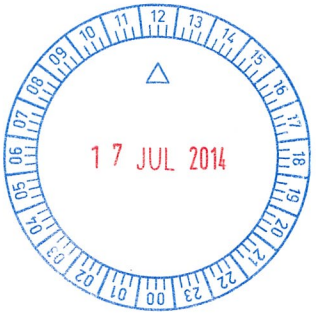
Hon **Mark Lewis** MLC
Member for the Mining and Pastoral Region

Kimberley, Pilbara, North West Central, Kalgoorlie, Eyre



Hon Simon O'Brien MLC
Chairman
Standing Committee on Environment and Public Affairs
Legislative Council Committee Office
WEST PERTH WA 6000

Dear Chair,

Petition No 42 – Oppose Environmental Protection (Environmentally Sensitive Areas) Notice 2005 – *Environmental Protection Act 1986* (EPA).

Thank you for your letter dated the 19 June 2014 seeking a submission to your committee with respect to the above petition. Firstly, I advise that to my knowledge, this issue has not been before the Parliamentary Commissioner for Administrative Investigations.

As a member of the Delegated Legislation Committee, I am aware of the letter that was sent to you from that committee, so I will not go over all of the issues and concerns expressed in that letter. However, I would like to draw your attention to the complexity of the ESA framework, which in my experience, is beyond the normal comprehension of nearly everybody that tries to understand the framework. In my view, this is one of many issues that need to be teased out and examined with an in-depth enquiry by your committee.

Just by way of background, having worked many years as a senior public servant involved with these sorts of land and environmental matters, and more recently, reviewing this issue over many months, I still struggle to grasp the complexities of this framework. These complexities range from, whether:

1) the Minister fulfilled section 51B (4) of the EP Act and properly consulted
2) the Notice was properly scrutinised as required by Section 51B (2) of the Act which states that, 'a notice under this section is subsidiary legislation for the purposes of the *Interpretations Act 1984*.'
3) those to be affected by the Notice were informed that they were, as required by the Act
4) the necessary information to determine whether a land owner might be affected by the Notice was made available and at/or by State Law Print, as required of all statute
5) the information is reasonably '*made public*' for a land owner to determine that they may or do have an ESA on their property or are required to have a buffer/s to and ESA on their property or an adjoining property
6) given the possibly number of 'missteps' in the Notice's progress through the process is the 'principle of regularity' valid?
7) the information is reasonably '*made public*' for a land owner to make aware a potential purchaser (or for a purchaser to be aware) of any encumbrances of the Notice to that land.

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8) landholders specifically affected by subclause 4 (1)(d) or (e) (that is, that land that falls under two categories of land prescribed in the ESA Notice ('*rare flora*' areas and an area '*covered by a threatened ecological community*') have been notified that their land is an ESA
9) there is actually anybody that fully understand the overlapping interactions between the primary Act, regulations, Schedules and Notices
10) if at all the whole framework is administratively possible or indeed workable.

As such, I concur with the sentiments of the petition and was pleased to present it to the Legislative Council. I am also pleased to present the following information to your committee for your deliberation.

I wish the committee to note from the outset that I do not object to protecting areas of environmental significance. However, I do strongly oppose the framework that is currently in place as I believe it is unworkable. This is manifestly highlighted with respect to when a person grazes stock in areas defined as ESA's. This would not normally be such an issue if the penalty for such an act was not a criminal offence or the potential for a $250,000 fine, or both and there weren't possibly thousands of landholders who are currently (unknowingly) breaching the Notice and subject to these very onerous penalties. By way of example, when you drive to Bunbury down the freeway most animals you see on that drive would almost certainly have been at some stage, illegally grazing in an ESA, and as such, every landholder is liable to the above penalties.

In my view, the whole ESA framework is almost unfathomable as borne out by a number of specialist resource and land matter lawyers and indeed our own committee lawyers who have all had differing views on the way the ESA framework works. This in itself is a compelling reason to undertake an enquiry, as the amount of uncertainty which surrounds the legislation effectively means it is not administratively possible to administer. Again, this is borne out by the fact that the government has never applied the workings of the Notice even though there are many, many cases that, on first principle, appear to be contrary to the Notice.

Finally, because I am of the view there are so many landholders unwittingly contravening the Notice, and because the Department has not used the provisions of the Notice to date to effectively prosecute what appear to be obvious infringements, what is the point of having the Notice? Given the unworkability of the Notice, all the Notice serves to do is create uncertainty. As such, repeal of the Notice will not change the way the land is used or the way DER administers it, the only real effect of repeal is the upside of bringing certainty to those thousands of landholders currently caught within the insidious nature of the Notice.

Yours sincerely,

Mark Lewis MLC
Member for Mining and Pastoral

08 July 2014