



Hon Albert Jacob MLA
Minister for Environment; Heritage

Your Ref. Petition No 42
Our Ref 50-05333

Hon Simon O'Brien MLC
Chairman
Standing Committee on Environment and Public Affairs
GPO Box A11
PERTH WA 6837

Simon

Dear ~~Mr O'Brien~~

Thank you for your letter dated 16 September 2014 requesting my comments on the petition tabled in Parliament and referred to the Committee in relation to the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005*.

I have addressed the terms of the petition generally and the issues raised by the principal petitioner and tabling Member below. In addition, I provide further information in relation to the effect and purpose of environmentally sensitive areas (ESAs) to clarify their legislative effect.

What are environmentally sensitive areas?

ESAs are areas declared by the Minister under s 51B of the *Environmental Protection Act 1986* (EP Act). ESAs are primarily defined in legislation (for example, areas covered by Environmental Protection Policies made under the EP Act, Ramsar convention wetlands or World Heritage properties listed under the *Environment Protection and Biodiversity Conservation Act 1999* [EPBC Act]), or based on Government endorsed policies and documents such as Bush Forever

ESAs are only relevant in the limited context of exemptions in the *Environmental Protection (Clearing of Native Vegetation) Regulations 2004* (Clearing Regulations). Section 51C of the EP Act makes it an offence to cause or allow clearing of native vegetation unless the clearing done under the authority of a permit or in accordance with an exemption. Exemptions for prescribed low impact land management practices are prescribed in the Clearing Regulations, but do not apply in ESAs. All other clearing either requires a clearing permit or is authorised under a law and listed in Schedule 6 of the EP Act and ESAs are not relevant.

How was the current ESA Notice made?

Section 51B of the EP Act allows the Minister for Environment to declare by notice either a specified area of the State, or a class of areas of the State, to be an ESA. The notice must be made after consultation with the Environmental Protection Authority (EPA) and such public authorities, persons and groups as the Minister considers to have an interest in its subject matter (s 51B(4)).

ESAs were initially included in regulation 6 of the Clearing Regulations for a transitional period of nine months to allow time to develop a notice following the commencement of the clearing provisions. The current notice was made at the conclusion of the nine months on 8 April 2005. It is essentially the same list as was included in the regulations.

The draft *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* was circulated to stakeholders prior to the making of the notice in 2005 (including the Pastoralists and Graziers Association, and the WA Farmers Federation) and the EPA and 11 submissions were received. The explanatory memorandum to the Joint Standing Committee on Delegated Legislation included details of the consultation process.

I confirm that the procedural requirements of the making of a s 51B ESA Notice were followed, including consultation and referral to the Joint Standing Committee on Delegated Legislation.

What is the purpose of ESAs?

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 through a permit application, and therefore potentially degrade areas of special environmental sensitivity or value. It is not the case that the presence of ESAs necessarily precludes clearing from taking place – a total of 924 permits have been granted within ESAs since 12 June 2005.

Whether the information is reasonably made public for land owner to determine the location of any ESAs on their property

The Clearing Regulations – Environmentally Sensitive Areas spatial dataset is available via Landgate's Shared Land Information Platform (www2.landgate.wa.gov.au) and from the Department of Environment Regulation's website

The metadata statement accompanying the dataset states that “[t]his dataset is provided to assist landowners and managers in determining the location of environmentally sensitive areas under the *Environmental Protection Act 1986*. It is not a substitute for any requirement of the legislation. Those seeking further information should contact the data custodian. Any person who intends to undertake activities that may involve clearing native vegetation is advised to consult the actual legislation and seek advice, including legal advice, where necessary. While the Department has endeavoured to ensure the accuracy of the contents of this web page, it accepts no responsibility for any inaccuracies and persons relying on this information do so at their own risk.”

Individual data sets for ESAs are publicly available as follows:

- (a) a declared World Heritage property as defined in s 13 of the *Environment Protection and Biodiversity Conservation Act 1999* - available from Australian Government ‘Discover Information Geographically’ website, www.environment.gov.au/metadataexplorer/explorer.jsp.
- (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* - available from Australian Government ‘Discover Information Geographically’ website, www.environment.gov.au/metadataexplorer/explorer.jsp.
- (c) a defined wetland and the area within 50 metres of the wetland - available from Landgate’s Shared Land Information Platform, www2.landgate.wa.gov.au/web/guest/57.
- (d) the area covered by vegetation within 50 metres of rare flora, to the extent to which the vegetation is continuous with the vegetation in which the rare flora is located. Clause 4(5)(b) applies and the owner, occupier or person responsible for the care and maintenance of the land must have been notified.
- (e) the area covered by a threatened ecological community. Clause 4(5)(b) applies and the owner, occupier or person responsible for the care and maintenance of the land must have been notified.
- (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 – available from Landgate’s Shared Land Information Platform, www2.landgate.wa.gov.au/web/guest/57.
- (g) the areas covered by the following policies —
 - (i) the *Environmental Protection (Gnangara Mound Crown Land) Policy 1992* - available from EPA website www.epa.wa.gov.au/AbouttheEPA/spatial-data/Pages/default.aspx
 - (ii) the *Environmental Protection (Western Swamp Tortoise) Policy 2002* - available from EPA website, www.epa.wa.gov.au/AbouttheEPA/spatial-data/Pages/default.aspx.

- (h) the areas covered by the lakes to which the *Environmental Protection (Swan Coastal Plain Lakes) Policy 1992* applies - available from EPA website, www.epa.wa.gov.au/AbouttheEPA/spatial-data/Pages/default.aspx.
- (i) protected wetlands as defined in the *Environmental Protection (South West Agricultural Zone Wetlands) Policy 1998*, available from EPA website, www.epa.wa.gov.au/AbouttheEPA/spatial-data/Pages/default.aspx.
- (j) areas of fringing native vegetation in the policy area as defined in the *Environmental Protection (Swan and Canning Rivers) Policy 1998*. This policy has been subsequently repealed

The reason for the differentiation between clauses 4(5)(a) and 4(5)(b) of the *Environmental Protection (Environmentally Sensitive Areas) Notice 2005* is that no spatial information is publicly available for threatened ecological communities or rare flora in order to protect the location of these highly significant values. The general practice is for the owner, occupier or person responsible for the care and maintenance of the land to be notified in writing by a hand delivered letter from the Department of Parks and Wildlife (formerly the Department of Environment and Conservation). A record is kept of the notification.

Regulation of clearing

The submission to the petition raises general issues about the regulation of clearing native vegetation. It is important to note the historical context for the regulation of clearing. There has been long standing recognition of the need to regulate clearing for more than 30 years.

Specific regulation of clearing commenced in Western Australia as a result of concerns with salinisation of water supply catchments in the south west in the 1970s (which resulted in amendments to the *Country Areas Water Supply Act 1947*) and land degradation concerns (which resulted in amendments to the *Soil and Land Conservation Act 1945*) particularly wind erosion in the Great Southern region in the 1980s and increasingly salinity outside of water catchments from the 1980s onwards. In 1995, a Cabinet direction was given that existing clearing controls under these Acts be augmented by a system to ensure other natural resource conservation issues were considered.

As there is opposition to ESAs in farming groups, why not repeal the notice?

The clearing provisions of the EP Act defer to statutory processes without reference to ESAs (exemptions in Schedule 6), and otherwise provide for exemptions for routine low impact land management practices in regulations, but not in ESAs. If ESAs were 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 impact in ESAs. This would have a negative impact on the majority of landholders whose vegetation is not within an ESA.

The workability of the framework

The Department of Environment Regulation's published explanatory material clearly outlines the requirements in relation to environmentally sensitive areas and the low impact exemptions contained in the Clearing Regulations. Those intending to clear are encouraged to contact the Department to clarify legal requirements.

Amendments are being drafted to the EP Act which will greatly assist in remedying concerns relating to any negative impact of ESAs, while retaining their value in protecting small but high value areas.

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 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 calendar 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 offence 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.

Based on this information, I am satisfied that the 2005 ESA Notice was properly made in accordance with the requirements of s 51B of the EP Act, that the areas are reasonably made public or, in the case of rare flora and threatened ecological communities, the owner, occupier or person responsible for the care and maintenance of the land is notified.

I consider 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.

I therefore do not support the repeal of the ESA Notice.

Yours sincerely



Albert Jacob MLA
MINISTER FOR ENVIRONMENT; HERITAGE

2 OCT 2014