



Department of **Biodiversity,  
Conservation and Attractions**  
Office of the Director General

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Western Australia.*

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Dear Ms Crichton

## **INQUIRY INTO PRIVATE PROPERTY RIGHTS**

Thank you for your letter of 5 July 2019 inviting a submission in relation to the above inquiry.

The mission of the Department of Biodiversity, Conservation and Attractions (DBCA) includes managing Western Australia's parks, forests and reserves to conserve wildlife, provide sustainable recreation and tourism opportunities, protect communities and assets from bushfire and achieve other land, forest and wildlife management objectives, inspire and act for wildlife conservation and provide scientific excellence and deliver effective conservation of the State's biodiversity.

In response to specific encumbrances that can affect land referred to in the terms of reference, I provide the following information.

### **Environmentally Sensitive Areas**

Environmentally Sensitive Areas are declared under section 51B of the *Environmental Protection Act 1986* which is administered by the Department of Water and Environmental Regulation. As Environmentally Sensitive Areas are often located on *Conservation and Land Management Act 1984* land, I can advise the following.

In addition to the specific matters referred to in item (b) of the terms of reference, DBCA has responsibility for specific matters under the *Biodiversity Conservation Act 2016* that may involve the lodgement of notification on title.

Nature conservation covenants are currently established by DBCA under section 129BA of the *Transfer of Land Act 1893*. These covenants restrict the use of land for the benefit of biodiversity conservation and are established in consultation and with the agreement of the landowner and other persons with a registered interest in the land. The Biodiversity Conservation Act has provisions under section 122 for the establishment of biodiversity conservation covenants and DBCA proposes to transition to this provision for the establishment of covenants. In both situations, the conservation covenant is lodged on title and runs with title to successive owners.

The Minister for Environment may enter into a biodiversity conservation agreement with a landowner or occupier under section 114 of the Biodiversity Conservation Act. Such an agreement sets out assistance that the Minister might provide to the landowner for the conservation of



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biodiversity on the land and the obligations of the landowner. Before an agreement can be entered into, consent must be obtained for any occupier of the land or mortgagee of the land. Any biodiversity conservation agreement entered into by the Minister must be registered on title.

Under section 50 of the Biodiversity Conservation Act, the Minister may notify the owner or occupier of land that a threatened species or an occurrence of a threatened ecological community occurs on that land. Such a notification imparts certain statutory requirements on the owner or occupier of the land. The Act (section 51) also provides the capacity for the Chief Executive Officer (CEO) to lodge on title a notification in relation to a section 50 notice regarding the presence of a threatened species or an occurrence of a threatened ecological community. The lodgement of a section 51 notification on title is at the discretion of the CEO.

Section 54 of the Biodiversity Conservation Act provides for the Minister to list an area of habitat of a threatened species or a threatened ecological community as critical habitat where that area is critical to the survival or ongoing persistence of the threatened species or threatened ecological community. Such a listing is done following consultation with the owner or occupier of the land. Once critical habitat is listed, under section 59, a habitat conservation notice may be issued to a person that requires management action, or protection measures, to be applied to the land. Where the person who is the recipient of a habitat conservation notice is the owner or occupier of the land, under section 63, the CEO may lodge a notification in relation to the notice on the title of the land. The lodgement of a section 63 notification on title is at the discretion of the CEO.

Private property owners or people with an interest in land (e.g. pastoral leases) within the boundary of a National Heritage and World Heritage listed site may be affected under the *Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth). This provides statutory protection of the property from pressures or changes that might negatively impact the Outstanding Universal Value, including the integrity and/or authenticity of the property. Under the Act there is a requirement for approval of activities that would have a significant impact on a declared World Heritage property. There is no provision in the Environment Protection and Biodiversity Conservation Act for National or World Heritage status to be on title. Information on National and World Heritage property boundaries are available from the Commonwealth Department of the Environment and Energy's website.

The Register of the National Estate (Register) was closed in 2007 and is no longer a statutory list. All references to the Register were removed from Environment Protection and Biodiversity Conservation Act on 19 February 2012. The expiration or repeal of parts of the Environment Protection and Biodiversity Conservation Act and the *Australian Heritage Council Act 2003* (Commonwealth) relating to the Register does not diminish protection of Commonwealth heritage places. These parts have been superseded by stronger ongoing heritage protection provisions under Commonwealth environment law. Places in the Register may be protected under other appropriate State, Territory or local government heritage legislation. The Register is maintained on a non-statutory basis as a publicly available archive and educational resource.

### **Bushfire Prone Areas**

DBCA does not have any legislative responsibility for declaring bushfire prone areas. DBCA manages bushfire risk on land for which it has legislative responsibility under the Conservation and Land Management Act.

Bushfire prone areas are designated by the Fire and Emergency Services Commissioner and are displayed on the Department of Fire and Emergency Services website or SLIP platform administered by Landgate.

## Easements

DBCA owns and manages freehold land. These lands are held for offices and depots, to mitigate environment harm (e.g. environmental offsets), or are in transition from one owner to DBCA for future reservation as conservation reserve (e.g. Western Australian Planning Commission purchased freehold land).

DBCA's freehold lands are subject to express and implied easements. Information on easements can be found through the Landgate website.

Express easements, granted through a "deed of easement", are usually for the purpose of access or utility services, pipelines or cable routes. For example, private owners of enclave freehold properties occasionally request access from DBCA over its estate via an express easement if the local government does not provide road access to their property.

On occasions DBCA does burden private freehold land with express easements to provide access to its estate for DBCA staff and the public, for operational purposes or for its utility services. For example, DBCA has burdened private freehold land with a "right of carriageway" so that DBCA and Forest Products Commission staff can access tree plantations through the private freehold.

DBCA's freehold land is burdened by implied easements. In the majority these are utility service corridors, for example Western Power powerlines or service connections to offices and depots. DBCA is not aware of any implied easements that it has requested or been granted over private freehold land.

Miscellaneous licences, granted under the *Mining Act 1978* within the Minister for Mines and Petroleum's portfolio, can be considered to be an "implied easement" because this encumbrance provides a tenement holder an ability to install temporary infrastructure on private property, the interest is not registered as an encumbrance on the certificate of title and tenement holders do treat this infrastructure as their exclusive domain and seek to exclude access to these areas by the public, often for health and safety reasons.

## Commercial Fishing

While the Department of Primary Industries and Regional Development is responsible for managing commercial fishing licensing, there is an issue of compensation for loss of property rights. Under the Conservation and Land Management Act, certain zones in marine parks and marine nature reserves prohibit commercial fishing. The gazettal of these zones triggers the *Fishing and Related Industries Compensation (Marine Reserves) Act 1997* which provides the mechanism for payment of compensation to holders of leases, licences and permits under the *Fish Resources Management Act 1994* and *Pearling Act 1990* on account of the effect of marine nature reserves and marine parks.

Thank you for the opportunity to provide a submission on the Inquiry into Private Property Rights.

Yours sincerely



Peter Dans  
ACTING DIRECTOR GENERAL

31 July 2019