting; this is more trying to ease the administrative burden, rather than a change to the policy settings about how the regimes operate.*[130]

9.7 The Principal Petitioner's view on the proposed amendments (as described by the Minister above) is that it is '*pleasing to note that amendments are to be made to Legislation. These should be judged on merit*'.[131] However, he noted his concerns about the difficulties in quantifying environmental harm:

> *There is a problem with how you determine trivial and significant. … the problem with the act is—see, you are not allowed to do anything to harm any native flora or fauna in Western Australia, unless you have a permit* [or] *an exemption. When you are talking environmental harm, how do you measure it? A very green person might say that a 1 000-year-old red gum was worth $10 million. On the other hand, a farmer who finds that it is in the way of his centre pivot might think it is a nuisance and he wants to clear it. It is very, very difficult to define a value for environmental damage, and that is a problem.*[132]

9.8 It is not known how the CEO would interpret 'trivial impact'.[133] The concept of clearing with 'trivial impact' may be at odds with the definition of 'clearing' in the EP Act which refers to 'substantial damage' to native vegetation.

9.9 It appears to the Committee that the proposed referral model does not change the substance or the policy settings of the clearing laws. It will only involve the CEO providing his interpretation of the current law, then providing a response to applicants who want to clear native vegetation within 21 days.

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129 Jason Banks, Director General, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p6.

130 Ibid.

131 Submission from Murray Nixon, Principal Petitioner, 2 March 2015, p3.

132 Murray Nixon, Principal Petitioner, *Transcript of Evidence*, 11 March 2015, p9.

133 When the Department was asked if grazing would fall within the definition of clearing with a 'trivial impact' and if the Department would publish a list of what they consider to be trivial clearing, the Department advised: '*I guess that is a draft document that is being developed* [the Draft Guide for Grazing] *that articulates where we are at and the current regime*': Jason Banks, Director General, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p6.

9.10 The proposed referral model falls short of the Petition's request to repeal the ESA Notice. Neither does it adequately address concerns that the law fails to distinguish between trivial and significant land clearing.

9.11 The Committee is unable to make any recommendation on the proposed amendments without knowing the precise terms of the amendments.

9.12 The Committee is of the view that without amendments to the substance and policy parameters of the law, and the amendments proposed in this Report, the amendments proposed by the Minister for Environment will not address the issues raised in this report.

Finding 10: The Committee finds that the 'referral model' the Minister for Environment proposes to introduce to amend land clearing laws may provide some administrative convenience to the Department but it will not resolve the substantial issues identified in this report.

Drafting clearer legislation

9.13 The law should be clear and certain.

9.14 As noted at Boxes 1 and 2, section 51C involves a complex web of interrelated laws, some of which refer to a numerous other laws and Government policies and documents (including geomorphic maps). It may be difficult for a reasonably informed person to understand and apply the law to their particular circumstances.

9.15 In providing a number of circumstances where clearing is permitted, the law has many limbs and is convoluted. In particular:

- Section 51C (an offence provision) of the EP Act involves a double negative (that is, it is an offence unless) and is not drafted in direct positive language that clearly states when a person is authorised to clear native vegetation.
- The three limbs of section 51C refer to defined terms and pick up other provisions and Schedules in the EP Act and provisions in two instruments of delegated legislation (the ESA Notice and Clearing Regulations).
- The ESA Notice also refers to and picks up definitions in that notice, definitions in other legislation, Government policy and other documents. As previously noted, the ESA Notice is also difficult to understand and apply at a practical level.

9.16 The Principal Petitioner commented that the legislation is '*some of the most complicated and difficult to interpret of any legislation ever*'[134] and it '*is becoming an*

[134] Submission from Murray Nixon, Principal Petitioner, received 15 July 2014, p1.

absolute can of worms to try to sort out what your property rights are.'[135] Hon Mark Lewis MLC described the ESA framework as unworkable, creating uncertainty[136] and '*beyond the normal comprehension of nearly everybody that tries to understand the framework*'. He added: Is there '*actually anybody that fully understand*[s] *the overlapping interactions between the primary Act, regulations, Schedules and Notices*'.[137]

9.17 On the other hand, the Minister considers that the '*legislative requirements are clear, although I acknowledge that there are opportunities for improvement of the clearing provisions, which the Government is currently pursuing*'.[138] The Department noted the difficulty in drafting the legislation:

> *The legislation is complex … There is some difficulty in devising a set of regulation exemptions that cover all things that reasonably should be covered and do not include anything that would result in a significant environmental impact that was unintended and basically are clear and straightforward for everyone to understand.*[139]

9.18 The Committee does not know if the proposed amendments will clarify or simplify the EP Act or other clearing laws. The Committee is concerned about how section 51C of the EP Act is drafted. In any amendment of this section, notes could be included in the Act to explain the law and cross reference other legislation. Again, the Committee supports adequate consultation with the landowners affected by the law.

Finding 11: The Committee finds that the proposed amendments to land clearing laws presents an opportunity for the Minister for Environment, following full and wide consultation, to introduce clearer laws that can be more easily understood by the public.

Recommendation 8: The Committee recommends that section 51C of the *Environmental Protection Act 1986* be redrafted to state in direct positive language the circumstances in which a person is authorised to clear native vegetation.

135 Murray Nixon, Principal Petitioner, *Transcript of Evidence*, 11 March 2015, p6.

136 Submission from Hon Mark Lewis MLC, 8 July 2014, p2.

137 Ibid, p1.

138 Submission from Hon Albert Jacob MLA, Minister for Environment, 2 October 2014, p5.

139 Sarah McEvoy, Executive Director, Strategic Policy and Programs, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p2.

Noting an ESA on the Certificate of Title

9.19 The Committee also considered the option of improving notification of an ESA on a parcel of land by registering or noting the ESA on the Certificate of Title. A purchaser could become aware of the ESA through an inquiry on the online WA Atlas, but notification of the ESA on the Certificate of Title itself would ensure that prospective purchases were alerted to the ESA.

9.20 Noting an ESA of the Certificate of Title was raised during debate in the Legislative Council, where a number of Members supported this measure. For example, Hon Robin Chapple MLC stated, in support of comments made by Hons Mark Lewis MLC and Rick Mazza MLC:

> *when title deeds are passed on there needs to be a clear indication of the status of the land … we need to make sure that where there are issues of environmental sensitivity on a property that at the time of sale they are clearly identified I take on board what Hon Rick Mazza said: it is an impost on the person taking on the title.*[140]

9.21 The Department currently registers memorials on Certificates of Title in relation to an environment protection notice or vegetation conservation notice.[141] These memorials, and other legal rights or interests noted on the Certificate of Title (such as mortgages, easements and caveats), and notifications on the title are found on the Record of the Certificate of Title under the heading 'Limitations, interests, encumbrances and notifications'.

9.22 Another way of noting an ESA on a Certificate of Title is to register a section 70A of the *Transfer of Land Act 1893* (**TLA**) notification on the Certificate of Title. This authorises notification in relation to '*a factor affecting the use of enjoyment of the land or part of the land*'. As the Minister for Lands, who suggested this possible method of noting ESAs on the title, advised:[142]

> *Section 70A of the Transfer of Land Act 1893, (the TLA) provides that where a Local Government or Public Authority considers it desirable that a proprietor or prospective proprietor be made aware of facts affecting the use and enjoyment of the land, they may lodge with the Registrar a notification under Section 70A setting out those factors.*

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140 Hon Robyn Chapple MLC, Legislative Council, *Parliamentary Debates (Hansard)*, 21 August 2014, p5675.

141 Letter from Jason Banks, Director General, Department of Environment Regulation, 31 March 2015, Attachment 3. Section 66 of the EP Act provides for environmental protection notices to be registered on land titles and section 70 deals with vegetation conservation notices.

142 Letter from Hon Terry Redman MLA, Minister for Lands, 17 April 2015, p2.

> *The registered proprietor is a party to the notification … This is a generic provision for use where there is no specific mechanism for placing a notation on title to land. This provision could be used to note ESA's but only if the owner consents which is potentially likely.*

9.23 The cost of registering a notification or memorial (if not cost exempt) is the same at $160. At the Committee's request, the Department advised that the cost of lodging a memorial on a Certificate of Title for a title with ESAs would be over $18 million (based on the minimum lodge fee per registration of $184[143] multiplied by 98,042 titles) and 24,511 hours of Departmental officers time (98,042 x 15 minutes to obtain the Certificate of Title and register the memorial on each title). The Department added that it is not possible to estimate the resources required to ensure that the area registered was accurately recorded and that amendments to the EP Act are likely to be necessary to register ESAs on titles. The Minister added that the cost of registering a notification would be more than $15.6 million ($15.6 million being 98,042 times $160 registration fee), plus administrative resources.[144] The Department's summary on lodging a memorial follow:[145]

	No Titles	Lodgement costs	DER Hours	DER FTE
Certificate of Title with ESAs (other than Crown Reserves/State Forest)	98,042	$18,039,728	24,511	12.6

In summary, Landgate fees would total approximately $18 million and require almost 13 FTEs to lodge the memorials alone. Significant additional resources would be required to prepare the surveyed areas of ESAs consistent with requirements of Landgate.

9.24 The Minister does not support registering a section 70A notification on Certificates of Title with an ESA. The Minister is of the view that the section 70A notification mechanism would not be '*effective as a means of notifying prospective proprietors of the existence of ESAs and their effect for a number of reasons*', namely:[146]

- Based on the scheme of the clearing provisions in the EP Act the '*single most important factor*' triggering the requirement for a clearing permit is the presence of native vegetation. ESAs are '*only relevant in the limited context*' of the Clearing Regulations. The Minister stated:

  > *The notification of ESAs would therefore be ineffective in guiding proprietors and potential proprietors on how the clearing provisions*

143 $184 is comprised of the cost of searching a Certificate of Title ($24) and the cost of registering a memorial fee ($160).

144 Letter from Hon Albert Jacob MLA, Minister for Environment, 12 May 2015, p2.

145 Letter from Jason Banks, Director General, Department of Environment Regulation, 31 March 2015, Attachment 3.

146 Letter from Hon Albert Jacob MLA, Minister for Environment, 12 May 2015, p2.

most significantly affect "the use or enjoyment of the land or part of the land".

- The data on the presence of native vegetation is inadequate and '*it would be beyond the resources of the Department of Environment Regulation to develop such a dataset*'.

- The consent of the proprietor of the land is likely to be difficult to obtain '*based on the views expressed to the current Inquiry about the perceived effect of ESAs on property values*'. Unless notification is universal, it would be of very limited value.

- The cost of registering the notification, without any allowance for the administrative resources, is more than $15.6 million.

9.25 The Minister for Lands is of the view that it is impractical to enter a record on Certificates of Title but suggests that *some* ESA information could be recorded on the title with a section 70A notification. The Minister for Lands advised:

> *Clearly the amount of land affected by ESAs makes it impractical to enter a record on titles. However, given that it is possible to place a notification on title to land, and where it is in the public interest to make small, high value ESA information available, recording that information on the title is an efficient and effective method. To achieve this, the part of the ESA, and the part of land in the relevant title comprising the small high value portion of that ESA, must be defined by a spatial/graphic description and a deposited plan lodged at Landgate so the ESA can be accurately recorded on title.*[147]

9.26 The cost of registering the notification is clearly significant. However, the costs of entering a section 70A notification on the Certificate of Title would be reduced if the fee of $160 was waived. Section 66(2) of the EP Act exempts the payment for registering an memorial for an environmental protection notice when it provides:

> *(2) On receiving a copy of an environmental protection notice delivered under subsection (1), the Registrar of Titles or the Registrar of Deeds and Transfers, as the case requires, shall, without payment of a fee, register the environmental protection notice and endorse or note accordingly the appropriate Register or register or record in respect of the land to which that notice relates.*

[147] Letter from Hon Terry Redman MLA, Minister for Lands, 17 April 2015, p2.

Finding 12: The Committee finds that noting an ESA on a Certificate of Title would notify the landowner or another party (after a title search) of the existence of an ESA but would not notify that person of the impact of the ESA.

9.27 It would be a cheaper option for the Department to write to affected landowners to advise of ESAs and their impact. If a Government introduces a law that impacts on landowners and may potentially devalue property, the Government should advise each landowner of the law and the impact of the law. Indeed, it seems extraordinary to the Committee that a Government would apply the restrictions of ESA status to 98,042 titles without formally notifying the landowners.[148]

9.28 The Committee acknowledges that writing to all affected landowners will be a big undertaking but is of the view that this should have been done 10 years ago when the ESA Notice was introduced.

Finding 13: The Committee finds that if the Government introduces a law that impacts on property owners and may potentially devalue property, the Government should formally notify each landowner of the law and the impact of the law.

Recommendation 9: The Committee recommends that the Minister for Environment directs the Department of Environment Regulation to write to each affected landowner to advise of the existence of the ESA and its impact.

Compensation

9.29 Another measure raised to address the financial impact of ESAs is compensating an owner of an ESA for any restriction imposed on their land by the State.[149]

9.30 It has been argued that if an ESA has an adverse financial impact on the owner of the land, for example, a permit is not granted to clear the ESA land that would otherwise be granted, this burden should be borne by the whole community through State compensation, and it is unfair to burden the farmer with the cost of protecting environmentally sensitive areas. As the Principal Petitioner submitted:

148 As noted in paragraph 8.5, clause 4(5)(b) of the ESA Notice only provides that an owner of rare flora and threatened ecological community ESAs must be notified of the ESA.

149 The Land Acquisition Legislation Amendment (Compensation) Bill 2014 before Parliament relates to circumstances where the Government acquires an interest in land. The Western Australian *Constitution Act 1889* does not contain a provision similar to section 51(xxxi) of the Commonwealth of Australia Constitution Act which provides the guarantee that property must be acquired '*on just terms*' in the event of the Commonwealth acquiring property from the State or any person. The High Court of Australia in *New South Wales v Commonwealth* (1915) 20 CLR 54 held that the sovereignty of each State Parliament empowers it to take or acquire land with or without payment of compensation. Western Australia does provide compensation for land in the *Land Administration Act 1995*. However, the impact of an ESA is not that the Government acquires the land, but that restrictions may be imposed.

> *we believe that if property rights are taken, compensation should be available on just terms.*[150]
>
> *If the community wishes to lock up valuable land as a type of National Park, the land owner must receive fair compensation.*[151]
>
> [If] *land use is restricted for the communities benefit, not their own, the community should purchase the property to pay just compensation … If the community wishes to use agricultural land for other purposes, they must buy it or fully compensate the land owner in other ways.*[152]

9.31 A number of Members in the Legislative Council supported the principle of compensation during the debate on 21 August 2014.[153]

9.32 Hon Sue Ellery MLC referred (with approval) to the following comment in the Standing Committee on Public Administration and Finance's report *The Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*:

> *2.112 The Committee believes that where such an interest in the land, or any granted right attaching to that interest, is subsequently taken from the landholder by the State Government for a public purpose, then the State should provide fair compensation to the landholder.*[154]
>
> [Then Hon Sue Ellery MLC added] *I can understand that it is big decision to make because it would involve an awful lot of money … However, there are serious issues around compensation that need to be properly addressed.*[155]

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150 Murray Nixon, Principal Petitioner, *Transcript of Evidence*, 11 March 2015, p4.

151 Submission from Murray Nixon, Principal Petitioner, received 15 July 2014, p2.

152 Submission from Murray Nixon, Principal Petitioner, 8 February 2015, pp1 and 3.

153 For example, Hon Rick Mazza MLC stated '*The Environmental Protection (Clearing of Native Vegetation) Regulations, which deal with environmentally sensitive areas, undermine the integrity of private property ownership. I accept that there are environmentally sensitive areas that are of significance and require protection. However, if a benefit for the community is to be derived from that ESA, the cost of that benefit should be shared amongst the community and not burdened on a single landholder. In other words, we should not have regulation theft*': Hon Rick Mazza MLC, Legislative Council, *Parliamentary Debates (Hansard)*, 21 August 2014, p5673. Hon Nigel Hallett MLC added that '*There should be compensation that is enacted*': Hon Nigel Hallett MLC, Legislative Council, *Parliamentary Debates (Hansard)*, 21 August 2014, p5679.

154 Hon Sue Ellery MLC, Legislative Council, *Parliamentary Debates (Hansard)*, 21 August 2014, p5677 quoting Legislative Council Standing Committee on Public Administration and Finance, *The Impact of State Government Actions and Processes on the Use and Enjoyment of Freehold and Leasehold Land in Western Australia*, Report 7, 14 May 2004, p204.

155 Hon Sue Ellery MLC, Legislative Council, *Parliamentary Debates (Hansard)*, 21 August 2014, p5677.

9.33 As noted above, there would be a significant cost associated with a compensation scheme. It was also noted in the Legislative Council that the cost of ESAs currently exists, but this cost is being borne by the landowner.[156]

9.34 During the debate in the Legislative Council, Hon Helen Morton MLC, the Minister representing the Minister for Environment, who did not support the motion, referred to the Land Acquisition Legislation Amendment (Compensation) Bill 2014, since tabled in the Legislative Assembly. However, this Bill applies to circumstances where the government acquires an interest in land, and does not impact on ESAs, which involve a potential restriction on a landowner's use and enjoyment of the land and Executive oversight of any clearing on that land.[157]

9.35 The Government does not support compensation for landowners with an ESA. The Minister, reporting on the Government's position, advised:

> *There are several provisions within the Environment Protection Act 1986 [EP Act] that potentially affect property owners, including regulations of clearing and emissions.*
>
> *The clearing provisions of the* [EP Act] *(where clearing of native vegetation is an offence unless a permit is held or an exemption applies) mean that there is a presumption against clearing without authorisation.*
>
> *The most significant potential effect on property owners is when a clearing permit is refused, and the clearing cannot lawfully proceed. The effect of the clearing provisions for landholders who have ESAs on their property is the same for those who wish to clear native vegetation for which an exemption does not apply, that is a permit is required.*
>
> *Given this approach to the clearing provisions, I would not support compensation that applied to property owners within ESAs.*

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156 For example, Hon Peter Katsambanis MLC commented '*A number of people have spoken about how compensation would lead to a massive cost, so if we paid compensation to private landowners it would cost our society a lot of money. I put it to members that it would cost no more than it costs today; the cost is already there. However, the cost today is being borne by each of those individual landowners who have had their land uses fettered and their property actually ameliorated – the value of their property reduced. … it is a private cost being borne by private landowners for a social or public benefit to people who believe in private property rights and individual rights, that is an obscenity that needs to be addressed*': Hon Peter Katsambanis MLC, Legislative Council, *Parliamentary Debates (Hansard)*, 21 August 2014, p5680. Hon Rick Mazza also stated: '*You are quite right. It is a lot of money but at the moment that financial burden is being borne by the few landholders it affects, so those people have the burden of reduced land values*': Hon Rick Mazza MLC, Legislative Council, *Parliamentary Debates (Hansard)*, 21 August 2014, p5677.

157 Sarah McEvoy, Executive Director, Strategic Policy and Programs, Department of Environment Regulation, and Jason Banks, Director General, Department of Environment Regulation, *Transcript of Evidence*, 11 March 2015, p10.

> *Further, noting the Standing Committee's particular interest in grazing within ESAs, I requested an analysis of refused clearing permits which include a purpose of grazing. This analysis indicates that none would be exempt under item 14, regulation 5 of the* [Clearing Regulations] … *even if they were not in an ESA.*
>
> *Finally, as part of the Government's commitment to improving private property rights, Premier's Circular 2014/4 (A Private Property Rights Charter for Western Australia) outlines principles to ensure that proper regard is given to the rights of private land owners where the exercise of statutory powers may restrict the development or use of privately owned land. Relevantly, the Charter provides the public officials should only exercise such powers where they consider it to be justified, having regard to the appropriate balance between the interests of affected land owners and the interest of the broader community.*[158]

9.36 A number of difficulties arise when considering compensation for an ESA including:

- The cost of compensating landowners may be difficult to determine. In what circumstances would compensation apply and how would the quantum of compensation be determined?
- It is difficult to ascertain the impact of ESAs given the discretion to grant a permit to clear an ESA. It could be difficult to establish when an application for a permit to clear an ESA was refused because the land was an ESA.
- There are provisions in the EP Act and other legislation that potentially adversely affect property rights in land (for example, town planning, emission and easements laws) that are not compensated by the State and do not fall within the scope of compensation legislation.

9.37 Measures that increase a potential purchaser's awareness of ESAs, for example noting the ESA on the Certificate of Title,[159] may to some extent address the argument for compensation as that landowner would be aware of the ESA when purchasing the land.

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158 Letter from Hon Albert Jacob MLA, Minister for Environment, 13 April 2015, pp1-2.

159 For example, during the debate in the Legislative Council, Hon Paul Brown did not support compensation for ESAs but he considered that ESA recognition on the Certificate of Title was needed when he stated that '*the idea of compensation for ESAs would put a very large burden on the state because of the areas covered by ESAs, the value of the land and the magnitude of the debt to the State, all of which would be very real and problematic for the state. I do not think that that argument can be successfully propagated*': Legislative Council, *Parliamentary Debates (Hansard)*, 21 August 2014, p5677-78.

9.38 The Committee is of the view that if the Minister for Environment implements the recommendations in this report, there is likely to be a reduced impact of ESAs on landowners.

9.39 The Committee commends its report to the House.

Hon Simon O'Brien MLC
Chairman

11 August 2015

APPENDIX 1

THE PETITION

I, Murray Nixon **in the State of Western Australia, am the promoter of this petition which contains 14 signatures.**

PETITION IN RELATION TO [SUBJECT MATTER]

To the President and Members of the Legislative Council of the Parliament of Western Australia in Parliament assembled.

We the undersigned residents of Western Australia are opposed to Environmental Protection (Environmentally Sensitive Areas) Notice 2005 published in the Government Gazette in April 2005 No. 55.

Firstly, we believe that the Government failed to fulfil the requirements of the *Environmental Protection Act 1986* as spelt out in section 51B.

Because there was no:

- consultation as required by section 51B prior to the Notice being Gazetted
- subsequent contact since the publishing of the Notice
- detailed requirements made available in printed form by Law Print or are reasonably accessible,

owners are still unaware of the impact of the Notice on their properties.

Owners of property with areas declared ESA's by the Notice are in our opinion at risk of criminal prosecution with large fines and/or imprisonment.

Finally, in our opinion if the full legal requirements of the Notice were fully implemented it would destroy the livelihood of an estimated 3,000 to 4,000 property owners and their communities from Kalbarri through to the South West corner to east of Esperance.

Your petitioners therefore respectfully request the Legislative Council to recommend repeal of the Environmental Protection (Environmentally Sensitive Areas) Notice 2005.

And your petitioners as in duty bound, will ever pray.

APPENDIX 2

THE ESA NOTICE

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WESTERN AUSTRALIAN GOVERNMENT Gazette

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PERTH, FRIDAY, 8 APRIL 2005 No. 55 SPECIAL

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Environmental Protection Act 1986

Environmental Protection (Environmentally Sensitive Areas) Notice 2005

Made by the Minister for the Environment under section 51B of the Act.

1. Citation

This notice is the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*.

2. Commencement

This notice comes into operation on the day on which it is published in the *Gazette*.

3. Terms used in this notice

In this notice —

"defined wetland" means —

(a) a wetland included in the List of Wetlands of International Importance kept under the Ramsar Convention;

(b) a nationally important wetland as defined in "A Directory of Important Wetlands in Australia" (2001), 3rd edition, published by the Commonwealth Department of the Environment and Heritage, Canberra;

(c) a wetland designated as a conservation category wetland in the geomorphic wetland maps held by, and available from, the Department;

(d) a wetland mapped in Pen, L. "A Systematic Overview of Environmental Values of the Wetlands, Rivers and Estuaries of the Busselton-Walpole Region" (1997), published by the Water and Rivers Commission, Perth; and

(e) a wetland mapped in V & C Semeniuk Research Group "Mapping and Classification of Wetlands from Augusta to Walpole in the South West of Western Australia" (1997), published by the Water and Rivers Commission, Perth;

"ecological community" means a naturally occurring biological assemblage that occurs in a particular type of habitat;

"maintenance area", of a stretch of road or railway, means any area in the reserve for that stretch of road or railway that is lawfully cleared;

"Ramsar Convention" means the Convention on Wetlands of International Importance especially as Waterfowl Habitat done at Ramsar, Iran, on 2 February 1971, as in force for Australia in accordance with the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth, and set out in Australian Treaty Series 1975 No. 48;

"rare flora" means flora that is declared to be rare flora under section 23F of the *Wildlife Conservation Act 1950*;

"threatened ecological community" means an ecological community that —

(a) has been determined by the Minister to be a threatened ecological community; and

(b) is referred to in the list of threatened ecological communities maintained by the chief executive officer of the department of the Public Service principally assisting in the administration of the *Conservation and Land Management Act 1984*.

4. Declaration of environmentally sensitive areas

(1) Subject to this clause, the following areas are declared to be environmentally sensitive areas for the purposes of Part V Division 2 of the Act —

(a) a declared World Heritage property as defined in section 13 of the *Environment Protection and Biodiversity Conservation Act 1999* of the Commonwealth;

(b) an area that is included on the Register of the National Estate, because of its natural heritage value, under the *Australian Heritage Council Act 2003* of the Commonwealth;

(c) a defined wetland and the area within 50 m of the wetland;

(d) the area covered by vegetation within 50 m of rare flora, to the extent to which the vegetation is continuous with the vegetation in which the rare flora is located;

(e) the area covered by a threatened ecological community;

(f) a Bush Forever site listed in "Bush Forever" Volumes 1 and 2 (2000), published by the Western Australia Planning Commission, except to the extent to which the site is approved to be developed by the Western Australia Planning Commission, as described in subclause (3);

(g) the areas covered by the following policies —

(i) the *Environmental Protection (Gnangara Mound Crown Land) Policy 1992*;

(ii) the *Environmental Protection (Western Swamp Tortoise) Policy 2002*;

(h) the areas covered by the lakes to which the *Environmental Protection (Swan Coastal Plain Lakes) Policy 1992* applies;

(i) protected wetlands as defined in the *Environmental Protection (South West Agricultural Zone Wetlands) Policy 1998*;

(j) areas of fringing native vegetation in the policy area as defined in the *Environmental Protection (Swan and Canning Rivers) Policy 1998*.

(2) For the purposes of subclause (1)(d), an area of vegetation is continuous with another area of vegetation if any separation between the areas is less than 5 m at one or more points.

(3) For the purposes of subclause (1)(f), an area of a Bush Forever site is approved to be developed by the Western Australia Planning Commission if —

(a) the Commission has made a decision with respect to the area that, if implemented, would have the effect that development or other works can take place in the area;

(b) that decision is not under assessment under Part IV of the *Environmental Protection Act 1986*; and

(c) where an assessment under Part IV of the *Environmental Protection Act 1986* has been made — the decision may be implemented.

(4) An area that would otherwise be an environmentally sensitive area because of this clause is not an environmentally sensitive area to the extent to which the area is within the maintenance area of a stretch of road or railway.

(5) An area that would otherwise be an environmentally sensitive area because of this clause is not an environmentally sensitive area unless —

(a) the determination of the flora, ecological community, site or area has been made public; or

(b) in the case of an area referred to in subclause (1)(d) or (e) — the owner, occupier or person responsible for the care and maintenance of the land has been notified of the area.

(6) In this clause, unless the contrary intention appears or the context otherwise requires, a reference to the determination of flora, an ecological community, a site or an area is a reference to the determination of the flora, ecological community, site or area as in force or effect immediately before the day on which this notice comes into operation.

(7) In subclauses (5) and (6) —

"determination", in relation to flora, an ecological community, a site or an area, means the declaration, determination, designation, registration, listing, mapping or other description of the flora, ecological community, site or area;

Date:

JUDY EDWARDS, Minister for the Environment.

———————————

APPENDIX 3

SECTION 51B OF THE EP ACT

(DECLARATION OF ESAS)

51B. Environmentally sensitive areas, declaration of

(1) The Minister may, by notice, declare —

(a) an area of the State specified in the notice; or

(b) an area of the State of a class specified in the notice,

to be an environmentally sensitive area for the purposes of this Division.

(2) A notice under this section is subsidiary legislation for the purposes of the *Interpretation Act 1984*.

(3) Subsections (1), (2), (3), (5), (6) and (8)(a) of section 42 of the *Interpretation Act 1984* apply to a notice under this section as if it were regulations within the meaning of that section.

(4) Before a notice is published under this section the Minister shall —

(a) seek comments on it from the Authority and from any public authority or person which or who has, in the opinion of the Minister, an interest in its subject matter; and

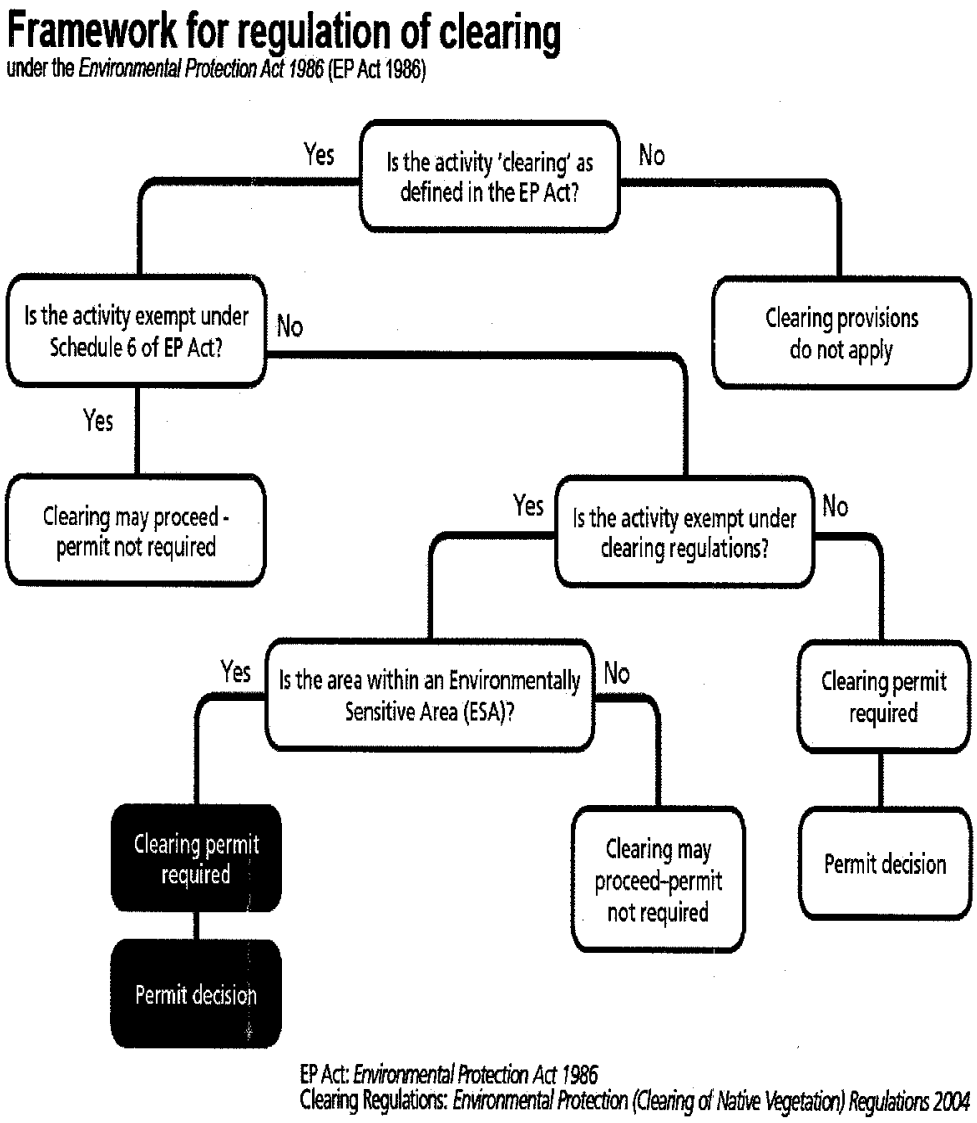
(b) take into account any comments received from the Authority or such a public authority or person.

[Section 51B inserted by No. 54 of 2003 s. 110(1).]

APPENDIX 4

THE DEPARTMENT'S

FRAMEWORK FOR REGULATION OF CLEARING



APPENDIX 5

SCHEDULE 6 OF THE EP ACT

(THE SCHEDULE 6 CLEARING EXEMPTIONS)

Schedule 6 — Clearing for which a clearing permit is not required

[Heading inserted by No. 54 of 2003 s. 104.]

[s. 51C]

1. Clearing that is done in order to give effect to a requirement to clear under a written law.

2. Clearing that is done —

   (a) in the implementation of a proposal in accordance with an implementation agreement or decision; or

   (b) in the case of a proposal that —

      (i) was made under an assessed scheme; and

      (ii) because of section 48I(2), was not referred to the Authority,

   in the implementation of the proposal in accordance with a subdivision approval, a development approval or a planning approval given by the responsible authority; or

   (c) in accordance with —

      (i) a prescribed standard; or

      (ii) a works approval; or

      (iii) a licence; or

      (iv) a requirement contained in a closure notice, an environmental protection notice or a prevention notice; or

      (v) an approved policy; or

      (vi) a declaration under section 6; or

      (vii) an exemption under section 75; or

      (viii) a licence, permit, approval or exemption granted, issued or given under the regulations;

   or

   (d) in the exercise of any power conferred under this Act.

3. Clearing by the Department, within the meaning of the *Conservation and Land Management Act 1984*, in the performance of its function

under section 33(1)(a) of that Act of managing land, but, in the case of land referred to in section 33(1)(a)(i), only if the management is carried out in accordance with section 33(3).

4. Clearing authorised under a licence —

   (a) referred to in paragraph (a); or

   (b) granted under paragraph (b),

   of section 3(1) of the *Sandalwood Act 1929*.

5. Clearing consisting of the taking of flora —

   (a) as authorised under a licence under section 23C of the *Wildlife Conservation Act 1950*; or

   (b) as consented to under section 23F of the *Wildlife Conservation Act 1950* by the Minister administering that Act.

6. Clearing consisting of the taking of flora by a person authorised —

   (a) by subsection (1)(a); or

   (b) under subsection (1)(b),

   of section 23D of the *Wildlife Conservation Act 1950* for the purposes of sale under a licence issued under that section.

7. Clearing under the *Forest Products Act 2000*, of vegetation maintained, or established and maintained, under section 10(1)(g) of that Act.

8. Clearing under a production contract or road contract entered into and having effect under the *Forest Products Act 2000*.

9. Clearing in accordance with a subdivision approval given by the responsible authority under the *Planning and Development Act 2005*, including —

   (a) clearing for the purposes of any development that is deemed by section 157 of that Act to have been approved by the responsible authority; and

   (b) clearing in any building envelope described in the approved plan or diagram.

10. Clearing that is done —

   (a) as permitted under section 17(5); or

(b) in accordance with a permit obtained under section 18; or

(c) in accordance with an exemption granted under section 22C; or

(d) under section 22(2), 23, 26A, 39(1)(d) or 44(1)(c); or

(e) as authorised by a proclamation under section 26,

of the *Bush Fires Act 1954*.

11. Clearing that is done under section 34(a), (c) or (h) of the *Fire Brigades Act 1942*.

12. Clearing that is done for fire prevention or control purposes or other fire management works on Crown land, within the meaning of the *Land Administration Act 1997*, by the FES Commissioner as defined in the *Fire and Emergency Services Act 1998* section 3.

13. Clearing caused by the grazing of stock on land under a pastoral lease within the meaning of the *Land Administration Act 1997* as long as that grazing is not in breach of —

(a) that Act; or

(b) the pastoral lease; or

(c) any relevant condition set or determination made by the Pastoral Board under Part 7 of that Act.

14. Clearing of aquatic vegetation that occurs under the authority of a licence or permit within the meaning of the *Fish Resources Management Act 1994*.

[Schedule 6 inserted by No. 54 of 2003 s. 116; amended by No. 38 of 2005 s. 15; No. 25 of 2009 s. 20; No. 22 of 2012 s. 123.]

APPENDIX 6

REGULATION 5 OF THE CLEARING REGULATIONS

(THE CLEARING EXEMPTIONS THAT DO *NOT* APPLY IN ESAS)

Prescribed clearing — section 51C

(1) Clearing is of a kind prescribed for the purposes of section 51C(c) if —

(a) it is described in an item in the Table to this subregulation;

(b) it is by, or with the prior authority of, a person listed in the item in which the clearing is described; and

(c) it is done in such a way as to limit damage to neighbouring native vegetation.

Table

Item	Description of clearing	Person
1	**Clearing to construct a building** Clearing of a site for the lawful construction of a building or other structure on a property, being clearing which does not, together with all other limited clearing on the property in the financial year in which the clearing takes place, exceed 5 ha, if — (a) the clearing is to the extent necessary; and (b) the vegetation is not riparian vegetation.	The owner of the property on which the clearing is to take place.
2	**Clearing resulting from accidents or to reduce danger** Clearing — (a) for the purposes of preventing imminent danger to human life or health or irreversible damage to a significant portion of the environment; or (b) as a result of an accident caused otherwise than by the negligence of the person clearing or the person who authorised the clearing.	The owner of the land on which the clearing is to take place. A person responsible for the safety or welfare of the persons who are likely to be in danger or for the portion of the environment.
3	**Clearing for fire hazard reduction** Clearing that is fire hazard reduction burning if the clearing is — (a) to occur outside the prohibited or restricted burning times declared under the *Bush Fires Act 1954* for the zone in which the clearing is to take place; and (b) done in such a way as to minimise long term damage to the environmental values of the vegetation.	The owner of the land on which the clearing is to take place.

Item	Description of clearing	Person
4	**Clearing in accordance with a code of practice**	
	Clearing in accordance with a code of practice issued by the CEO under section 122A of the Act.	A person to whom the code applies.
5	**Clearing for firewood**	
	Clearing to provide firewood for use by the owner or occupier of the property on which the vegetation is located for domestic heating or cooking, being clearing which — (a) does not kill any live vegetation and does not prevent regrowth of the vegetation; (b) is carried out to provide firewood to the extent to which firewood could not be obtained from vegetation already cleared for another purpose; and (c) does not, together with all other limited clearing on the property in the financial year in which the clearing takes place, exceed 5 ha.	The owner or occupier.
6	**Clearing to provide fencing and farm materials**	
	Clearing to provide material for use by the owner or occupier of the property on which the vegetation is located for constructing and maintaining fences, buildings and other structures on land in the possession of the owner or occupier, being clearing which — (a) does not kill any live vegetation and does not prevent regrowth of	The owner or occupier.

Item	Description of clearing	Person
	the vegetation; (b) is carried out to provide material to the extent to which the material could not be obtained from vegetation already cleared for another purpose; and (c) does not, together with all other limited clearing on the property in the financial year in which the clearing takes place, exceed 5 ha.	
7	**Clearing for woodwork** Clearing to provide timber for use by the owner or occupier of the property on which the vegetation is located for non-commercial woodwork (in the nature of furniture making, wood turning or carving), being clearing which — (a) does not kill any live vegetation and does not prevent regrowth of the vegetation; (b) is carried out to provide timber to the extent to which the timber could not be obtained from vegetation already cleared for another purpose; and (c) does not, together with all other limited clearing on the property in the financial year in which the clearing takes place, exceed 5 ha.	The owner or occupier.
8	**Clearing for cultural purposes of Aboriginal persons** Clearing for the cultural or spiritual, but not commercial, purposes of an Aboriginal person on land to which the	The Aboriginal person.

Item	Description of clearing	Person
	person has a cultural or spiritual connection and a right of access.	
9	**Clearing by licensed surveyors** Clearing by — (a) an authorised land officer or surveyor (as defined in the *Standard Survey Marks Act 1924*) in the exercise of powers under that Act; or (b) a licensed surveyor (as defined in the *Licensed Surveyors Act 1909*) in the course of making an authorised survey.	The authorised land officer or licensed surveyor.
10	**Clearing along a fence line – alienated land** Clearing of alienated land along a fence line of, or within, a property to the width necessary to provide access to construct or maintain a fence, being clearing which does not, together with all other limited clearing carried out on the property in the financial year in which the clearing takes place, exceed 5 ha.	The owner of the property on which the clearing is to take place.
11	**Clearing along a fence line — Crown land** Clearing of Crown land along a fence line to provide access to construct or maintain a fence — (a) between alienated land and Crown land — if the clearing is no more than 1.5 m from the fence line; or (b) between Crown land and Crown land — if the clearing is no more than 5 m from the fence line on one side and no more than 1.5 m from	The owner of the land on which the clearing is to take place.

Item	Description of clearing	Person
	the fence line on the other side.	
12	**Clearing for vehicular tracks** Clearing to construct a vehicular track on a property, being clearing which does not, together with all other limited clearing carried out on the property in the financial year in which the clearing takes place, exceed 5 ha, if — (a) the clearing for the track is no wider than necessary; (b) there is at least 100 m between that track and any other cleared land that could be used for the purpose for which the particular track is intended; (c) the vegetation is not in a road reserve; and (d) the vegetation is not riparian vegetation (unless there is no reasonable alternative route and the track is necessary for the commercial activities carried out on the property).	The owner of the property on which the clearing is to take place.
13	**Clearing for walking tracks** Clearing to construct a walking track on a property, being clearing which does not, together with all other limited clearing carried out on the property in the financial year in which the clearing takes place, exceed 5 ha, if — (a) the clearing for the track is no wider than necessary; and (b) the track is used by pedestrians or	The owner of the property on which the clearing is to take place.

Item	Description of clearing	Person
	there is a reasonable expectation that it will be used by pedestrians.	
14	**Clearing to maintain existing cleared areas for pasture, cultivation or forestry** Clearing of land that was lawfully cleared within the 20 years prior to the clearing if — (a) the land has been used as pasture or for cultivation or forestry within those 20 years; and (b) the clearing is only to the extent necessary to enable the land to be used to the maximum extent to which it was used in those 20 years.	The owner or occupier of the land on which the clearing is to take place.
15	**Clearing to maintain existing cleared areas around infrastructure etc.** Clearing of land that was lawfully cleared within the 10 years prior to the clearing for one of the following purposes — (a) around a building or structure for the use of the building or structure; (b) for a fire risk reduction area for a building; (c) to maintain an area along a fence line to provide access to construct or maintain the fence; (d) to maintain a vehicular or walking track, to the extent of the prior clearing.	The owner or occupier of the land on which the clearing is to take place.

Item	Description of clearing	Person
	Clearing of land that was previously lawfully cleared for one of the following purposes if the clearing does not exceed the extent specified for the purpose — (a) around a building or structure for the use of the building or structure — 20 m from the building or structure; (b) for a fire risk reduction area for a building — 20 m from the building; (c) to maintain an area along a fence line to provide access to construct or maintain the fence — 5 m from the fence line; (d) to maintain a vehicular or walking track — 5 m wide.	
16	**Clearing under the *Rights in Water and Irrigation Act 1914*** Clearing that is the result of carrying out works under a permit or other approval under, or referred to in, section 11, 16, 17 or 21A of the *Rights in Water and Irrigation Act 1914*.	The person to whom the permit is granted or other approval is given.
17	**Clearing under the *Country Areas Water Supply Act 1947*** Clearing in accordance with a clearing licence granted under section 12C of the *Country Areas Water Supply Act 1947* if — (a) the licence is granted before Part 9 of the *Environmental Protection Amendment Act 2003* comes into operation; and	The person to whom the licence is granted.

Item	Description of clearing	Person
	(b) the clearing takes place within 2 years after Part 9 of the *Environmental Protection Amendment Act 2003* comes into operation.	
18	**Clearing under the *Swan River Trust Act 1988*** [2] Clearing — (a) in accordance with an approval under Part 5 of the *Swan River Trust Act 1988* [2]; or (b) as described in regulation 6(2) of the *Swan River Trust Regulations 1989* [2].	In the case of paragraph (a), the person to whom the approval is granted, in the case of paragraph (b), a person.
19	**Clearing isolated trees** Clearing of a tree on a property that is in an otherwise cleared area on the property and that is more than 50 m from any other native vegetation, being clearing which does not, together with all other limited clearing carried out on the property in the financial year in which the clearing takes place, exceed 5 ha.	The owner of the property on which the tree is located.
20	**Clearing: low impact or other mineral or petroleum activities** Clearing that is, or is the result of carrying out, a low impact or other mineral or petroleum activity described in Schedule 1 if the activity is carried out — (a) in accordance with Schedule 1; and	The person granted the authority to carry out the activity.

Item	Description of clearing	Person
	(b) in an area of the State other than a non-permitted area specified in Schedule 1.	
21	**Clearing for a temporary bypass road** Clearing that is the result of the construction of a temporary vehicular track that is necessary to bypass a stretch of road (whether public or private) that is impassable due to unforseen damage to part of that stretch of road.	The Commissioner of Main Roads, the Public Transport Authority, the local government, the person or the entity responsible for the stretch of road.
21A	**Clearing for a crossover** Clearing that is the result of constructing a crossover from a road to a property adjacent to the road, and any associated sight line areas, if the construction is within the scope of the authority to construct the crossover.	The person with the authority to construct the crossover.
22	**Clearing for maintenance in existing transport corridors** Clearing in relation to a stretch of road (whether public or private) or railway if the clearing is carried out — (a) in an area or for a purpose specified in Schedule 2; and (b) to the extent specified for that area or purpose in Schedule 2; and (c) in accordance with Schedule 2.	The Commissioner of Main Roads, the Public Transport Authority, the local government, the person or the entity responsible for the stretch of road or railway.

Item	Description of clearing	Person
23	**Clearing resulting from infrastructure maintenance activities** Clearing that is the result of carrying out an infrastructure maintenance activity described in Schedule 3 if the activity is carried out in accordance with Schedule 3 and within — (a) in the case of an activity referred to in Schedule 3 clause 1(a), (b) or (c) — 12 months after Part 9 of the *Environmental Protection Amendment Act 2003* comes into operation; or (b) in the case of an activity referred to in Schedule 3 clause 1(d) — 18 months after Part 9 of the *Environmental Protection Amendment Act 2003* comes into operation.	The utility or local government responsible for the infrastructure.
24	**Clearing under a Petroleum Act** Clearing that is the result of carrying out exploration under an authority under the *Petroleum and Geothermal Energy Resources Act 1967*[3], the *Petroleum Pipelines Act 1969* or the *Petroleum (Submerged Lands) Act 1982*.	A person covered by the authority to carry out the exploration.
25	**Clearing under the *Mining Act 1978*** Clearing that is the result of carrying out prospecting or exploration under an authority granted under the *Mining Act 1978*.	The person granted the authority to carry out the prospecting or exploration.
26	**Clearing in accordance with a notice of intention under the *Soil and Land Conservation Regulations 1992*** Clearing that is the result of carrying out an activity —	The person who gave the notice of intention.

Item	Description of clearing	Person
	(a) in respect of which notice of intention was given under regulation 5 or 6 of the *Soil and Land Conservation Regulations 1992* before Part 9 of the *Environmental Protection Amendment Act 2003* comes into operation and at least 90 days before the activity was commenced;	
	(b) which is commenced not more than 2 years after the giving of the notice of intention and is completed not more than 2 years after Part 9 of the *Environmental Protection Amendment Act 2003* comes into operation;	
	(c) which was not referred to the Authority as a proposal under Part IV of the Act, or was so referred and not accepted by the Authority; and	
	(d) in respect of which a soil conservation notice, within the meaning of Part V of the *Soil and Land Conservation Act 1945*, has not been served.	

(2) For the purposes of subclause (1) item 8, the cultural or spiritual purposes of an Aboriginal person and the person's cultural or spiritual connection to particular land is to be determined in accordance with the body of traditions, observances and customs of the particular community or communities to which the Aboriginal person belongs or with which the person identifies.

(3) For the purposes of subclause (1) item 19, the area of a tree is the area covered by the drip line of the tree.

[Regulation 5 amended in Gazette 21 Jan 2005 p. 259; 24 Jun 2005 p. 2755-7; 23 Dec 2005 p. 6268; 6 Jan 2006 p. 31; 31 Mar 2006 p. 1165; 7 Jul 2006 p. 2500; 30 Mar 2007 p. 1457; 22 Jun 2007 p. 2845; 10 Jun 2008 p. 2486; 3 Dec 2013 p. 5623-4.]

APPENDIX 7

EM TO THE ESA NOTICE

Department of Environment

Your ref:

Our ref:

Enquiries S McEvoy

Direct tel. 9278 0519

Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
Harvest Terrace
PERTH WA 6000

ENVIRONMENTAL PROTECTION (ENVIRONMENTALLY SENSITIVE AREAS) NOTICE 2005

The explanatory memorandum is only an aid to understanding and must not be substituted for the subsidiary legislation or other instrument gazetted, or made available to the public in any way.

Title

Environmental Protection (Environmentally Sensitive Areas) Notice 2005

Statute under which it is made

The *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* is made by the Minister for the Environment under s.51B of the *Environmental Protection Act 1986*. It was gazetted on 8 April 2005.

Purpose

Clearing of native vegetation is regulated under Part V Division 2 of the *Environmental Protection Act 1986*. Under s.51C, clearing requires a permit unless subject to an exemption. There are two kinds of exemptions: those in Schedule 6 of the Act and those in regulations

The *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* will replace the environmentally sensitive areas defined in Regulation 6 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004*, which are transitional and expire on 8 April 2005.

The Minister under s.51B of the Environmental Protection Act 1986 declares environmentally sensitive areas. These declared areas are not subject to exemptions from the requirement to hold a clearing permit under regulations, and therefore have greater protection than other lands.

The notice will commence operation on the date of gazettal.

Identification of Controversial Provisions

Given that no additional areas are defined, and that the environmentally sensitive areas have been operating for nine months without significant incident, it is not anticipated that the notice will be contentious or sensitive.

Westralia Square
Level 8 141 St Georges Terrace
Perth Western Australia 6000
PO Box K822 Perth Western Australia 6842
Telephone (08) 9222 7000 Facsimile (08) 9322 1598
E-mail info@environment.wa.gov.au
www.environment.wa.gov.au

Western Australian environment AWARDS

Hyatt Centre
Level 2 3 Plain Street
East Perth Western Australia 6004
PO Box 6740 Hay Street East Perth Western Australia 6892
Telephone (08) 9278 0300 Facsimile (08) 9278 0301
National Relay Service (Australian Communication Exchange) 132 544
E-mail info@environment.wa.gov.au
www.environment.wa.gov.au

Consultation

The effect of the Notice is to transfer environmentally sensitive areas defined in Regulation 6 to the 51B notice. Extensive consultation was undertaken on the regulations, including the environmentally sensitive areas, over a period between August 2003 and June 2004.

Stakeholders have been aware of the review of the environmentally sensitive areas, which commenced in August 2004, for some time prior to the letter being circulated.

In addition, the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* was circulated to the following stakeholders by fax on 1 April 2005. A follow up letter was also sent.

- Alinta Gas
- Association of Mineral and Exploration Companies
- Australian Petroleum Production and Exploration Association
- Chamber of Minerals and Energy
- Conservation Council
- Department of Conservation and Land Management
- Department of Industry and Resources
- Department of Planning and Infrastructure
- Environmental Defenders Office
- Environmental Protection Authority
- Main Roads WA
- Pastoralists and Graziers Association
- Public Transport Authority
- Roadside Conservation Committee
- WA Farmers Federation
- WA Local Government Association
- Water Corporation

The covering letter from the A/Director General notes that the Notice includes the same list of environmentally sensitive areas as included in Regulation 6 of the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004*. The letter also contains a commitment to include a review of environmentally sensitive areas in the comprehensive review of the regulations due to commence in July. Comments were sought from stakeholders by 6 April 2005.

Eleven submissions were received. Submissions were generally supportive or neutral, and no substantive issues were raised. Most of the issues raised were raised during the consultation on the Regulations and some of the submissions have explicitly acknowledged this. These issues were considered during the development of the regulations

Contact

Ms Sarah McEvoy,

D Carew-Hopkins
A/DIRECTOR GENERAL

Dr Judy Edwards MLA
MINISTER FOR THE ENVIRONMENT; SCIENCE

8 APR 2005

2

APPENDIX 8

EM TO THE CLEARING REGULATIONS

Department of Environment

Your ref:

Our ref:

Enquiries:

Direct tel: S McEvoy 9278 0378

Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
Harvest Terrace
PERTH WA 6000

JOINT STANDING COMMITTEE ON ENVIRONMENTAL PROTECTION (CLEARING OF NATIVE VEGETATION) REGULATIONS 2004, COUNTRY AREAS WATER SUPPLY (CLEARING LICENCE) AMENDMENT REGULATIONS 2004, ENVIRONMENTAL PROTECTION (ALCOA – HUNTLY AND WILLOWDALE MINE SITES) EXEMPTION ORDER 2004 AND PROCLAMATION NOTICE

The explanatory memorandum is only an aid to understanding and must not be substituted for the subsidiary legislation or other instrument gazetted, or made available to the public in any way.

Title

The *Environmental Protection (Clearing of Native Vegetation) Regulations 2004*, *Country Areas Water Supply (Clearing Licence) Amendment Regulations 2004*, *Environmental Protection (Alcoa – Huntly And Willowdale Mine Sites) Exemption Order 2004* and Proclamation Notice for various sections of the *Environmental Protection Amendment Act 2003* were gazetted on 30 June 2004.

Purpose

The purpose of this proposal is to seek the Joint Standing Committee on Delegated Legislation's consideration and endorsement of:

(a) The *Environmental Protection (Clearing of Native Vegetation) Regulations 2004.*
(b) The *Environmental Protection (Alcoa – Huntly and Willowdale mine sites) Exemption Order 2004.*
(c) The *Country Areas Water Supply (Clearing Licence) Amendment Regulations 2004.*
(d) The proclamation notice for provisions relating to clearing permits and environmental harm.

(a) The *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* will:

- Declare when intentionally sown, planted or propagated vegetation is considered to be native vegetation.
- Define clearing of a prescribed kind, which is exempt from the requirement for a clearing permit unless done in an environmentally sensitive area.
- Define environmentally sensitive areas.
- Set fees relating to clearing permits.
- Prescribe records to be kept by the Chief Executive Officer.

Westralia Square
Level 8 141 St Georges Terrace
Perth Western Australia 6000
PO Box K822 Perth Western Australia 6842
Telephone (08) 9222 7000 Facsimile (08) 9322 1598
E-mail info@environ.wa.gov.au
www.environ.wa.gov.au

WESTERN AUSTRALIAN environment AWARDS

Hyatt Centre
Level 2 3 Plain Street
East Perth Western Australia 6004
PO Box 6740 Hay Street East Perth Western Australia 6892
Telephone (08) 9278 0300 Facsimile (08) 9278 0301
National Relay Service (Australian Communication Exchange) 132 544
E-mail correspondence@wrc.wa.gov.au
www.wrc.wa.gov.au

The regulations will commence operation on 8 July 2004.

(b) The *Environmental Protection (Alcoa – Huntly and Willowdale Mine Sites) Exemption Order 2004* will:

- Exempt clearing at the Huntly and Willowdale mine sites.
- Require that the clearing be done in accordance with an approval from, or a mining plan approved by, the Minister for State Development after taking into account advice from the Minister for the Environment and the Mining Management Program Liaison Group.
- Limit the area to which the exemption applies.

The order will commence on the day Part 9 of the *Environmental Protection Amendment Act 2003* comes into operation.

(c) The *Country Areas Water Supply (Clearing Licence) Amendment Regulations 2004* will:

- exempt clearing done under a clearing permit if no compensation has been paid under Part IIA of the *Country Areas Water Supply Act 1947* in respect of the area.

The regulations will commence on the day Part 9 of the *Environmental Protection Amendment Act 2003* comes into operation.

(d) The proclamation notice will:

- Proclaim provisions relating mainly to environmental harm and clearing permits.

It will come into operation on 8 July 2004.

Consultation

Consultation with industry stakeholders, Government and conservation interests has taken place since August 2003. This has included briefings and invitations to make written submissions. In addition, the Minister invited farmers through a press release to write to her with their comments and set up a working group of key stakeholders chaired by Hon Ken Travers MLC to gain a better understanding of farming issues. The results of this consultation have been considered in preparing the regulations

Contact

Ms Sarah McEvoy, Senior Ecologist of the Department of Environment on 9278 0378 or sarah.mcevoy@environment.wa.gov.au or Ms Denise True, Program Manager also of the Department of Environment on 9278 0505 or denise.true@environment.wa.gov.au

D Carew-Hopkins
A/DIRECTOR GENERAL

Dr Judy Edwards MLA
MINISTER FOR THE ENVIRONMENT

-7 JUL 2004